No. _____

IN THE

# Supreme Court of the United States

SHAUN KAREEM BURNEY, *Petitioner,*

v.

RONALD BROOMFIELD, WARDEN, *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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## INDEX TO APPENDIX

**Page**

Ninth Circuit Court of Appeals
Per Curiam Opinion,
Case No. 22-99002 (May 7, 2026)..... Pet. App. A, 1–52

United States District Court
Judgment
Case No. 10-cv-00546-FLA (February 8, 2022) ..... Pet. App. B, 53

United States District Court
Order Denying Petition for Writ of Habeas Corpus
Case No. 10-cv-00546-FLA (February 8, 2022) ..... Pet. App. C, 54–117

Supreme Court of California
Order Denying Petition for Writ of Habeas Corpus
Case No. S190968 (August 17, 2016)..... Pet. App. D, 118

Supreme Court of California
Order Denying Petition for Writ of Habeas Corpus
Case No. S133439 (December 17, 2009) ..... Pet. App. E, 119

Supreme Court of California
Order Affirming Judgment on Appeal
Case No. S042323 (July 30, 2009).....Pet. App. F, 120–206

Exhibits to Petition for Writ of Habeas Corpus
Volume 10 of 11, Exhibit 83
Case No. S19096 (January 31, 2018)..... Pet. App. G, 207

Petition for Writ of Habeas Corpus
Claim VIII
Case No. S133439 (January 31, 2018)..... Pet. App. H, 208–223

Exhibits to Petition for Writ of Habeas Corpus
Volume 1, Medical declarations
Case No. S133439 (January 31, 2018).....Pet. App. I, 224–259

Excerpts of Clerk's Transcript Vol. 3 of 8
Burney Redacted Interview Transcript
Superior Court of Orange County, Case No. C-94692 .....App. J, 260–322

## INDEX TO APPENDIX

**Page**

Excerpts of Clerk's Transcript Vol. 7 of 8
Superior Court of Orange County, Case No. C-94692 ..... Pet. App. K, 323

Excerpts of Clerk's Transcript Vol. 8 of 8
Superior Court of Orange County, Case No. C-94692 .....Pet. App. L, 324–359

Excerpts of Reporter's Transcript Vol. 6 of 11
Superior Court of Orange County, Case No. C-94692 .....Pet. App. M, 360

Excerpts of Reporter's Transcript Vol. 7 of 11
Superior Court of Orange County, Case No. C-94692 ..... Pet. App. N, 361

Excerpts of Reporter's Transcript Vol. 8 of 11
Superior Court of Orange County, Case No. C-94692 ..... Pet. App. O, 362–367

Excerpts of Reporter's Transcript Vol. 9 of 11
Superior Court of Orange County, Case No. C-94692 .....Pet. App. P, 368–372

Excerpts of Reporter's Transcript Vol. 10 of 11
Superior Court of Orange County, Case No. C-94692 ..... Pet. App. Q, 373–395

Excerpts of Reporter's Transcript Vol. 11 of 11
Superior Court of Orange County, Case No. C-94692 ..... Pet. App. R, 396–410

Trial Exhibit BBB
Burney Unredacted Interview Transcript
Superior Court of Orange County, Case No. C-94692 .....Pet. App. S, 411–478

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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|---|---|
| SHAUN KAREEM BURNEY,<br><br>*Petitioner-Appellant*,<br><br>v.<br><br>RONALD BROOMFIELD, Warden,<br><br>*Respondent-Appellee*. | No.22-99002<br><br>D.C. No.<br>2:10-cv-00546-FLA<br><br>OPINION |

Appeal from the United States District Court
for the Central District of California
Fernando L. Aenlle-Rocha, District Judge, Presiding

Argued and Submitted January 13, 2026
Pasadena, California

Filed May 7, 2026

Before: Mark J. Bennett, Lawrence VanDyke, and Holly A. Thomas, Circuit Judges.

Opinion

## SUMMARY*

### Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Shaun Burney's 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging his California conviction for murder.

In a certified issue, Burney claimed that the trial judge was biased and engaged in judicial misconduct. The State responded that because the California Supreme Court denied the claim both on the merits and on procedural grounds, the deferential standard of review prescribed by the Antiterrorism and Effective Death Penalty Act (AEDPA) applies, and the claim is procedurally defaulted. Because deciding whether Burney procedurally defaulted his judicial bias and misconduct claims would require the resolution of several complex preliminary questions, the panel exercised its discretion to proceed directly to the merits, which it reviewed de novo.

Burney argued that the trial judge demonstrated bias against Burney and in favor of the death penalty. The panel held that Burney's judicial bias claim fails on the merits. The trial judge's comments do not demonstrate that the judge had either a personal interest or direct involvement in the proceedings. The judge neither relied upon knowledge acquired outside proceedings nor displayed deep-seated and unequivocal antagonism that would render fair judgment impossible. In context, the challenged comments also do not show an intolerable risk of bias nor

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

create an appearance of impropriety, as the judge emphasized that the jurors had to be convinced beyond a reasonable doubt to find the defendant guilty and stressed the importance of serving as a jury member.

In his judicial misconduct claim, Burney alleged that the trial judge's behavior during voir dire and trial resulted in proceedings being conducted without dignity and respect. Burney cited various examples of what he described as racist comments, inappropriate jokes and banter, jokes about assaulting jurors, and sexist comments, rendering the proceedings fundamentally unfair in violation of the Due Process Clause of the Constitution. The panel held that Burney did not demonstrate that the challenged comments rendered his trial so fundamentally unfair as to transgress constitutional limits. The comments do not appear to be adverse to Burney to a substantial degree and were not of sufficient gravity to warrant the conclusion that fundamental fairness was denied.

Burney requested that the panel expand the certificate of appealability (COA) to include (1) his claims that his confession to the detectives should have been excluded at trial because it was involuntary and he did not validly waive his *Miranda* rights; and (2) his claim that the trial court's admission of his codefendants' allegedly "inadequately-redacted and self-serving statements" violated *Bruton v. United States*, 391 U.S. 123 (1968). The panel declined to expand the COA because the district court's denial of these claims is not debatable.

## COUNSEL

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## OPINION

PER CURIAM:

In 1994, Shaun Burney was jointly tried and convicted of the murder of Joseph Kondrath. Burney and his codefendants, Allen Burnett and Scott Rembert, had approached Kondrath, forced him out of his car at gunpoint, and ordered him into the trunk. The defendants drove Kondrath's car to various places and discussed needing to kill him because he had seen their faces. Ultimately, Burney opened the trunk and fired a single shot into it. That shot killed Kondrath.

Burney now appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. In his appeal, he raises one certified issue: whether the trial judge was biased and engaged in judicial misconduct. In his brief to our court, Burney also raises two uncertified claims.

First, he argues that his confession was involuntary and that his *Miranda v. Arizona*, 384 U.S. 436 (1966), waiver was invalid. Second, he argues that the introduction of his codefendants' redacted statements resulted in a *Bruton v. United States*, 391 U.S. 123 (1968), error that was not harmless.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We affirm the district court's denial of Burney's habeas petition and deny Burney's request to expand the certificate of appealability ("COA").

I.

On June 10, 1992, sometime after 8:00 p.m., a civilian traffic enforcer noticed an illegally parked car. As he walked around the car, the traffic enforcer saw "a dark puddle near the right rear tire" and something "dripping from the trunk area." Law enforcement arrived to assist in the inspection of the car and found Kondrath's body in the trunk. Kondrath's autopsy revealed a gunshot wound on the back of his right hand and through the left side of the back of his head.

Police investigation led to the arrests of 18-year-old Burney, 20-year-old Rembert, and 18-year-old Burnett.

A.

1.

Investigators interviewed each defendant separately. Transcripts of the defendants' redacted statements were later admitted at trial.

a. Burney's Interview

At the outset of Burney's interview, Detective Georgia Erickson told Burney that they were investigating a

homicide and said to him, "I'm required by law to read you your Miranda warnings." Detective Erickson then advised Burney of his *Miranda* rights. After reading each right to Burney, Detective Erickson asked if he understood, and Burney responded "[y]es" each time. Burney was offered something to drink and a blanket before questioning began.

Upon questioning, Burney explained that before sunrise on June 10, 1992, the defendants intended to steal Ron Hussar's car stereo. After they failed to locate Hussar's car, they saw Kondrath getting into a car. One of the defendants was drunk and wanted Burney to steal the car, but Burney did not want to. Burney said that he approached the car and asked Kondrath for the time. When Kondrath cracked the window open to hear him, one defendant pointed a gun at him through the window. The defendants took Kondrath's wallet and forced him out of the car and into the trunk.

Defendants drove to several places—first to Jeffrey Howard's house and then to look for members of Watergate Crips, a rival gang. At some point, the drunk defendant insisted they kill Kondrath because he had seen their faces. Burney stated, "we're gonna kill him" after the drunk defendant said, "you gotta kill him." Burney then told the drunk defendant that he (the drunk defendant) was drunk and that they should leave. Burney admitted to the detectives that, despite not wanting to shoot Kondrath, he nevertheless did so. Burney described opening the trunk and, without looking, firing one shot toward where he had heard Kondrath's voice. When the detectives asked Burney why he did not refuse to shoot Kondrath and hand the gun back to the drunk defendant instead, Burney responded that he was afraid the drunk defendant would accidentally shoot him

(Burney). After Burney fired the gun, he recalled handing it to someone and running away.

At times during the interview, Burney became emotional and began to cry. He cried when he realized the detectives were in possession of the gun linked to the murder. He cried again when asked about Kondrath's actions right before Burney shot him. When Burney cried, the detectives offered him a tissue, gave him time to gather himself, and offered him something to drink.

After describing the events, Burney confessed that he "did everything" and that "nobody else did it." He also stated, "I guess I'm going to the pen. The f[***]in' pen. Damn."

b. Rembert's First Interview

Initially, Rembert stated that he had heard about the person who "was found in the trunk of the car" from the newspaper and from his mother. Rembert insisted that he was not involved. Eventually, Rembert said that "one [of them] was drunk and the other one just wanted to go ahead and do it." He stated that he did not touch anyone and told "them" not to "do it" because there was "no reason to kill [Kondrath]." Rembert said he thought "they" were going to take someone's stereo and that "they" had not said anything about killing someone when they left the apartment. Rembert stated that the "people that were involved . . . tricked [Kondrath], asked him what time it was, he rolled down his window, put a gun to his head, and got out and he went inside the trunk. They put him inside the trunk."

c. Rembert's Second Interview

The detectives told Rembert that the others had been arrested and charged with homicide. Rembert subsequently admitted being present during the shooting. He said that when they all left the apartment, Rembert had the gun in his pants pocket, and that they intended to take Hussar's stereo, but Hussar's car was not there. On their way back to the apartment, they saw Kondrath, and the others started talking about "jacking him." One of them asked for the gun that Rembert had and Rembert gave it to him. One of them asked Kondrath for the time, Kondrath rolled down his window a bit, one of them pointed the gun through the window, and Kondrath got out of the car and into the trunk. Rembert relayed that they went to Howard's house to get a shotgun, drove around, and that Rembert shot the handgun twice in the air before they returned the shotgun. Back at Howard's house, Rembert said they got more bullets for the gun and Rembert put them in the gun. Rembert recalled that, back in the car, the others were arguing about who was going to shoot Kondrath. One of them wanted to do it because "he" did not get to shoot the gun into the air.

d. Burnett's Interview

Burnett admitted being present when Kondrath was shot but denied having shot Kondrath. Burnett recalled that the night of the shooting, he did not want to go out but "they" wanted him to go because he was drunk. When they all left the apartment, "they" wanted to take Hussar's speakers. Burnett stated that they could not find Hussar's car but that when they saw Kondrath, they decided to steal his car to "[g]o blastin' Watergate." Burnett told the investigators that he walked over and then "[o]ne of the others" asked

Kondrath the time, and when Kondrath rolled down the window, "[o]ne of the others" "put the gun in the window and told [Kondrath] to get out the car" and "threw [Kondrath] in the trunk."

Burnett said that after the defendants left Howard's house, Burnett had suggested driving Kondrath somewhere far away but instead, "he" pulled over and started wiping down the car and then shot Kondrath. Burnett said one of them was farther away from the car "ready to jump the fence already" and one of them said, "f[***] it, I'll do it." According to Burnett, "one of the others" said "don't shoot that mother f[*****] and then he [the shooter] just shot him." The shooter "said f[***] it and [then] everybody ran." Burnett recalled that the shooter opened the trunk and fired a single shot.

2.

The State of California ("the State") charged the defendants with second-degree robbery, kidnapping, kidnapping for purposes of robbery, and first-degree murder. The indictment also alleged the special circumstances of murder in the commission of a robbery and murder in the commission of a kidnapping.[1] The State sought the death penalty only as to Burney.

3.

Judge Fitzgerald presided over the trial. During voir dire, the judge described the killing of Kondrath as a "very

[1] As to Burney, the indictment alleged as to all counts the personal use of a firearm. The trial court subsequently granted the prosecution's motion to dismiss the firearm-use allegations against Burney for all counts except first-degree murder. The indictment alleged that Rembert and Burnett were vicariously armed with a firearm.

horrendous crime," and as "dastardly conduct." He described the potential penalties as "a very difficult possible punishment for one defendant" and not "a walk in the park" for the other defendants, either. The trial judge instructed prospective jurors to disregard their own life experiences during the trial, and he instructed the jurors not to speculate about the prosecutor's decision to seek the death penalty for one defendant but not the others. The trial judge also remarked that everyone should believe in the death penalty.

At times during voir dire, the trial judge appeared to joke with jurors. When explaining the purpose of voir dire, he stated:

> All we're concerned with now is whether you have the ability to serve on this case if you have passed all the requirements that the attorneys may ask of you during the course of their inquiry in a thing that we call voir dire, which simply means they're going to ask you a bunch of questions to find out if you are stupid or smart. Not exactly. But something like that.

When encouraging prospective jurors to serve on the jury, the trial judge explained the case was not going to last very long relative to other cases and stated:

> [I]t's going to be a fairly enjoyable experience in my court because I'm so lazy and you won't have to put that much time in. But there are other judges around that are a little bit more brutal than I. In fact, I believe

> Judge Ogre next door is picking a very long case.

The judge also commented:

> [T]he ones that stay on this case as jurors may pick up on the fact that the court's got a really weird sense of humor. I can't help it, it's me, that's what I am. I apologize to you right now if I offend people. That's going to happen. I don't do it intentionally. Maybe I do do it intentionally. But in any event, I apologize to you for offending anyone that I may talk to during this process.

In response to a prospective juror stating she was an airline stewardess, the trial judge quipped, "Can I get some cheap seats?" to which the prospective juror responded, "See what I can do." And when another prospective juror made a joke, the trial judge responded, "I'm supposed to be the funny one here." Just before a break during voir dire, the trial judge told prospective jurors that those who were not excused for hardship had to return in the morning. The judge joked that "[i]f the hallway is filled with people out here don't panic don't commit suicide or anything like that just go down . . . and come back after about a half hour."

Some of the comments had a racial or ethnic component. Questioning one prospective juror, Duke Nguyen, the trial judge asked if Nguyen was "foreign born" or born in the United States and whether he was "educated in the United States." In response to the judge's follow-up questions, Nguyen responded that he was born in Vietnam, left when he was eight years old, did not learn about Vietnam's legal

system, and did not live in other countries or learn about their legal systems.

The judge also pointed out during voir dire that all three defendants were Black and that very few prospective jurors were Black. The judge asked if anyone had any "disagreeable or difficult or violent or any kind of incident with any Black individual" or any "confrontation with any member of our Black community." The judge then confirmed that all prospective jurors accepted the notion that the law is "color blind" and that everyone, "regardless of race, . . . is entitled to full consideration of the law."

Some other jokes had a gender component. Burnett's counsel asked a prospective juror what his wife would say if counsel said he looked like a hard-working man. The prospective juror responded that his wife would say that he had a "one-track mind," meaning that he was goal oriented. The trial judge interjected, "I thought it was women." After a prospective juror mentioned that she was a Christian, the trial judge asked if she could follow the laws and rules of the court and not those of her religion. The prospective juror responded that she would and added, "I can't imagine you would do anything that I wouldn't go along with." The judge replied, "I wish there were ladies in my past that have all thought that way." He then stated, "That's an aside. That's that stupid sense of humor. I apologize. You never know what I'm going to say."

In trying to determine whether a prospective juror was up to the task, the trial judge explained that a juror's role was to administer the law and that such a role was not a light one. The trial judge asked if the prospective juror was "up to that kind of task" and explained as an example that "[e]very once in a while I tell my wife and my grown daughters that I am

the law. They have come to the point where they begin to believe that. And I say it jokingly occasionally but sometimes I'm serious." And when a prospective juror was answering the question of what his typical day looked like and stated that he made breakfast, did the food shopping, planned the meal, cooked dinner, and washed the dishes, the trial judge joked, "Does your wife get out of bed yet?"

Several other jokes were about the deliberation process or capital punishment. Explaining to the jurors that California allows capital punishment, the judge stated, "California has executed one guy so far. And even though we take forever to finalize these things and they do go on, they are to pick up their Baskin Robbins ticket to step into the gas chamber." After learning that prospective jurors were talking about the death penalty and related issues, the judge admonished prospective jurors in open court not to discuss their opinions on capital punishment or the case because it was important to get each juror's personal opinion. The judge noted that a prospective juror was overheard talking about their ideas on capital punishment and joked, "That person now has to be shot."

In another instance, the trial judge hypothesized that if, during deliberation, one juror says he wants to acquit but cannot because one or all of the defendants did not testify, "the other 11 jurors are entitled, under the law, to beat the devil out of that juror." After the prospective jurors laughed, the trial judge stated that if anything like that happened or there was any other violation of a court order during deliberations, other jurors "should simply remind that juror of the law." The trial judge also examined the impartiality of a prospective juror who stated she was uncomfortable with serving on a jury that could vote in favor of the death penalty. To assess her ability to follow the law,

the judge asked her to imagine being "hogtie[d] . . . and drag[ged] into the jury room" and to consider whether, in that situation, she could render a verdict imposing death if the law warranted it. The juror responded that she would feel obligated to do so but was unsure whether she wanted to be in that position.

After the trial began, the judge made a number of comments that were not directly pertinent to the evidence or the proceedings. Just before the prosecutor began cross-examining an investigator, the prosecutor asked whether the investigator was used to being cross-examined by the State and the investigator said he was not. The trial judge then stated, "Tear him up." During closing argument, the prosecutor referred to the medical examiner as Dr. Fukumoto instead of Dr. Katsuyama. The trial judge corrected him and said, "I know they all look alike, but you still have to get the names straight." And during deliberations, when the jury informed the court that it could not resolve two counts and two special circumstances for one defendant, the trial judge addressed the foreperson, saying, "you are still the foreperson; is that correct? In other words, they haven't lynched you or anything like that?" After counsel for Rembert objected to one of the prosecutor's questions, the trial judge said, "Touchy-feely time or what?"

Outside the presence of the jury, the trial judge read a note from a juror and joked that it addressed him as "your magnificent exalted worthiness." The trial judge at some point also commented that he had a "jacket of being oppressive to counsel on another case or two," and then asked, "is there any counsel that feels so overwhelmed by the court's ominous presence to the point that you can't do your job and represent your client adequately?" In another

instance, counsel for Burney had referred to the defendants as "three boys" in open court. The trial judge admonished him outside the presence of the jury not to refer to the defendants as boys. The judge told counsel that the defendants were "grown boys" and "that means they're men." The judge confirmed with counsel that counsel was not "trying to endear any kind of favoritism with the jury" by using the term "boys."

4.

None of the defendants testified during trial, and Burney did not present any evidence. Burney's counsel argued that he was not guilty of felony murder because the robbery and kidnapping concluded before the murder took place. Counsel also argued that Burney was only guilty of second-degree murder because the murder was not premeditated or deliberate.

The jury returned guilty verdicts as to all counts for Burney and Burnett, and to all but the murder and robbery counts (and the special circumstances) for Rembert.

B.

During the penalty phase, Burney submitted psychological evidence through the testimony of Dr. Stephen Wells, Ph.D. Dr. Wells testified that Burney was a child both in intellectual development and social maturity. Dr. Wells believed that Burney was a "follower" and did not intend to kill Kondrath. Burney admitted to Dr. Wells that at the time of the crimes, he felt stuck in a situation he did not want to be in and was afraid that if he did not kill Kondrath, Rembert and Burnett would have hurt or rejected him, leaving him nowhere to go. In Dr. Wells's opinion,

Burney "was experiencing the symptoms of a manic-depressive mental disorder at the time of the murder."

Dr. Wells also recounted a number of traumatic events that Burney had experienced. When Burney was eight years old, he and his mother returned home from a funeral to find that his father had changed the locks and was living with another woman. When he was nine years old, Burney experienced suicidal feelings. At 15 years old, Burney went to live with his father after a reconciliation, but his father soon kicked him out, renewing Burney's feelings of abandonment. When Burney was 18, shortly before the murder, Thomas, his mother's husband, began living with Burney and his mother. Thomas physically abused Burney's mother. After Burney and Thomas had an altercation, Burney could no longer live at home.

Forensic psychiatrist Dr. William Vicary, M.D., also testified. He concluded that prior to the murder, Burney was depressed and suicidal. Burney had told him that he had drunk 40 ounces of malt liquor before the murder. Dr. Vicary reported that Burney's mother physically abused him when he was a child but later became "over indulgent" and "over protective." Dr. Vicary also echoed Dr. Wells, stating that Burney experienced trauma when his father left, when his mother physically abused him, and when he was forced to leave both his parents' and friend's homes. Dr. Vicary further testified that Burney expressed remorse for the killing and opined that Burney would not constitute a danger while incarcerated.

The jury sentenced Burney to death on May 25, 1994.

C.

1.

In 2005, Burney filed his first state habeas petition in the California Supreme Court ("CSC"). In 2009, the CSC, on direct appeal, affirmed Burney's convictions and sentence. The CSC later denied his first state habeas petition on the merits and on procedural grounds. The United States Supreme Court denied a petition for certiorari.

In 2011, Burney filed a second state habeas petition in the CSC. In 2016, the CSC denied some claims on the merits, and some claims as procedurally barred.

2.

Burney filed the operative federal habeas petition on March 1, 2011. In 2020, the district court dismissed some of Burney's claims as procedurally barred and denied some claims on the merits. In 2022, the district court denied the remainder of Burney's claims and entered judgment.

II.

"We review *de novo* a district court's denial of a habeas corpus petition and review for clear error any factual findings made by the district court." *Jurado v. Davis*, 12 F.4th 1084, 1090 (9th Cir. 2021). "The decision by the district court to decline to order an evidentiary hearing is reviewed for abuse of discretion." *Roy v. Lampert*, 465 F.3d 964, 968 (9th Cir. 2006).

A.

Because the federal petition was filed after April 24, 1996, our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004).

Under AEDPA, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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)(1)–(2).

We apply deferential review under AEDPA to the last reasoned state court decision. *See Wilson v. Sellers*, 584 U.S. 122, 125 (2018). To satisfy § 2254(d)(1), Burney must show that "'there was no reasonable basis' for the [CSC]'s decision." *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). Under § 2254(d)(2), "[a] state court's factual findings are unreasonable if 'reasonable minds reviewing the record' could not agree with them." *Ayala v. Chappell*, 829 F.3d 1081, 1094 (9th Cir. 2016) (quoting *Brumfield v. Cain*, 576 U.S. 305, 314 (2015)); *see Wood v. Allen*, 558 U.S. 290, 301 (2010) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.").

B.

A petitioner seeking a COA on the denial of constitutional rights "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; *or* that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alteration in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

## III.

We begin with the certified issue on appeal. Burney raises claims of judicial bias and misconduct.[2] He argues that jocular, racist, and sexist comments by the trial judge during voir dire and trial rendered his trial fundamentally unfair in violation of the Due Process Clause of the Constitution. He further alleges that the trial judge's behavior resulted in proceedings being conducted without dignity and respect. The State responds that because the CSC denied this claim both on the merits and on procedural grounds, AEDPA deference applies, and the claim is procedurally defaulted. Alternatively, the State asserts that under both AEDPA and de novo review, Burney's claim lacks merit. In reply, Burney alleges that the State waived the affirmative defense of procedural default by failing to raise it in district court.[3]

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[2] It is not clear whether Burney intended to raise a separate judicial bias claim. We therefore address judicial bias and judicial misconduct separately.

[3] In Claim X of his initial state habeas petition, Burney alleged, among other things, that improprieties during voir dire deprived him of his constitutional rights. As relevant here, he pointed out that the trial judge improperly described the crime as "very horrendous" and stated that there was "a very difficult possible punishment for one defendant and the prospects for the other two isn't a walk in the park either." Burney alleged that the judge's statements were prejudicial and signaled a bias against him and in favor of the death penalty. In Claim XIII, Burney argued, among other things, that the trial judge's comments amounted to judicial misconduct which violated his right to due process, rendering his trial fundamentally unfair.

The CSC denied Claims X and XIII on the merits. It also denied Claim X "to the extent it alleges the trial court erred by informing the jury that the death penalty is a punishment more severe than life in prison without parole" and Claim XIII because they were not raised on

Deciding whether Burney has procedurally defaulted his judicial bias and misconduct claims would require the

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appeal. Additionally, the CSC barred Claim X because it could have been, but was not, raised in the trial court.

In Claim 8(C) of his second state habeas petition, Burney again challenged the propriety of the trial judge's comments during voir dire and pointed out several additional statements. He argued that the comments demonstrated that the trial judge was biased and displayed partiality. In Claim 9, Burney again raised a claim of judicial misconduct and bias based on the trial judge's rulings and comments made at trial and referenced comments specified in Claim 8(C). He further argued that the trial judge's jocular and insensitive comments and attitude during trial constituted judicial misconduct because the judge failed to conduct the proceedings with dignity and respect.

The CSC denied Claims 8 and 9 because they were untimely, could and should have been raised on appeal but were not, and were raised and rejected in the initial petition. The CSC also denied Claim 8 because it was raised and rejected on appeal and should have been raised in trial court but was not. The CSC additionally denied Claim 9 insofar as it could and should have been raised in the initial petition but was not.

In Burney's § 2254 petition, Claims 8(C) and 9 substantially mirrored Claims 8(C) and 9 from his second state habeas petition. The district court ordered the parties to meet and confer to determine which claims could be "resolved solely on the trial record and/or the record on appeal," and as to those record-based claims, ordered the State not to brief the question of procedural default at that time.

After the parties briefed the record-based claims, which included Claims 8 and 9, the district court applied AEDPA deference to the resolution of Claim 8(C) and concluded that the voir dire comments did not violate Burney's right to an impartial judge. As to Claim 9, the district court recognized that the parties disagreed whether the entire claim had been adjudicated on the merits and, rather than resolve that question, decided instead to review Claim 9 de novo. Under de novo review, the court denied Claim 9, concluding that the comments made during trial did not render the trial fundamentally unfair nor demonstrate bias.

resolution of several complex preliminary questions. We therefore exercise our discretion to proceed directly to the merits of Burney's judicial bias and misconduct claims. *See Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same."). We review this claim de novo. *See Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010) (explaining that when a state court's decision is correct under de novo review it is necessarily reasonable under AEDPA's more deferential standard of review).

A.

The Due Process Clause does not provide a uniform standard under which to analyze a judicial bias claim. *See Hurles v. Ryan*, 752 F.3d 768, 788 (9th Cir. 2014). The Clause, however, does provide a "constitutional floor" and requires a "'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997) (citation modified) (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). To succeed on a judicial bias claim, Burney must show that the facts demonstrate "an intolerable risk of bias." *Hurles*, 752 F.3d at 789; *see Greenway v. Schriro*, 653 F.3d 790, 806 (9th Cir. 2011) ("A showing of judicial bias requires facts sufficient to create actual impropriety or an appearance of impropriety."). Without "evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases.'" *Larson v. Palmateer*, 515 F.3d

1057, 1067 (9th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Judicial bias is a structural error that is not subject to harmless error analysis. *See Greenway*, 653 F.3d at 805.

1.

Burney argues that the trial judge demonstrated bias against Burney and in favor of the death penalty. He alleges that the judge predetermined his guilt by describing the crime as a "very horrendous crime" and "dastardly conduct," and by stating that the potential penalty was "a very difficult possible punishment for one defendant" and that "the prospects of the other two isn't a walk in the park either." Burney claims that the trial judge instructed the prospective jurors to disregard their own life experiences when considering what penalty to impose. He also objects to the judge's comments telling the jurors not to speculate about the prosecutor's decision to seek the death penalty for one defendant but not the others and remarking that "[e]verybody should believe in" the death penalty.

The Supreme Court has found judicial bias where a judge had a personal or direct interest or involvement in the proceedings. For example, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the trial judge, who was engaged in "a running, bitter controversy" with the defendant, *id.* at 465, also ruled over proceedings to determine whether the defendant was guilty of contempt, *see id.* at 465–66. In *In re Murchison*, 349 U.S. 133 (1955), the trial judge acted both as the trier of the defendant and the grand jury. *See id.* at 137. And in *Tumey v. Ohio*, 273 U.S. 510 (1927), the judge had a pecuniary interest in the cases he presided over because he stood to profit from each conviction. *See id.* at 523.

2.

Burney's allegations do not meet the bar set by these cases. The trial judge's comments do not demonstrate that the judge had either a personal interest or direct involvement in the proceedings. The judge "neither (1) relied upon knowledge acquired outside [the] proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky*, 510 U.S. at 556; *see Larson*, 515 F.3d at 1067 (relying on *Liteky* to state that without evidence of an extrajudicial source of bias, a trial judge's remarks are generally insufficient to rebut the presumption of judicial integrity).

In context, moreover, the challenged comments also do not show an intolerable risk of bias nor create an appearance of impropriety. *See Hurles*, 752 F.3d at 789; *Greenway*, 653 F.3d at 806. Indeed, the judge emphasized that the jurors had to be convinced beyond a reasonable doubt to find the defendants guilty and stressed the importance of serving as a jury member.

For example, the judge's remarks describing the crime as "very horrendous" and the potential penalty as "a very difficult possible punishment for one defendant" were made at a time when the judge was emphasizing that being a juror on this case was a serious matter and that many jurors have felt that serving on a criminal case was impactful. The judge further acknowledged that some potential jurors were probably thinking of ways to get out of service but encouraged them to remain. Thus, in context, it appears the judge made these comments to impress upon the jury the importance and seriousness of the role of jurors.

In a similar vein, the judge's description of the crime as "dastardly conduct" for which the jurors must suppress their

"revulsion," came in the context of the judge's questioning of a prospective juror to determine whether she could be an objective and fair juror. The prospective juror expressed uncertainty about her ability to remain objective, and the judge pressed her for a more definitive answer. This included telling her that it was normal for jurors to be angry if they determined that someone was guilty of the crime, but that they were required to "suppress that anger, that revulsion, that overwhelming kind of condemnation that we all must have in society of this kind of dastardly conduct." The trial judge continued, stating that jurors had to be ready to set aside their emotions, and if they determined that the defendant was guilty, to proceed to the penalty phase and evaluate the aggravating and mitigating factors dispassionately.

These comments do not intimate that the trial judge harbored a bias against Burney, nor do they display antagonism. *See Hurles*, 752 F.3d at 789; *Liteky*, 510 U.S. at 556. While the challenged comments appear off-the-cuff and informal, they are not sufficient to establish a judicial bias claim or overcome the presumption of judicial integrity. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) ("[T]here are objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (internal quotation marks and citation omitted)); *Larson*, 515 F.3d at 1067.

The three remaining comments regarding the death penalty that Burney challenges also do not demonstrate a risk of intolerable bias or create an appearance of impropriety. *See Hurles*, 752 F.3d at 789; *Greenway*, 653 F.3d at 806. When the trial judge commented that the jury should disregard their own life experiences when

determining the penalty, the trial judge was speaking to a prospective juror who had worked as a prison guard in Germany. The prospective juror stated that after seeing the conditions of prisoners serving a sentence of life without the possibility of parole, he found it "difficult to separate life without possibility of parole from death conceptually." In response to that statement, the trial judge informed him that he had to disregard his experience in Germany for the purpose of determining what the ultimate punishment would be in Burney's case. In addition, the trial judge explained that he should not share his own personal life experiences with the other jurors to persuade them on any point of view, just as jurors are prohibited from bringing other outside materials into the jury room to influence other jurors.

Another comment was made during voir dire of a prospective juror who felt strongly that if a defendant was convicted of murder, they should receive the death penalty. The trial judge explained that the prosecutor had the authority to determine who to charge with a capital crime, and the jury should not speculate about the prosecutor's decision. Outside the presence of the jury, Burney's counsel voiced his concern regarding the trial judge's admonition not to second guess the prosecutor because he intended to argue to the jury that the prosecutor in fact did make a mistake in seeking death for Burney. The trial judge clarified that Burney's counsel would not be prohibited from making that argument and that he did not intend to suggest otherwise with his comment.

The trial judge's comment that "[e]verbody should believe in" the death penalty, also did not reflect bias when examined in context. After the trial judge had mistakenly inferred that one prospective juror favored the death penalty, the juror clarified that she did not say she favored the death

penalty, but she did believe in it. The trial judge responded that "[e]verybody should believe in it" and that "it's not a maybe kind of thing" because California law provided for it.

Burney does not explain how these comments, when examined in the context in which they were made, demonstrate that Judge Fitzgerald held an intolerable risk of bias against Burney and in favor of the death penalty. Indeed, considering the transcript as a whole, the trial judge accurately explained the law regarding the death penalty to the jury. For example, the judge stressed to the jury that the defendants were innocent until proven guilty. The judge explained that if the jury found the defendants not guilty, there would be no penalty phase. The judge also told the jury not to "expect that there will be a second phase of the trial." He explained that if the State failed to meet its burden, there would be no penalty phase "[b]ecause we will not commit to death people who are innocent or people who do not fully qualify having committed all the elements necessary to qualify a person for capital punishment." The judge additionally clarified, "[Y]ou understand that the reason I'm talking to you about punishment, punishment, punishment is not because we preordained guilt in this case? In other words, it's the only way we can find out people's attitudes is to ask them?"

Burney further alleges that the trial judge's comments infringed on the jury's duty to consider the evidence and determine the appropriate penalty. But this claim also fails. Burney relies on *Penry v. Johnson*, 532 U.S. 782 (2001), for support. But the issue in *Penry* was whether a conflicting set of jury instructions violated the Eighth Amendment, *see id.* at 786; *Penry* did not address a claim of judicial bias. In addition, Burney does not allege, and the record does not demonstrate, that the jury instructions were confusing or

misleading with respect to the jury's ability to consider the mitigating evidence and provide a "reasoned moral response" when determining the appropriate penalty.[4] *Id.* at 800.

B.

The standard of review for a judicial misconduct claim is the same as that for a prosecutorial misconduct claim. *See Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995). That standard is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). For a general judicial misconduct claim on habeas review, "we must ask whether the state trial judge's behavior rendered the trial so

[4] Burney further argues that the CSC was aware of the trial judge's "propensity for judicial bias." But the cases he cites are factually distinguishable and relied only on California law, which does not control the outcome of our habeas review. *See People v. Fatone*, 211 Cal. Rptr. 288, 295 (Ct. App. 1985) (noting that Judge Fitzgerald treated defense counsel with a "demeaning, patronizing attitude"); *People v. Grist*, No. G026871, 2001 WL 1555192, at *5–10 (Cal. Ct. App. Dec. 5, 2001) (concluding that Judge Fitzgerald's behavior was similar to that condemned in *Fatone*); *Ng v. Superior Ct.*, 61 Cal. Rptr. 2d 49, 57 (Ct. App. 1997) (noting that Judge Fitzgerald had an "unusual interest in personally handling the case," made "derogatory and apparently unfounded statements concerning counsel," and refused to reinstate defense counsel despite there having been no basis to remove counsel in the first instance); *People v. Melton*, 750 P.2d 741, 764 (Cal. 1988) (disapproving of Judge Fitzgerald's remarks which could have been interpreted negatively against a party or attorney but ruling that the remarks "[fell] short of the intemperate or biased judicial conduct which warrants reversal" and noting that "[w]ell-conceived judicial humor can be a welcome relief during a long, tense trial").

fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett*, 67 F.3d at 740.

1.

Burney alleges that various comments made by the trial judge during voir dire and trial rendered the proceedings fundamentally unfair because the judge failed to maintain proper courtroom dignity and respect. Burney provides various examples of what he describes as racist comments, inappropriate jokes and banter, jokes about assaulting jurors, and sexist comments in support of his judicial misconduct claim.

For example, during voir dire, when explaining that California allows for capital punishment, the trial judge stated, "California has executed one guy so far. And even though we take forever to finalize these things and they do go on, they are to pick up their Baskin Robbins ticket to step into the gas chamber." And after a prospective juror mentioned that she was a Christian, the trial judge asked if she could follow the laws and rules of the court and not those of her religion. The prospective juror responded that she would and added, "I can't imagine you would do anything that I wouldn't go along with." The trial judge replied, "I wish there were ladies in my past that have all thought that way."

During closing argument, the prosecutor referred to the forensic pathologist as Dr. Fukumoto instead of Dr. Katsuyama. The trial judge corrected him and said, "I know they all look alike, but you still have to get the names straight." During trial, counsel for Burney referred to the defendants as "three boys." Outside the presence of the jury, the trial judge admonished him not to refer to the defendants as boys. The judge told counsel that the

defendants were "grown boys" meaning that "they're men." The judge confirmed with counsel that he was not "trying to endear any kind of favoritism with the jury" by using the term "boys." During guilt phase deliberations, the jury informed the court that it could not resolve two counts and two special circumstances. Addressing the foreperson, the trial judge asked, "[Y]ou are still the foreperson; is that correct? In other words, they haven't lynched you or anything like that?"[5]

2.

Out of the thousands of pages of transcripts covering Burney's voir dire and trial, the comments that Burney points to do not suffice to sustain a judicial misconduct claim. The judge's comments and behavior, although at times inappropriate, are less egregious than in other cases in which federal appellate courts have rejected judicial misconduct claims on habeas review. For example, in *Duckett*, during examination of witnesses, the trial judge asked his own questions, some of which resulted in answers helpful to the prosecution and harmful to the defendant. 67 F.3d at 740. The trial judge also took over the prosecution's questioning of one witness, criticized and expressed frustration with a defense witness when he testified, and told the prosecutor to "once in a while throw in an objection for the heck of it" during the defendant's testimony. *Id.* Though we did not condone the trial judge's behavior, we determined in *Duckett* that "when considered in the context of the trial as a whole [the

[5] Burney provides many more examples of comments by the trial judge in support of his judicial misconduct claim. We included more examples in the sections above and do not repeat them here. *See supra* Section I.A.3.

questioned conduct was] not 'of sufficient gravity to warrant the conclusion that fundamental fairness has been denied.'" *Id.* at 741 (quoting *Daye v. Att'y Gen. of N.Y.*, 712 F.2d 1566, 1572 (2d Cir. 1983)).

Similarly, in a case from our sister circuit, *Daye*, 712 F.2d 1566, the trial judge asked his own questions of the witnesses, repeatedly referred to the robber in the case as "the defendant[,]" and questioned the defendant in such a way as to imply that the judge disbelieved his testimony. *See id.* at 1568–70, 1572–73. The court criticized the trial judge's behavior but concluded that the questions and comments did not render the trial unfair. *Id.* at 1572–73.

Here, the trial judge did not take over the questioning of any witness and did not openly criticize or express frustration with Burney or his counsel. And although some of the judge's comments—including some made to jurors—were informal, or even insensitive, Burney has not explained how they were adverse to him or rendered his trial unfair. *See id.* at 1572; *Duckett*, 67 F.3d at 741. Indeed, the trial judge emphasized several times that his jokes and banter should not minimize the seriousness of the case or the jurors' roles.

Burney relies on *Wellons v. Hall*, 558 U.S. 220 (2010) (per curiam), to support his allegation that the trial judge was required, but failed, to conduct proceedings "with dignity and respect." Specifically, Burney cites to the opening sentence in *Wellons*, which reads: "From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Id.* at 220. Even if this statement were not dicta, *Wellons* is distinguishable. *Wellons* resolved a procedural issue and involved far more

egregious allegations of misconduct, including ex parte contacts between the judge, jury, and bailiff, as well as inappropriate juror gifts. *See id.* at 221–23. Nothing like that is present here. And *Wellons* did not hold that any failure by a trial judge to conduct proceedings with dignity and respect necessarily rises to the level of a Due Process violation.

Even if the judge's conduct created a "pervasive climate of partiality and unfairness" as Burney asserts, that is the standard for a federal appellate court's supervisory power over the district court on direct appeal. *Duckett*, 67 F.3d at 740 ("In reviewing cases on direct appeal, in the exercise of our supervisory powers over the district courts, . . . . there must be an 'extremely high level of interference' by the trial judge which creates 'a pervasive climate of partiality and unfairness.'" (quoting *United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982))); *Daye*, 712 F.2d at 1571 ("[T]rial judge intervention will exceed federal standards of judicial propriety before transgressing the limits of fundamental fairness required by the Constitution . . . ."). "The only commands that federal courts can enforce in state courts are those of the Constitution." *Daye*, 712 F.2d at 1571. That power is narrower and more limited than our supervisory power over other federal courts. *See id.*

Here, Burney has not demonstrated that the challenged comments rendered his trial so fundamentally unfair as to transgress constitutional limits. *Cf. Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir. 1978) ("The final nonconstitutional claim is that the trial judge interrupted the trial with jokes, stories, and personal reminiscences. Again, we do not approve of storytelling in the courtroom, but we doubt that it ever would render a trial fundamentally unfair unless it completely thwarted the introduction of

evidence, which was not the case here."). Because the challenged comments do not appear to be "adverse to the defendant to a substantial degree[,]" *Daye*, 712 F.2d at 1572, they were not "of sufficient gravity to warrant the conclusion that fundamental fairness has been denied," *Duckett*, 67 F.3d at 741 (quoting *Daye*, 712 F.2d at 1572), and thus did not "exceed[] constitutional limits," *Daye*, 712 F.2d at 1571.

3.

To be sure, our holding should not be taken as condoning or minimizing the trial judge's remarks during Burney's trial. The trial judge's comment that "they all look alike" was inexcusable and had no place in a courtroom. So, too, was the judge's quip that the foreperson had not been "lynched" by his fellow jurors. Other instances of the trial judge's commentary also contributed to a troubling lack of seriousness during a very serious case. Yet, again, "[t]he only commands that federal courts can enforce in state courts are those of the Constitution." *Id.* The question is thus not how we would rule in an exercise of supervisory power—there is no question that we "lack such authority with respect to state courts." *Id.* The question is whether the trial judge's comments, isolated within thousands of pages of transcript, were sufficiently grave, antagonistic, or adverse to Burney that they require the conclusion that Burney's trial was rendered fundamentally unfair or that they can sustain a judicial misconduct claim. When we consider the trial judge's comments in the context of the entire trial, we cannot reach that conclusion.

IV.

Burney requests that we expand the COA to include his claims that his confession to the detectives should have been excluded at trial because it was involuntary and he did not

validly waive his *Miranda* rights. We decline to expand the COA because the district court's denial of these claims is not debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In reaching that conclusion, "[w]e look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id.* As relevant here, under AEDPA's "unreasonable application" prong, 28 U.S.C. § 2254(d)(1), a "prisoner must show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement,'" *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam) (quoting *Harrington*, 562 U.S. at 103). "[T]he state court decision [must] be more than incorrect or erroneous"; it "must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Burney also argues that he may overcome AEDPA deference because the state court's allegedly deficient fact-finding process "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

A.

Burney presented his involuntary confession claim in his first state habeas petition, and the CSC summarily denied it on the merits and as procedurally barred. This claim is thus entitled to AEDPA deference, *see Apelt v. Ryan*, 878 F.3d 800, 825 (9th Cir. 2017), and the question before us is whether the district court's denial of this claim is debatable in light of the required AEDPA deference owed to the state court's determination. Carrying out this analysis, we conclude that a fairminded jurist could agree with the state court that Burney's confession was voluntary, and we believe that such conclusion is not debatable. Nor do we

think it debatable that a fairminded jurist could agree that it was not objectively unreasonable for the state court to decide that Burney had failed to make a prima facie showing that his confession was involuntary, and thus he was not entitled to further state court proceedings such as an evidentiary hearing.[6]

"Whether a confession is involuntary must be analyzed within the 'totality of [the] circumstances.'" *Cook v. Kernan*, 948 F.3d 952, 968 (9th Cir. 2020) (alteration in original) (quoting *Withrow v. Williams*, 507 U.S. 680, 693 (1993)). "The factors to be considered include the degree of police coercion; the length, location and continuity of the interrogation; and the defendant's maturity, education, physical condition, mental health, and age." *Brown v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011) (citing *Withrow*, 507 U.S. at 693–94). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "Coercive police activity can be the result of either 'physical intimidation or psychological pressure.'" *Cook*, 948 F.3d at 968 (quoting *Townsend v. Sain*, 372 U.S. 293, 307 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)). Law enforcement's conduct may be coercive "only because, in the particular circumstances of the case, the confession is

[6] Because we address the merits of the involuntary confession claim, we do not consider the state court's procedural default ruling and the parties' arguments on procedural default. *See Franklin*, 290 F.3d at 1232 ("[A]ppeals courts are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar.").

unlikely to have been the product of a free and rational will." *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014) (en banc) (quoting *Miller v. Fenton*, 474 U.S. 104, 110 (1985)). Thus, the key inquiry is "whether the defendant's will was overborne by the circumstances surrounding the giving of the confession." *Id.* (alterations accepted) (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)).

The totality of the circumstances show that Burney's confession was voluntary. There was no inherently coercive police activity. The detectives did not use threats, violence, promises, or deception to obtain Burney's confession.[7] *See Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam) ("The test [of voluntariness] is whether the confession was extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exertion of any improper influence." (quotation marks omitted) (quoting *Bram v. United States*, 168 U.S. 532, 542–43 (1897))).

Burney argues that the detectives' suggestive and persistent questioning was psychologically coercive considering his youth (18 at the time), mental deficits (including bipolar disorder, post-traumatic stress disorder, and intellectual impairments), and the length of the

[7] Burney alleges that, by asking him to tell his side of the story, the detectives deceived him into thinking that they wanted to help him. There was no deception because the detectives warned Burney from the start that anything he said could be used against him in court and, as discussed below, Burney understood that warning. *See Miranda*, 384 U.S. at 469 (noting that the *Miranda* warning "serve[s] to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest").

interrogation. But the record does not require this conclusion. Although the interrogation transcript spans 63 pages, we found nothing in the record showing that the duration of the interrogation was lengthy. Indeed, both below and on appeal, Burney failed to point to anything in the record demonstrating the duration of his interrogation. The length of Burney's interrogation therefore does not provide any weight to the totality of the circumstances.

Turning to the remaining factors, the record defeats Burney's claim that his youth and mental deficits rendered the detectives' questioning coercive. Burney's full-scale IQ was 86 and his verbal IQ was 83. This corresponds to the IQ described by Burney's expert clinical psychologist, Dr. Stephen Wells, as falling within the "dull normal range."[8] Burney's IQ scores were at least four points above the "borderline retarded range." While it is true that Burney's IQ scores showed that—at age 18—Burney had the mental age of a 15-year-old, the transcript of the interrogation nevertheless demonstrates that Burney's will was not overborne.

As noted above, the detectives did not use any threats, violence, deception, or promises to obtain Burney's confession. To the contrary, the transcript suggests that the detectives acted calmly and professionally. They also took measures to make Burney more comfortable. At the start of the interrogation, for example, they offered Burney something to drink and a blanket. When Burney became emotional, the detectives offered him a tissue, gave him time

[8] We use the terminology used by Dr. Stephen Wells, and intend no disrespect.

to gather himself, and again offered him something to drink.[9] They also took a break when Burney asked to use the restroom. In addition, nothing Burney said suggested that he had mental deficits or difficulty understanding the detectives. Indeed, Burney's responses were appropriate and coherent in general.[10] In short, we see nothing in the record showing "the crucial element of police overreaching." *Connelly*, 479 U.S. at 163.

Burney's responses to the detectives' questions reinforce the conclusion that his will was not overborne. Significantly, Burney did not simply agree with the detectives' suggestions. For example, although the detectives suggested that Burney knew that the group went to a house to pick up a gun, Burney consistently denied those

[9] Burney argues that police coercion is evidenced by the fact that he cried during the interview. But viewed in context, Burney's emotional responses were not because of any coercive tactics. Burney cried when he realized that the detectives were in possession of the gun linked to the murder and when the detectives asked about the victim's actions right before Burney shot the victim. In context, Burney became emotional because he realized that the detectives had evidence connecting him to the crime and because he regretted his actions, not because the detectives used any coercion.

[10] The following are some examples, taken from different points during the interview, that demonstrate Burney's comprehension of the conversation: (1) Q: "How'd you get him into the trunk?" A: "I told him to get in the trunk and he just got in the trunk. He got in the trunk." (2) Q: "Then what happened?" A: "I guess that's when he got the shotgun." Q: "You guess?" A: "Oh, that's when he got the shotgun." (3) Q: "Why'd you put the socks on your hands?" A: "Fingerprints." (4) Q: "He look at you?" A: "I wasn't looking at him. I just know he didn't say nothing. I opened the trunk. I wasn't looking at him. And I was like, naw, man. Can't do this. And I was like, you gotta kill him, you gotta kill him." Q: "So, then what happened?" A: "I killed him."

suggestions. He also repeatedly denied that a gun had been shot from inside the car even though the detectives disclosed that a shell casing had been found inside the car. When the detectives suggested that the group had discussed driving the car to Pomona, Burney denied that there had been any conversations about going to Pomona. Even when the detectives suggested that others had remembered it differently, Burney maintained that no one had talked to him about going to Pomona. Burney also consistently denied suggestions that he had told "Jeff" about the shooting. That Burney did not agree to the detectives' suggestions supports that his confession was deliberate and "the product of a free and rational will." *Preston*, 751 F.3d at 1016 (quoting *Miller*, 474 U.S. at 110).

Under the totality of the circumstances, Burney's will was not overborne and thus his confession was voluntary. Because the circumstances show that the detectives did not engage in any coercive conduct—even considering Burney's age and mental deficits—the district court properly concluded that a fairminded jurist could agree with the state court that Burney's confession was voluntary. *See Connelly*, 479 U.S. at 167. No reasonable jurist could debate that conclusion in light of the record.

Burney also argues that, assuming the truth of his allegations, he established a prima facie case for relief and so he was entitled to further state court proceedings, including an evidentiary hearing. *See Cullen*, 563 U.S. at 188 n.12 (explaining that when the CSC summarily denies a petition it assumes the allegations in the petition are true but does not accept conclusory allegations, and it also considers the trial record); *Montiel v. Chappell*, 43 F.4th 942, 956 (9th Cir. 2022) (describing California's habeas procedures). Because the CSC denied his claim without a hearing, Burney

argues that its decision "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2); *see also Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (noting that a petitioner may bring a challenge under § 2254(d)(2) alleging that the state court's "fact-finding process itself" was "deficient in some material way" (citing *Taylor v. Maddox*, 366 F.3d 992, 999, 1001 (9th Cir. 2004), *overruled on other grounds by Cullen*, 563 U.S. 170)).

Burney's argument is unconvincing because it rests on the faulty premise that the CSC's prima facie determination was objectively unreasonable. *See Marks v. Davis*, 106 F.4th 941, 971 (9th Cir. 2024) (reviewing the CSC's prima facie determination for objective reasonableness under AEDPA). Burney did not allege that the detectives improperly influenced him to confess by threats or violence, or that the detectives made any promises.[11] He alleged that his mental impairments, along with the detectives' suggestive and persistent questioning, rendered his confession involuntary. But as discussed above, the record shows that the detectives did not engage in any coercive conduct. Thus, even assuming the truth of Burney's allegations, the CSC could have reasonably concluded that Burney failed to establish a prima facie case of involuntariness. No reasonable jurist could debate that conclusion given the absence of any coercive conduct by the detectives. Thus, we decline to issue a COA on the involuntary confession claim.

[11] Burney did allege that the detectives deceived him into thinking that they wanted to help him. But, as noted, the state court could have reasonably rejected that allegation because the detectives warned Burney that anything he said could be used against him in court. *Supra* note 7.

B.

Burney presented his invalid *Miranda* waiver claim in his second state habeas petition. The CSC dismissed the claim as procedurally barred on multiple grounds. Rather than consider the state court's procedural rulings, however, we consider de novo the merits of the invalid *Miranda* waiver claim because the merits are straightforward.[12] *See Franklin*, 290 F.3d at 1232; *Berghuis*, 560 U.S. at 390 ("[A] habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review."). "[E]ven under a de novo review, 'we still defer to a state court's factual findings under [28 U.S.C.] § 2254(e).'"[13] *Stevens v. Davis*, 25 F.4th 1141, 1165–66 (9th Cir. 2022) (quoting *Crittenden v. Chappell*, 804 F.3d 998, 1011 (9th Cir. 2015)). For the reasons below, the *Miranda* waiver claim fails on de novo review.

[12] In denying the invalid *Miranda* waiver claim on the merits, the district court applied AEDPA deference. We are, however, not limited to the district court's reasoning. *See Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam) ("We may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt.").

[13] Under § 2254(e), "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Although the State failed to argue below that § 2254(e)(1) applies, we determine that the standard applies because which standard of review to apply is a pure issue of law and the record below has been fully developed. *See Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985) (citing *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978), *overruled on other grounds by United States v. Gomez*, 165 F.4th 1199 (9th Cir. 2026) (en banc)).

Under *Miranda*, to protect a defendant's privilege against self-incrimination, law enforcement must provide warnings before performing a custodial interrogation. 384 U.S. at 478–79. "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* at 444. To demonstrate a valid waiver, the government must prove by a preponderance of the evidence two things, considering the totality of the circumstances surrounding the interrogation. *See Connelly*, 479 U.S. at 168; *Moran v. Burbine*, 475 U.S. 412, 421 (1986). "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Burbine*, 475 U.S. at 421. "Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

Regarding the first factor of the waiver inquiry, Burney's *Miranda* waiver was voluntary even under de novo review for the reasons discussed above. *See Connelly*, 479 U.S. at 169–70 ("There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context.").

As to the second factor, Burney argues that he did not knowingly and intelligently waive his rights because he did not understand the rights that were read to him or that he was being asked to waive them. But, as explained below, the state court found that Burney understood his rights, and Burney cannot rebut that finding by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Detective Erickson told Burney that they were investigating a homicide and then she said to him, "I'm required by law to read you your Miranda warnings." Detective Erickson then advised Burney of his *Miranda* rights. After reading each right to Burney, Detective Erickson asked if he understood, and Burney responded, "[y]es." At the suppression hearing during trial, Burney testified that he understood the "words of the rights" Detective Erickson spoke, but he did not believe that he could actually invoke the rights. Burney also testified that one month before his interview with Detective Erickson, he had been arrested for attacking his stepfather and read his *Miranda* rights, although Burney claimed that he did not understand his rights then either. The trial court found that Burney's testimony was not credible and that he understood his rights.

The trial court's findings are supported by the record. Burney acknowledged that he understood his rights during the interview, and he later admitted that he understood Detective Erickson's statements describing his rights. Burney's testimony that he did not believe the rights that were read to him was not credible in light of Detective Erickson's prefatory statement that the rights were "required by law" and because Burney had just been given *Miranda* warnings a month earlier. In addition, Burney's appropriate and coherent responses throughout the interview suggested an overall comprehension of the conversation. *See Cook*, 948 F.3d at 967–68 (holding that the fact that defendant had been provided *Miranda* warnings before and responded coherently to investigators' questions supported that he understood his Fifth Amendment rights). His statements also showed that he understood the consequences of abandoning his rights. After confessing, Burney stated,

"I guess I'm going to the pen. The f[***]in' pen. Damn." We must defer to the state court's finding that Burney understood his rights, as it is fairly supported by the record. *See* 28 U.S.C. § 2254(e)(1). Thus, Burney's claim that his waiver was not knowing and intelligent because of a lack of understanding fails. *See Berghuis*, 560 U.S. at 385 (explaining that if a defendant understands his rights, then "it follows that he knew what he gave up when he spoke").

Burney also argues that his waiver was not valid because he did not give an express verbal or written waiver. That argument is meritless because an express verbal or written waiver is not required. *See id.* at 384 ("The prosecution . . . does not need to show that a waiver of *Miranda* rights was express."). A suspect may waive his rights when, as here, he "received and understood the *Miranda* warnings," did "not invoke[] his *Miranda* rights," and implicitly "waive[d] the right[s] . . . by making an uncoerced statement to the police." *Id.* at 388–89.

Under de novo review, the State proved by a preponderance that Burney's waiver was voluntary, knowing, and intelligent, and thus the district court properly denied the claim. No reasonable jurist could debate that conclusion considering the record and the deference that must be given to the state court's findings. We therefore decline to issue a COA on the invalid *Miranda* waiver claim.

V.

Burney also requests that we expand the COA to include his claim that the trial court's admission of his codefendants' allegedly "inadequately-redacted and self-serving statements" violated *Bruton*. The district court's denial of this claim is not debatable, so we decline to expand the COA to include the claim. *See Miller-El*, 537 U.S. at 336.

In *Bruton*, the Supreme Court reversed a defendant's criminal conviction because the admission of a codefendant's confession violated the defendant's "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. George William Bruton and his codefendant (a man named Evans) were convicted of armed postal robbery. *Id.* at 124. During trial, a postal inspector testified that Evans had confessed that he and Bruton had committed the crime. *Id.* The trial court admitted the testimony but instructed the jury that Evans's confession "had to be disregarded in determining [Bruton]'s guilt or innocence." *Id.* at 125. But the Supreme Court held that the instruction was insufficient—because "Evans did not take the stand," Evans's confession (which implicated Bruton's involvement) was "not subject to cross-examination," so Bruton "was denied his constitutional right of confrontation." *Id.* at 127–28.

Here, both before trial and during trial, Burney unsuccessfully moved to sever his trial from the trials of Rembert and Burnett, based partly on the idea that a joint trial featuring the statements of Burney's codefendants would violate *Bruton* and related California state constitutional law. In response to this concern, the prosecution offered to "sanitize the statements of the various defendants." The redacted statements—which replaced the names of Burney, Rembert, and Burnett with pronouns and vague references such as "other" and "the others"—were the result. The trial court admitted the redacted statements into evidence, denied the requests for severance, and instructed the jury to consider each statement against its speaker only—not against any other defendant.

On direct appeal, the CSC determined that any *Bruton* error was harmless. Although the State conceded—and the court assumed—that the statements were not sufficiently redacted to satisfy *Bruton*'s demands, the court concluded that any error "was harmless beyond a reasonable doubt." *See Harrington v. California*, 395 U.S. 250, 253–54 (1969) (applying the harmless-error doctrine to a *Bruton* claim). The court reasoned that "overwhelming evidence, apart from the codefendants' statements," supported Burney's "convictions for the first degree murder, robbery, and kidnapping of Kondrath and the kidnapping-murder and robbery-murder special circumstances."

Burney presented his *Bruton* claim in his first state habeas petition, and the CSC summarily denied it on the merits. He presented the claim in his second state habeas petition as well, and the CSC summarily denied it as procedurally barred. Thus, AEDPA deference applies to this claim. *See* 28 U.S.C. § 2254(d); *Catlin v. Broomfield*, 124 F.4th 702, 723 (9th Cir. 2024).

Here, Burney argues that the CSC's harmless-error determination was both "contrary to and an unreasonable application of" *Chapman v. California*, 386 U.S. 18 (1967), and "an unreasonable determination of the facts at trial." We analyze these arguments in turn.

A.

"[W]hen, as here, the state court has determined on direct appeal that an error was harmless beyond a reasonable doubt—the standard required for review of non-structural constitutional errors under *Chapman* . . . —a petitioner must demonstrate that the court 'applied *Chapman* in an objectively unreasonable manner.'" *Sansing v. Ryan*, 41 F.4th 1039, 1050 (9th Cir. 2022) (quoting *Davis v. Ayala*,

576 U.S. 257, 269 (2015)). "That determination requires us to ask whether 'fairminded jurists' could agree with the [CSC's] conclusion" that any *Bruton* error "was harmless beyond a reasonable doubt." *Id.* at 1051 (citing *Ayala*, 576 U.S. at 269). "If so, relief is precluded under 28 U.S.C. § 2254(d)(1)." *Id.*

Burney argues that "Rembert's and Burnett's statements were not 'cumulative' of independently-admissible evidence." Specifically, Burney argues that Rembert's and Burnett's statements

> were the only sources of the following key evidence: that Burney forced the others to leave the apartment that night; that Rembert asked Burney not to shoot the victim; that Burney tried to make Burnett shoot the victim; and that Burney was the one who "just wanted to go ahead and [shoot]."

But no element of any offense of which Burney was convicted required that Burney forced the codefendants to leave the apartment, that a codefendant asked Burney not to shoot Kondrath, or that Burney tried to make a codefendant shoot Kondrath. *See* Reporter's Transcript on Appeal at 49–62, 65–94, *Burney v. Ayers*, No. 2:10-cv-00546-FLA (C.D. Cal. Jan. 31, 2018), Dkt. No. 104-35 (hereinafter "Jury Instructions") (defining the elements of each offense for the jury).[14] And although unlawful intent was an element of deliberate and premeditated murder, *see id.* at 65–66 (requiring that, for a non-felony-murder conviction, the defendant "manifested an intention unlawfully to kill a

[14] The cited page numbers are as assigned by CM/ECF.

human being" or committed "an intentional act . . . deliberately performed with knowledge of the danger to, and with conscious disregard for, human life"), other evidence overwhelmingly established that Burney had the requisite intent for deliberate and premeditated murder. Burney himself repeatedly admitted that he was aware of the apparent need to kill Kondrath to prevent future identification; that Burney stated, "we're gonna kill him"; that Burney fired the fatal shot; and that "nobody else did it."

Burney's statement also independently supported the elements of robbery and kidnapping. Burney admitted that he knew that his codefendants wanted to "rob" Kondrath of his car, so Burney approached Kondrath to ask for the time, which allowed the defendants to "snatch[] [Kondrath] out of his car." Burney admitted that he participated in forcing Kondrath into the trunk by urging him to "get in the trunk" while a gun was pointed at him. And then, Burney admitted, Burney drove Kondrath's car with Kondrath in the trunk to Howard's house before the shooting took place. These admissions supported Burney's convictions, even without Burney's codefendants' statements. *See* Jury Instructions at 78–80 (enumerating the elements of robbery), 81–82 (enumerating the elements of kidnapping), 82–85 (enumerating the elements of kidnapping to commit robbery).

Burney fails to identify any noncumulative, material evidence from the codefendants' statements. The CSC's harmless-error determination was reasonable. *See* 28 U.S.C. § 2254(d)(1); *see also Schneble v. Florida*, 405 U.S. 427, 431 (1972) (finding *Bruton* error harmless where the defendant confessed to the crime, and where the details of the defendant's own confession "were internally consistent,

were corroborated by other objective evidence, and were not contradicted by any other evidence in the case").

Next, Burney points to the fact that, during opening statement and closing argument, the prosecution repeatedly emphasized the statements of all three defendants. But the trial transcript shows that the prosecution emphasized the statements of each defendant to show each defendant's involvement—not to use Rembert's and Burnett's statements as the sole evidence to prove any element of the charges against Burney. Additionally, the trial court instructed the jury that "statements made by the attorneys during the trial are not evidence," and, as shown above, Burney's convictions had overwhelming evidentiary force even absent his codefendants' statements. Jury Instructions at 31; *see also Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions." (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987))).

Burney also argues that the CSC unreasonably applied *Chapman* by failing "to examine the record as a whole" and by failing "to consider how the admission of the redacted statements actually hamstrung Burney's defense." Specifically, Burney contends that—had his own *unredacted* statement been admitted—he would have been able to argue more persuasively that Burnett was the ringleader who encouraged Burney to commit the crimes of which he was convicted. Instead—because references to Burnett in Burney's statement were replaced with vague references like "one of the others"—Burney argues that the redaction of his statement prevented him from shifting blame to Burnett.

This argument contains at least two fatal flaws. First, Burney's argument is irrelevant to the inquiry of whether any *Bruton* error was harmless. To determine whether a

*Bruton* error was harmless, the relevant question is *not* whether separate trials might have yielded a different outcome but instead "whether [the codefendants'] admissions were sufficiently prejudicial to [the defendant] as to require reversal." *Schneble*, 405 U.S. at 432. After all, *Bruton*'s holding is rooted in the "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment," not in any right to a trial separate from the trials of one's codefendants. 391 U.S. at 126. And, as discussed above, the CSC reasonably determined that the admission of the redacted statements of Burney's codefendants did not harm Burney. Second and relatedly, whether the trial court abused its discretion in denying Burney's motion to sever is not a constitutional issue for which we can grant habeas relief under AEDPA. *See Collins v. Runnels*, 603 F.3d 1127, 1131–33 (9th Cir. 2010) (recognizing that there is no clearly established law, binding on state courts, requiring severance). Thus, the CSC's alleged failure to consider the effect of the redactions on Burney's defense was not an unreasonable application of *Chapman*.

Finally, Burney contends that the CSC "unreasonably applied *Chapman*" by "evaluat[ing] the prosecution's case in the light most favorable to the prosecution." Specifically, Burney points to allegedly "implausible" aspects of Rembert's and Burnett's statements and argues that, had Burney been tried separately, he would have been able to impeach the statements. But again, the relevant question before the CSC was whether the *admission* of Rembert's and Burnett's statements was harmful error. *See Schneble*, 405 U.S. at 432. Had the statements not been admitted at all, there would have been nothing for Burney to impeach. Thus, the CSC's harmless-error determination

was not "contrary to, or involv[ing] an unreasonable application of" *Chapman*. 28 U.S.C. § 2254(d)(1).

B.

Under section 2254(d)(2), habeas relief might be warranted if the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

Here, most of Burney's arguments about the CSC's factual determinations are recycled from his arguments about why the CSC unreasonably applied *Chapman*, and we reject those arguments again. For instance, Burney argues that the CSC "ignored how heavily the prosecution relied on Burnett's and Rembert's statements to prove Burney guilty" and that Burney's statement failed to establish the requisite intent for robbery, kidnapping, and murder. As explained above, Burney's arguments overstate the prosecution's reliance on Burnett's and Rembert's statements, and Burney's own statement established his criminal intent for the offenses of which he was convicted. Even if these issues are recharacterized as issues of fact, the CSC's harmless-error determination was not unreasonable.

Next, Burney argues that the CSC "ignor[ed] . . . key facts of duress" in Burney's statement. Burney argues that his statement showed that "his actions that night were made, not because he wanted to rob, kidnap, and/or kill the victim (who would not have recognized and identified him as a neighbor), but because he felt forced to by Burnett." But

the jury was not instructed on a duress defense, and Burney identifies nowhere in the trial record where he raised duress anywhere to the jury or otherwise, so the relevance of any evidence of duress is unclear. *See generally* Jury Instructions. In fact, in California, duress is not a defense to murder, and duress alone cannot reduce a first-degree murder to a lesser offense. *See People v. Anderson*, 50 P.3d 368, 369, 379 (Cal. 2002). As explained above, Burney's own statement supplied evidence for each element of every crime of which he was convicted, and his codefendants' statements provided no unique support for those elements.

Finally, pointing to a jury note where the jury asked if it could "use the transcripts testimony of one of the defendants to support the lack of guilt for another defendant," Burney argues that his codefendants' statements "were . . . critical to [the] deliberations" and "were also being used collectively to evaluate the culpability of each accused." But Burney's argument is speculative—if anything, the jury note shows that the jury was particularly cautious about the inferences it drew from the statements and that it took care to follow the trial court's instruction not to consider Burney's codefendants' statements as evidence against Burney. *See* Jury instructions at 37–38. Either way, even assuming that the CSC ignored the note, that does not mean that its determination of the facts was unreasonable. *See Taylor*, 366 F.3d at 1001 ("To fatally undermine the state fact-finding process, and render the resulting finding unreasonable, the overlooked or ignored evidence must be highly probative and central to petitioner's claim.").

In sum, the CSC's harmless-error determination was not unreasonable, and this conclusion is not debatable. We

therefore decline to expand the COA to include Burney's *Bruton* claim.

***

For the reasons stated above, we decline to expand the COA and affirm the district court's denial of the habeas petition.

**AFFIRMED.**

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHAUN KAREEM BURNEY,

Petitioner,

v.

RON BROOMFIELD, Acting Warden of San Quentin State Prison,

Respondent.

Case No. 2:10-cv-00546-FLA

**DEATH PENALTY CASE**

**JUDGMENT**

Pursuant to the Order Denying Petition for Writ of Habeas Corpus issued simultaneously with this Judgment, IT IS HEREBY ORDERED AND ADJUDGED that the Petition is DENIED and that 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.

IT IS SO ORDERED.

Dated: February 8, 2022

FERNANDO L. AENLLE-ROCHA
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHAUN KAREEM BURNEY,

Petitioner,

v.

RON BROOMFIELD, Acting Warden of San Quentin State Prison,

Respondent.

Case No. 2:10-cv-00546-FLA

**DEATH PENALTY CASE**

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

## INTRODUCTION

Petitioner Shaun Kareem Burney was convicted of the first-degree murder, second-degree robbery, kidnapping, and kidnapping for purposes of robbery of Joseph Kondrath. *People v. Burney*, 47 Cal. 4th 203, 211 (2009). The jury found that Petitioner personally used a firearm in the commission of the murder and found robbery-murder and kidnapping-murder special circumstance allegations to be true. *Id.* The California Supreme Court affirmed Petitioner's conviction and sentence, *id.*, and denied his state habeas petitions. Dkts. 54, 76.

Petitioner filed a Petition for Writ of Habeas Corpus in this court on March

1, 2011. Dkt. 29 ("Pet."); *see also* Dkt. 74. On November 14, 2011, the court stayed the federal proceedings while Petitioner exhausted his claims in state court. Dkt. 77. The court lifted the stay on September 22, 2016. Dkt. 99. The court directed the parties to identify which claims could be resolved on the basis of the appellate record alone. *Id.*; *see also* Dkt. 100. The court ordered the parties to brief the merits of those claims first, followed by briefing on the merits of the state habeas claims. Dkts. 101, 115, 124. The court also ordered limited briefing on procedural bars. Dkt. 115 at 2. On July 14, 2020, the court issued an order denying and dismissing selected claims, including all appellate claims. Dkt. 127. The court now addresses the merits of the remaining claims.

## LEGAL STANDARD

### I. 28 U.S.C. § 2254(d)

28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides:

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

28 U.S.C. § 2254(d).

The Supreme Court has held that when determining whether a petitioner has satisfied § 2254(d), a court may only consider evidence in the state court record. *Cullen v. Pinholster*, 563 U.S. 170, 181, 185 n.7 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). Section 2254(d)(2) "includes the language 'in light of the evidence presented

in the State court proceeding,' . . . [providing] additional clarity . . . on this point." *Id.* at 185 n.7.

The Supreme Court has explained that a state court decision is "contrary to our clearly established precedent" under § 2254(d)(1) "if the state court applies a rule that contradicts the governing law set forth in our cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from our precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (internal quotations omitted).

"[U]nder the 'unreasonable application' clause" of § 2254(d)(1), "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75 (internal quotation omitted). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Id.* (internal citation omitted). In addition, "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." *Davis v. Ayala*, 576 U.S. 257, 267-68 (2015) (discussing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)) (internal quotation omitted).

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

> must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. Similarly, when the challenge is to the state court's procedure, mere doubt as to the adequacy of the state court's

> findings of fact is insufficient; we must be satisfied that any appellate court to whom the defect [in the state court's fact-finding process] is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.

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

Petitioner raised the claims addressed in this order in state habeas proceedings, not on direct appeal. *See generally* Dkts. 129, 138. The California Supreme Court summarily denied them. Because the California Supreme Court issued a summary denial, instead of a reasoned decision, under § 2254(d), this court "must determine what arguments or theories . . . *could have supported*[] the state court's decision . . . ." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (reviewing summary denial by state court) (emphasis added). This court does not "look through" the state court's summary denial on habeas review to its reasoned opinion on direct appeal because the claims were not raised on direct appeal. Thus, there is no relevant state court rationale upon which this court may rely. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that . . . *provide[s] a relevant rationale*" on the claims at issue) (emphasis added).

The Supreme Court has made clear that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (internal quotation omitted). Section 2254(d) provides "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181 (internal quotations omitted).

**II. *Strickland v. Washington***

Where Petitioner alleges "that counsel's assistance was so defective as to require reversal of a conviction or death sentence," he must establish "two components":

> First, [Petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to him] by the Sixth Amendment. Second, [he] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable. Unless [he] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To show prejudice, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result." *Pinholster*, 563 U.S. at 189 (internal quotations and citations omitted). "In the capital sentencing context, the prejudice inquiry asks whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Shinn v. Kayer*, 141 S. Ct. 517, 522-23 (2020) (internal quotation omitted).

**DISCUSSION**

**I. Claims 8D ¶¶ 25-32 and 1C2**

In Claim 8D ¶¶ 25-32 and Claim 1C2, Petitioner alleges that trial counsel was ineffective for failing to challenge the racial composition of the venire. Specifically, Petitioner alleges that the:

> percentage of blacks, a distinctive group in the community, was not fair and reasonable in relation to the number of blacks in the community, due to systematic exclusion of the group in the jury-selection process. In the

> venire, unlike in the general population, the percentage of blacks was very nearly zero.

Dkt. 74 at 21 (internal quotation marks omitted); *see also* Pet. at 239 ("Burney's jury venire included only one or two black jurors at most").

"The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community." *Berghuis v. Smith*, 559 U.S. 314, 319 (2010). To establish the denial of that right, Petitioner bears the "burden of proving that the underrepresentation 'was due to [the group's] systematic exclusion in the jury-selection process.'" *Id.* (quoting *Duren v. Missouri*, 439 U.S. 357, 359 (1979)); *Murray v. Schriro*, 882 F.3d 778, 808 (9th Cir. 2018) ("[T]here must be evidence that the juror selection process was susceptible to abuse or was not neutral.").

Although Petitioner makes the conclusory statement that the exclusion of Black prospective jurors was systematic, he fails to provide any specific allegations or evidence in support of his claim. *See* Dkt. 129 at 27-30; Dkt. 141 at 12. A petitioner's "cursory and vague claim cannot support habeas relief." *Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) ("[Petitioner's] conclusory suggestions . . . fall far short of stating a valid claim of constitutional violation."); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

Claims 8D ¶¶ 25-32 and 1C2, therefore, are DENIED.

## II. Claims 4, 1I1, and 1I4

### A. Statements to Police

#### 1. Allegations and Legal Standard

In Claim 4, Petitioner alleges his statements to police and his waiver of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), were involuntary. He alleges that the evidence of his confession admitted at trial did not meet "the constitutional requirement

of heightened reliability for capital cases . . . ." Pet. at 161. In Claim 1I4, Petitioner alleges trial counsel failed to challenge adequately the admission of his purportedly involuntary and unreliable statements on the basis of his "multiple mental illnesses and dysfunctions." Dkt. 74 at 66.

To be voluntary, a statement to police "must be 'the product of a rational intellect and a free will.'" *Bradford v. Davis*, 923 F.3d 599, 615 (9th Cir. 2019) (quoting *Mincey v. Arizona*, 437 U.S. 385, 398 (1978)). The "voluntariness inquiry considers 'all the circumstances of the interrogation.'" *Id.* at 615-16 (quoting *Mincey*, 437 U.S. at 401). Those circumstances "may include: a suspect's age, education, intelligence, physical health, and prior experience with the criminal system; the length, location, and conditions of detention; the length and nature of questioning; and the use by law enforcement of any threats, punishments, or inducements." *Id.*

The voluntariness of a *Miranda* waiver is subject to the same standard. "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the [due process] confession context." *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986) (quoted with approval in *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010)); *see Thompkins*, 560 U.S. at 385 (discussing interpretations of *Miranda*'s requirement that waiver be "knowing[] and intelligent[]"). "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Thompkins*, 560 U.S. at 384 (concluding that petitioner understood his rights where evidence showed he could read and understand English, received a written copy of *Miranda* warnings, was given time to read them, and read one warning aloud).

Petitioner alleges his statements to police and waiver were involuntary because: (1) he was eighteen years old at the time of the interrogation; (2) he had never been interrogated in connection with a serious police investigation; (3) as a result of "multiple mental illnesses," he was "functioning as a fifteen-year-old child" (Pet. at 163

(citing Pet. Ex. 4a ¶ 56)); and (4) he had "limited intelligence" and "a low IQ." *Id.* at 171 (citing Pet. Ex. 96 ¶ 26; Pet. Ex. 3 ¶ 5). He adds:

> During the course of his lengthy and tearful interview, the officers pressured Burney to agree with their version of the crime; they refused to follow up on his answers where further questioning would have yielded exculpatory evidence; and when open-ended questions failed to generate specific information, they failed to test for the validity of his answers.

*Id.* at 164.

Petitioner does not specify the length of his interview. *See id.* The pressuring he alleges included telling him, for example, "'[W]e know the whole story, okay, and this is not the right story, it's a piece of the story, but it's not the right story, okay?'" and "'You're not remembering quite right . . . .'" *Id.* (quoting 8 CT 2550, 2562). Petitioner alleges detectives repeated questions and provided the answer when he said he didn't know. *Id.* at 164-65. He alleges, for example, that:

> Detective Gallagher asked, 'When you got to Jeff's house, what was the reason to go to Jeff's house?' (CT 2561.) When Burney failed to give the 'right' answer, the officer provided the answer: 'And the reason that you went over to Jeff's house was to pick up the shotgun, straight out.' (CT 2562.)

*Id.* at 165 (also citing 8 CT 2579, 2595).

Petitioner alleges he did not comprehend his constitutional rights at the time he was advised of them and was not competent to waive them. *Id.* at 171 (citing Pet. Ex. 4a ¶ 42). His supporting evidence states there are "serious doubts about his competency" (Pet. Ex. 4a ¶ 42) and that his dysfunction and impairment "implicated the full panoply of his constitutional rights including . . . his competence to . . . waive rights or make statements to the police . . . ." *Id.* ¶ 63.

**2. Analysis**

The California Supreme Court could have reasonably concluded that Petitioner's statements and *Miranda* waiver were voluntary, knowing, and intelligent. The state court also could have reasoned that Petitioner's age, intelligence, and prior experience

with the criminal system did not show such a degree of impairment to his rational intellect and free will that his statements, under the circumstances of his detention and interrogation, were not voluntary. *See Connelly*, 479 U.S. at 170-71 (holding that a hallucinated "perception of coercion flowing from the 'voice of God'" in an interrogation, "however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak."); *Balbuena v. Sullivan*, 980 F.3d 619, 632-33 (9th Cir. 2020) ("[I]t was not unreasonable for the state court to conclude, under the totality of the circumstances including the *Miranda* warnings, that [the 15-year-old suspect's] confession was voluntary," even though his "youth and lack of experience with law enforcement, the time of the interview, the location of the interview, and the detectives' tactics [were] all factors that could potentially support a conclusion that [his] confession was involuntary.").

As to Petitioner's intelligence, his allegations do not specify the extent of his "low IQ." Pet. at 171 (citing Pet. Ex. 3 ¶ 5). The supporting declaration on which he relies cites the expert's penalty phase testimony. Pet. Ex. 3 ¶ 5 (citing 10 RT 1851). There, the expert testified that when Petitioner "committed the murder at [the] age of eighteen, and now facing the possibility of execution, that he was a child at that time in terms of intellectual development, social maturity, psychological functioning, and remains pretty much a child at this point." 10 RT 1851. Taking Petitioner's IQ in isolation, the expert testified that "his IQ looked at as a whole is in the dull normal range." 10 RT 1852. The California Supreme Court, however, could have reasoned that even if Petitioner did not function at the ability of an eighteen-year-old, his dull-normal IQ did not show his statements to have been coerced under the circumstances of his detention and questioning. *See, e.g., Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979) (holding 16-year-old voluntarily and knowingly waived *Miranda* rights and gave voluntary statements; courts are able "to take into account those special concerns that are present when young persons, often with limited experience and education and

with immature judgment, are involved," and there was "no indication that [minor] was of insufficient intelligence to understand the rights he was waiving").

As to those circumstances, Petitioner does not specify the length of his interrogation and does not allege that its location or conditions were coercive. *See* Dkt. 74 at 62 (alleging only that Petitioner was arrested at 3:00 a.m., in Claim 1I1). He does not allege that officers used threats, punishments, or inducements in questioning him. The California Supreme Court, therefore, could have reasoned that the interrogation techniques the detectives used in questioning Petitioner did not show his confession to be involuntary. To the extent the detectives' statements were misrepresentations, the California Supreme Court could have reasoned that they did not rise to the level of coercion. *See Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("[T]he [United States Supreme] Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily."); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented the statements that [petitioner's codefendant] made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."); *Pollard v. Galaza*, 290 F.3d 1030, 1034 (9th Cir. 2002) ("[M]isrepresentations made by law enforcement in obtaining a statement, while reprehensible, do[] not necessarily constitute coercive conduct.").

Because the California Supreme Court could have reasonably concluded that Petitioner's statements and *Miranda* waiver were voluntary, knowing, and intelligent, Claim 4 is DENIED. The state court likewise could have reasonably concluded that Petitioner failed to show prejudice from any deficient performance by counsel in challenging the admission of his statements. *See Boyde v. Brown*, 404 F.3d 1159, 1173 (9th Cir. 2005) ("[To] show that he was prejudiced by counsel's error[, petitioner must demonstrate] . . . that, had his counsel objected, it is reasonable that the trial court would have granted the objection as meritorious.") (internal quotation and alteration omitted); *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) ("To show prejudice

under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] 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."). Accordingly, Claim 1I4 is DENIED.

**B. Circumstances and Legality of Arrest**

The entirety of Claim 1I1 states:

> Counsel failed to challenge the circumstances and legality of Burney's arrest. According to the available record, Burney was arrested at 3:00 a.m. on June 16, 1992. There was no motion filed to suppress evidence or challenge the lawfulness of his arrest in conjunction with the motion to exclude Burney's statements. Counsel failed to present evidence regarding Burney's arrest as further grounds in support of excluding evidence of the involuntary and unreliable statement.

Dkt. 74 at 62. Petitioner, however, does not elaborate on the claim in his merits brief. *See* Dkt. 129 at 40 n.15.

Petitioner's allegations that trial counsel was deficient in failing to challenge the "circumstances and legality" of his arrest are conclusory and do not merit relief. Petitioner does not specify the grounds upon which counsel should have raised such a challenge. To the extent trial counsel failed to advance the argument that Petitioner's statement was involuntary and unreliable because he was arrested at 3:00 a.m., the California Supreme Court could have reasonably found no deficient performance by counsel for all the reasons set forth above. Claim 1I1, therefore, is DENIED.

**III. Claims 23, 1E3, 2C3, and 2D7**

In Claim 23, Petitioner alleges he was not afforded his right to the "competent assistance of mental health professionals" (Pet. at 422) under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Pet. at 424; *see also* Dkt. 129 at 36. Petitioner alleges trial counsel "failed to arrange for a competent mental health assessment of Burney's developmental background and psycho-social history . . . ." Pet. at 421. Petitioner also asserts that

counsel failed to provide his two court-appointed mental health experts with adequate information. *Id.* at 421-22. In Claim 1E3, Petitioner argues that counsel's deficient performance resulted in prejudice at the guilt phase of trial. Dkt. 74 at 55-56. Lastly, in Claims 2C3 and Claim 2D7, Petitioner alleges counsel's deficient performance resulted in prejudice at the penalty phase of trial. Pet. at 112-13, 146. The court addresses each argument in turn.

**A. *Ake v. Oklahoma***

In *Ake*, 470 U.S. at 74, the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." The Court reached "a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness." *Id.* at 83.

To establish a constitutional violation, Petitioner must demonstrate the state denied him access to a competent psychiatrist and appropriate examination and assistance. *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1991); *see also McWilliams v. Dunn*, 137 S. Ct. 1790, 1795-96, 1799 (2017) (holding state court unreasonably applied *Ake* in denying petitioner's claim where defense counsel sought a continuance for review by mental health experts after "the eleventh-hour arrival of [an Alabama Department of Mental Health neuropsychologist's] report and . . . mental health records," both requested by the defense).

In *Harris*, the Ninth Circuit found no constitutional violation "because the state did in fact provide Harris with psychiatric assistance. The state provided Harris with *access* to any competent psychiatrist of his choice when it gave Harris the funds to hire two psychiatrists from the general psychiatric community. The state did not limit Harris's access to psychiatric assistance in any way." *Harris*, 949 F.2d at 1516 (emphasis in original).

Here, the California Supreme Court could have reasonably held that the state did not limit Petitioner's access to the assistance of mental health experts. Petitioner does not allege the trial court denied him funding for additional mental health experts or otherwise prevented him from obtaining mental health expert assistance. The state court's denial of Petitioner's *Ake* claim, thus, was not contrary to or an unreasonable application of clearly established federal law.

**B. Providing Background Information**

As for Petitioner's allegation that trial counsel failed to provide his defense mental health experts with the necessary background information, a defense attorney's:

> duty to investigate is critically important in capital penalty phase proceedings. In a capital case, a criminal defendant has a constitutionally protected right to provide the jury with mitigating evidence. *Williams v. Taylor*, 529 U.S. 362, 393 (2000). Accordingly, a criminal defense attorney has a duty to investigate, develop, and present mitigation evidence during penalty phase proceedings. *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003). 'To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to '"present[ ] and explain[ ] the significance of all the available [mitigating] evidence."' *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) (quoting *Williams*, 529 U.S. at 399). [¶] Although we must defer to a lawyer's strategic trial choices, those choices must have been made after counsel has conducted 'reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary.' *Strickland*, 466 U.S. at 691.

*Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir. 2005) (finding deficient performance where counsel "conducted no investigation of [petitioner's] family and social history" and developed a "mental health defense . . . based solely on the limited information developed at [petitioner's] pre-trial competency examination, which was prepared for an entirely different purpose") (internal citations edited) (alterations in original); *see also Kipp v. Davis*, 971 F.3d 866, 879-80 (9th Cir. 2020) (finding no deficient investigation where "the allegedly overlooked evidence in this case was largely

duplicative of theories of mitigation that were in fact presented at trial" and counsel "did not completely overlook a new, different theory of mitigation").

Where defense counsel retains mental health experts to investigate mitigating evidence, counsel may reasonably rely on those experts to request the background information they need. *See Murtishaw v. Woodford*, 255 F.3d 926, 945 (9th Cir. 2001) ("In the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client." (internal quotation omitted)); *see also Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997) ("[C]ounsel does not have a duty to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert." (internal quotation omitted)).

Petitioner's trial counsel retained psychiatrist William Vicary and forensic psychologist Stephen Wells, J.D., Ph.D. Trial counsel instructed Dr. Vicary "to explore the issues of diminished intent, legal insanity, competency to stand trial, mitigating circumstances, and the need for psychiatric treatment." Pet. Ex. 80-2397 (emphasis added). Trial counsel instructed Dr. Wells "to assess the defendant's psychological condition in relation to the case." Pet. Ex. 3 ¶ 2. Dr. Wells declares that his "findings related to the defendant's state of mind at the time of the offense as well as his childhood and overall functioning . . . ." *Id.* ¶ 3 (emphasis added).

Petitioner makes no allegation that Dr. Vicary or Dr. Wells requested additional background material. Dr. Vicary's report states that he reviewed: police reports; police interviews of Petitioner and his codefendants at trial, Scott Rembert and Allen Burnett; a "C.I.I. Record"; autopsy reports; school records; investigation reports; a Minnesota Multiphasic Personality Inventory ("MMPI") test report; and jail records. Pet. Ex. 80-2397. Neither Dr. Vicary's report (*id.*) nor his postconviction declaration (Pet. Ex. 2) states he requested or required any additional records. Dr. Wells prepared two reports, one of which states that he reviewed "extensive records . . . ." Pet. Ex. 82-2417. Neither of his reports (Pet. Exs. 82 and 83) nor his postconviction declaration (Pet. Ex.

3) states that he requested or required any additional records. On that basis, the California Supreme Court could have reasonably found no deficient performance by counsel in providing background information. *See Murtishaw*, 255 F.3d at 945; *Bloom*, 132 F.3d at 1277.

Claims 23, 1E3, 2C3, and 2D7, therefore, are DENIED.

## IV. Claims 21 and 1E1

### A. Allegations and Legal Standard

In Claim 21, Petitioner alleges he was incompetent at the time of trial because he was unable to understand the nature of the proceedings and assist in his defense. Pet. at 407-15. In Claim 1E1, Petitioner alleges trial counsel failed to investigate adequately, develop, and present evidence of Petitioner's incompetency. Dkt. 74 at 51-52.

A defendant is competent to stand trial if he has "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and 'a rational as well as factual understanding of the proceedings against him.' Competence 'has a modest aim: It seeks to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel.'" *Deere v. Cullen*, 718 F.3d 1124, 1144 (9th Cir. 2013) (quoting *Godinez v. Moran*, 509 U.S. 389, 396, 402 (1993)) (internal citations omitted) (alteration in original).

Here, Petitioner emphasizes Dr. Wells's opinion that Petitioner's IQ was in the dull normal range; specifically, that "in terms of intellectual development, social maturity, [and] psychological functioning, [Petitioner] remain[ed] pretty much a child at th[at] point"; and because of a manic-depressive disorder, Petitioner experienced hyperactivity, inability to sleep, elevated mood, despair, and suicidal tendencies. 10 RT 1851-52, 1856. Petitioner adds that his postconviction expert, Dr. Jane Wells,[1]

[1] For brevity, because the court refers more often to trial expert Dr. Stephen Wells, the court refers to him as "Dr. Wells." Where the court refers to postconviction expert Dr. Jane Wells, the court refers to her as "Dr. Jane Wells."

opined that he was "functioning at the age of a 15-year[-]old." Pet. Ex. 4a ¶ 34. Petitioner relies on her conclusions that there are "serious doubts about his competency," that he was "unlikely" to be able to assist trial counsel, and that his "dysfunction and impairment implicated the full panoply of his constitutional rights including . . . his competence to . . . stand trial . . . ." *Id.* ¶¶ 42, 63.

**B. Analysis**

Dr. Vicary examined Petitioner at the time of trial. Pet. Ex. 80-2397. Trial counsel asked him to "explore [Petitioner's] . . . competency to stand trial," among other issues. *Id.* Dr. Vicary concluded:

> The defendant is mentally competent to stand trial. . . . The defendant is aware of the nature and purpose of the legal proceedings against him. He knows the specific charges. He gives a consistent account of his behavior prior to, during, and after the alleged offense. He is familiar with the roles of defense counsel, district attorney, and judge. He has faith in his counsel. At this time there is no significant impediment to rational cooperation with counsel in going forward with the legal proceedings.

Pet. Ex. 80-2397, 80-2410.

Petitioner does not allege he behaved erratically in the courtroom. Nor does he allege that the prosecutor, trial judge, or trial counsel ever expressed any concerns about Petitioner's competence during the proceedings. *See Williams v. Woodford*, 384 F.3d 567, 606 (9th Cir. 2004) ("[D]efense counsel is in the best position to evaluate a defendant's competence and ability to render assistance." (internal quotation and alterations omitted)); *Douglas v. Woodford*, 316 F.3d 1079, 1094 (9th Cir. 2003) ("[Petitioner's] trial attorney . . . had absolutely no doubt that Douglas understood the charges against him and was able to assist in his defense. . . . [Petitioner] did not exhibit any strange behavior in the courtroom, nor did the prosecutor or trial judge express any concerns about his competence."); *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991) ("[A] defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings. We deem significant the fact that the trial judge,

government counsel, and [petitioner's] own attorney did not perceive a reasonable cause to believe [petitioner] was incompetent." (internal citation omitted)).

The California Supreme Court could have reasoned that Dr. Jane Wells's conclusions that there were "serious doubts" about Petitioner's competency and that he was "unlikely" to be able to assist trial counsel (Pet. Ex. 4a ¶ 42) did not "identif[y] injuries or conditions that the petitioner actually ha[d]." *Rhoades v. Henry*, 638 F.3d 1027, 1050 (9th Cir. 2011) (explaining that petitioner's expert "reports are speculative [because] [t]hey talk in terms of conditions that [he] 'likely' has or 'may' have") (emphasis added). "Speculation about potential brain dysfunctions or disorders 'is not sufficient to establish prejudice.'" *Id.* (quoting *Bible v. Ryan*, 571 F.3d 860, 871 (9th Cir. 2009)). The California Supreme Court could have reasonably concluded that Petitioner's evidence failed to establish that he lacked the capacity to understand the proceedings and to assist counsel.

Similarly, the California Supreme Court could have reasonably determined that the contemporaneous evidence did not trigger a need to explore Petitioner's competency further, that trial counsel's reliance on Dr. Vicary's opinion was adequate, and that counsel's performance in investigating Petitioner's competency was not deficient. *Harris*, 949 F.2d at 1525 ("It is certainly within the wide range of professionally competent assistance for an attorney to rely on properly selected experts.") (internal quotation marks omitted); *see also Deere*, 718 F.3d at 1130-47 (reversing grant of relief under pre-AEDPA law on claim that trial counsel was ineffective for failing to request a competency hearing, notwithstanding opinion from mental health expert who examined petitioner at the time of trial that petitioner could not rationally assist in his defense); *Douglas*, 316 F.3d at 1094 (holding under pre-AEDPA law that petitioner did not raise a real and substantial question about his competence to stand trial despite two expert opinions concluding he was incompetent at the time of trial).

Accordingly, Claims 21 and 1E1 are DENIED.

## V. Claims 22 and 1E2

### A. Allegations and Background

In Claim 22, Petitioner alleges he was "insane within the meaning of state and federal law" at the time of the offenses. Pet. at 415. In Claim 1E2, Petitioner alleges trial counsel was ineffective for failing to investigate and present an insanity defense. Dkt. 74 at 53-54. Petitioner asserts that "the pervasive physical and emotional abuse, neglect, extreme trauma, post-traumatic stress disorder ('PTSD'), abandonment, suicidality, depression, bipolar disorder, low IQ, and other mental impairments and deprivations that he endured as a child and adolescent provide strong evidence that he suffers from severe mental illness." Pet. at 418. He alleges that "[g]iven his longstanding, multiple impairments, he lacked the ability to form the requisite intent for the offenses charged." *Id.* at 420. In support, Petitioner relies on Dr. Jane Wells's postconviction opinion that he "'was in a reactive state'" when he shot Kondrath. Dkt. 129 at 34 (quoting Pet. Ex. 4a ¶ 51).

Quoted more fully than in Petitioner's excerpt, Dr. Jane Wells's opinion states, "Petitioner panicked, as his attorney argued in closing argument, and shot because he feared he would be killed if he didn't fire the gun. Petitioner was in a reactive state; his actions were a form of self-defense."[2] Pet. Ex. 4a ¶ 51 (emphasis added).

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[2] The court explained in its prior order: "'[A]lthough he now contends the evidence established that he [fired the gun] under threat of harm from his codefendants, neither his statement to the police nor any other evidence supports such a claim. In his statement, defendant merely claimed that the codefendants informed him repeatedly that the victim must be killed because he had seen the three men [Petitioner and his codefendants] and would be able to identify them, and that one of the codefendants threatened to 'blast' the victim himself. Nothing in defendant's statement indicates that either Burnett or Rembert threatened defendant with harm if he did not shoot the victim, and no other evidence establishes that Burnett or Rembert, rather than defendant – who was the actual shooter – was 'more culpable' for Kondrath's murder. Indeed, defendant specifically informed the detectives that he did not hand the gun to Burnett and did not insist that Burnett shoot the victim – not because defendant feared that Burnett intentionally would hurt defendant, but because he was frightened that Burnett

Trial counsel asked Dr. Vicary to "explore the issues of diminished intent [and] legal insanity," among others. Pet. Ex. 80-2397. Dr. Vicary concluded:

> There is insufficient evidence to support either a diminished intent or legal insanity defense. At the time of the alleged offense, the defendant was aware of the nature and consequences of his acts. He also understood that what he was doing was both wrongful and illegal. He and his companions fled the scene and attempted to avoid apprehension. At the time of the offense, the defendant was not grossly intoxicated. He never experienced any psychotic symptoms.

Pet. Ex. 80-2397, 80-2410.

**B. Legal Standard and Analysis**

Under California law, "a belief in the need for self-defense that is purely delusional is a paradigmatic example of legal insanity." *People v. Elmore*, 59 Cal. 4th 121, 134-35 (2014). "[U]nreasonable self-defense," by contrast, "involves a misperception of objective circumstances, not a reaction produced by mental disturbance alone." *Id.* at 134. Unreasonable self-defense applies:

> when the defendant's act was *caused by the circumstances*, rather than by cognitive defects alone. . . . [U]nreasonable self-defense is based on a defendant's assertion that he lacked malice because he acted under an unreasonable *mistake of fact* – that is, the need to defend himself against imminent peril of death or great bodily harm. . . . [A] mistake of fact is predicated upon a negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality. A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality.

*Id.* at 136 (internal quotation marks, alteration, footnote, and citations omitted) (emphasis in original).

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was too drunk and accidentally might shoot defendant. Instead, defendant willingly chose to shoot the victim himself, and because defendant did not want to look at the victim's face, he shot him assertedly without taking aim.' *Burney*, 47 Cal. 4th at 238-39. Petitioner does not appear to take issue with those facts and does not establish that the state court's decision was objectively unreasonable." Dkt. 127 at 21.

The California Supreme Court could have reasonably determined that Dr. Jane Wells's opinion failed to establish that Petitioner was insane at the time of the shooting. The California Supreme Court also could have reasoned that even accepting Petitioner's claim that he panicked and was in a reactive state because he feared he would be killed if he did not kill the victim, his reaction was based on his interpretation of actual facts (i.e., the actions of his codefendants) rather than a perception divorced from reality. The California Supreme Court, thus, could have reasoned that Dr. Jane Wells's opinion did not establish Petitioner's insanity.

The California Supreme Court also could have reasonably found no deficient performance by trial counsel in investigating Petitioner's sanity at the time of the crimes, as the court may have reasoned counsel was entitled to rely on Dr. Vicary's opinion that Petitioner was not insane. *See Harris*, 949 F.2d at 1525.

Accordingly, Claims 22 and 1E2 are DENIED.

## VI. Claims 11, 1I6, and 1I7

In Claim 11, Petitioner alleges the prosecutor misled the jury about Petitioner's involvement in the crimes. Pet. at 258-65. In Claims 1I6 and 1I7, Petitioner faults trial counsel's failure to challenge the alleged misconduct. Dkt. 74 at 68-69.

### A. Mental State

First, Petitioner alleges the prosecutor misled the jury by presenting Petitioner's unreliable confession. Pet. at 259-61, 264. In particular, Petitioner alleges the evidence was misleading because the interrogating officers failed to ask follow-up questions when Petitioner told them, for example, that he was pressured to shoot the victim and that he "'didn't even think I hit him.'" *Id.* at 260. Petitioner alleges his statements "suggested" his mental state "was less than that required for first-degree murder." *Id.* at 261.

As discussed in the court's prior order on Claims 7 and 14 (Dkt. 127 at 18-21, 39-41) and above regarding Claim 4, the California Supreme Court could have reasonably concluded that Petitioner's confession was not unreliable and that there was

sufficient evidence to support Petitioner's conviction for first-degree murder. The California Supreme Court also could have reasonably concluded on the same basis that the prosecutor did not commit misconduct by offering Petitioner's confession and that trial counsel was not deficient in failing to object.

**B. Joint Trial**

Second, Petitioner alleges that by opposing severance of the codefendants' trial, the prosecutor "was able to mislead the jury with respect to evidence of the codefendants' involvement and motive to commit crimes. . . . Because the codefendants were tried jointly, the jury attributed Burnett and Rembert's motivations, backgrounds, and gang ties to Burney." Pet. at 261-62; *see also id.* at 264. Petitioner argues the prosecution "knew that it would not be able to properly redact the codefendants' confessions if the three young men were tried together." Dkt. 129 at 38. Petitioner emphasizes that the California Supreme Court "acknowledged that the redactions were unconstitutional." *Id.*

The court held in its prior order that to the extent the trial court erred in admitting Petitioner's codefendants' statements, the California Supreme Court reasonably concluded that any error was harmless. Dkt. 127 at 18-21. The California Supreme Court, therefore, could have reasonably concluded on the same grounds that any related alleged prosecutorial misconduct, and any failure of trial counsel to challenge it, also was harmless.

**C. Failure to Present Physical Evidence**

Third, Petitioner alleges the prosecutor "misled the jury by presenting a story in which Burney saw the victim before shooting him, when in fact that was not the case." Pet. at 264. Petitioner alleges the prosecutor "fail[ed] to present critical evidence relating to the crime scene . . . including the lighting and trajectory of the round fired into the trunk" of the car, where the victim was held. *Id.* at 262. Petitioner asserts that "[h]ad the prosecution presented [such] evidence . . . , the jury likely would have been persuaded that Burney was unable to see into the trunk, thereby casting sufficient doubt

on the prosecution's deliberate and premeditated murder theory." *Id.* at 263. Petitioner alleges trial counsel was ineffective for failing to consult properly with an expert to investigate and present such evidence. Dkt. 74 at 68-69.

Petitioner does not provide any citation to the record to support his allegations. *Cf.* Pet. at 262-64; Dkt. 129 at 38. A review of the prosecutor's arguments reveals no such remarks. *Cf.* 5 RT 837; 9 RT 1531. The California Supreme Court, therefore, could have reasonably held on that basis that Petitioner failed to show prosecutorial misconduct. As to Petitioner's claim that the prosecutor failed to present critical evidence concerning the crime scene, the California Supreme Court could have reasoned that the prosecutor had no constitutional duty to present evidence at trial Petitioner considered "critical." *See generally Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("[U]nless 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.") (emphasis added); *Martinez v. Ryan*, 926 F.3d 1215, 1228 (9th Cir. 2019) ("If the prosecution does not discover, or does not have a duty to discover, certain evidence until after the trial ends, then there can be no *Brady* claim against it even if exculpatory evidence later surfaces.").

As to Petitioner's claim of ineffective assistance of counsel, the California Supreme Court could have reasoned that even if expert testimony about the conditions of the crime scene would have bolstered Petitioner's statements to police that he did not aim at the victim when firing into the trunk, there was no reasonable probability of a different verdict given that his statements as a whole "'unequivocally establish[ed] both deliberation and premeditation on his part.'" Dkt. 127 at 20 (quoting *Burney*, 47 Cal. 4th at 235-36); *see id.* at 18-21.

Petitioner adds that trial counsel was ineffective for failing to analyze blood found on shoes seized from Petitioner's codefendants' apartment. Dkt. 74 at 69; *see id.* at 9 ("On cross-examination of Detective Erickson, she stated that she retrieved a bloody pair of shoes from Burnett and Rembert's apartment and that Burney, who told

her he only owned one pair of shoes, did not have blood on his shoes when he was arrested. ([8] RT 1371.)"). Petitioner, however, presents no evidence the analysis would have yielded exculpatory results. Consequently, the California Supreme Court could have reasoned that Petitioner failed to show a reasonable probability of a different outcome at trial had counsel analyzed the blood.

Claims 11, 1I6, and 1I7, therefore, are DENIED.

## VII. Claims 5, 1I2, and 2D3

### A. Allegations

In Claim 5, Petitioner alleges his constitutional rights were violated because the prosecutor's decision to seek the death penalty was "based on insufficient information" and "the grand jury and the prosecutor failed to fulfill their statutory duties during the charging process." Pet. at 176. Petitioner asserts the prosecutor lacked information on his "involvement in the offense; his young age, background, and long-term mental impairments; and . . . his incompetency and mental condition at the time of the offense." *Id.* at 177. Petitioner argues that if the prosecutor had that information but "ignored" it during the charging decision, the prosecutor acted "outside the bounds of due process." Dkt. 129 at 17. Petitioner makes the related allegation that in its presentation to the grand jury, the prosecution told "a completely one-sided story . . . ." Pet. at 181.

In Claims 1I2 and 2D3, Petitioner alleges trial counsel "failed to adequately investigate and timely present to the state evidence that would have been relevant to the state's decision to charge Burney with a capital crime." Dkt. 74 at 62; *see* Pet. at 143-44. Petitioner alleges that "[h]ad trial counsel adequately discovered and developed Burney's case in preparation for their meeting with the prosecutor," to "discuss the charging decision and potential sentencing factors," trial counsel "would have had substantial evidence that could have persuaded the prosecutor to drop the capital charges against Burney." Dkt. 74 at 63; *see* Pet. at 143-44. Petitioner alleges that "rather than base its charging decision on all the relevant information about Burney that

it had at its disposal, the state instead chose to base the charging decision on Burney's race, in clear violation of basic principles of equal protection jurisprudence." Pet. at 176. Petitioner alleges that the prosecutor charged him with capital murder because he was Black and the victim was White. Dkt. 129 at 17. Petitioner identifies three Orange County murders of non-White victims in which the five defendants were not charged with capital murder. *Id.* at 18. Petitioner further alleges that "in 1992, there were forty-five homicides allegedly committed by individuals between the ages of eighteen and twenty-four in Orange County," and that among those individuals, he was "the only eighteen-year-old Black male charged with capital murder." *Id.*

**B. Analysis**

**1. Charging Decision**

"[W]here a defendant contends that a prosecutor made a charging decision in violation of the Constitution, the defendant's 'standard [of proof] is a demanding one.'" *Nuñes v. Ramirez-Palmer*, 485 F.3d 432, 441 (9th Cir. 2007) (quoting *United States v. Armstrong*, 517 U.S. 456, 463 (1996)). "[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties" in making those decisions. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotation omitted). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in his [or her] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

A prosecutorial decision, however, may not be:

> 'based on an unjustifiable standard such as race, religion, or other arbitrary classification.' To establish such a violation of equal protection, '[t]he claimant must demonstrate that the . . . prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.' [¶] To meet the first requirement, of discriminatory effect, [the claimant] 'must show that similarly situated individuals of a different ethnic origin were not prosecuted.'

*United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003) (quoting *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996)); *see also United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997) (holding that defendants failed to show that similarly situated persons of other races were not prosecuted, where defendants' statistical report did not address whether other sellers of drugs were "gang members who sold large quantities of crack[,] the principal characteristic of the federal defendants"). "[R]aw statistics," such as those "demonstrating that the United States charges blacks with a death-eligible offense more than twice as often as it charges whites," "say nothing about charges brought against *similarly situated defendants*." *United States v. Bass*, 536 U.S. 862, 863-64 (2002) (per curiam) (internal quotation and alteration omitted; emphasis in original).

Here, the California Supreme Court could have reasonably determined that Petitioner failed to proffer evidence to show that he was similarly situated to non-Black defendants accused of murder or Black defendants accused of murdering non-White victims against whom the District Attorney's Office did not seek the death penalty. Petitioner's evidence does not address the number of Orange County defendants charged not only with murder, but also with second-degree robbery, kidnapping, kidnapping for purposes of robbery, and first-degree murder with robbery-murder and kidnapping-murder special circumstances. *See Turner*, 104 F.3d at 1185. The California Supreme Court, thus, could have reasonably rejected Petitioner's claim that the prosecutor's decision to seek the death penalty was based on race. It also could have reasonably concluded that the prosecutor's decision was not improper, considering Petitioner's role in the crimes, youthful age, background, and mental condition.

**2. Presentation to the Grand Jury**

As to the prosecutor's presentation to the grand jury, the California Supreme Court could have reasonably concluded that if any errors were committed, they were rendered harmless by the petit jury's verdict. A "constitutional error in the grand jury

proceedings is harmless [where the petitioner] . . . was ultimately convicted of the offenses charged." *Williams v. Stewart*, 441 F.3d 1030, 1042 (9th Cir. 2006) (rejecting petitioner's claim that the prosecutor submitted false evidence to the grand jury); *see United States v. Mechanik*, 475 U.S. 66, 67 (1986) ("[T]he petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted. Therefore, the convictions must stand despite the rule violation" during grand jury proceedings).

As for trial counsel's alleged failure to present evidence to the prosecution when meeting to discuss its charging decision, Petitioner does not allege or present evidence that the prevailing professional standards at the time required trial counsel to make such a presentation to the prosecutor. (*See* Dkt. 74 at 64 (alleging only that professional standards required counsel to investigate "the facts of Burney's life, family, and comprehensive social history"); Pet. at 143-44; Dkt. 129 at 19-21); *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) ("[C]onstitutional deficiency [] is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'") (quoting *Strickland*, 466 U.S. at 688) (internal quotation omitted); *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009) (reversing grant of habeas relief in part because the Court was "aware of no 'prevailing professional norms' that prevent[ed] counsel" from taking the action held to be ineffective by the lower court). The California Supreme Court, thus, could have reasonably found no deficient performance by counsel on that basis.

Claims 5, 1I2, and 2D3, therefore, are DENIED.

## VIII. Claims 1 and 2D4

In the remaining portions of Claims 1 and 2D4, Petitioner raises various allegations of ineffective assistance of counsel during voir dire and the guilt phase of trial.

### A. Claims 1C1 and 2D4

In Claims 1C1 and 2D4, Petitioner alleges trial counsel was ineffective during voir dire for "repeatedly conced[ing]" Petitioner's guilt and "emphasiz[ing] the tragic nature of this crime . . . ." Dkt. 74 at 16; *see also* Pet. at 144.

Each of the alleged concessions Petitioner challenges (*see* Dkt. 74 at 16) emphasized that while Petitioner was "guilty of something," (3 RT 314), the jury's task was to listen to the evidence thoughtfully to determine the nature of his guilt. (*See, e.g.*, 3 RT 303 ("Shaun Burney is guilty, it's just a question of what he's guilty of, okay? I'm not going to for one second at any point in this trial tell you that that's an innocent man over there. But, you know, I may say to you he's guilty of this but he's not guilty of this. [¶] You understand that?") Counsel's remarks regarding the tragic nature of the crime related to the evidence the jurors would see and the severity of the penalty sought. *See, e.g.*, 3 RT 314 ("[Y]ou are going to see some pictures that are real ugly, it's a real sad murder. Murder is sad but I think this one is particularly sad, okay? You still have to put your emotions aside, you just have to wait, be objective, be patient basically until you hear everything it make decision [sic]. [¶] Can you do that?").

The California Supreme Court could have reasonably determined that counsel's remarks to the jury were strategically adequate in light of the evidence the prosecution was expected to and did present at trial, including Petitioner's statements to police. The California Supreme Court could have reasoned that trial counsel intended to preserve credibility with the jurors and to ensure they could rationally consider the evidence they would hear. *See Florida v. Nixon*, 543 U.S. 175, 192 (2004) ("[C]ounsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade.") (internal quotation omitted). Claim 1C1, therefore, is DENIED.

Petitioner further alleges in Claim 2D4 that trial counsel "failed to explain a reasonable defense strategy and preview mental state and mitigation evidence to prospective jurors" during voir dire. Pet. at 144. The California Supreme Court could have reasoned that trial counsel had no such duty during voir dire. Indeed, it is

improper to precondition jurors by previewing evidence during voir dire.[3] Because the California Supreme Court could have reasonably found no deficient performance by counsel, Claim 2D4 is DENIED.

**B. Claims 1D2a, 1D2b, 1D2d(i), 1D2d(iii), and 1D2e**

In Claims 1D2a, 1D2b, 1D2d(i), 1D2d(iii), and 1D2e, Petitioner alleges trial counsel failed to show that: Petitioner lacked a motive to kill the victim (1D2a); if he did shoot the victim, he did not intend to shoot him in the head (1D2b); he acted under duress because of the unequal power dynamics among the three codefendants (1D2e); and he was dominated by his co-defendants throughout the night because he was inexperienced and unsophisticated relative to his codefendants (1D2d(iii)) and because codefendant Allen Burnett catalyzed and controlled the events (1D2d(i)). Dkt. 74 at 34-48.

The court explained and held in its prior order as to other subclaims within Claim 1D:

> In Claim 1D, Petitioner alleges that trial counsel performed deficiently by 'try[ing] to advance two irreconcilable and competing theories' of the defense. (Dkt. 74 at 24.) He alleges:
>
> > Initially, trial counsel was going to advance a theory that Burney had in fact shot [Joseph] Kondrath . . . [but that] the evidence failed to show that the killing was deliberate or premeditated. [¶] Two months before trial began, however, it came to trial counsel's attention that Rembert, not Burney, shot Kondrath. Accordingly,

[3] While a "party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence," *People v. Coffman*, 34 Cal. 4th 1, 47 (2004); *see also People v. Solomon*, 49 Cal. 4th 792, 839 (2010), "the trial judge should not permit counsel to attempt to precondition the prospective jurors to a particular result . . . ." Cal. Standards of Jud. Admin. Standard 4.30(c).

> trial counsel started pursuing a completely conflicting approach to this case – that Rembert, not Burney, was the shooter. . . .
>
> [B]ecause they were trying to protect the theory that Burney shot Kondrath, trial counsel missed many opportunities to effectively advance the defense that Rembert was in fact the shooter. . . . [C]onversely, because they were trying to protect the theory that Rembert shot Kondrath, trial counsel missed many opportunities to demonstrate to the jury that Burney did not have a deliberate and premeditated state of mind when he shot Kondrath.

(Dkt. 74 at 22, 24 (citing Pet. Ex. 44 ¶¶ 5, 6; Pet. Ex. 7m ¶ 6).)

Petitioner omits from his account of events that he was the driving force behind counsel's changes of tack. Trial counsel declares:

> Burney had made a statement to the police confessing to the murder of Joseph Kondrath. Statements from the co-defendants and other evidence corroborated Burney's role as the shooter. We initially began developing strategies and themes based on the assumption that Burney shot Kondrath.
>
> A few months before the beginning of trial, however, Burney changed his story. He told us that co-defendant Rembert had been the one to pull the trigger, but that he, Burney, had agreed to take the blame because he just didn't care. Though we uncovered no evidence to corroborate this version, Burney insisted this new story was the truth. . . .
>
> On May 2, 1994, [during trial,] . . . we went to the jail to speak with Burney. Burney then told us that he, not Rembert, had pulled the trigger. On May 10, 1994, we went in camera with the court and informed the judge that we would no longer be pursuing the defense that Rembert had been the shooter.

(Pet. Ex. 44 ¶¶ 5, 6, 9, 10.) Defense counsel's statements to the trial court (10 RT 1738-42[4]) make clear that his strategy was at all times built around Petitioner's "decisions [of the kind] . . . reserved for the client . . . ." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (citing

[4] Dkt. 104-98.

> *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). Such a strategy is not merely constitutionally adequate; it is constitutionally mandated.

Dkt. 127 at 7-8.

The California Supreme Court could have likewise reasonably determined as to Claims 1D2a, 1D2b, 1D2d(i), 1D2d(iii), and 1D2e that counsel's performance was strategic. Accordingly, these claims are DENIED.

**C. Claim 1F**

In Claim 1F, Petitioner alleges trial counsel failed to object to prosecutorial misconduct during trial. Dkt. 74 at 56-58. "[B]ecause many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct." *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013) (internal quotation omitted). An argument based on a reasonable inference from the evidence is not a misstatement, let alone an egregious one. *See United States v. Henderson*, 241 F.3d 638, 652 (9th Cir. 2000) ("Prosecutors have considerable leeway to strike 'hard blows' based on the evidence and all reasonable inferences from the evidence.").

**1. Claim 1F1**

In Claim 1F1, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's statement during closing argument, "When you acquit someone, hopefully it's because there's no evidence to prove the charge. We don't have that problem in this case." 10 RT 1662; Dkt. 74 at 56. In its prior order, this court explained that the prosecutor's statement was part of his argument, "'I state to you, *based on this evidence, it's overwhelming* . . . .'" Dkt. 127 at 46 (quoting 10 RT 1662) (emphasis in original). The court noted that the jury was instructed on the prosecution's burden of proof beyond a reasonable doubt (10 RT 1682-83), and the "almost invariable assumption of the law that jurors follow their instructions . . . ." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). The California Supreme Court could

have reasonably concluded on that basis that Petitioner failed to show a reasonable probability of a different outcome at trial had counsel objected to the prosecutor's statement.

**2. Claim 1F2**

In Claim 1F2, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's closing argument that Petitioner's statements to Janette Roper "just seem[ed] like bragging." 9 RT 1532; Dkt. 74 at 56. The California Supreme Court could have reasoned that the prosecutor's argument was a "hard blow" based on a reasonable inference from Ms. Roper's testimony that "Shaun . . . said he was leaving the state and I asked him why. And he said because 'this is my seventh 187 since I've been out here.'" (7 RT 1091); *Henderson*, 241 F.3d at 652. The California Supreme Court could have reasonably concluded that Petitioner failed to show deficient performance in counsel's lack of objection.

**3. Claim 1F3**

In Claim 1F3, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's characterization of the evidence during closing argument, such as the evidence regarding shots fired at Cynthia Melson's house. *See* Dkt. 74 at 57. As the court held previously on Petitioner's related claim that the prosecutor misstated the evidence, including evidence regarding the shots fired at Ms. Melson's house, the "California Supreme Court may have reasoned that the prosecutor's discussions of the facts . . . were not improper . . . ." Dkt. 127 at 50. The California Supreme Court could have reasonably concluded that Petitioner failed to show deficient performance in trial counsel's lack of objection.

**4. Claim 1F4**

In Claim 1F4, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's arguments concerning his legal theory of the case. Dkt. 74 at 57 (citing 9 RT 1502; 10 RT 1647). Petitioner appears to reference his allegation in Claim 17H that "[t]he prosecutor first argued the killing was intentional ([9] RT 1502), but

thereafter, in an effort to bolster his case, argued the killing occurred during the course of a felony. ([10] RT 1647.) He therefore misstated legal concepts and improperly confused the jurors as to his legal theory." Pet. at 342. This court rejected that claim in its prior merits order, holding, "[t]he California Supreme Court may have reasoned that the prosecutor permissibly argued two theories of first degree murder." Dkt. 127 at 49. The California Supreme Court could have concluded on the same basis that Petitioner did not show deficient performance in trial counsel's lack of objection.

**5. Claim 1F5**

In Claim 1F5, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's statement that "[i]t's no tribute to Joey Kondrath if this case is about anything other than the crimes against him. Kind of makes you understand why these other crimes weren't charged." 10 RT 1653; Dkt. 74 at 57. The trial judge instructed the jury to consider only evidence introduced at trial and not to consider the arguments of counsel as evidence. 10 RT 1665-66. The California Supreme Court could have reasonably concluded that Petitioner failed to show a reasonable probability of a different outcome at trial had counsel objected to the prosecutor's comment. *See Cunningham*, 704 F.3d at 1159 ("The comments were a single paragraph of a twenty-page argument and the trial judge explained to the jury that closing arguments are not evidence."); *cf. Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (holding prosecutor's numerous improper remarks, including one "incorporat[ing] the defense's use of the word 'animal'" to refer to petitioner, did not render trial fundamentally unfair).

**6. Claim 1F6**

In Claim 1F6, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's argument that codefendant Burnett's intoxication defense was a "red herring." 9 RT 1523; Dkt. 74 at 57. The California Supreme Court could have concluded that the argument was a reasonable inference from Burnett's own statements about his relative sobriety. *See* 9 RT 1522-23 (discussing Burnett's statements). The

California Supreme Court, therefore, could have reasonably concluded that Petitioner did not show deficient performance in trial counsel's lack of objection.

**7. Claim 1F7**

In Claim 1F7, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's argument that the defendants stole money from the victim's wallet. *See* 10 RT 1652 ("Did he ever get to enjoy his wallet again? We have an empty billfold; is it reasonable to infer that money was taken from that?"); Dkt. 74 at 57 (alleging it was "more likely" defendants had not stolen money than that they had). The California Supreme Court on direct appeal explained on an unrelated claim:

> The contents of the victim's wallet [when found] included a photograph of two small children, a photograph of a small child seated on a horse, the victim's identification, and *a one-dollar bill on which the words 'I love you' were written*. . . . During the closing argument, the prosecutor urged that the circumstance that *the billfold section* of the victim's wallet was empty of any money suggested that cash had been taken from the wallet during the charged crimes.

*Burney*, 47 Cal. 4th at 243 (emphasis added). Here, the California Supreme Court could have reasoned that the prosecutor's argument that money had been taken was a reasonable inference from the evidence admitted at trial and that Petitioner failed to show deficient performance in trial counsel's lack of objection.

**8. Claim 1F8**

In Claim 1F8, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's argument that defendants robbed the victim of his car. Dkt. 74 at 57-58 (citing Claim 14 and 10 RT 1652). The evidence at trial supported such an argument. *See* Dkt. 127 at 34-36 (discussing evidence and holding that the "state court reasonably concluded that there was sufficient evidence of robbery and, in particular, of Petitioner's intent to permanently deprive Joseph Kondrath of his vehicle"). As a result, the California Supreme Court could have concluded that the argument was a reasonable inference from the evidence and that Petitioner failed to show deficient performance in trial counsel's lack of objection.

**9. Claim 1F9**

In Claim 1F9, Petitioner alleges trial counsel was ineffective for failing to object to the prosecutor's comments that the defendants were "'bums' and 'cowards.'" 10 RT 1652; Dkt. 74 at 58. As above, the trial judge instructed the jury to consider only evidence introduced at trial and not to consider the arguments of counsel as evidence. 10 RT 1665-66. Accordingly, the California Supreme Court could have concluded that Petitioner failed to show a reasonable probability of a different outcome at trial had counsel objected. *See Cunningham*, 704 F.3d at 1159; *cf. Darden*, 477 U.S. at 180.

**10. Claims 1F10 and 1F11**

In Claim 1F10, Petitioner alleges trial counsel was ineffective for failing to object to hearsay. Dkt. 74 at 58. In Claim 1F11, Petitioner alleges trial counsel was ineffective for failing to object to testimony lacking a proper foundation. *Id.* Petitioner does not identify in his Petition or merits briefing the allegedly objectionable testimony. His only reference to a lack of foundation concerns an objection trial counsel did make to the admission of his co-defendants' statements. *See* Pet. at 211-12. Thus, Petitioner's allegations are conclusory and do not warrant relief. *See Greenway*, 653 F.3d at 804; *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26.

**11. Conclusion**

For the above reasons, Claim 1F is DENIED.

**D. Claim 1H**

In Claim 1H, Petitioner faults trial counsel for failing to object to remarks by the trial judge allegedly amounting to judicial misconduct. Dkt. 74 at 60-61. In its prior order, the court rejected on the merits the underlying claim of judicial misconduct. Dkt. 127 at 24-26. The court held that Petitioner failed to show that the remarks deprived him of a fair trial. *Id.* at 24-26. The California Supreme Court likewise could have reasonably denied Claim 1H on the ground that Petitioner failed to show prejudice from any deficient performance by counsel. Claim 1H is DENIED.

**E. Claim 1I3**

In Claim 1I3, Petitioner alleges trial counsel "fail[ed] to adequately articulate sufficient grounds for severance." Dkt. 74 at 65-66. The only prejudice Petitioner alleges in Claim 1I3 is that the court admitted into evidence during the joint trial a redacted version of Petitioner's statement to police that was "a cold, sanitized version of some of the events of the night of the incident." *Id.* at 65-66. Petitioner alleges the redacted statement "failed to convey Burney's emotional tone or the remorse he expressed during the interrogation." *Id.* at 66. He adds that had he "not been tried with his codefendants an unredacted version telling the full story would have been presented to the jury." *Id.*

The court observed in its prior order, in the context of an unrelated claim:

> Defense counsel presented to the jury at both the guilt and penalty phases that Petitioner expressed remorse and cried loudly when confessing to police. (*See, e.g.*, 9 RT 1628 (guilt phase argument, 'He's crying. That's what it says right in the transcript, crying. [¶] 'Please, . . . I'm so . . . sorry.' . . . Crying. That's not sophisticated, that's not shifting the blame, that's not call[o]us'); 10 RT 1886-87 (penalty phase testimony from defense psychologist Stephen Wells, J.D., Ph.D. that Petitioner expressed much remorse in the transcript and videotape of his statements to police); 11 RT 1981-82 (penalty phase testimony from defense psychiatrist William Vicary, M.D. that he was 'impressed' with the remorse Petitioner expressed in his videotaped statements to police, in which he 'seemed to be very sorry about what he had done and was actually crying,' and in his

> conversations with Dr. Vicary, in which '[t]here were tears in his eyes when he described what he had done'), 2105-06 (penalty phase argument discussing Petitioner's crying during his police interview and stating, '[H]e's talking about what he did to these people and he is remorseful.').)

Dkt. 127 at 10-11.

The California Supreme Court could have reasoned that the jury did, in fact, hear evidence of Petitioner's emotional tone and remorse about the night's events and reasonably determined that Petitioner failed to show prejudice in Claim 1I3. Claim 1I3 is DENIED.

**F. Claim 1I8**

Relying on the allegations in Claims 12 and 18 (Dkt. 74 at 69), Petitioner asserts in Claim 1I8 that trial counsel performed deficiently by "failing to request and proffer adequate instructions; by failing to explain to the jury the critical levels of proof necessary to find Burney death-eligible; and by failing to rebut the prosecutor's misconduct and misstatements of the law in closing argument." *Id.* at 70.

The court denied Claims 12 and 18 in its prior merits order. As to all but one of the instructions at issue in Claim 12, trial counsel did, in fact, request or proffer the instruction (*see* 6 CT 2045-49; Dkt. 127 at 28-33), providing a reasonable ground for the California Supreme Court's denial of Claim 1I8. As to the remaining instruction regarding an inference of guilt from flight after a crime, this court held that the prosecution was required to prove Petitioner's guilt notwithstanding his pretrial admission and that such an inference was not unconstitutional. Dkt. 127 at 26-28. The California Supreme Court, therefore, could have reasonably held that any request by trial counsel to give a contrary instruction would have been meritless. *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."); *Molina*, 934 F.2d at 1447 ("[I]t is not professionally unreasonable to decide not to file a motion so clearly lacking in merit.").

As to all but one of the instructions in Claim 18, the Petition makes clear that trial counsel requested the instruction (Pet. at 348-49 (Claim 18B), 363 (Claim 18E), 367-68 (Claim 18F), 369-73 (Claim 18G), 376-77 (Claim 18H), 380-81 (Claim 18I), 386-87 (Claim 18J), 392-93 (Claim 18K), 394-95 (Claim 18L)), or objected to the absence of the instruction. *Id.* at 358 (Claim 18D).

Petitioner alleges the remaining instruction removed from the jury's consideration whether the uncharged conduct constituted a crime. *Id.* at 354 (Claim 18C). In a motion to exclude the prosecutor's evidence of uncharged conduct, trial counsel argued he was unable "to make more specific due process and Evidence Code section 352 arguments because the notice provided by the prosecutor concerning this evidence is so vague and ambiguous that the defense cannot determine [whether] such [conduct] . . . violates a penal statute." 6 CT 1953. Counsel requested a hearing outside the presence of the jury for the prosecutor to make "a more specific offer of proof by presenting the actual testimony of the proposed witnesses." *Id.* at 1955. The court twice denied the defense's request to hear the proposed witnesses' testimony, asked the prosecutor for an offer of proof with "specific facts so I can determine if it is a crime," and ruled the evidence admissible. 10 RT 1768-70. The California Supreme Court could have reasoned that additional objections by counsel over whether the conduct constituted a crime or whether the jury could be so instructed would have been futile and could have reasonably found trial counsel's failure to raise such additional objections to not be deficient.

Finally, the court has already addressed Petitioner's allegations that trial counsel was ineffective for failing to rebut the prosecutor's alleged misconduct in closing argument and misstatements of law in closing argument. *See supra* § VIII.C.

Claim 1I8, therefore, is DENIED.

**G. Claim 1I9**

In Claim 1I9, Petitioner alleges trial counsel failed to provide conflict-free representation as a result of counsel's fee agreement with the Orange County Superior

Court. Petitioner alleges the required flat fee for all services left counsel with "no incentive to fully prepare the case for trial." Dkt. 74 at 70. Petitioner alleges the "arrangement led to counsel's inadequate, incomplete, and incompetent investigation, work-up, and development of evidence on Burney's behalf." *Id.* Petitioner further alleges his lead trial counsel "both consciously and subconsciously[] acted on behalf of his former employer, the Orange County District Attorney" and "improperly assisted his former partner in private practice, . . . who represented Burnett." *Id.* Petitioner does not specifically allege how trial counsel assisted the District Attorney or Burnett's counsel.

"'[U]ntil . . . a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.'" *Mickens v. Taylor*, 535 U.S. 162, 175 (2002) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)) (emphasis added). "[A] state court's rejection of a conflict claim not stemming from concurrent representation is neither contrary to, nor an unreasonable application of, established federal law as determined by the United States Supreme Court." *Rowland v. Chappell*, 876 F.3d 1174, 1192 (9th Cir. 2017) (rejecting for lack of clearly established federal law capital habeas petitioner's conflict of interest claim based on trial counsel's prior working relationship, as a prosecutor, with the chief investigating officer against petitioner; counsel's former representation of the officer in civil matters; and their ongoing friendship). Petitioner's allegations regarding counsel's fee arrangement, former employer, and former partner in private practice do not show concurrent representation and are otherwise insufficient.

Because Petitioner's claim lacks support in clearly established federal law, Claim 1I9 is DENIED.

## IX. Claim 2

In the remaining portions of Claim 2, Petitioner raises allegations of ineffective assistance of counsel at the penalty phase of trial.

### A. Opening Statement

Petitioner faults trial counsel for telling the jury in his opening statement that the crimes were "aggravated" and "horrible." 10 RT 1780-81; Pet. at 91. However, "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Nixon*, 543 U.S. at 192. The California Supreme Court could have applied the same reasoning to counsel's opening statement, challenged by Petitioner here, that Petitioner "acted out, and he acted wrong, and he hit . . . or choked" his ex-girlfriend, in order to garner credibility with and prepare the jury for the testimony the prosecutor would ultimately present by addressing that testimony directly and forthrightly at the beginning of trial. 10 RT 1783; Pet. at 92.

Petitioner also alleges trial counsel repeatedly expressed sympathy for the victim's family, but not "for his own client or for Burney's family and friends." Pet. at 92. In context, trial counsel told the jury:

> We feel terribly sorry for the Kondrath family and for all the people that loved Joey Kondrath. Mr. Burney has also expressed great remorse many times, and you'll hear evidence of that, about the horrible thing he did, but we do also want you to know about the person. So right now, I'm going to try to tell you the story of Shaun Burney as I anticipate it's going to come in to you.

10 RT 1780-81. The California Supreme Court could have reasoned that counsel strategically aimed to prepare the jury for the victim impact evidence the prosecutor would present and to ask the jury to consider Petitioner's personal background as well.

Finally, Petitioner alleges trial counsel "expressed moral judgments" about him by stating Petitioner "'probably was spoiled.'" Pet. at 92 (quoting 10 RT 1784). The California Supreme Court, however, could have held that counsel strategically previewed for the jury the anticipated testimony from Petitioner's mother and Dr. Wells, and, therefore, reasonably found no deficient performance. *See* Pet. Ex. 83-2427 (report from Dr. Wells that Petitioner was "[s]imultaneous[ly] spoiled and deprived [¶] Not well supervised (mother worked at night)"); 10 RT 1862 (testimony from Dr. Wells

that Petitioner's mother "spoiled him in various ways and at the same time he was deprived; spoiled and deprived at the same time. [¶] He was spoiled in the sense of not being able to stand on his own, not being able to separate from her"); 11 RT 1951 (testimony from Petitioner's mother that he "was very spoiled").

**B. Aggravating Evidence**

Petitioner further alleges trial counsel failed to "neutralize" the aggravating evidence presented by the prosecutor at the penalty phase of trial. Pet. at 94.

**1. Facts and Circumstances of the Crime**

First, Petitioner alleges trial counsel should have rebutted the prosecutor's argument that Petitioner "wanted to shoot" Kondrath by "drawing the jury's attention to [Petitioner's] candid and revealing statements" to police to the contrary. *Id.* at 96.

In the portion of the argument Petitioner cites, the prosecutor argued:

> When the car ultimately stopped over on Crescent Street and the trunk opened and Joey Kondrath begs for his life, seeing the gun, with his hands raised up, crossed over his head, what sympathy did Shaun Burney show him at that point? Did he show him any at all? Does it take anything less than the most cold, black, malignant heart to reject a plea of mercy for your life?

11 RT 2022.

Trial counsel argued in response that Petitioner said:

> 'I didn't want to look at him, I just shot.' He says, 'I didn't know that I even killed him but I shot and then I ran and I ran, and I ran, and I ran.' [¶] This is consistent with who Shaun is. He's not that bad, vile person, that lizard under the rock that deserves death. He's still got those human feelings . . . . [¶] He was saying, 'I didn't want to do it.' [¶] It doesn't make the loss to the Kondraths any less. Doesn't make the loss to Joseph Kondrath any less. But it does make it less premeditated. It makes it less evil on the part of Shaun and it makes Shaun less evil, which he is not.

11 RT 2072-74. The California Supreme Court could have reasoned that trial counsel adequately rebutted the prosecutor's argument, and therefore reasonably concluded that Petitioner failed to show deficient performance by counsel.

Petitioner also argues trial counsel should have "investigat[ed]" Petitioner's claim that he did not believe he struck the victim when he fired the gun. *Id.* Petitioner faults counsel for failing to present corroborating evidence regarding the poor visibility and other conditions at the crime scene. *Id.* The California Supreme Court could have found no reasonable likelihood of a different outcome at the penalty phase of trial from such corroborating evidence, just as it may have found at the guilt phase of trial. *See supra* § VI.C.

Petitioner further asserts trial counsel should have presented evidence to rebut the argument that he "needed to be punished for keeping Kondrath in the trunk before he was killed." Pet. at 97. Petitioner points to a post-trial review by a retired police officer concluding Petitioner was not the leader among the co-defendants and was not "'responsible for many of the night's events.'" *Id.* (quoting Pet. Ex. 41 ¶ 14). Petitioner argues that, "[l]ike Kondrath, Burney was caught up in a storm of events over which he had little control." *Id.* at 98.

The California Supreme Court could have reasoned that the jury would not have been sympathetic to a line of argument that Petitioner and Kondrath were similarly powerless, and reasonably found no deficient performance by counsel in opting not to pursue it.

**2. Sylvia Carmona Testimony**

Petitioner faults trial counsel for failing to understand and show the jury that the "instances of domestic violence" between Petitioner and his ex-girlfriend, Sylvia Carmona, "were evidence of Burney's inability to cope with the trauma in his life and his deficient problem-solving skills." Pet. at 99. Petitioner argues trial counsel should not have "downplayed the significance of these fights and shifted the blame to Carmona." *Id.* Petitioner further alleges trial counsel should have presented evidence to show that Petitioner had a history of trying to avoid violent situations and that although he dated many women, Carmona was the only one with whom he fought. *Id.* at 100-01.

> At trial, trial counsel asked Dr. Wells:
>
> Q. [W]e've . . . had testimony that on more than one occasion, he struck his girlfriend, Sylvia Carmona. . . . How does that fit into your opinions about Shaun?
>
> A. I believe that his experiences, not that it's excusable, I can't excuse any battering of a woman, . . . but it's clear that he was unable to deal with all the intense feelings that he had, . . . with regard to his girlfriend . . . . He lacked the full ability to control his impulses under those situations. He had a great deal of pent-up anger that found expression. To me, it's [a] mark of his emotional dysfunction as much as it is something that's unacceptable.

10 RT 1860; *compare* Pet. Ex. 80-2411 (pretrial report by Dr. Vicary that Petitioner was "prone to store frustrations until rare, impulsive, angry outbursts occur – especially when intoxicated" and had "a history of . . . assaultive behavior").

The California Supreme Court, in turn, could have reasoned that trial counsel's presentation of Dr. Wells's testimony was adequate under *Strickland* and, therefore, not deficient. *See Richter*, 562 U.S. at 105 ("[T]he 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.").

**3. Attack on Lee Thomas**

Petitioner alleges trial counsel failed to contextualize Petitioner's assault on his stepfather, Lee Thomas, with a knife and his vandalism of Thomas's car. Petitioner contends trial counsel was ineffective for failing to show the jury that the "incident was about Burney protecting his mother and himself from a vindictive, belligerent man who had disrespected and abused them from the day he set foot in their house." Pet. at 103. Petitioner alleges trial counsel should have presented evidence that: because his father repeatedly abandoned him, Petitioner developed a powerful focus on his mother; for the better part of his life he was the "man of the house"; he vied with Thomas for his mother's attention and in the hierarchy in the house; Thomas was physically and emotionally abusing Petitioner's mother; the abuse was at least partly related to

Thomas's alcohol abuse; Thomas was unfaithful to Petitioner's mother; Petitioner had "learned aggression within the context in which he was raised"; and Thomas catalyzed the attack by "debasing Burney's mother by making disrespectful, chauvinistic, and lustful comments about other women." *Id.* at 103-07 (internal quotation omitted).

Although the jury heard evidence from a responding police officer that Thomas hit Petitioner first on the day of the attack, Petitioner alleges trial counsel should have elicited that evidence through cross-examination of Thomas. *Id.* at 108. Petitioner further alleges trial counsel failed to investigate and present available "impeachment evidence" from two family friends about Thomas's bias against Petitioner and that trial counsel should have presented testimony from a friend of Thomas that Thomas "knew his testimony could get Shaun the death sentence and he wanted that." Pet. at 110 (internal quotation omitted).

The California Supreme Court could have determined that counsel appropriately strategized that the jury would have viewed much of the unfavorable character evidence against Thomas as an effort to distract the jury from the relevant issues at trial. Trial counsel declared that his "strategy at the penalty trial was to emphasize petitioner's background," rather than to "introduc[e] . . . evidence regarding the credibility and character of petitioner's stepfather, Lee Thomas." Pet. Ex. 7-760 ¶ 17. Consistent with that stated strategy, trial counsel presented evidence from Dr. Wells that "according to Shaun, there was physical abuse of his mother which he was unable to prevent by the stepfather . . . ." 10 RT 1859. Trial counsel also presented testimony from Petitioner's mother that Petitioner was deeply attached to her "because it was only [them] . . . for so long. . . ." 11 RT 1950; *see also, e.g.*, 10 RT 1862. She testified that Petitioner "didn't like the idea [of] somebody else [sic] moving into our house" and that Petitioner "kept telling [her that she] should put him out." 11 RT 1951. During trial counsel's examination, Petitioner's mother testified that Thomas treated Petitioner "[l]ike he didn't exist" and would never speak to him, and that "[i]t was like he wasn't there." *Id.*

The California Supreme Court could have reasoned that the jury was able to understand the implications of Thomas's testimony in favor of the death penalty without any witness testimony to that effect. On those grounds, the California Supreme Court could have reasonably found no deficient performance by counsel regarding Thomas's testimony.

**C. Defense Expert Testimony**

Petitioner alleges trial counsel provided ineffective assistance in presenting damaging evidence from Dr. Vicary. Pet. at 111-18. Petitioner alleges Dr. Vicary erroneously diagnosed Petitioner because he did not follow professional guidelines. *Id.* at 113-14.[5] According to Petitioner, trial counsel should have "either obtained a second opinion and/or not put Dr. Vicary on the stand to begin with." *Id.* at 115. Petitioner also alleges trial counsel failed to prepare the defense experts for trial. *Id.* at 147.

**1. Following Professional Guidelines**

Petitioner's contention that his constitutional rights were violated by Dr. Vicary's alleged failure to follow professional guidelines lacks support in clearly established federal law. The Ninth Circuit has rejected the premise that *Ake* could allow petitioners to "'require this court and other federal courts to engage in a form of "psychiatric medical malpractice" review as part-and-parcel of its collateral review of state court judgments.'" *Harris*, 949 F.2d at 1517 (quoting *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990)) (emphasis omitted). Accordingly, the California Supreme Court's denial of Petitioner's claim was not contrary to or an unreasonable application of clearly established federal law.

**2. Obtaining Second Opinion**

[5] Petitioner's allegations that trial counsel failed to provide Dr. Vicary and Dr. Wells with the background information necessary for an accurate diagnosis are addressed above. *See supra* § III.B.

Petitioner alleges trial counsel should have obtained a second opinion after receiving Dr. Vicary's report, which in counsel's opinion, "contained a number of harmful facts and conclusions." Pet. Ex. 44 ¶ 12. Petitioner alleges the report's conclusions about antisocial personality disorder were particularly damaging. Pet. at 115-16. He alleges trial counsel "should have asked another mental health expert for a second opinion . . . with an eye to antisocial personality disorder" and "easily could have done so," because "[a]t the time they received Dr. Vicary's report, counsel had already hired a second mental health expert, Dr. Stephen Wells . . . ." *Id.* at 116.

First, as a matter of law, "[i]t is certainly within the wide range of professionally competent assistance for an attorney to rely on properly selected experts." *Harris*, 949 F.2d at 1525 (internal quotation marks omitted). Petitioner does not allege trial counsel erred in selecting Dr. Vicary. The California Supreme Court, therefore, could have reasonably concluded that once counsel had obtained Dr. Vicary's report, his reliance on it was adequate:

> [T]he relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable. An argument that counsel could have relied on 'any number of hypothetical experts . . . whose insight might possibly have been useful' is speculative and insufficient to establish that counsel was deficient. *Richter*, 562 U.S. at 107.

*Atwood v. Ryan*, 870 F.3d 1033, 1064 (9th Cir. 2017) (rejecting petitioner's argument that even if counsel "could have reasonably decided not to pursue a PTSD theory, a mental health expert might have come up with some other useful theory, and there would have been no harm in hiring such an expert") (internal quotation omitted) (internal citation edited).

Second, as a factual matter, Dr. Wells's declaration states that trial counsel instructed him "to assess the defendant's psychological condition in relation to the case." Pet. Ex. 3 ¶ 2. He declares that he delivered to trial counsel his "findings related to the defendant's state of mind at the time of the offense as well as his childhood and

overall functioning . . . ." *Id.* ¶ 3 (emphasis added). The California Supreme Court could have reasoned that trial counsel did not rely on Dr. Vicary's assessment alone.

In addition, although Dr. Wells did not state that he was instructed to consider antisocial personality disorder, he was prepared to discuss the topic on cross-examination. Dr. Wells identified the diagnostic criteria for antisocial personality disorder (10 RT 1883) and testified that Petitioner exhibited:

> some and perhaps not some of the most important traits. . . . I don't think he had history as a juvenile offender that would be required for antisocial personality.
>
> He certainly is not the kind of person who most of us would label an antisocial personality. He's capable – there's another side to him. He's capable of warmth. He's capable of empathy. He's capable of sensitivity. . . . [T]here's [a]nother side to him that I believe is very positive which one doesn't find in most antisocial personality disorders. And my history starting from a probation officer, I've seen terribly antisocial individuals. I just wouldn't put him in that category.

10 RT 1884.

In light of the investigation trial counsel performed with the assistance of properly selected mental health experts, the California Supreme Court could have concluded Petitioner failed to show deficient performance by counsel.

**3. Calling Dr. Vicary as a Witness**

The California Supreme Court also could have reasonably held that trial counsel was not deficient for calling Dr. Vicary as a witness at trial. As Petitioner acknowledges, "[c]ertain aspects of his testimony were somewhat helpful – for instance, he did sparingly mention that Burney had a 'traumatic background' (RT 1966) and that Burney was remorseful. (RT 1982.)" Pet. at 117. Although Petitioner minimizes that testimony as "entirely cumulative" of Dr. Wells's penalty phase testimony (*id.*), counsel may have reasonably strategized that the helpful testimony would be more compelling to the jury coming from not just one, but two experts. *See Richter*, 562 U.S. at 105 ("[T]he 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."). The California Supreme Court, therefore, could have reasonably found no deficient performance by trial counsel in calling Dr. Vicary as a witness.

**4. Preparing Expert Witnesses to Testify**

Petitioner's allegations that trial counsel "failed to prepare their experts to present their conclusions at trial" are conclusory. Pet. at 147. While Petitioner makes much of counsel's statement that his unspecified "failure to prepare" Dr. Vicary "still haunts [him] as the biggest mistake [he] ha[s] ever made in a death penalty case" (Pet. Ex. 44 ¶ 12), "[r]eliance on the harsh light of hindsight to cast doubt on a trial that took place . . . [many] years ago is precisely what *Strickland* and AEDPA seek to prevent." *Richter*, 562 U.S. at 107 (internal quotation marks omitted). Petitioner fails to specify how any expert's testimony would have differed had counsel prepared the witness differently. Petitioner's "cursory and vague" claim does not merit habeas relief. *Greenway*, 653 F.3d at 804; *see also Jones*, 66 F.3d at 205 ("[Petitioner's] conclusory suggestions . . . fall far short of stating a valid claim of constitutional violation."); *James*, 24 F.3d at 26 ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

**D. Mitigating Evidence**

**1. Mental Health and Social History Evidence**

**a. Allegations**

Petitioner alleges trial counsel was deficient for failing to investigate and present evidence "of a number of mental illnesses which affected Burney at the time of the killing and which strongly impacted his state of mind and his actions." Pet. at 120. Petitioner contends trial counsel failed to investigate and present evidence that Petitioner suffered from PTSD. *Id.* Petitioner alleges "trial counsel did not make the link with PTSD" despite "what they knew of [Petitioner's] story of devastation, chronic abandonment, and unremitting trauma . . . ." *Id.* at 123. Petitioner further alleges trial

counsel failed to present to the jury Petitioner's "failure to form interpersonal attachments" as a result of his "repeated abandonment trauma . . . ." *Id.*

Petitioner cites evidence from Dr. Jane Wells that, because of his failure to form interpersonal attachments, "'[h]is unfortunate choices here are not seen as the outgrowth of a menacing, sociopathic intent on his part but rather the manifestation of someone with limited intelligence and poor problem-solving skills who was struggling for acceptance and a sense of belonging.'" *Id.* at 124 (quoting Pet. Ex. 96 ¶ 26). Moreover, citing a second postconviction expert witness, Stanley Huey, Jr., Ph.D., Petitioner alleges trial counsel failed to present evidence that:

> [w]ith the proper intervention at some point in Shaun's youth, his trajectory could have differed dramatically. For example, Shaun had significant mental health problems, including depression, suicidal ideation and behavior (including an attempt with a handgun at eighteen), probable bipolar disorder, and possible PTSD. Although effective interventions exist for each of these problems, Shaun received virtually no mental health treatment until prison.

*Id.* (quoting Pet. Ex. 99 ¶ 130).

**b. Analysis**

As noted above:

> the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable. An argument that counsel could have relied on 'any number of hypothetical experts . . . whose insight might possibly have been useful' is speculative and insufficient to establish that counsel was deficient. *Richter*, 562 U.S. at 107.

*Atwood*, 870 F.3d at 1064. In addition, counsel may rely on properly selected experts. *Harris*, 949 F.2d at 1525.

As discussed above, trial counsel retained Dr. Vicary, a psychiatrist, and Dr. Wells, a forensic psychologist. Trial counsel instructed Dr. Vicary to explore, inter alia, mitigating circumstances, and instructed Dr. Wells to assess Petitioner's psychological condition in relation to the case. Pet. Ex. 3 ¶ 2; Pet Ex. 80-2397. Dr.

Wells's findings related to Petitioner's state of mind at the time of the offense as well as his childhood and overall functioning. Pet. Ex. 3 ¶ 3.

Petitioner presents no evidence Dr. Vicary or Dr. Wells requested additional background information from counsel. *See Murtishaw*, 255 F.3d at 945; *see also Bloom*, 132 F.3d at 1277. Trial counsel developed and presented the following mental health and social history evidence at trial:

> Dr. Stephen Wells interviewed defendant and testified on his behalf. Dr. Wells opined that defendant, 18 years of age at the time of the murder, was a child in terms of intellectual development and social maturity. Wells believed defendant did not intend to kill the victim until he was influenced to do so by codefendant Rembert. Defendant was experiencing the symptoms of a manic-depressive mental disorder at the time of the murder. Defendant was a 'follower' rather than a 'leader.' . . .
>
> Wells determined that a series of traumatic events in defendant's life profoundly had affected his emotional functioning. When defendant was eight years of age, his mother took him to the out-of-town funeral of her father. When they returned, defendant's father, David Burney, had changed the locks on the door of the family residence, where he was residing with another woman. Defendant and his mother stayed in motels and with friends for the next six months. At the time, defendant spoke of committing suicide and was taken to a psychologist. Defendant eventually reestablished contact with his father and, when he was 14 years of age, visited him in North Carolina at Christmas. Defendant remained in that state, residing with his father for a while but, after a disagreement, was ejected from his father's home and resided with his aunt for the remainder of the school year.
>
> Wells further testified that when defendant was 18 years of age, his mother Ernestine married Lee Thomas. Defendant did not get along with Thomas, who physically abused Ernestine on many occasions, and defendant felt powerless to prevent this abuse. Wells also described the circumstances of defendant's assault on Thomas. At the time of trial, Ernestine no longer was residing with Thomas, but instead with defendant's father, David Burney. According to Wells, David Burney, who had had no contact with defendant since ejecting him from his home in 1988, refused to testify on defendant's behalf in the present proceedings.

David Burney's sister, Brenda Burney, testified that David was dishonest and unreliable, and had not been a good father to defendant.

Rogelio Onofre testified that after being released from jail following the assault on Thomas, defendant resided with Onofre, a friend of his since grade school, and Onofre's mother, Maria Gomez. Defendant wanted to reside with his mother, but could not do so because his release from police custody was conditioned on defendant having no further contact with her husband, Thomas. Defendant was deeply upset when, six days before the murder, Onofre's young niece accidentally drowned in a Jacuzzi. Onofre testified that his mother asked defendant to leave her residence because she believed he was associating with the wrong persons.

Forensic psychologist William Vicary examined defendant and concluded he was depressed and suicidal prior to the murder. . . . Vicary concluded that defendant was traumatized by the absence of his father. Defendant's mother physically abused him when he was a child, and defendant was traumatized by twice having been required to leave his father's home and then, just before the murder, being ejected from his mother's home. After defendant was required to leave Onofre's residence, he stayed with the codefendants and another person, who were gang members and who exerted a negative influence on defendant. . . . Vicary acknowledged, however, that he had determined defendant had an antisocial personality, and that on one occasion after defendant's arrest, he had violently attacked a Hispanic inmate who had called him a 'nigger.'

Ernestine Burney Thomas testified that she had a good relationship with defendant and that he loved children and enjoyed helping others. Rogelio Onofre testified that defendant was a loving person and a good friend, and that although he had seen defendant arguing with his ex-girlfriend, Sylvia Carmona, he could not imagine defendant pulling the trigger or shooting the victim. Maria Gomez testified that she had known defendant since he was nine years of age, and that he was like a son to her. Gomez stated that defendant was helpful with household chores, and that she could not believe that defendant could have been involved with a murder. Carol Warren, whose daughter, Leslie Coulter, was defendant's best friend since childhood, testified that defendant was well-behaved, a sweet person, and a 'joy to be around.' Leslie Coulter testified that defendant was a very sweet person who always helped others, was good with children, and had known the codefendants only for a few months prior to the night of the murder. Coulter also stated that defendant was a good friend and a leader

> rather than a follower, and that she never had observed him acting violently or being involved in a fight.

*Burney*, 47 Cal. 4th at 220-22.

To the extent Dr. Vicary and Dr. Wells did not diagnose Petitioner with PTSD or probable bipolar disorder, as Petitioner now alleges, the California Supreme Court could have held that trial counsel performed adequately in relying on their opinions, and investigating and presenting mitigating evidence at trial.

**2. Influence of PCP**

Petitioner faults trial counsel for failing to investigate and present evidence that on the night of the crimes, he was under the influence of "'sherm' . . . , a tobacco or marijuana cigarette that has been dipped in phencyclidine, also known as PCP." Pet. at 129. Petitioner further faults trial counsel for failing to investigate and present evidence that because he did not receive mental health treatment, he used PCP, alcohol, and marijuana to self-medicate, impairing his judgment and making him susceptible to "'violent street influences.'" *Id.* at 124 (quoting Pet. Ex. 99 ¶ 130).

Petitioner's jury, however, heard evidence from Dr. Vicary that Petitioner "frequently consumed alcohol and smoked marijuana" and "informed [Dr.] Vicary that he drank 40 ounces of malt liquor before committing the murder," although Petitioner "earlier had told a defense investigator that he had had nothing to drink before the murder." *Burney*, 47 Cal. 4th at 221.

Although courts have disagreed over whether competent counsel should have presented additional evidence of a petitioner's substance use, *cf. Mayfield v. Woodford*, 270 F.3d 915, 931 n.17 (9th Cir. 2001) (observing that "juries are unlikely to favor defenses [in mitigation] based on abuse of dangerous drugs in evaluating a defendant's culpability for violent behavior"); *Doe v. Ayers*, 782 F.3d 425, 460 n.61 (9th Cir. 2015) ("[T]he evidence of [petitioner's] substance abuse would have been useful to the jury not to explain an intoxicated state that precipitated the crime, as in *Mayfield* . . . , but rather to help the jurors understand that [petitioner] had unsuccessfully attempted to

self-medicate."), "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*, 562 U.S. at 105. Here, the California Supreme Court could have reasoned that counsel performed adequately in selecting the quantity and quality of evidence of substance use to present to the jury, and that Petitioner failed to show deficient performance by his counsel.

**3. Lack of Gang Membership**

Petitioner alleges trial counsel failed to "fully investigate and present evidence contrasting Burney's lack of gang membership with that of his co-defendants . . . and provid[ing] further support for counsel's argument that Burney had been caught up in events beyond his control." Pet. at 131-32.

Trial counsel presented expert testimony at the penalty phase that Petitioner:

> has an enormous need for attention and affection and this was part of why he became affiliated, a follower, of these guys in gangs, because he wasn't getting that elsewhere. . . .
>
> My understanding from everything that I read was that he was not a member, as such, of the BGD'S, of the gangs here; that he was a person who was, quote, affiliated or friendly with the gang members, and someone, basically, who wanted that status for acceptance, for protection, for friendship, a sense of belonging.
>
> My belief is that as a member of minority group [sic] that's represented by only two percent of the population, that to a certain degree he felt marginal culturally. So association with these gang members even though he was not brought up as a gang-oriented person was something that gave him that feeling of association.
>
> And one of the things about followers gang research is that they become subject to being manipulated or pressured by the hard-core members of the gang who are more experienced and often act in a way that's out of character or not typical of the person; and my belief is that that's exactly what happened to Shaun in this case.

10 RT 1860-61, 1863. The California Supreme Court could have found counsel's performance in this regard constitutionally adequate.

**4. Lack of Future Danger**

Petitioner alleges trial counsel should have responded to the prosecutor's argument that Petitioner would be a future danger to guards and other inmates. Pet. at 134. Petitioner alleges counsel should have "explain[ed] Burney's mental state and the circumstances of his post-arrest conduct [by] pointing out, for instance, that the few jailhouse fights in which Burney was involved were instigated by others." *Id.* He faults trial counsel for failing to "present[] an expert like [Daniel] Vasquez," a former warden at San Quentin State Prison, to explain the significance of the evidence trial counsel did present. *Id.* at 134-35 (citing Pet. Ex. 43). Petitioner acknowledges "there was some argument at trial that the few fights in which Burney was involved were reactive fights, not predatory fights," but argues that the issue of future dangerousness is so significant in jurors' deliberations that the failure to present an expert witness was deficient. *Id.* at 135-36.

Trial counsel presented evidence from two deputies at the Orange County Intake-Release Center, the county jail where Petitioner was housed. Deputy Sheriff Steve Parsons testified that he and the other deputies knew Petitioner "as being respectful and easy to work around." 10 RT 1915. Deputy Parsons testified that Petitioner was "very friendly, as far as he gets along with all the other inmates. He's extremely hard working, keeps the mod clean. And I don't have to supervise him too much as far as keeping up on the work and making sure everything looks good. And he stays out of trouble." *Id.*

Deputy Keith Miller, who worked with Petitioner for one year of his housing at the jail, testified that Petitioner was "an ideal inmate; no problems, not a trouble maker, even helps out. . . . He helps out with different chores that need to be done; cleaning, picking up after meals, making sure the floors are clean, small errands here and there." 10 RT 1921; *see also* 10 RT 1919-20. Deputy Miller testified Petitioner once stood up

for another inmate who was being harassed by several others. 10 RT 1921-22. He also testified Petitioner was once the victim of a racially motivated assault, even though Petitioner "was trying to do everything in his power to avoid that." 10 RT 1922-23. Further, Deputy Miller testified he never witnessed any violence Petitioner had provoked. 10 RT 1924.

Trial counsel also presented the testimony of two mental health experts that Petitioner would not pose a danger to others in prison. Dr. Wells testified that he used a Dangerous Behavior Rating Scale and:

> the test results indicated that in the future in terms of a danger to other inmates in a maximum security prison, that it was extremely doubtful that he would be a danger to others; that this particular set of circumstances would not be likely to recur in a maximum security prison. . . . In terms of institutional adjustment records, I think and I have considered these on a number of occasions he seems to have done extremely well. He did have one altercation involving a racial epithet and I think a minor violation or two, but basically his has been a fairly model adjustment; someone who is respected by correctional officers, the deputies; someone who's tried to use his time productively.

10 RT 1864; *see also Burney*, 47 Cal. 4th at 220.

Dr. Vicary testified that Petitioner's defense of another inmate "speaks to his fundamental character" in terms of the way he may behave as a future prisoner. 11 RT 1995; *see also Burney*, 47 Cal. 4th at 222. Dr. Vicary testified that Petitioner "really is an exceptional person for the jail population. He's, quote, 'a nice guy,' unquote, compared to most of the other characters that are at the jail." 11 RT 1996. Dr. Vicary added that although Petitioner attacked an inmate on one early occasion after the inmate reportedly called him a "nigger," Petitioner's "adjustment [to jail] seems to have gotten better and better over time." 11 RT 1993-95.

The California Supreme Court could have reasoned that trial counsel adequately investigated and presented ample evidence of Petitioner's cooperative and helpful conduct in jail and his lack of future dangerousness while incarcerated, and, as a result, that counsel performed competently.

**E. Objections**

The court held in its prior order that the California Supreme Court could have reasonably found harmless the prosecutor's statements concerning Petitioner's codefendants' statements, remarks comparing Petitioner to the codefendants, statement about the "two things" the defense "needs to show," alleged misstatements of the evidence, appeal to the jury to be the conscience of the community, statement about the impetus for the jury's task, and reference to victim impact testimony. Dkt. 127 at 46-50; *see* Pet. at 136-40. The court likewise holds that the California Supreme Court could have reasonably found no reasonable probability of a different outcome at trial had counsel objected to the remarks and moved for a mistrial.

**F. Closing Argument**

In Claim 2C6, Petitioner alleges trial counsel failed to present an adequate penalty phase closing argument. Pet. at 140-42. Petitioner faults counsel for "conceding every harmful fact introduced against Burney," "reminding the jury about what Burney had allegedly done from the point of view of the hostile witness," failing to contextualize and argue evidence that would have explained Petitioner's conduct, "lectur[ing]" on United States history and philosophy rather than arguing Petitioner's own history, and "demonstrat[ing] disdain" for Petitioner by saying that he did not know and did not care whether Petitioner's mother abused him when he was young. *Id.* at 140-42.

Contrary to Petitioner's claim that trial counsel conceded the truth and value of the prosecutor's penalty phase allegations, counsel argued that Petitioner's actions toward Sylvia Carmona and Lee Thomas did not show "substantial injury" and that "if it's aggravating, it's minimal." 11 RT 2054-55. Counsel questioned the credibility of Thomas's account of the events involving Petitioner. *Id.* at 2054, 2103.[6] Counsel

[6] Each of Petitioner's co-counsel delivered closing remarks to the jury. Their remarks are discussed collectively here.

argued that Petitioner acted this way toward no one in his life, except those "two individuals, an intimate part of his life that apparently he did not know how to relate to." *Id.* at 2055. Counsel argued that the prosecutor's evidence regarding the circumstances of the crime rested on the co-defendants' false statements, and that Petitioner was not the driving force behind the crimes. *Id.* at 2055-58, 2060-72.

Counsel also contextualized and argued evidence that explained Petitioner's conduct. Counsel argued that Petitioner's father forced Petitioner and his mother out of the family home when Petitioner was eight years old because Petitioner's father was living with another woman, that Petitioner had struggled with suicidal ideations since approximately nine years old, and that Petitioner's father "was never there for him." *Id.* at 2100-02. Counsel also argued to the jury that when Petitioner's close relationship with his mother was ended by her involvement with Thomas, that was "the final straw" in Petitioner's downfall. *Id.* at 2103. Counsel argued that although it did not excuse Petitioner's actions or give him "immunity from the death penalty . . . , it does tell you something about who it is, about what brings him to the situation on the night that he kills Joey Kondrath where he just says no one [cares] anyway." *Id.* at 2100; *see also id.* at 2102-04.

Counsel emphasized that his arguments were designed to show that "[i]t's not good enough . . . to have lofty ideals and lofty principles unless we apply them . . . . [T]he center of it all is the individual and his importance." *Id.* at 2052-53. Moreover, in context, counsel's argument concerning Petitioner's mother's abuse was intended to show that, regardless, Petitioner's relationship with his mother remained strong and was critical to his well-being. Counsel argued that Petitioner's mother was:

> the one stability in his life. And maybe she does spoil him too much. Maybe she did beat him when he was young. I don't know and I don't care. [¶] But the important thing is what he had was her, or at least maybe that's his perception. And then Lee Thomas comes into his life and all of a sudden, he doesn't have her anymore.

*Id.* at 2103.

In addition, trial counsel attempted to contextualize the victim impact evidence by reminding the jury that the death of any murder victim was tragic, but that Petitioner's crime did not deserve the death penalty. *Id.* at 2059-60, 2091, 2095, 2111-12. Counsel argued that Petitioner was not a "bad, vile person" who "deserves death," but rather a person who had "human feelings" and "human fears." *Id.* at 2072-73. Counsel argued that the death penalty was reserved for the cruelest criminals and the cruelest crimes, and that Petitioner and his crimes were neither. *Id.* at 2074, 2087, 2094-95, 2111. Counsel argued that a sentence of life imprisonment without the possibility of parole was "an incredibly severe punishment," especially given that Petitioner was then twenty years old, and that it was a fitting punishment. *Id.* at 2087-91, 2112. Counsel argued that Petitioner's life was valued by many who loved him and whom he had treated with kindness and consistency. *Id.* at 2107-10, 2112. Counsel argued that Petitioner was not causing trouble in jail, was getting along with other inmates, and was even being helpful. *Id.* at 2096-98. Moreover, counsel argued Petitioner showed remorse for what he had done. *Id.* at 2104-07.

A review of counsel's arguments shows that the California Supreme Court could have reasonably determined that counsel presented an adequate closing argument and, therefore, reasonably denied Petitioner's claim on that basis.

**G. Other Allegations**

**1. Jury Instructions**

Petitioner alleges trial counsel provided ineffective assistance by failing to request the jury instructions listed in Claim 18. Pet. at 142-43.

Petitioner's allegations in Claim 18 show that counsel, in fact, requested the instructions in Claims 18B and 18D through 18L. Pet. at 348-49, 358, 363, 367, 369, 376, 380, 386-87, 392-94. Petitioner did not object to or request to supplement the remaining instruction discussed in Claim 18C. *See* Pet. at 353-57. The court held in its prior merits order on Claim 18C that the given instructions were constitutionally

adequate. Dkt. 127 at 51. The California Supreme Court, thus, could have reasonably found no deficient performance by counsel with respect to Claim 18C or any other jury instruction at issue in Claim 18.

**2. Discovery**

Petitioner alleges trial counsel failed to pursue adequate discovery. Pet. at 143. Petitioner contends adequate discovery would have uncovered "mitigation evidence including, but not limited to: the uncharged incidents; Lee Thomas's military records, prior instances of domestic violence, and alcohol-fueled fights; and the co-defendants [sic] criminal, mental, and social histories." *Id.* Petitioner does not specify the evidence such additional discovery would have uncovered.

To the extent such evidence has been offered in support of other claims in his petition, the court has discussed and rejected those claims. To the extent Petitioner alleges additional discovery would have uncovered other, unspecified evidence, his conclusory allegations do not merit relief. *See Greenway*, 653 F.3d at 804; *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26.

**3. Motion to Modify Verdict**

Finally, Petitioner alleges trial counsel performed deficiently at the automatic motion to modify the verdict. Pet. at 147. Petitioner cites only "the omissions discussed above" in his petition and fails to specify how counsel should have "presented evidence and argument in a more clear, easily digestible, and more effective manner." *Id.* Petitioner's allegations are vague and do not merit relief. *See Greenway*, 653 F.3d at 804 ("[Petitioner's] cursory and vague claim cannot support habeas relief.").

**H. Conclusion**

For the above reasons, the California Supreme Court could have reasoned that Petitioner failed to demonstrate deficient performance or prejudice from any ineffective

assistance of counsel. *See Strickland*, 466 U.S. at 687, 694. Claim 2, therefore, is DENIED.

**X. Claim 25 as to Appellate Counsel**

In the remaining portion of Claim 25 (*see* Dkt. 127 at 57 (denying Claim 25 as to state habeas counsel)), Petitioner alleges his appellate counsel provided ineffective assistance. Pet. at 436-40. To establish ineffective assistance of appellate counsel, a petitioner must show that "a particular nonfrivolous issue was clearly stronger than issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). If the unpresented issue is not clearly stronger, a petitioner cannot show prejudice from any deficient performance by appellate counsel, because there would be no reasonable probability of a more favorable appellate outcome. *See id.* at 288-89, 289 n.16.

Here, Petitioner alleges appellate counsel "failed to enumerate, assert, and argue numerous . . . federal constitutional . . . issues that were readily apparent on the face of the record," i.e., Claims 1, 2, 3, and 9, pleaded here. Pet. at 438-39. Petitioner further alleges appellate counsel failed to obtain all relevant court records, including the sealed transcript of an in-camera hearing on May 10, 1994, on which Petitioner relies in Claim 1. *Id.* at 438. The court has held, as to Claim 1, that it would be reasonable to conclude that the in-camera hearing showed trial counsel's conduct to be strategic and adequate. *See supra* § VIII.B; *see also* Dkt. 127 at 8; Pet. Ex. 44 ¶ 10 ("[Petitioner] told us that he, not Rembert, had pulled the trigger. On May 10, 1994, we went in camera with the court and informed the judge that we would no longer be pursuing the defense that Rembert had been the shooter."); Dkt. 104-98 (10 RT 1738-42).

Accordingly, the California Supreme Court could have found: no prejudice from any alleged deficient performance by appellate counsel in failing to obtain the in camera hearing transcript;[7] no reasonable probability of a different appellate outcome

[7] The California Supreme Court likewise could have found no reasonable probability of a different outcome on direct appeal had appellate counsel obtained the transcript,

had appellate counsel raised Claims 1, 2, 3, and 9; and no claim that was clearly stronger than those raised on appeal, for the same reasons the California Supreme Court could have denied the same claims on their merits. *See supra* (Claims 1 and 2); Dkt. 127 at 14-15 (Claim 3), 24-26 (Claim 9).

Claim 25 as to appellate counsel, therefore, is DENIED.

## XI. Claims 15, 26, 2D5, and 2D6

### A. Allegations

In Claim 15, Petitioner alleges his constitutional rights were violated because "the numerous guilt phase errors previously discussed in this Petition rendered the penalty determination unreliable . . . ." Pet. at 315.

In Claim 2D5, Petitioner alleges more narrowly that because he was not severed from his codefendants for trial, "prejudicial evidence and argument introduced by the prosecutor against the co-defendants [at the guilt phase] spilled over into the penalty phase as well." *Id.* at 144. Petitioner alleges he suffered prejudice at the penalty phase from trial counsel's failure to obtain a severance and to object "when the prosecutor urged the jury to consider all the facts and circumstances of the case." *Id.* at 145.

In Claim 2D6, Petitioner alleges the cumulative errors by trial counsel at the guilt and penalty phases deprived him of a fair trial. *Id.* at 145-46.

In Claim 26, Petitioner alleges more broadly that the cumulative effect of all errors at the guilt and penalty phases of trial violates due process. *Id.* at 440-43.

### B. Analysis

As to the implications of the guilt phase evidence at the penalty phase, the circumstances of the crime are a proper factor for the jury's penalty consideration. *Tuilaepa v. California*, 512 U.S. 967, 976 (1994) ("[O]ur capital jurisprudence has

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because "in California, IAC claims, except in rare instances, are to be raised on habeas corpus, not on direct appeal." *Visciotti v. Martel*, 862 F.3d 749, 768 n.10 (9th Cir. 2016) (internal quotation and alteration omitted). The same reasoning applies to appellate counsel's lack of presentation of Claims 1 and 2 more generally.

established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. . . . The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence."). The court has rejected Petitioner's claims based on the lack of a severance from his codefendants at trial. *See supra* § VI.B; Dkt. 127 at 18-21. The California Supreme Court could have reasonably determined that the jury's consideration at the penalty phase of the admitted evidence did not deny him a fair trial.

As to Petitioner's allegations of cumulative error, the court must first consider any instances of ineffective assistance of counsel cumulatively. "While an individual claiming IAC 'must 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, the court considers counsel's conduct *as a whole* to determine whether it was constitutionally adequate." *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017) (emphasis in original) (internal citation edited); *see also Woods v. Sinclair*, 764 F.3d 1109, 1139 (9th Cir. 2014) (considering "cumulative impact of [petitioner's] counsel's deficiencies"); *Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir. 2004) ("As our discussion of the ineffective assistance claims illustrates, [petitioner] has not demonstrated prejudice as to the individual claims, and the nature of the claims does not support a conclusion of cumulative prejudice.").

The court finds no prejudice from any ineffective assistance of counsel, considered cumulatively. *See, e.g.*, *supra* § VI.B (challenging prosecution's introduction of evidence regarding co-defendants' involvement and motive); §§ VI.C, IX.B.1 (consulting with experts regarding conditions of crime scene and blood on shoes); §§ VIII.C, IX.E (objecting and moving for mistrial following prosecutor's arguments to the jury); § VIII.D (objecting to alleged judicial misconduct); § VIII.E (arguing for severance).

The court must also consider any prosecutorial misconduct cumulatively. *See Hein v. Sullivan*, 601 F.3d 897, 915 (9th Cir. 2010) ("[W]e first analyze the prosecutorial misconduct challenges to assess whether they alone so infected the trial with unfairness as to make the resulting conviction a denial of due process. If the prosecution's comments alone do not meet this standard, we analyze them together with the non-disclosure" for materiality); *cf. Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam) (*Brady* evidence is material "when there is any reasonable likelihood it could have affected the judgment of the jury") (internal quotations omitted). The court finds that the alleged prosecutorial misconduct did not so infect the trial with unfairness as to make the resulting conviction a denial of due process and that there is no reasonable likelihood that the alleged misconduct could have affected the judgment of the jury. *See, e.g.*, *supra* § VI.B (introducing evidence regarding co-defendants' involvement and motive); § VII.B.2 (presenting evidence to the grand jury); Dkt. 127 § XI (making improper arguments to the jury).

Beyond the cumulative effect of any ineffective assistance of counsel and prosecutorial misconduct, "prejudice may result from the cumulative impact of multiple deficiencies." *Harris*, 64 F.3d at 1438-39. "[W]here the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. This is simply the logical corollary of the harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (internal citation and quotation omitted); *United States v. Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983) (holding that when examining "the cumulative effect of several errors[, . . .] [w]hether the alleged errors prejudiced the [defendants'] rights to a fair trial depends in turn upon the strength of the Government's cases against them; the stronger the prosecution's case, the less likely that a defendant would be prejudiced by error or misconduct."). "[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial, 'for there are no perfect trials.'" *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (rejecting cumulative error claim

based upon trial court errors) (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

Here, Petitioner fails to show that prejudice resulted from the cumulative impact of the alleged multiple deficiencies. Any trial court errors, considered cumulatively with any ineffective assistance of counsel and prosecutorial misconduct, were constitutionally harmless in light of the evidence presented. *See, e.g.*, Dkt. 127 § III (denial of severance and admission of codefendants' statements); Dkt. 127 §§ IV.C and V (comments during voir dire and trial); *cf. Burney*, 47 Cal. 4th at 213-20 (setting forth prosecution guilt and penalty phase evidence presented at trial), 232-36 (discussing evidence presented at trial when considering harmlessness of admission of co-defendants' statements).

Claims 15, 26, 2D5, and 2D6, therefore, are DENIED.

**ORDER**

Petitioner's remaining claims – Claims 1, 2, 4, 5, 8D ¶¶ 25-32, 11, 15, 21-23, 25 as to appellate counsel, and 26 – are DENIED. The Petition for Writ of Habeas Corpus is DENIED.

**CERTIFICATE OF APPEALABILITY**

Rule 11(a) of the Rules Governing Section 2254 Cases and Section 2255 Proceedings ("Rule 11(a)") requires the court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant" and to "state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)" if issuing a certificate. Rule 11(a). The court may issue a certificate where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner "must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) (internal quotation and alteration omitted).

The court finds the standard met as to Claim 9, alleging that the judge's remarks denied him a fair trial. *See* Pet. at 244-51; Dkt. 127 at 24-26. While "Petitioner does not present authority to show that a judge's racist remarks, not directed toward the defendant or the defense case, can deprive the defendant of a fair trial" (Dkt. 127 at 26), or that a jocular remark about lynching during a capital trial can do so, the issues deserve encouragement to proceed further. The court GRANTS a certificate of appealability on Claim 9. The court DENIES a certificate of appealability on all other claims, including those denied in the court's prior merits order. Dkt. 127.

The court concludes it is able to rule on the certificate without additional briefing; thus, it will not permit Petitioner to file a motion to expand the certificate. *See* Rule 11(a) ("Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.") (emphasis added); Judicial Council of the Ninth Circuit, Criminal Justice Act Policies and Procedures § IV(D)(8) ("Briefing on entitlement to a COA should be authorized only if a court concludes that it cannot rule without additional argument from the parties.").

IT IS SO ORDERED.

Dated: February 8, 2022

FERNANDO L. AENLLE-ROCHA
United States District Judge

S190968

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

SUPREME COURT
FILED
AUG 17 2016
Frank A. McGuire Clerk
Deputy

In re SHAUN KAREEM BURNEY on Habeas Corpus

The petition for writ of habeas corpus, filed February 28, 2011, is denied.

To the extent it is presented as a claim for habeas corpus relief, Claim Fourteen is denied as noncognizable. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Lindley* (1947) 29 Cal.2d 709; see also *In re Reno* (2012) 55 Cal.4th 428, 443, 505 506 (*Reno*).)

Claims Three, Fifteen, Twenty, Twenty-Four, Twenty-Five (insofar as it alleges ineffective assistance of prior habeas corpus counsel), Twenty-Six, and Twenty-Seven are denied on the merits.

Except for Claims Three, Fifteen, Twenty, Twenty-Four, Twenty-Five (insofar as it alleges ineffective assistance of prior habeas corpus counsel), Twenty-Six, and Twenty-Seven, all claims are procedurally barred as untimely under In re Robbins (1998) 18 Cal.4th 770, 780-781. (See also *Reno, supra,* 55 Cal.4th at pp. 443, 459 476.)

With respect to Claims Six, Seven, Eight, Ten, Twelve, Thirteen, Fourteen, and Sixteen through Nineteen, except to the extent they allege ineffective assistance of counsel, they are procedurally barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225, insofar as they were raised and rejected on appeal. (See also *Reno, supra,* 55 Cal.4th at pp. 443, 476-490.)

With respect to Claims Eight, Nine, Fourteen, and Seventeen, except to the extent they allege ineffective assistance of counsel, they are procedurally barred under *In re Dixon* (1953) 41 Cal.2d 756, 759, insofar as they could and should have been raised on appeal but were not. (See also *Reno, supra*, 55 Cal.4th at pp. 443, 490-496.)

With respect to Claims One, Two, Four, Five, Seven, Eight, Nine, Eleven, Seventeen, Twenty-One, Twenty-Two, Twenty-Three, and Twenty Five, they are procedurally barred under *In re Miller* (1941) 17 Cal.2d 734, 735, insofar as they were raised and rejected in petitioner's prior habeas corpus petition. (See also *Reno, supra,* 55 Cal.4th at pp. 443, 496-501.)

With respect to Claims One, Two, Four, Nine, and Fourteen, they are procedurally barred under *In re Clark* (1993) 5 Cal.4th 750, 767-769, insofar as they could and should have been raised in petitioner's prior habeas corpus petition but were not. (See also *Reno, supra*, 55 Cal.4th at pp. 443, 501 505.)

With respect to Claims Four, Five, Eight, Eleven, Twenty-One, and Twenty Two, except to the extent they allege ineffective assistance of counsel, they are procedurally barred under *In re Seaton* (2004) 34 Cal.4th 193, 201, insofar as they could and should have been raised in the trial court but were not. Justice Werdegar would not apply the *Seaton* bar to any of these claims.

CANTIL-SAKAUYE

*Chief Justice*

SUPREME COURT
FILED
DEC 17 2009
Frederick K. Ohlrich Clerk
Deputy

S133439

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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In re SHAUN KAREEM BURNEY on Habeas Corpus.

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The petition for writ of habeas corpus is DENIED.

All claims are denied on the merits, except for claim XXIV, which is denied as premature without prejudice to renewal after an execution date is set.

Except to the extent that they allege ineffective assistance of counsel, Claims VI, VIII, and X also are barred insofar as they could have been, but were not, raised in the trial court. (*In re Seaton* (2004) 34 Cal.4th 193, 197-200.)

Claim X, to the extent it alleges the trial court erred by failing to grant sequestered voir dire, also is barred insofar as this issue was raised and rejected on appeal. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.) Claim X, to the extent it alleges the trial court erred by informing the jury that the death penalty is a punishment more severe than life in prison without parole, also is barred insofar as it could have been, but was not, raised on appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759.)

Claims VI, X, XI, XIV also are barred insofar as they could have been, but were not, raised in the trial court. (*In re Seaton, supra*, 34 Cal.4th at pp. 197-200.)

Claims XII and XIII also are barred insofar as they could have been, but were not, raised on appeal. (*In re Dixon, supra*, 41 Cal.2d at p. 759.) In addition, Claim XII, to the extent it alleges that the prosecutor committed misconduct by (1) stating that petitioner showed no remorse and had squandered life opportunities, (2) citing to the testimony of the victim's father in closing argument, (3) telling the jury not to consider petitioner's age as a mitigating factor, and (4) telling the jury that petitioner would present a danger to prisoners and guards if he were to be sentenced to life imprisonment without possibility of parole, also is barred insofar as the issues presented in this claim were raised and rejected on appeal. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Claim XV (except to the extent it alleges ineffective assistance of counsel), and Claims XVI and XXII also are barred insofar as the issues presented in these claims were raised and rejected on appeal. (*In re Waltreus, supra*, 62 Cal.2d at p. 225.)

Werdegar, J., would not apply the bar of *In re Seaton, supra*, 34 Cal.4th at pp. 197-200, to Claims VI, VIII, X, XI, and XIV.

GEORGE
Chief Justice

CAPITAL CASE

Date Filed:
SAN DIEGO DOCKETING
AUG 5 2009
No. SD199KS0008
BY NOEMI ABUNDEZ

SUPREME COURT
FILED
JUL 30 2009
Frederick K. Ohlrich Clerk
Deputy

COPY

# IN THE SUPREME COURT OF CALIFORNIA

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SHAUN KAREEM BURNEY,<br><br>Defendant and Appellant. | S042323<br><br>Orange County<br>Super. Ct. No. C-94692 |

A jury convicted defendant Shaun Kareem Burney of second degree robbery (Pen. Code, §§ 211, 212.5, 213, subd. (a)(2)),[1] kidnapping (§ 207, subd. (a)), kidnapping for purposes of robbery (§ 209, subd. (b)), and the first degree murder of Joseph Kondrath (§ 187). Allegations of robbery-murder and kidnapping-murder special circumstances (§ 190.2, subd. (a)(17)(A), (a)(17)(B)) were found true, and defendant was found to have personally used a deadly weapon (a firearm) in the commission of the murder. (§ 12022.5.) Following the penalty phase of the trial, a jury returned a verdict of death against defendant. The trial court denied the automatic motion to modify the penalty (§ 190.4, subd. (e)) and imposed a sentence of death. Defendant's appeal is automatic. (§ 1239, subd. (b).) We affirm the judgment in its entirety.

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

## I.

## PROCEDURAL HISTORY

In late July 1992, the Orange County grand jury returned an indictment against defendant and two codefendants, charging them each with second degree robbery (count I), kidnapping (count II), kidnapping for purposes of robbery (count III), and first degree murder (count IV). The indictment alleged against all three defendants the special circumstances of murder in the commission of a robbery and murder in the commission of a kidnapping. As to defendant, the indictment alleged as to all counts the personal use of a firearm, but shortly after the commencement of the guilt phase of the trial, the trial court granted the prosecution's motion to dismiss the firearm-use allegations against defendant in counts I, II, and III. As to the two codefendants, the indictment alleged they were vicariously armed with a firearm.

The three defendants were tried jointly in a jury trial that began in April 1994. The death penalty was sought only against defendant. The jury found him guilty of the four counts charged against him, found that the murder was of the first degree, found the two special circumstance allegations true, and found true the allegation that defendant personally used a firearm in the commission of the murder.[2] At the penalty phase of defendant's trial, the jury determined that defendant's punishment should be death.

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[2] The jury found codefendant Allen Dean Burnett II (Burnett) guilty of the four counts charged against him, found that the murder was of the first degree, found the two special circumstance allegations true, and found true the allegation that Burnett was armed with a firearm in the commission of the murder. The jury was unable to reach a verdict on the robbery and murder counts and the special circumstances as to codefendant Scott Boxer Rembert (Rembert), and the court declared a mistrial as to those counts. The jury found Rembert guilty of the kidnapping and kidnapping for robbery charges. The record does not reveal the

*(footnote continued on next page)*

## II.

## FACTS

### A. Introduction

In the early morning hours of June 10, 1992, defendant and his two codefendants, Burnett and Rembert, left their apartment intending to find and assault Ron Hussar, and to steal Hussar's car stereo. When Hussar could not be found, the three men decided to steal an automobile and then drive to an area where members of a rival gang resided, so they could shoot at them. The three men observed the victim, Joseph Kondrath, entering his automobile in a carport adjacent to Kondrath's apartment building. At gunpoint, they forced Kondrath out of the vehicle, robbed him of his wallet, and forced him into the trunk of his automobile.

The three men drove to the residence of Jeffrey Howard, from whom they borrowed a shotgun. They drove to an area where rival gang members resided, but did not observe any gang members. The group then drove to, and fired gunshots into, an apartment belonging to Cynthia Melson, Burnett's former girlfriend, and thereafter returned the shotgun to Howard.

The three men discussed the need to kill Kondrath because he had seen their faces and could identify them. They drove to Crescent Avenue in Anaheim and stopped the automobile. Defendant opened the trunk of the vehicle and fired one shot, which fatally struck Kondrath in the head. The men then fled the scene.

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*(footnote continued from previous page)*

outcome of Rembert's retrial, but the Attorney General states in his briefing that "[u]pon a third jury trial, Rembert was convicted of first degree murder with true findings of special circumstances." Both Burnett and Rembert ultimately were sentenced to life in prison without the possibility of parole.

The next day, defendant informed Jeannette Roper, Rembert's girlfriend, that he had shot the victim. During a videotaped police interrogation several days later, defendant confessed that he had kidnapped and murdered Kondrath. Both Rembert and Burnett gave statements to the police, confirming that the three men discussed killing the victim because he had seen their faces, and that defendant shot Kondrath while the victim lay in the trunk.

**B. Guilt Phase Evidence**

*1. The prosecution*

Defendant was arrested on June 16, 1992, subsequently waiving his rights under *Miranda v. Arizona* (1966) 385 U.S. 436, and consenting to an audiotaped and videotaped interview with Detective Georgia Erickson and Detective Paul Gallagher. A transcript of the interview was read to the jury. The interview was redacted to eliminate references to the codefendants by name, replacing each occurrence of the codefendants' names with the word "other" or "others."[3]

During the course of the interview with Detectives Erickson and Gallagher, defendant offered numerous and sometimes contradictory versions of the events that took place on the night of Kondrath's murder. Defendant initially stated he had no information regarding a murder beyond knowing that a body had been found near the residence of his friend David Wilson, but defendant did not dispute the statement of one of the detectives that defendant had been "going around town telling people that [he] did it." Defendant stated that on the night of Kondrath's

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[3] Transcripts of police interviews with both of defendant's codefendants also were read to the jury. The statements are described in detail in connection with defendant's claim that the trial court erred in failing to sever his trial from that of his codefendants. The court instructed the jury that the statement of each defendant was to be considered only as to that particular defendant.

murder, he and his two companions departed from an apartment where he had resided "on and off." The three men were angry at an acquaintance named Ron Hussar because Hussar had refused to take David Wilson to the hospital when Wilson accidentally shot himself in the foot. In retaliation, they planned to steal Hussar's car stereo and to assault Hussar. All three men donned latex gloves upon leaving the apartment in order to avoid leaving fingerprints when stealing Hussar's stereo. When they arrived at Hussar's residence, neither Hussar nor his automobile was present. The three men were exploring Hussar's neighborhood, still wearing the latex gloves, when they encountered Kondrath.

In his statement to the police, defendant stated that his companions suggested that he take the victim's automobile and, although defendant initially was hesitant, he joined his two companions in "rushing" the victim. According to this version of the events, defendant took the victim's keys, but after he and the others entered the vehicle, defendant asked to be dropped off at the apartment where he had been residing. When the two men returned to that apartment some time later, they informed defendant they had parked the vehicle at an undisclosed location.

After further police questioning, defendant admitted he had not been dropped off but had stayed with his two companions. Defendant stated that his companions placed the victim in the trunk without defendant's knowledge or participation, although ultimately he admitted actively participating in forcing the victim from his vehicle and into the trunk at gunpoint. Initially, defendant denied that the trio had used a firearm to take the automobile from the victim. Defendant subsequently admitted that before the three men approached the victim, defendant handed the firearm to one of his companions. Defendant explained that the robbery had commenced when, after observing the victim enter his vehicle, defendant approached the driver's side window and asked the victim the time.

Prior to approaching the victim, defendant and the others discussed "jacking" the victim — which he explained to officers meant robbing him. When the victim rolled down the window of his automobile to respond to defendant's query about the time, defendant's companion forced the victim from his vehicle at gunpoint. The victim requested that defendant take the automobile but not hurt him. One of defendant's companions asked Kondrath for his wallet, which the victim handed to him, after which defendant and his companions placed Kondrath in the trunk.

According to defendant's statement, defendant drove away, with the victim in the trunk. Sometime later, one of his companions stated to the group that, because the victim had observed them, it was necessary to kill him. One of defendant's companions said something about a credit card and then threw an object out of the window.

Defendant gave conflicting accounts concerning why the trio next went to the residence of Jeffrey Howard. Initially, he informed the detectives that the three men drove there because Howard had paged defendant. Later, defendant stated that he drove to Howard's residence because one of his companions directed him to do so. Defendant stated that while he remained in the vehicle, one of his companions went upstairs to Howard's apartment and returned with a shotgun.

Defendant and the others then drove to the neighborhood where they believed Watergate Crips gang members resided. As they were driving, one of defendant's companions asked the victim whether he could hear them, and after the victim answered that he could, the victim was told to "shut up." Defendant then made a U-turn; the two other men exited from the automobile, and one of them fired the shotgun several times into the air. Defendant and his cohorts returned to Howard's residence to return the shotgun. At that location, defendant removed the latex gloves he had been wearing, because they were torn. To avoid

leaving fingerprints, he placed socks on his hands. His two companions kept their latex gloves on.

During the police interview, defendant initially denied having shot the victim and claimed he had informed others he had shot the victim "[j]ust to seem like a bad ass." Eventually, however, defendant admitted that he himself had shot and killed the victim, allegedly at the instigation of his companions. Defendant's companions informed defendant repeatedly that the victim had to be killed because he had seen the men and would be able to identify them, and one of them threatened to "blast" the victim. Defendant stated that at first, he merely opened and then shut the trunk. When defendant opened the trunk again, the victim said, "don't hurt me." One of defendant's companions handed defendant a firearm and again directed him to kill the victim. Defendant did not hand the firearm back to his companion, who was drunk, because defendant feared being accidentally hit by gunfire if his companion were to attempt to shoot the victim. Instead, because he did not want to look at the victim's face, he shot him without taking aim. Defendant expressed remorse for having taken the victim's life, and stated that at the time he fired into the trunk, he did not intend to kill Kondrath and did not believe he had hit him with the shot.

After shooting Kondrath, defendant handed the gun back to one of his companions and ran away, meeting them and another man, Dwight Chandler, at the apartment where defendant had been staying. According to defendant's statement, on the night of the murder defendant did not ingest drugs and consumed only one 12-ounce can of beer. The next day, when defendant inquired concerning the whereabouts of the murder weapon, he was told it was gone.

Later, defendant informed his girlfriend Summer and his friend Dwight Chandler about his participation in Kondrath's murder.[4]

Huntington Park Police Officer Joseph Settles testified that on June 10, 1992, he was employed as a civilian traffic enforcer for the Anaheim Police Department. At approximately 8:00 p.m. that day, he observed a white Volkswagen Jetta illegally parked in front of no-parking signs on Crescent Avenue. Settles issued a citation, and then opened an unlocked door to look inside the vehicle. Although he observed nothing unusual inside the automobile, outside he noticed a dark puddle caused by something dripping from the trunk beneath the right rear tire. After Settles called for additional police assistance, officers arrived and pried open the trunk, where they found the body of a White male, later identified as Joseph Kondrath.

David Schindler, who resided on Crescent Avenue, testified that at approximately 5:00 a.m. on June 10, 1992, he was in his garage when he heard a loud noise. Schindler was uncertain whether what he heard was a gunshot, or had come from an automobile or a firecracker. The area was poorly illuminated. Schindler looked outside and saw two Black or Hispanic individuals, whom he could not identify, in the vicinity of a white automobile approximately 50 to 100 yards from his garage. This vehicle was parked in a no-parking zone in an industrial area containing empty and abandoned buildings. As Schindler watched, the two individuals fled by jumping a fence and running to a drainage ditch or culvert. Later, Schindler approached the vehicle but observed nothing unusual. He did not call the police.

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4 Dwight Chandler had died by the time of trial.

William Townsend testified that at approximately 6:00 a.m. on June 10, 1992, he discovered a wallet lying in the street on Manchester Avenue in Anaheim approximately one mile from Crescent Avenue. The wallet contained Joseph Kondrath's personal papers, family photographs, and one dollar. Townsend turned the wallet over to the police later that day.

Dr. Masamichi Katsuyama conducted an autopsy on Kondrath's body. He testified there was a gunshot entrance wound on the left side of the back of Kondrath's head. There was discoloration to the back of the right hand, indicating that the weapon had been fired relatively close to the skin. A badly deformed bullet, having characteristics consistent with a .357-caliber bullet, was recovered near the midline of Kondrath's head. There were no other traumas or injuries to the victim's body. The cause of death was loss of blood from the gunshot wound to the head.

Anaheim police Detective James Conley examined Kondrath's Jetta after his body was found. Latent fingerprints lifted from the automobile were identified as Kondrath's. A spent shotgun shell and shotgun casing were found on the right rear floorboard. A torn piece of latex was found between the right front passenger seat and the car door. Kondrath's Visa credit card was found in the same location. Mud debris was found on the floorboard between the front seats, and on a T-shirt, brace, and towel located on the right rear seat.

Detective Georgia Erickson testified that she interviewed Jeffrey Howard approximately one week after Kondrath was murdered. Howard informed Detective Erickson that codefendant Burnett arrived at Howard's residence early in the morning June 10, 1992, and asked to borrow a shotgun and shotgun shells. Burnett told Howard that he had a person confined in the trunk of his automobile. Howard informed Detective Erickson that Burnett returned the shotgun later that morning, and that he saw defendant behind the wheel of the automobile when

Howard accompanied Burnett to the first floor of his residence. Burnett told Howard he wanted the shotgun in order to shoot at a rival gang.

Jeffrey Howard testified that on June 10, 1992, he resided at 326 South Claudina Street in Anaheim. Between midnight and 2:00 a.m. that morning, codefendants Rembert and Burnett came to his residence and awakened him. Rembert was armed with a Derringer pistol that Howard previously had seen in Rembert's possession. Burnett asked Howard for a 12-gauge shotgun, which Howard gave him. During his testimony, Howard could not recall whether Burnett had explained why he wanted the shotgun. Howard testified that in addition to the shotgun, Howard gave Burnett red shotgun shells, loaded the shotgun with three shells, and gave Rembert a "handful" of bullets for the Derringer pistol. According to Howard, approximately one hour later Burnett returned the shotgun. Howard placed that weapon under his bed and went back to sleep, testifying he did not check the shotgun to determine whether it had been fired. Howard did not recall whether he informed Detective Erickson that Rembert and Burnett had said that someone was confined in the trunk of the automobile, that he had gone downstairs with Burnett, that he had stated to the detective that defendant was driving, or that Burnett had told him he intended to shoot at rival gang members. Howard denied ever carrying the Derringer pistol. He acknowledged that in his interview with the police, he had not mentioned that Rembert accompanied Burnett when Burnett arrived to borrow the shotgun. Howard testified that he did not observe defendant when the codefendants arrived at his apartment for the first time, and that the street below his apartment was not visible from the second story.

Howard further testified that on June 11, 1992, he returned the shotgun to Ryan Leuta, who owned the gun and occasionally lent it to others. Howard denied

ever having possession of the Derringer pistol. He gave the remainder of the shotgun shells and bullets in his possession to Detective Erickson.

Detective Conley testified that a shotgun and a .357-caliber Derringer pistol were recovered from the residence of Ryan Leuta on June 16, 1992. Criminalist Dennis Fuller testified that in his opinion, the shell casing found on the rear floorboard of the victim's automobile had been fired from the shotgun recovered from Leuta's residence.

Jeffrey Howard's mother-in-law, Deborah Cook, testified that she resided with her daughter, Lakesha Howard, and Jeffrey Howard at the Howards' apartment. On June 10, 1992, at approximately 4:00 a.m., she was awakened by a knock on the front door. She answered the door and a male, who may have been codefendant Burnett, asked for Jeffrey. About an hour later, the same person returned and asked for Jeff. Cook denied having informed Detective Erickson that three persons approached the door on both occasions on June 10. Cook was not acquainted with defendant.

Cynthia Melson testified that on June 10, 1992, she resided in an apartment located on Pine Street in Westminster. Melson's roommate, Marcia, and Melson's mother, Marjorie, also were present in the apartment on the morning of June 10. Melson was codefendant Burnett's ex-girlfriend, and Burnett and Rembert previously had resided at the Pine Street apartment with Melson. Melson had been acquainted with Burnett for approximately three years, but had ended their relationship approximately six months previously because they did not get along. Melson testified that at approximately 4:42 a.m., five or six shots were fired at her apartment. After the shots were fired, Melson heard her former boyfriend Burnett yell "fuck you." The shots damaged Melson's front door, the upstairs bedroom window, the downstairs kitchen window, and a wall in Marcia's bedroom. A bullet missed Marcia's head by six inches. Melson later discovered red shotgun

cartridges on a patio by the front door of her residence. Melson was not acquainted with defendant and had not seen him prior to the trial.

Westminster Police Officer Cotrell testified that he recovered expended shotgun shell casings and wadding from inside the Melson residence after the shooting. Shotgun shell casings discovered at that location were from the same type of cartridge as the casings recovered from Kondrath's automobile. Criminalist Fuller opined that the shotgun shell casings found at the Melson residence and in the victim's automobile had been fired from the same shotgun. As Fuller explained, shotgun wadding protects pellets inside the shotgun and is expelled from the barrel of a shotgun. Fulton testified that wadding recovered from Melson's residence was made by the same manufacturer that produced the shotgun shells admitted in evidence. A copper slug and jacket found at the Melson apartment were consistent with a jacketed hollow-point bullet and had been fired from the Derringer pistol. The projectile recovered from the victim's head was a jacketed hollow-point .357- or .38-caliber bullet with markings consistent with having been fired from the top barrel of the Derringer. Based on test firing of the Derringer, Fuller concluded that the weapon was fired at close range.

Rembert's ex-girlfriend Jeannette Roper testified that on the morning of June 10, 1992, she was awakened by a phone call from Rembert. Rembert instructed her that if anyone were to inquire concerning his whereabouts the preceding night, she was to say he had spent that night with her. Later that day, Roper went to Rembert and Burnett's apartment, where she saw defendant. She testified that defendant informed her he had walked up to an automobile and asked the male driver for the time, but then pointed a firearm at him and ordered him to get out of the vehicle. Defendant told her he shot the driver, and that it was his seventh murder. Detective Erickson testified that she spoke to Roper on June 15.

Roper informed her that defendant stated he had shot a man in the head and then placed him in the trunk of the man's automobile. Erickson testified that Roper stated defendant and his codefendants initially had planned to, but ultimately did not, steal the victim's car stereo.

*2. The defense*

Defendant did not testify or present any other evidence in his defense. During opening and closing arguments, defense counsel contended that defendant was not guilty of murder under a felony-murder theory, because the robbery and kidnapping of Kondrath ended before the homicide took place. Counsel also asserted that defendant was guilty of only second degree murder, because Kondrath's murder was not deliberate and premeditated.

Codefendant Burnett did not testify, but presented evidence indicating that he was a chronic alcoholic and was intoxicated on the night of the murder.

Codefendant Rembert also did not testify. He presented the testimony of a psychologist who had conducted testing on Rembert. The psychologist concluded Rembert had a submissive personality and was "likely to go along with the crowd." She testified he was dependent on alcohol, abused drugs, suffered from depression, and had been diagnosed with adult antisocial behavior. She opined that Rembert "may not really have comprehended what was going on in a timely manner to make the kind of decision that he could have made." The psychologist acknowledged that Rembert previously had been arrested for assaulting a girlfriend and had pleaded guilty to assault in another case, but she nonetheless stated she did not believe Rembert had assaultive or aggressive tendencies.

**C. Penalty Phase Evidence**

*1. The prosecution*

The prosecution presented evidence regarding uncharged acts of violence, including multiple occasions on which defendant assaulted his former girlfriend and one occasion on which he assaulted his stepfather. Sylvia Carmona, who dated defendant for several years starting when she was 15 years of age and defendant was 16 years of age, testified that on one occasion, defendant locked her inside his residence and then hit her with his hand, causing a black eye for which she sought treatment at a hospital. Carmona admitted that she had thrown an iron at defendant prior to this assault, and that she "put [defendant] down all the time." Carmona testified that on another occasion, defendant choked her, and that on a third occasion, defendant pulled her hair, causing her to fall to the ground.

Lee Thomas, defendant's stepfather, testified regarding defendant's violent conduct toward him. In May 1992, Thomas was residing in an apartment with defendant and his mother Ernestine Burney Thomas. Defendant was upset concerning a comment made by Thomas and confronted him outside the apartment. After a verbal exchange, defendant struck Thomas on the side of his face. After a further heated verbal exchange between defendant, Thomas, and Ernestine, defendant lunged at Thomas with a knife. Thomas testified that defendant hit Thomas either with the back of his hand holding the knife, or with the blunt part of the knife, but did not cut Thomas. At this point, Thomas picked up a large rock and warned defendant to depart. When Thomas went upstairs, defendant slashed the tires and the seat of Thomas's automobile with the knife. When the police arrived, defendant informed them the argument began because Thomas had made a comment about women with large buttocks and breasts, and stated he made a stabbing motion at Thomas and would have killed him had Ernestine not stepped in between them. He also informed the police that Thomas

had hit him on a prior occasion, knocking him down. The police arrested defendant for assault, but the charges were dismissed.

Kondrath's parents, his fiancée, and one of his sisters testified concerning the impact of the murder upon them, the good and peaceful nature of the victim, and how much the victim's friends and family missed him.

*2. The defense*

Forensic psychologist Dr. Stephen Wells interviewed defendant and testified on his behalf. Dr. Wells opined that defendant, 18 years of age at the time of the murder, was a child in terms of intellectual development and social maturity. Wells believed defendant did not intend to kill the victim until he was influenced to do so by codefendant Rembert. Defendant was experiencing the symptoms of a manic-depressive mental disorder at the time of the murder. Defendant was a "follower" rather than a "leader." According to Wells, defendant expressed remorse for the murder and would not pose a danger to others in prison.

Wells determined that a series of traumatic events in defendant's life profoundly had affected his emotional functioning. When defendant was eight years of age, his mother took him to the out-of-town funeral of her father. When they returned, defendant's father, David Burney, had changed the locks on the door of the family residence, where he was residing with another woman. Defendant and his mother stayed in motels and with friends for the next six months. At the time, defendant spoke of committing suicide and was taken to a psychologist. Defendant eventually reestablished contact with his father and, when he was 14 years of age, visited him in North Carolina at Christmas. Defendant remained in that state, residing with his father for a while but, after a disagreement, was ejected from his father's home and resided with his aunt for the remainder of the school year.

Wells further testified that when defendant was 18 years of age, his mother Ernestine married Lee Thomas. Defendant did not get along with Thomas, who physically abused Ernestine on many occasions, and defendant felt powerless to prevent this abuse. Wells also described the circumstances of defendant's assault on Thomas. At the time of trial, Ernestine no longer was residing with Thomas, but instead with defendant's father, David Burney. According to Wells, David Burney, who had had no contact with defendant since ejecting him from his home in 1988, refused to testify on defendant's behalf in the present proceedings.

David Burney's sister, Brenda Burney, testified that David was dishonest and unreliable, and had not been a good father to defendant.

Rogelio Onofre testified that after being released from jail following the assault on Thomas, defendant resided with Onofre, a friend of his since grade school, and Onofre's mother, Maria Gomez. Defendant wanted to reside with his mother, but could not do so because his release from police custody was conditioned on defendant having no further contact with her husband, Thomas. Defendant was deeply upset when, six days before the murder, Onofre's young niece accidentally drowned in a Jacuzzi. Onofre testified that his mother asked defendant to leave her residence because she believed he was associating with the wrong persons.

Forensic psychologist William Vicary examined defendant and concluded he was depressed and suicidal prior to the murder. Defendant frequently consumed alcohol and smoked marijuana. Defendant informed Vicary that he drank 40 ounces of malt liquor before committing the murder. Vicary acknowledged that defendant earlier had told a defense investigator that he had had nothing to drink before the murder. Vicary concluded that defendant was traumatized by the absence of his father. Defendant's mother physically abused him when he was a child, and defendant was traumatized by twice having been

required to leave his father's home and then, just before the murder, being ejected from his mother's home. After defendant was required to leave Onofre's residence, he stayed with the codefendants and another person, who were gang members and who exerted a negative influence on defendant.

Vicary testified that defendant experienced remorse for killing the victim and would not constitute a danger while incarcerated. Vicary acknowledged, however, that he had determined defendant had an antisocial personality, and that on one occasion after defendant's arrest, he had violently attacked a Hispanic inmate who had called him a "nigger."

Ernestine Burney Thomas testified that she had a good relationship with defendant and that he loved children and enjoyed helping others. Rogelio Onofre testified that defendant was a loving person and a good friend, and that although he had seen defendant arguing with his ex-girlfriend Sylvia Carmona, he could not imagine defendant pulling the trigger or shooting the victim. Maria Gomez testified that she had known defendant since he was nine years of age, and that he was like a son to her. Gomez stated that defendant was helpful with household chores, and that she could not believe that defendant could have been involved with a murder. Carol Warren, whose daughter Leslie Coulter was defendant's best friend since childhood, testified that defendant was well-behaved, a sweet person, and a "joy to be around." Leslie Coulter testified that defendant was a very sweet person who always helped others, was good with children, and had known the codefendants only for a few months prior to the night of the murder. Coulter also stated that defendant was a good friend and a leader rather than a follower, and that she never had observed him acting violently or being involved in a fight.

## III.

## DISCUSSION

### A. Asserted Errors Affecting the Guilt Phase of Trial

*1. Denial of defendant's motion to quash the grand jury indictment*

*(a) Facts*

At trial, defendant unsuccessfully moved to quash the indictment on the ground that the Orange County grand jury selection process was unconstitutional because of the absence of Asian-American prospective jurors in the venire. On appeal, defendant contends that the trial court's denial of his motion to quash was erroneous and violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the California Constitution, requiring reversal of the guilt and penalty judgments. Defendant's claim is without merit.

In connection with his motion to quash, defendant filed a motion for joinder in a case already pending in Orange County Superior Court, *People v. Robert Chien-Nan Chan* (1994, No. 93ZF0012) (*Chan*). The defendant in *Chan*, joined by defendant and numerous other defendants whose trials were then pending in Orange County, alleged unconstitutional discrimination against Asian-Americans in Orange County's grand jury selection process.

A lengthy hearing was held in the *Chan* proceedings. John Weeks, who held a Ph.D. in demography, testified on behalf of the defendants. Weeks explained that, from a pool of 157 applicants for the 1992-1993 Orange County Grand Jury that indicted the defendants, 30 persons ultimately were selected as grand jurors. Of the 157 applicants for the grand jury, nine were nominated by judges, and the others were self-nominated. None of the nine persons nominated by judges was Asian-American. In the previous 10 years, only one Asian-

American had been nominated by a judge. Regarding the grand jury that returned the indictment against defendant, four of the persons nominated by judges actually became grand jurors. In past years, persons nominated by judges were statistically more likely to become grand jurors. Weeks acknowledged that, because judges subsequently selected all of the members of the grand jury, every person ultimately chosen for grand jury service had been, in effect, nominated by a judge. For purposes of the defense motion to quash the indictment, Weeks considered the composition of the grand jury *pool*, as opposed to the grand jury itself, to be the relevant inquiry.

In the 1992-1993 grand jury pool, there were nine minority group members, including two Asian-Americans. The two Asian-Americans later withdrew their applications, and accordingly no Asian-Americans were seated on the grand jury. One African-American and four Hispanic jurors were seated on the grand jury.

The percentage of Asian-Americans in the grand jury pool was only 1.3 percent. Among persons over 18 years of age in Orange County, the percentage of Asian-Americans was 11.7 percent. In his initial testimony, Weeks did not exclude from his calculations Asian-Americans who were not fluent in the English language and therefore were not qualified to serve as grand jurors. Under this initial analysis, the "absolute disparity" for Asian-Americans in the jury pool was 10.4 percent (11.7 percent minus 1.3 percent) and the "relative disparity" was 89 percent (10.4 over 11.7 multiplied by 100). Weeks concluded there was no statistical possibility that such a relative disparity could occur by chance. Weeks testified again after adjusting his calculations to exclude non-English speaking Asian-Americans, and stated that the absolute disparity for Asian-Americans in the grand jury pool was 6.4 percent or less, depending on the level of proficiency of English that was being considered.

Among 2,335 persons contacted in a random Orange County sampling who indicated they qualified for federal jury service on the basis of their American citizenship and proficiency in English, the percentage of Asian-Americans was 8.5 percent. Persons who sit as grand jurors, however, are usually older than the general population and retired. Weeks estimated that, within Orange County, there were 5,601 Asian-Americans of retirement age (i.e., 60 years of age or older) but under 75 years of age who would qualify for grand jury service. Some of those persons, Weeks testified, might not speak English perfectly, and a large proportion of them would have been born outside the United States. Weeks speculated that a lack of familiarity with the grand jury system would make Asian-American potential grand jurors reluctant to participate in it. Weeks did not know whether Asian-Americans tended to be involved in family businesses more than persons in the general population and, therefore, to retire at a later age. Taking these calculations and variables into account, Weeks concluded there was "some" systematic exclusion of Asian-Americans and other minorities in the application process for the grand jury pool.

A declaration signed by Orange County Jury Commissioner Alan Slater, with attached exhibits, was admitted into evidence for purposes of the hearing on the motion to quash the grand jury indictments. In the declaration and in testimony given at the hearing, Slater explained that a committee of 15 superior court judges selected a grand jury panel of 30 persons from which 19 would be randomly selected to serve as grand jurors. The remaining 11 persons on the panel would serve as alternates.

Throughout the year, the superior court clerk's office distributed grand jury information to an ever-increasing number of "organizations of all varieties,"

encouraging as many persons as possible to apply to serve as grand jurors.[5] Slater further testified that the clerk's office attempted to be inclusive of all possible ethnic groups, attempted to enlist the mass media in an effort to inform persons in the community about jury service, and sent persons to speak about grand jury service to "anyone who is willing to listen."

Grand jurors are required to work full time for a year and at times on evenings and weekends, and are compensated by daily fees of $25, up to a maximum of $100 per week. In the previous 10 years, there had been 22 applications by Asian-Americans for grand jury service and six occasions on which Asian-Americans had been chosen as grand jurors.

William Gyak, the Orange County demographer, testified that, of the persons in the county between the ages of 60 years and 74 years of age who were

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[5] Among such organizations sent materials, on a mass mailing list for minority organizations, were the following: American Vietnamese Fellowship; Asian American Planning Council; Asian American Drug Abuse Program; Asian American Christian Fellow Student Activities; Asia American Youth Services; Asian Hispanic American Association, California State University, Fullerton (CSUF); Asian Pacific American Legal Center; Asia Pacific Counseling Treatment Center; Asian Rehabilitation Services; The Cambodian Family; Cambodian Student Association, CSUF; Chinese Christian Fellowship; Chinese Student Association, CSUF; Elderly Korean American Association of Orange County; Hoi Ai Huu Cuu N. Trung Voung; Hoi Phat Giao Tuong Te.Nam Cal.; International Sangha Baiksu; Japanese American Citizens League; Japanese American Citizens; Japanese Student Association, CSUF; Korean American Association; Korean American Bible Study, CSUF; Korean Student Association, CSUF; Korean Youth Center; Lao Family Community, Inc.; Little Saigon Community Development Organization; Little Tokyo Service Center; Operation Japanese American Association; Oriental Service Center; Filipino American Student Association; United Cambodian Community, Inc.; Vietnamese American Council; Vietnamese Chamber of Commerce; Vietnamese League of Orange County; Vietnamese Pharmacists Association; Vietnamese Service Center; and Vietnamese Student Association, CSUF.

very proficient in the English language, only 2.1 percent, or 3,011, were Asian-Americans and Pacific Islanders. Of the 240,000 Asian-Americans and Pacific Islanders in the county, 91,000 resided in areas having average incomes above the county median. For the prior 10-year period, Asian-Americans who applied for grand jury duty had a statistically greater chance of becoming a grand juror than did White applicants. Gyak explained that comparative disparities in statistics tend to be magnified when the group under consideration forms a very small proportion of the population in question.

Finally, John Mei Liu, a professor of comparative culture, testified that Asians constituted a distinct group.

*(b) Discussion*

We set forth the relevant legal inquiry in *People v. Horton* (1995) 11 Cal.4th 1068, 1087-1088. Although that decision concerned petit juries, the same standard applies in evaluating the composition of grand juries. (*Vasquez v. Hillery* (1986) 474 U.S. 254, 261-262.)[6]

"Under the federal and state Constitutions, an accused is entitled to a jury drawn from a representative cross-section of the community. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *Duren v. Missouri* (1979) 439 U.S. 357, 358-367; *People v. Howard* (1992) 1 Cal.4th 1132, 1159.) That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. (*People v. Mattson* (1990) 50 Cal.3d 826, 842.) 'In order to establish a prima facie violation of the fair-cross-section requirement, the

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6 Although defendant is African-American rather than Asian-American, he need not be a member of a particular group to challenge its exclusion. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1217, fn. 3; *People v. Wheeler* (1978) 22 Cal.3d 258, 281.)

defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.' (*Duren v. Missouri*, *supra*, 439 U.S. at p. 364; [citation].) The relevant 'community' for cross-section purposes is the judicial district in which the case is tried. (*People v. Mattson, supra*, 50 Cal.3d at p. 844; *Williams v. Superior Court* (1989) 49 Cal.3d 736, 744-745.) If a defendant establishes a prima facie case of systematic underrepresentation, the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in the disparity in the jury venire. (*People v. Sanders* (1990) 51 Cal.3d 471, 491.)

"As to the third element of the *Duren* test, a defendant does not meet the burden of demonstrating that the underrepresentation was due to systematic exclusion, by establishing only statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of an improper feature of the jury selection process. (*People v. Howard, supra*, 1 Cal.4th at p. 1160; *People v. Bell* (1989) 49 Cal.3d 502, 530.) When a county's jury selection criteria are neutral with respect to race, ethnicity, sex, and religion, the defendant must identify some aspect of the manner in which those criteria are applied (the probable cause of the disparity) that is constitutionally impermissible. (*People v. Sanders, supra*, 51 Cal.3d at p. 492; *People v. Bell, supra*, 49 Cal.3d at p. 524.)" (*People v. Horton, supra,* 11 Cal.4th at pp. 1087-1088, italics omitted.)

In the present case, the trial court hearing the motion to quash the grand jury indictments issued an order denying the motion, concluding that it "border[ed] on being frivolous." Acknowledging a conflict in the law regarding whether "Asians"

constituted a cognizable group for purposes of constitutional analysis, the court nonetheless concluded that they did not constitute a cognizable group, because they did not share a common language or common historical factors. Rather, according to the court, the term "Asians" includes groups such as Chinese and Filipino, separate ethnic groups that *do* constitute cognizable groups. Additionally, relying on *People v. Bell, supra,* 49 Cal.3d 502, 527, footnote 14, in which we criticized the use of tests more complex than the absolute disparity test when the group allegedly excluded is very small, the court concluded that because the absolute disparity in the present case was estimated at 3.8 percent by Gyak, and 6.4 percent by Weeks, the disparity was constitutionally insignificant. (See *People v. Bell, supra*, 49 Cal.3d at p. 528, fn. 15 [noting that absolute disparity levels of less than 11.49 percent have been found to be constitutionally insignificant]) The trial court also stated it was making its decision without reaching the third prong of the test articulated in *Duren v. Missouri, supra*, 439 U.S. 357, 364.

Whether "Asians" can or do constitute a cognizable group is an unsettled issue. We previously have observed, however, that "it is at least questionable whether the generic description Asian . . . can constitute a 'cognizable group.' " (*People v. Johnson, supra*, 47 Cal.3d at p. 1217, fn. 3, citing *United States v. Sgro* (1st Cir. 1987) 816 F.2d 30.) We need not decide that question, however, because defendant has not met his burden of satisfying the third prong of the test articulated in *Duren v. Missouri, supra*, 439 U.S. 357 — that there was "systematic exclusion" of Asians from the grand jury selection process. (*People v. Bell, supra*, 49 Cal.3d at pp. 527-528 [declining to resolve the question of whether a cognizable group was underrepresented, because defendant failed to show any disparity was caused by "systematic exclusion"].) As detailed above, Jury Commissioner Slater's declaration and testimony detailed the exhaustive efforts undertaken by the Orange County Superior Court Clerk's office to invite Asian-

Americans to apply for grand jury service. The defendants bringing the motion to quash offered no evidence to rebut the showing of substantial efforts undertaken by the county to include Asian-Americans in the venire, and offered no proof of any improper feature of the jury selection process. The defendants therefore failed to establish a prima facie case that the statistical discrepancies identified were caused by any systematic exclusion of Asian-Americans. Defendant's briefing in this court focuses upon the status of Asians as a cognizable group and upon the statistical comparisons that should be applied to claims of discrimination against prospective grand jurors, but points to no evidence in the record that would establish systematic exclusion. Accordingly, there is no merit in defendant's claim that Asian-Americans unconstitutionally were excluded from the grand jury that indicted him, and the trial court properly denied the motion to quash his indictment on that basis.

2. *Denial of defendant's severance motion*

Defendant puts forth intertwined claims that the trial court erred in denying his pretrial and midtrial motions for severance, and in admitting into evidence at the guilt phase the redacted statements of codefendants Rembert and Burnett, admission of which assertedly implicated him in the charged crimes and deprived him of his right to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitution in violation of *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton* v. *United States* (1968) 391 U.S. 123 (*Bruton*). Defendant contends the trial court's denial of his motions for severance violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the California Constitution, requiring reversal of the guilt and penalty judgments. For the reasons outlined below, we conclude that the trial court did not err.

*(a) Facts*

Defendant gave a long, detailed statement to the police implicating himself and his codefendants in the crimes committed against victim Joseph Kondrath. Codefendants Rembert and Burnett also made statements to law enforcement officers implicating defendant and themselves in the crimes, and naming defendant as Kondrath's killer.

Before trial, defendant moved to sever his trial from that of his codefendants. Defendant contended that a joint trial would be unfair because, among other reasons, the prosecution intended to introduce into evidence the statements made by codefendants Rembert and Burnett to the police, in violation of *Aranda, supra,* 63 Cal.2d 518, and *Bruton, supra,* 391 U.S. 123. Defendant asserted that a joint trial would prejudice him, because Rembert's and Burnett's statements implicated him in the charged offenses, and because the codefendants' defenses were in conflict with his own. The prosecutor opposed the motion, arguing the statements could be redacted to remove references identifying each of the other codefendants, thereby protecting all three defendants' constitutional right of confrontation. The prosecutor submitted to the trial court proposed redactions in the statements. The court denied the severance motion, concluding that the proposed redactions sufficiently protected the rights of each defendant. The redacted statements of defendant and both codefendants were read to the jury during trial. The jury was instructed to consider these statements against the speaker only and not against any other defendant. After admission of the statements, defendant renewed his motion for severance, and the court again denied the motion.

As noted, defendant's statement and his codefendants' statements were received in evidence in a redacted form that eliminated direct references to defendant, Burnett, or Rembert by deleting the names of each declarant's

codefendants, and substituting terms such as "the others" or "the other."[7] The codefendants' statements largely tracked defendant's own statement, but as pertinent here, both Burnett and Rembert stated that they advised "the others" not to kill the victim, contradicting defendant's contention in his own statement that "the others" repeatedly urged defendant to shoot Kondrath.

Specifically, codefendant Burnett's statement confirmed that the three codefendants departed from their shared apartment the night of the murder, intending to steal Ron Hussar's stereo. According to Burnett's statement, although Burnett was drunk and did not want to go, he went anyway. Burnett also informed the police that all three defendants wore latex gloves and encountered the victim sitting in his automobile as they left Hussar's carport. The three men spoke about robbing the victim and using his automobile to "blast" the Watergate gang, who were involved in an ongoing dispute with Burnett. Burnett stated that one of the codefendants asked the victim for the time, and that when Kondrath rolled down the car window, this codefendant placed a gun through the window and ordered the victim out of his automobile. Burnett said he and the others "snatched" the victim out of his automobile and ordered him into the trunk.

According to Burnett's statement, with the victim still in the trunk Burnett proceeded to Jeffrey Howard's residence and borrowed a shotgun with which to "blast" the Watergate gang members. Upon arriving in Santa Ana, the Watergate gang's territory, Burnett and "the others" did not observe any Watergate members.

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[7] The transcripts of the redacted statements were read to the jury, and copies of them were provided to each of the jurors during their deliberations. The words "the other" and "the others" do not appear in quotations or brackets, and are not otherwise highlighted. With the exception of some statements that have been deleted with the use of obvious censor's lines, the redactions in the transcripts that were read and provided to the jurors are not apparent.

Burnett nonetheless fired the shotgun into the air just to let the Watergate gang members know they were there. Burnett then returned the shotgun to Howard. Burnett and "the others" obtained additional bullets for the handgun from Howard.

Burnett related in his statement that he "passed out" or fell asleep in the backseat of the automobile. When he awoke, the vehicle was stopped. Burnett wanted to leave, but one of the "others" told him to shoot the victim because the latter had observed them. According to Burnett, he refused and told his companion not to do it. Burnett informed "the others" that the victim could just be left somewhere and they could walk home. The third companion also said not to shoot the victim. The person with the gun, however, said, "fuck it, I'll do it." One of Burnett's companions wiped down the automobile with a sock. The person with the gun opened the trunk, shot the victim one time, and closed the trunk. Burnett stated that he and "the others" then ran away.

In his statement to the police, codefendant Rembert initially denied all culpability and informed the detectives that he merely had heard about the murder. Ultimately Rembert admitted being present during the commission of the charged crimes and was asked: "What pushed the others over the edge?" Rembert replied, "one was drunk and the other one just wanted to go ahead and do it." Throughout the interview, Rembert insisted that he did not have any role in the murder, and that he told the others not to kill the victim. When asked about the reason for the killing, Rembert replied his companions were not thinking and must have been drunk. Rembert claimed he was across the street when the victim was killed. Rembert also stated that when the three men left the apartment, they spoke of stealing a stereo, but there was no discussion of killing anyone. Toward the end of the interview, Rembert informed the detectives that the two other men had tricked the victim by asking him for the time and, after the victim rolled down his

window, Rembert's companions put a gun to the victim's head and ultimately placed him inside the trunk of the victim's vehicle.

*(b) Discussion*

*(1)* Aranda/Bruton

Turning first to the constitutional issue, defendant contends the admission into evidence, at his joint trial, of the codefendants' out-of-court statements violated state law and deprived him of his rights to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitution. (*Bruton, supra*, 391 U.S. 123; *Aranda, supra*, 63 Cal.2d 518.) We recently set forth the governing law in great detail in *People v. Lewis* (2008) 43 Cal.4th 415 (*Lewis*). As we explained in that case, "[a] criminal defendant has a right, guaranteed by the confrontation clause of the Sixth Amendment to the United States Constitution, to confront adverse witnesses. The right to confrontation includes the right to cross-examination. (*Pointer v. Texas* (1965) 380 U.S. 400.) A problem arises when a codefendant's confession implicating the defendant is introduced into evidence at their joint trial. If the declarant codefendant invokes the Fifth Amendment right against self-incrimination and declines to testify, the implicated defendant is unable to cross-examine the declarant codefendant regarding the content of the confession.

"In *Bruton*, the United States Supreme Court held that the admission into evidence at a joint trial of a nontestifying codefendant's confession implicating the defendant violates the defendant's right to cross-examination guaranteed by the confrontation clause, even if the jury is instructed to disregard the confession in determining the guilt or innocence of the defendant. (*Bruton, supra*, 391 U.S. at pp. 127-128, 135-137.) The high court reasoned that although juries ordinarily can and will follow a judge's instructions to disregard inadmissible evidence,

'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.' (*Id.* at p. 135.) Such a context is presented when 'the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.' (*Id.* at pp. 135-136.)" (*Lewis, supra,* 43 Cal.4th at p. 453.)

In *Aranda, supra*, 63 Cal.2d 518, this court came to a conclusion similar to that subsequently reached by the high court in *Bruton*, but we also held that a codefendant's confession may be introduced at the joint trial if it can be edited to eliminate references to the defendant without prejudice to the confessing codefendant. (*Aranda, supra,* 63 Cal.2d at pp. 530-531; see also *Lewis, supra,* 43 Cal.4th at p. 454.) As the United States Supreme Court similarly concluded, "[T]he Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211.)

"[E]diting a nontestifying codefendant's extrajudicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights." (*People v. Fletcher* (1996) 13 Cal.4th 451, 468.) If a codefendant's confession cannot be so edited, severance is required. (*Lewis, supra,* 43 Cal.4th at p. 454; *Aranda, supra,* 63 Cal.2d at pp. 530-531.) " '[T]he sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement as a whole and the other evidence presented at the trial.' " (*Lewis, supra,* 43 Cal.4th at p. 454, quoting *People v. Fletcher, supra*, 13 Cal.4th

at p. 468.) " '[R]edactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that . . . the law must require the same result.' " (*Lewis, supra,* 43 Cal.4th at p. 455, italics omitted, quoting *Gray v. Maryland* (1998) 523 U.S. 185, 192 (*Gray*).) When, despite redaction, the statement obviously refers directly to the defendant, and involves inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial, the *Bruton* rule applies and introduction of the statement at a joint trial violates the defendant's rights under the confrontation clause. (*Lewis, supra,* 43 Cal.4th at p. 455; *Gray, supra*, 523 U.S. at pp. 196-197.)

Turning to the present case, we observe that the redacted statements of codefendants Rembert and Burnett did not completely eliminate any reference to the "existence" of accomplices (cf. *Richardson v. Marsh, supra*, 481 U.S. at p. 211) and, as the Attorney General concedes, the statements in conjunction with other evidence led to the obvious inference that defendant was "the other" who shot Kondrath. (*Gray, supra*, 523 U.S. at p. 193.) The redactions in the present case did not satisfy the standard set forth in *Gray, supra*, 523 U.S. at pages 196-197. As explained above, when, despite redaction, a codefendant's statement obviously refers directly to the defendant and implicates him or her in the charged crimes, the *Bruton* rule applies and introduction of the statement at a joint trial violates the defendant's rights under the confrontation clause. (*Lewis, supra,* 43 Cal.4th at p. 455; *Gray, supra*, 523 U.S. at pp. 196-197.)

It is well established, however, that *Aranda/Bruton* error is not reversible per se, but rather is scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1128.) In determining whether improperly admitted

evidence so prejudiced a defendant that reversal of the judgment of conviction is required, we have observed that "if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless." (*Id.* at p. 1129.)

In the present case, the prosecution advanced, and the jury was instructed on, three theories of first degree murder relating to the homicide of Joseph Kondrath: felony murder based upon robbery, felony murder based upon kidnapping, and deliberate and premeditated murder. The jury returned a general verdict finding defendant guilty of the first degree murder of Kondrath. As set forth below, overwhelming evidence, apart from the codefendants' statements, supports defendant's conviction of either deliberate, premeditated first degree murder, or one or both theories of felony murder, as well as the true findings on the kidnapping-murder special circumstance and the robbery-murder special circumstance. Accordingly, when viewed in the context of the instructions given to the jury and the evidence supporting defendant's convictions for the first degree murder, robbery, and kidnapping of Kondrath and the kidnapping-murder and robbery-murder special circumstances, any error in admitting the codefendants' statements was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; see *Lewis, supra,* 43 Cal.4th at p. 456.)

To prove a defendant guilty of kidnapping, the prosecution must establish that (1) the defendant took, held, or detained another person by using force or by instilling reasonable fear; (2) using that force or fear, the defendant moved the other person, or made the other person move a substantial distance; and (3) the other person did not consent to the movement. (§ 207, subd. (a).)

There was overwhelming evidence establishing that defendant committed the crime of kidnapping — that is, that he either forced Kondrath into the trunk of Kondrath's automobile at gunpoint, or aided and abetted in the kidnapping of

Kondrath by participating in transporting him over a substantial distance without his consent.[8] There also was overwhelming evidence provided by defendant's own statement to the police (and his statements to other witnesses) establishing that defendant killed Kondrath during the commission of that kidnapping, and that he did so to advance the commission of the kidnapping — that is, to eliminate Kondrath as a witness. (See *People v. Green* (1980) 27 Cal.3d 1, 61.) Defendant informed the police that he and the codefendants forced Kondrath into the trunk of Kondrath's automobile at gunpoint and repeatedly discussed the need to kill him because he had seen their faces and would be able to identify them.

Defendant contended at trial, and asserts in his briefing in this court, that the kidnapping-related counts cannot stand, and therefore the prosecution cannot establish absence of prejudice arising from the *Aranda/Bruton* error, because the kidnapping was completed prior to Kondrath's murder. This is so, he asserts, because at the time defendant shot Kondrath (1) the automobile was parked on the side of the road; (2) movement of the victim had ceased; (3) defendant had reached a place of temporary safety; (4) there was no other ongoing felonious conduct; and (5) defendant did not exhibit a single-minded purpose in committing the shooting.

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[8] "[T]he word 'substantial' means a 'significant amount' as contrasted with a distance that is 'trivial.' " (*People v. Morgan* (2007) 42 Cal.4th 593, 606-607.) The record does not provide us with the exact distance Kondrath was transported, but in defendant's statement to the police, he admitted to moving the victim more than a "trivial" distance. Specifically, defendant stated that after forcing Kondrath into the trunk of Kondrath's vehicle, defendant and "the others" drove to the home of Jeffrey Howard, then to the Watergate Crips gang area, then back to Howard's home, and finally to Crescent Avenue, where they parked the vehicle and defendant shot Kondrath.

This defense, however, was not affected or undermined by the admission of the codefendants' redacted statements, because nothing in either Rembert's or Burnett's statements contradicted defendant's assertion that he and the others had stopped the vehicle, and had ceased moving the victim, at the time he shot Kondrath. In any event, defendant's claim substantively is without merit. As we previously have recognized, "the crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim and [the defendant] has reached a place of temporary safety . . . ." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159; see also *People v. Silva* (1988) 45 Cal.3d 604, 632; *People v. Chacon* (1995) 37 Cal.App.4th 52, 60.) In the present case, defendant and his codefendants placed the victim in the trunk of his own automobile, where he remained while the men drove around shooting at targets, and where he lay when he was shot. The circumstance that defendant had stopped the vehicle before shooting the victim does not establish that the victim had been released or otherwise disposed of, because the kidnapping was clearly still in progress when defendant stopped the car on a dark, isolated street, opened the trunk, and shot the victim in the head. "Because [the victim] was still being detained at the time of his murder, he was killed while defendant was engaged 'in the commission of' the kidnapping." (*People v. Silva, supra,* 45 Cal.3d at p. 632; see *People v. Farmer* (1983) 145 Cal.App.3d 948, 952 ["A victim forcibly transported without [his] consent is still 'kidnapped' while the detention continues and an injury inflicted during detention is inflicted 'in the commission of' the kidnapping"].) Moreover, defendant had not reached a place of safety, as is evident by witness David Schindler's testimony that he saw two men flee the area of the shooting, and defendant's own statement to the police that he ran from the scene after shooting Kondrath.

The strong evidence of guilt — excluding the codefendants' statements but including defendant's own statements, in which he admitted all of the elements supporting the kidnapping-related counts and the kidnapping-murder special circumstance — supports the conclusion that any error in the admission of the codefendants' redacted statements was harmless beyond a reasonable doubt. Notably, the prosecutor did not rely upon Burnett's or Rembert's statements in discussing the kidnapping-related counts. Rather, during closing argument to the jury, the prosecutor pointed to defendant's own statement in support of the prosecution's contention that defendant was guilty of the kidnapping-related counts. Accordingly, we conclude that any error in the admission of the codefendants' redacted statements at the joint trial was harmless beyond a reasonable doubt (*Chapman v. California, supra*, 386 U.S. at p. 24) with regard to the jury's consideration of the kidnapping count, the kidnapping-felony-murder theory of first degree murder, and the special circumstance of murder during the commission of a kidnapping.

The error also is harmless beyond a reasonable doubt in relation to the jury's consideration of the robbery-felony-murder theory and the special circumstance of murder during the commission of a robbery. Robbery is the taking of "personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property." (See CALJIC No. 9.40.) In his own statement, defendant told the police that he and his codefendants forced the victim from his car and into the trunk of the vehicle at gunpoint. Defendant told the police that he used the ruse of asking the victim for the time in order to get him to roll down his window; that prior to approaching the victim, he and the others discussed "jacking" the victim — which, he explained to the officers, meant robbing him; that he joined

his codefendants in forcing the victim from the victim's automobile and into the trunk of the vehicle at gunpoint; and that the keys to the automobile were mistakenly left in the keyhole of the trunk, forcing defendant to retrieve them before driving off in the victim's automobile.[9]

Accordingly, defendant admitted all of the elements supporting the robbery-related counts and the robbery-murder special circumstance, and strong evidence of guilt — exclusive of the codefendants' statements — supports the conclusion that any error in the admission of the codefendants' redacted statements was harmless beyond a reasonable doubt with regard to the robbery-related counts and the robbery-murder special circumstance.

Finally, defendant's statements to the police also provide overwhelming evidence in support of a conviction for deliberate, premeditated first degree murder. A murder that is premeditated and deliberate is murder of the first degree. (§ 189.) " 'In this context, "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." ' " (*People v. Jurado* (2006) 38 Cal.4th 72, 118, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) " 'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' [Citation.] A reviewing court normally

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9 As set forth in detail in relation to defendant's contention that his convictions for the robbery-related counts are not supported by sufficient evidence, *post,* overwhelming evidence, contained in defendant's own statements, alternatively supports a finding that defendant was guilty of robbery because he intentionally aided and abetted the codefendants in taking the victim's wallet and therefore intended to permanently deprive the victim of money contained in that wallet.

considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported — preexisting motive, planning activity, and manner of killing — but '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.' " (*People v. Jurado, supra*, 38 Cal.4th at pp. 118-119.)

Defendant informed the police that very shortly after forcing the victim into the trunk at gunpoint, and again just before he shot the victim, defendant and his codefendants discussed the need to kill the victim because he would be able to identify them. Defendant further stated that, immediately prior to the shooting, his codefendant handed him the gun and instructed him to kill the victim, which defendant did by pointing the gun into the trunk and firing once. These facts provide overwhelming evidence of all three elements: preexisting motive, planning activity, and the manner of killing — pointing and shooting a gun at close range at the victim's head. It is true defendant also stated to the police that he did not want to shoot Kondrath but did so at the urging of his codefendants, who, he informed the police, repeatedly insisted the victim must be killed because he had seen their faces. Despite defendant's urging his codefendants to let the victim live, defendant fired his weapon into the trunk, but only once, without aiming and with no intent to kill the victim. This alternative explanation, however, does not vitiate defendant's statements to the police that unequivocally establish both deliberation and premeditation on his part. Moreover, in light of the evidence of premeditation, a jury reasonably could disbelieve defendant's statements to the extent they attempted to minimize his culpability. Accordingly, defendant's own statements, standing alone and considered without reference to his codefendants' statements, provide overwhelming evidence supporting a conviction for deliberate, premeditated murder, and any error in admitting his

codefendants' statements was harmless beyond a reasonable doubt with regard to this theory of first degree murder.

Because the *Aranda/Bruton* error was harmless beyond a reasonable doubt as to all three theories of first degree murder submitted to the jury, as well as to the true findings on the robbery-murder and kidnapping-murder special circumstances, such error provides no basis for reversing defendant's conviction for the first degree murder of Joseph Kondrath and for the kidnapping and robbery of Kondrath, or for setting aside the jury's true findings on the kidnapping-murder and robbery-murder special circumstances.

*(2) Denial of defendant's severance motions*

We also conclude the trial court did not abuse its discretion in denying defendant's motions for severance — motions founded on defendant's contention that admission of the codefendants' statements would prejudice him at a joint trial. Our Legislature has expressed a preference for joint trials. (*Lewis, supra,* 43 Cal.4th at p. 452; *People v. Boyde* (1988) 46 Cal.3d 212, 231, 250; cf. *People v. Soper* (2009) 45 Cal.4th 759, 771-772 [expressing judicial preference for joinder in context of joined charges].) "Section 1098 provides in pertinent part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.' The court may, in its discretion, order separate trials if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses." (*Lewis, supra,* 43 Cal.4th at p. 452, citing *People v. Avila* (2006) 38 Cal.4th 491, 574-575; see *People v. Massie* (1967) 66 Cal.2d 899, 917.) "Additionally, severance may be called for when 'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from

making a reliable judgment about guilt or innocence.' " (*Lewis, supra,* 43 Cal.4th at p. 452, quoting *Zafiro v. United States* (1993) 506 U.S. 534, 539 [addressing severance under Fed. Rules Crim.Proc., rule 14, 18 U.S.C.]; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.)

We review a trial court's denial of a severance motion for abuse of discretion based upon the facts as they appeared when the court ruled on the motion. (*Lewis, supra,* 43 Cal.4th at p. 453; *People v. Hardy* (1992) 2 Cal.4th 86, 167.) If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial. (*Lewis, supra,* 43 Cal.4th at p. 453; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 41; *People v. Keenan* (1988) 46 Cal.3d 478, 503.) "If the court's joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder ' "resulted in 'gross unfairness' amounting to a denial of due process." ' " (*Lewis, supra,* 43 Cal.4th at p. 452, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 162; see also *People v. Soper, supra,* 45 Cal.4th at p. 783 ["if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law"].)

As a threshold matter, in each count defendant was charged along with both of his codefendants with having committed " 'common crimes involving common events and victims.' " (*Lewis, supra,* 43 Cal.4th at p. 453, quoting *People v. Keenan, supra*, 46 Cal.3d at p. 500.) In light of this circumstance, the trial court was presented with a "classic case" for a joint trial. (*Lewis, supra,* 43 Cal.4th at p. 453; see also *People v. Avila, supra*, 38 Cal.4th at p. 575; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 40; *People v. Keenan, supra*, 46 Cal.3d at pp. 499-500.)

Moreover, in judging the circumstances as they appeared at the time of the ruling on the motion (see *People v. Cleveland* (2004) 32 Cal.4th 704, 726), any error under *Aranda* and *Bruton* in admitting the codefendants' statements is to be evaluated under *Gray, supra*, 523 U.S. 185, decided in 1998, four years after defendant's 1994 trial. (*Lewis, supra,* 43 Cal.4th at p. 456.) In *Gray*, the high court extended *Bruton*'s reasoning regarding unredacted statements to *redacted* statements, holding that the Sixth Amendment barred the admission of statements that were redacted in a manner that operated "just like a confession that names the defendant — they point an accusatory finger at the person 'sitting at counsel table,' i.e., the defendant on trial. ([*Gray, supra,* 523 U.S.] at p. 192.)" (*Lewis*, at p. 455.) As the Attorney General concedes, the redactions in the present case, although not as "obvious" as those considered in *Gray*, where the court substituted blanks and the word "delete" for the defendant's proper name, nonetheless led to the obvious inference that defendant was "the other" who shot Kondrath. Before *Gray*, however, "the law regarding the admissibility of redacted codefendant confessions was unsettled. (See, e.g., *People v. Fletcher, supra*, 13 Cal.4th 451.) Although *Gray* is retroactive to this case and we apply it here, we cannot fault the trial court for failing to anticipate *Gray*'s holding." (*Lewis, supra,* 43 Cal.4th at p. 455.) Therefore, no abuse of discretion appears in the denial of severance in the present case. (*Ibid.*)

Defendant nonetheless contends he was prejudiced by the denial of the severance motion and the admission of the codefendants' statements, because the defenses presented by his two codefendants were antagonistic to his defense. He asserts that both Burnett's and Rembert's statements minimized their own culpability in Kondrath's murder and in the crimes that preceded it, laying blame instead on defendant — improperly painting him as the "main perpetrator" and thereby undermining his defense that he was guilty only of second degree murder

because he did not participate in the victim's kidnapping and robbery, and because he shot the victim only under threat by his codefendants.

Aside from defendant's own self-serving statements to the police, no evidence was presented at trial indicating that Burnett and Rembert, rather than defendant, were the "main perpetrators" of the crimes against Kondrath. As related above, defendant admitted in his statement that he joined his codefendants in robbing the victim of his automobile, asked the victim for the time as a ruse before forcing him from his automobile at gunpoint, was present when his codefendants demanded the victim's wallet and forced the victim into the trunk of his own automobile, and returned to the trunk to retrieve the victim's keys upon realizing the victim had left them in the keyhole.

Most notably, Jeanette Roper testified that defendant informed her — as he admitted in his statement to the police — that he shot the victim, and although he now contends the evidence established that he did so under threat of harm from his codefendants, neither his statement to the police nor any other evidence supports such a claim. In his statement, defendant merely claimed that the codefendants informed him repeatedly that the victim must be killed because he had seen the three men and would be able to identify them, and that one of the codefendants threatened to "blast" the victim himself. Nothing in defendant's statement indicates that either Burnett or Rembert threatened defendant with harm if he did not shoot the victim, and no other evidence establishes that Burnett or Rembert, rather than defendant — who was the actual shooter — was "more culpable" for Kondrath's murder. Indeed, defendant specifically informed the detectives that he did not hand the gun to Burnett and did not insist that Burnett shoot the victim — not because defendant feared that Burnett intentionally would hurt defendant, but because he was frightened that Burnett was too drunk and accidentally might shoot defendant. Instead, defendant willingly chose to shoot the victim himself, and

because defendant did not want to look at the victim's face, he shot him assertedly without taking aim.

Antagonistic defenses do not warrant severance unless the acceptance of one party's defense would preclude acquittal of the other. (*Lewis, supra,* 43 Cal.4th at p. 461; *People v. Hardy, supra*, 2 Cal.4th at p. 168.) Here, defendant's defense and those of his codefendants "were not so irreconcilable that only one could be guilty." (*Lewis, supra,* 43 Cal.4th at p. 461.) "The prosecution presented independent evidence supporting each defendant's participation in the group's mutual criminal endeavors. No gross unfairness resulted from the joint trial." (*Ibid.*; see also *People v. Avila, supra*, 38 Cal.4th at pp. 574-576; *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 41; *People v. Box* (2000) 23 Cal.4th 1153, 1195-1197.)

Defendant also asserts that the joint trial prejudiced him because his own statement was redacted to replace all instances of Burnett's name with the word "other," thereby precluding defendant from informing the jury that Burnett, who was older than defendant and had gang ties, initiated the events on the night of Kondrath's murder, and that defendant acted only at the urging of his older codefendants. No evidence of any significance was eliminated as a result of the redaction of defendant's statement. First, the circumstance that codefendant Burnett may have instigated the night's events does not obviate defendant's own admitted culpability in the crimes committed against Kondrath. Moreover, although defendant's specific references to Burnett were replaced with the word "other," the jury nonetheless was made aware of the *substance* of defendant's statements — that he left the apartment with two men, one of whom wanted to seek out Watergate Crips gang members in revenge for an earlier assault, that this

same man directed defendant to go to Jeffrey Howard's home to borrow a shotgun, and that the men he was with fired that weapon in Watergate Crips territory.[10] The sole statement defendant points to in his own account that was deleted from the transcript of defendant's interview is his assertion that Burnett gave him the weapon and told him to kill the victim. The omission of this statement did not prejudice defendant, however, because other statements made by him to the police informed the jurors that one of "the others" handed defendant a gun and told him to kill the victim, and that the reason defendant did not hand the gun back to "the other" was that defendant feared being accidentally shot by his drunken companion.

In sum, neither the redaction of the codefendants' statements nor the redaction of defendant's own statement prejudicially undermined defendant's defense, and the joint trial itself did not result in gross unfairness depriving defendant of a fair trial. If any error occurred, it did not result from the trial court's denial of severance, but from its related but separate ruling admitting codefendants Rembert's and Burnett's redacted statements. As we have explained above, the admission at the joint trial of these two statements "did not result in gross unfairness to defendant," and any error was harmless. (*Lewis, supra,* 43 Cal.4th at p. 456.)

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10 Nor was defendant precluded from arguing that he was unduly influenced by his "older" codefendants. Defendant was 18 years of age at the time of the murder. Rembert was 20 years of age, and Burnett also was 18 years of age, a few months older than defendant. Not only was the jury informed of the ages of the three defendants, but the age difference that defendant attempts to portray as dispositive, is, in fact, quite minimal, and nothing either in defendant's own redacted statement or in the redacted statements of the codefendants omitted information regarding the age disparity among the three defendants.

*3. Denial of motion for sequestered* Hovey *voir dire*

Defendant contends the trial court's denial of his motion for sequestered voir dire pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1 was erroneous and violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the California Constitution, requiring reversal of the guilt and penalty judgments. This claim is without merit.

" 'In *Hovey v. Superior Court*[, *supra*,] 28 Cal.3d 1, 80, this court decided that in capital prosecutions the death-qualification portion of each prospective juror's voir dire should be sequestered, meaning that it should be conducted out of the presence of other prospective jurors. This court did not hold that sequestered voir dire was constitutionally required; instead, we mandated this practice as a rule of procedure.' " (*Lewis*, *supra,* 43 Cal.4th at p. 493, quoting *People v. Jurado*, *supra*, 38 Cal.4th 72, 100; see also *People v. Vieira* (2005) 35 Cal.4th 264, 287-288; *People v. Cudjo* (1993) 6 Cal.4th 585, 628.) " 'In 1990, however, the voters abrogated this aspect of *Hovey* by enacting Proposition 115, which added section 223 to the Code of Civil Procedure. That statute provides, in part, that "where practicable" the trial court must conduct voir dire "in the presence of the other jurors in all criminal cases, including death penalty cases." (Code Civ. Proc., § 223.)' " (*Lewis*, *supra,* 43 Cal.4th at p. 493.)

We review the trial court's denial of defendant's motion for individual sequestered voir dire under the abuse of discretion standard. (*People v. Navarette* (2003) 30 Cal.4th 458, 490; *People v. Waidla* (2000) 22 Cal.4th 690, 713-714.) A trial court abuses its discretion only if its ruling falls outside the bounds of reason. (*People v. Waidla, supra,* 22 Cal.4th at p. 714.)

In the present case, defendant requested that the prospective jurors be examined outside the presence of the other jurors as to all issues, because individual questioning would lead the jurors to respond more truthfully and

extensively, would prevent them from being influenced or affected by responses made by other prospective jurors, and would protect the privacy of prospective jurors. The trial court denied the motion without giving a statement of reasons, but indicated it would revisit its decision if necessary after the commencement of voir dire. The court informed counsel, however, that it would conduct questioning to ensure that a jury satisfactory to both sides was selected, and that if the allotted peremptory challenges proved inadequate, the court would provide additional challenges to all sides until a satisfactory jury was seated. It is evident, from the trial court's statement, that the court intended to revisit the issue of individualized voir dire if necessary and that it understood it had discretion to conduct individual voir dire, but that it declined to do so because it felt that group voir dire, with questioning conducted by the trial court and with ample peremptory challenges provided to defendant, adequately would safeguard defendant's constitutional right to an impartial jury. In view of the circumstance that defendant offered only generalized grounds for conducting individual voir dire, not specific to his case, the trial court's ruling did not fall outside the bounds of reason. (See *People v. Jurado, supra,* 38 Cal.4th at p. 102.)

On appeal, defendant contends he was prejudiced by the court's refusal to conduct sequestered voir dire of the prospective jurors. He points to a comment made by the court to one of the prospective jurors during voir dire. This prospective juror, who expressed strong support for the death penalty for any defendant found guilty of murder, erroneously believed that only one of the three defendants was charged with murder. The court and the prospective juror then engaged in the following colloquy:

"The Court: Only [for] one of the defendants will the people be seeking the death penalty. [¶] Juror D.M.: Oh, Okay. [¶] The Court: The prosecutor, the district

attorney of the county, elects who, if anyone, he chooses to seek the death penalty on. [¶] And at the time of the penalty phase he will explain to you, I'm sure, the reasons that he had for selecting one defendant over the other two, assuming that any of these people ever get convicted of anything. [¶] Can you accept that even though we're talking to you about penalty, these folks still have a presumption of innocence and are still presumed to be innocent until the contrary is proven? [¶] Juror D.M.: Yes, that I do. . . . [¶] The Court: Would you accept the proposition that the prosecution has the right to seek the death penalty for certain individuals that fall in the category of these three defendants out here, if they choose, and you won't second guess the prosecutor as to why he chose to seek the death penalty on one defendant over the other two? [¶] Juror D.M.: No."

The prospective juror ultimately was excused for cause.[11]

Defendant argues that the trial court's comment illustrates the prejudice he suffered from the court's refusal to conduct sequestered voir dire. According to defendant, the court's comment tainted the jury pool by diminishing the prospective jurors' sense of responsibility and giving them the impression that the prosecutor had authority to determine the penalty to be imposed. He claims the

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11 After this prospective juror was excused, defendant's counsel expressed concern that the court had suggested to the prospective jurors that they could not second-guess the prosecution's decision to seek the death penalty. The court agreed not to use such wording, and in subsequent questions explained to prospective jurors that it was the role of the jurors to decide whether capital

*(footnote continued on next page)*

court's comments reinforced the view that defendant "deserved" the penalty of death.

Defendant's generalized assertions of prejudice are without merit. The court's questioning of the juror who ultimately was excused for cause clearly made reference to the prosecution's decision to *seek* the death penalty against only one of the three defendants and, even under the most strained reading, could not reasonably be understood to advise prospective jurors that defendant "deserved" death. Defendant was not prejudiced by the court's refusal to conduct sequestered voir dire, and accordingly was not unconstitutionally deprived of a fair and impartial jury.

*4. Admission of autopsy and crime-scene photographs and contents of victim's wallet*

Defendant contends the trial court committed error by overruling his objection to the admission of crime-scene photographs and the contents of the victim's wallet. He claims the asserted error violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the California Constitution, requiring reversal of the guilt and penalty judgments. This claim is without merit.

Defendant objected to the admission of two photographs, People's exhibits 6 and 8, and to the admission of the contents of the victim's wallet, claiming this evidence was unduly prejudicial within the meaning of Evidence Code section 352. The photograph designated as People's exhibit 6 depicted a bullet being held

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*(footnote continued from previous page)*

punishment was appropriate if the charges against defendant were proved. Defendant did not seek any corresponding admonition to the prospective jurors.

in a glove and either "an open skull or at least open flesh." The photograph designated as People's exhibit 8 showed the victim's wound and his hair, with blood dripping from the gunshot wound. The contents of the victim's wallet included a photograph of two small children, a photograph of a small child seated on a horse, the victim's identification, and a one-dollar bill on which the words "I love you" were written. Defendant's counsel contended such evidence properly was admissible only at the penalty phase of the trial. The trial court overruled defendant's objection to the admission of the photographs, concluding they were probative and "not particularly ghastly." The court also overruled defendant's objection to the admission of the wallet's contents, finding the evidence was not inflammatory.

We find no error in the admission of either photograph. A trial court has wide discretion to admit autopsy photographs. (*People v. Riel* (2000) 22 Cal.4th 1153, 1193; *People v. Ochoa* (1998) 19 Cal.4th 353, 415.) Neither photograph in the present case was unduly prejudicial. Although photographs of murder victims often are graphic and disturbing, neither photograph here was "so gruesome as to have impermissibly swayed the jury." (*People v. Smithey* (1999) 20 Cal.4th 936, 974.) The photographs also had substantial probative value. In his statement, defendant informed the detectives that he shot the victim without aiming and did not believe, at the time of the shooting, that he had hit him. The photographic evidence indicated that the victim had been shot in the head at close range while holding his hand in front of his head, and was probative on the issue of malice and intent to kill. (*People v. Loker* (2008) 44 Cal.4th 691, 705; *People v. Crittenden* (1994) 9 Cal.4th 83, 133; *People v. Box*, *supra*, 23 Cal.4th 1153, 1199.) The prosecution was not obligated to " 'accept antiseptic stipulations in lieu of photographic evidence' " on these issues. (*People v. Loker, supra,* 44 Cal.4th at p. 705.)

There also was no error in admitting the contents of the victim's wallet. The prosecution referred to the photographs and the contents of the victim's wallet in both its opening statement and its closing argument at the guilt phase. During the closing argument, the prosecutor urged that the circumstance that the billfold section of the victim's wallet was empty of any money suggested that cash had been taken from the wallet during the charged crimes. Defendant refers to this circumstance, contending that the admission of the wallet improperly allowed the prosecution to treat evidence that linked the codefendants to the taking of the victim's wallet during the robbery as proof of defendant's guilt of that offense, despite his statement that he did not participate in the taking of the wallet.

The contents of the wallet had probative value, and were not unduly prejudicial. Although defendant claimed to the police that he did not participate in the taking of the victim's wallet, the uncontroverted facts establish that defendant was guilty as an aider and abettor of any theft of money from the wallet. Defendant tricked the victim into rolling down his window by asking him the time, and thereafter he and his two codefendants forced the victim from his vehicle at gunpoint and eventually into the trunk of the automobile. The codefendants evidently demanded the victim's wallet before forcing him into the trunk, but the circumstance that defendant did not make the demand or personally take the wallet does not obviate his culpability for the offense of robbery, in light of the events described above. Although the wallet contained family photographs and a notation on the dollar bill apparently indicating that someone loved the victim, these items were unlikely to provoke such a strong emotional response from the jury as to interfere with its duty to rationally decide the issue of defendant's guilt. The admission in evidence of the contents of the wallet at the guilt phase was not erroneous.

*5. Alleged instructional error*

Defendant contends that various asserted instructional errors at the guilt phase of his trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the California Constitution, requiring reversal of the guilt and penalty judgments. These claims lack merit.

*(a) Instruction on flight*

The court instructed the jury with the standard language of CALJIC No. 2.52: "The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all the other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is . . . a matter for you the jury to determine." Defendant objected to the instruction, asserting that evidence indicating that he left the scene of the shooting did not warrant giving the instruction, because defendant admitted shooting the victim and the prosecution did not rely upon defendant's conduct in leaving the scene to establish defendant's guilt. The prosecution argued that the instruction was warranted because the witness David Schindler testified that he observed two suspects jump a fence following a shooting, and because defendant informed the detectives that he fled after the homicide.

Defendant contends the instruction violated his rights under the Sixth, Eighth, and Fourteenth Amendments, because it compelled the jury to draw an impermissible inference of guilt. We previously have rejected such arguments, and similarly find the claim meritless in the present case. (*People v. Mendoza, supra*, 24 Cal.4th at pp. 179-181; *People v. Smithey*, *supra*, 20 Cal.4th at p. 983.) Defendant is correct that because of his pretrial admission that he shot the victim, neither the identity of the actual shooter nor defendant's consciousness of guilt

was a contested issue at the trial. Nonetheless, although defendant did not present any evidence in his defense, he pleaded not guilty to the charges, thereby putting in issue " 'all of the elements of the offenses.' " (*People v. Moon* (2005) 37 Cal.4th 1, 28, quoting *People v. Steele* (2002) 27 Cal.4th 1230, 1243.) Even if defendant conceded at trial his guilt of criminal homicide, "the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent." (*Moon*, at p. 28.)

We previously have rejected the notion that the flight instruction is improper when an accused concedes the issue of identity and merely contests his or her mental state at the time of the crime. (*People v. Smithey, supra*, 20 Cal.4th at p. 983.) "As we have said, even where the defendant concedes some aspect of a criminal charge, the prosecution is entitled to bolster its case, which requires proof of the defendant's guilt beyond a reasonable doubt, by presenting evidence of the defendant's consciousness of guilt." (*People v. Loker*, *supra*, 44 Cal.4th at p. 707.)

*(b) Felony murder based on robbery and kidnapping instruction*

The trial court instructed the jury pursuant to CALJIC No. 8.21 that "[t]he unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime or as a direct causal result of robbery or kidnapping is murder of the first degree when the perpetrator had the specific intent to commit such crime. The specific intent to commit robbery or kidnapping and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." Defendant contends that the trial court erred in refusing his proposed modification to CALJIC No. 8.21, which would have added the following language: "If the unlawful killing is committed after the commission or attempted commission of

the crime of robbery or kidnapping is completed, and is not a direct causal result of robbery kidnapping, you may not use the attempted commission or commission of the crime or robbery or kidnapping to find that the killing is a murder of the first degree."[12]

A trial court must instruct the jury, even without a request, on all general principles of law that are " 'closely and openly connected to the facts and that are necessary for the jury's understanding of the case.' [Citation.] In addition, 'a defendant has a right to an instruction that pinpoints the theory of the defense . . . .' " (*People v. Roldan* (2005) 35 Cal.4th 646, 715.) The court may, however, "properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (*People v. Moon, supra,* 37 Cal.4th at p. 30.)

In the present case, defendant's trial counsel conceded that the requested modification merely "restated" the existing instructional language.[13] The

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12 The trial court declined to give this modified instruction proffered by defendant, but stated that defense counsel nonetheless was free to argue to the jury his theory that the underlying felonies were completed prior to the murder and thus could not serve as predicate felonies. Defense counsel did so. The prosecution disputed this theory of the case, stating it was "laughable" to contend that the victim's kidnapping was "over" as he lay in the trunk of his car before defendant shot him.

13 This is especially so because the jury also was instructed pursuant to CALJIC No. 9.44 that a "robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in possession of the stolen property and fleeing in an attempt to escape. Likewise it is still in progress so long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property. A robbery is complete when the perpetrator has eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession of the stolen property after having effected an escape with such property."

proposed instruction would not have provided the jury with anything beyond what it otherwise learned from CALJIC No. 8.21 and CALJIC No. 9.44, and accordingly it was duplicative and properly was refused by the trial court. (*People v. Ochoa* (2001) 26 Cal.4th 398, 455 [affirming refusal to give virtually identical proposed instruction].)

*(c) Instruction on felony murder in furtherance of a conspiracy*

The jury was instructed pursuant to CALJIC No. 8.26 that "[i]f a number of persons conspire together to commit robbery or kidnapping, and if the life of another person is taken by one or more of them in furtherance of the common design, and if such killing is done to further that common purpose or is an ordinary and probable result of the pursuit of that purpose, all of the co-conspirators are deemed in law to be equally guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." Defendant requested that the court add the following sentence to the instruction: "If the killing is not done in furtherance of the common design, or not to further the common purpose and is not an ordinary and probable result of the pursuit of that purpose, you may not use the fact that a number of persons have conspired together to commit robbery or kidnapping to determine that all are equally guilty of murder in the first degree."

Again, defendant's proffered modification did nothing more than restate the existing instruction to highlight defendant's theory of the case. The jury was instructed pursuant to a correct statement of the law, and defendant was not entitled to an instruction that merely stated the converse of the language that already appeared in the existing instruction. (*People v. Moon*, *supra*, 37 Cal.4th at p. 32; *People v. Ochoa, supra,* 26 Cal.4th at p. 455.)

*(d) Instruction on felony murder based upon aiding and abetting*

The jury was instructed pursuant to CALJIC No. 8.27: "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery or kidnapping, all persons, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental." Seeking to modify the instruction by pinpointing the ensuing consequences in the event the jury believed the robbery or kidnapping was completed prior to the shooting of the victim, defendant requested language adding: "If a human being is killed by one of several persons after the commission or attempted commission of the crime and robbery or kidnapping was completed, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, [the defendants] are not guilty of the murder of the first degree by that reason alone, whether the killing is intentional, unintentional, or accidental."

The jury properly was instructed concerning the consequences of a determination that the underlying felonies had been completed prior to the shooting. (CALJIC No. 8.27.) As with the instructions discussed above, defendant's modification merely restated the existing instruction by presenting the converse of the instructional command, and by stating a circumstance that flowed logically from the existing language. The trial court's refusal to add duplicative

language to the existing instruction was not error. (*People v. Moon*, *supra*, 37 Cal.4th at p. 32; *People v. Ochoa, supra,* 26 Cal.4th at p. 455.)

*(e) Special instruction that the prosecution was bound by the contents of defendant's statement to the police*

Defendant contends the trial court erred in refusing to give a special instruction concerning the weight and impact of his statement to the police. Defendant asked the trial court to instruct the jury that "[t]he prosecution, having presented defendant's statement in order to prove their case, are bound by that statement and its explanation for the conduct in the absence of proof to the contrary." This proposed instruction was based upon the so-called *Toledo* doctrine (*People v. Toledo* (1948) 85 Cal.App.2d 577; *People v. Estrada* (1923) 60 Cal.App. 477), concerning which we have observed: "The courts may sometimes say that the prosecution is 'bound by' extrajudicial statements of defendant which are introduced by the prosecution and which are irreconcilable with guilt, but this concept is applicable only where there is no other competent and substantial evidence which could establish guilt." (*People v. Acosta* (1955) 45 Cal.2d 538, 542-543 (*Acosta*).) Moreover, we noted, if there is any " 'well established circumstance' " that is " 'incompatible' " with the defendant's exculpatory statement, then the jury may consider all the evidence in determining whether to convict. (*Id.* at pp. 541-542.)

In the present case, the trial court properly refused to give the special instruction requested by the defense. Opinions rendered by the Courts of Appeal subsequent to *Toledo* demonstrate that its holding has been superseded at least in part. "First, the so-called *Toledo* doctrine (whose genesis seems to have been merely an argument offered on appeal) actually refers to a principle of judicial review invoked in homicide prosecutions obviating a defendant's burden of showing mitigation or justification where the prosecution's proof itself tends to

show same or a lesser unlawful homicide. [Citations.] . . . To the extent that the doctrine is founded upon a notion that the prosecution is bound by their witnesses' statements [citation] on the antiquated theory of vouchsafing one's own witnesses [citation], that theory has long since been discarded in favor of the modern rule allowing impeachment of a witness by any party, 'including the party calling him.' (Evid. Code, § 785; *People v. Chacon* (1968) 69 Cal.2d 765, 779.) In the final analysis the question of defendant's guilt must be resolved from *all* the evidence considered by the jury." (*People v. Ross* (1979) 92 Cal.App.3d 391, 400, fn. omitted.)

Defendant's requested special instruction was founded on an antiquated and questionable statement of the law. Moreover, even within the terms of this court's discussion in *Acosta, supra,* 45 Cal.2d at pages 451-452, the prosecution presented " 'well-established circumstance[s]' " that were inconsistent with the exculpatory content of defendant's statement. The jury plainly was entitled to consider all of the evidence in arriving at its verdict. The trial court did not err in refusing to instruct the jury as requested by the defense.

*(f) Special instruction regarding threats and menace*

Defendant contends the trial court erred in refusing to deliver a special instruction that threats, menace, or compulsion may vitiate the mental state required for first degree murder.

The court instructed the jury pursuant to CALJIC No. 8.20, as follows: "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree." The trial court further instructed the

jury concerning second degree murder pursuant to CALJIC No. 8.30, as follows: "Murder of the second degree is also 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 prove deliberation and premeditation." Defendant requested an additional instruction, which read: "You may consider evidence showing the existence of threats, menaces or compulsion that played a part in inducing the unlawful killing of a human being for such bearing as it may have on the question of whether the murder was of the first or second degree." The trial court declined to give the additional instruction.

Defendant contends that in the absence of the requested instruction, his trial counsel was precluded from directly arguing to the jury that defendant's lack of intent was predicated on the legal theory of duress — further contending that this circumstance forced counsel to argue only generally that the evidence did not support first degree murder, but instead supported a verdict of second degree murder. We find no error. It is well established that duress does not constitute a defense to murder, and does not reduce murder to manslaughter. (*People v. Anderson* (2002) 28 Cal.4th 767, 771-783.) Nonetheless, duress may negate the deliberation or premeditation required for first degree murder, and an instruction such as the one requested by defendant may be appropriate if warranted by the circumstances of the case. (*Id.* at p. 784.)

No evidence was received at defendant's trial suggesting that defendant was threatened before he shot the victim. Contrary to defendant's assertion that the evidence established he shot the victim fearing that if he did not do so, his codefendant would shoot him, defendant's statement indicates that he shot the victim rather than handing the gun back to his codefendant because he feared that if his codefendant attempted to shoot the victim, his codefendant's drunken state would cause him to mistakenly shoot *defendant*. Indeed, when asked by Detective

Erickson why, upon hearing his codefendant's exhortations to kill the victim, defendant did not simply hand him the gun and tell him to kill the victim himself; defendant responded, " 'Cause . . . I don't want him to shoot me by accident." Although defendant's statement also indicates that defendant's codefendant repeatedly informed him "you gotta kill him," there is no evidence of any threat, menace, or compulsion accompanying these words.

The requested instruction was not supported by substantial evidence indicating that any threat, menace, or compulsion motivated defendant's conduct, and the trial court did not err in refusing to so instruct the jury. (*People v. Moon, supra,* 37 Cal.4th at p. 32.)

*(g) Failure to instruct on lesser included offenses*

Defendant contends the trial court erred in failing to instruct the jury on its own motion concerning second degree felony-murder, false imprisonment, involuntary manslaughter, and certain lesser included offenses to the charged offense of robbery. The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. (*People v. Blair* (2005) 36 Cal.4th 686, 745; *People v. Breverman* (1998) 19 Cal.4th 142, 154 [duty to instruct on court's own motion]; *People v. Flannel* (1979) 25 Cal.3d 668, 684 [duty to instruct upon request].) "That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser." (*People v. Blair, supra,* 36 Cal.4th at p. 745, citing *People v. Memro* (1995) 11 Cal.4th 786, 871; see also *People v. Breverman, supra,* 19 Cal.4th at p. 154.) "To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial — that is, it must be evidence from which a jury composed of reasonable persons

could conclude that the facts underlying the particular instruction exist." (*People v. Blair, supra,* 36 Cal.4th at p. 745, citing *People v. Breverman, supra,* 19 Cal.4th at p. 162.)

Defendant asserts he was entitled to a second degree felony-murder instruction because there was evidence indicating that he lacked the intent to commit robbery and that the crime of kidnapping was completed prior to the killing. According to defendant, therefore, it would be reasonable for the jury to doubt that the killing had taken place during the course of one of the felonies listed in section 189. Defendant also contends that had the jury been properly instructed regarding lesser included offenses of robbery — including theft, unlawful taking of an automobile, joyriding, and theft from a person — it is reasonably probable that he would have been found guilty of a felony that qualified the killing as second degree felony-murder.

There was no substantial evidence to justify instruction on second degree felony-murder. Overwhelming evidence established that defendant was guilty of kidnapping Joseph Kondrath. The victim was forced into his automobile trunk at gunpoint, driven a substantial distance, and remained in the trunk when defendant shot and killed him. As we concluded with regard to defendant's *Aranda/Bruton* claim discussed above, there is no merit in defendant's contention that the circumstance that defendant had stopped the car before shooting the victim establishes that the felony of kidnapping had been completed before the victim was murdered. Kidnapping is one of the offenses listed in section 189, and because of the overwhelming evidence supporting defendant's conviction for kidnapping Kondrath, if defendant was guilty of felony murder, that felony murder was of the first degree.

Defendant contends that an instruction on the asserted lesser included offenses of robbery such as theft, auto theft, joyriding, or theft from a person was

warranted, because a reasonable juror could conclude that defendant lacked the intent to commit robbery in light of the circumstance that he did not share his codefendants' intent to take the victim's wallet and did not intend to *permanently* deprive the victim of his automobile at the time of the robbery — the specific intent required for robbery under the facts of the present case. In the alternative, he asserts that instruction on lesser included offenses was warranted because a reasonable juror could have concluded that the taking of the victim's wallet and automobile was not accomplished by the threat of force.

Defendant was not entitled to instruction on any lesser included offenses of robbery, or to an instruction on second degree felony-murder, because there is no rational basis to conclude that the murder was committed during the unlawful taking of a vehicle, joyriding, or theft, but not during the commission of a robbery. If theft from the victim was committed, that theft clearly was accomplished by the threat of force — the use of a gun to take both the victim's wallet and his vehicle — and therefore constituted robbery. The evidence that the killing occurred during the commission of a crime that did not involve force is too insubstantial to support a second degree felony-murder instruction, and the trial court's failure to so instruct the jury did not constitute error. (*People v. Neely* (1993) 6 Cal.4th 877, 897.)

Nor is there substantial evidence to support an instruction on any lesser included offenses of robbery on the basis that defendant did not intend permanently to deprive the victim of his automobile. Evidence in the record establishes that defendant and his companions discussed "jacking" the victim just moments before approaching him, discussed killing the victim very shortly after forcing him into the trunk at gunpoint and absconding with his vehicle, and ultimately did kill the victim. Defendant contends an instruction on lesser included offenses nonetheless was warranted because he told police that, at some

point during the night, *after* the victim had been forced into the trunk and defendant and his companions had taken possession of the vehicle, he said to his codefendants that they should simply abandon the car and leave the victim unharmed, rather than killing him. Defendant's statement establishes, at best, that at some point during the robbery, defendant briefly suggested changing the planned course of action. This circumstance does not provide substantial evidence that defendant intended, at the time he and his companions forced the victim from his car and into the trunk at gunpoint, to borrow the car only temporarily, rather than permanently. Accordingly, defendant's claim is not supported by any evidence, let alone substantial evidence, justifying a second degree felony-murder instruction.

There also is no substantial evidence to justify instruction on involuntary manslaughter based upon the theory that the victim's death could have occurred during the commission of the crime of false imprisonment, a felony that is not inherently dangerous and that therefore would not support a conviction of second degree felony-murder. The evidence establishing that defendant and his companions forced the victim into the trunk of his automobile at gunpoint and drove around with him in that posture points indisputably to kidnapping. Defendant offered no evidence or argument that his sole purpose was to forcibly detain the victim at the scene of the shooting. The evidence of an intent merely to detain, rather than transport, the victim was too insubstantial to support the giving of an instruction on involuntary manslaughter. The trial court's failure to so instruct the jury did not constitute error. (*People v. Neely*, *supra*, 6 Cal.4th at p. 897.)

*6. Sufficiency of the evidence*

*(a) Robbery and first degree felony-murder predicated on robbery*

Defendant contends the evidence is insufficient to support his robbery conviction, his conviction of murder in the course of robbery or attempted robbery, and the special circumstance finding that he committed the murder while engaged in the commission of robbery. He contends the jury's verdict on these charges therefore violated his due process rights under the state and federal Constitutions.

" 'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' ". (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077; see also *People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *People v. Mayfield, supra*, 14 Cal.4th 668, 790-791 [same standard of review applies to determine the sufficiency of the evidence to support a special circumstance finding].) " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' " (*People v. Bean* (1988) 46 Cal.3d 919, 933, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702; see also *People v. Valdez* (2004) 32 Cal.4th 73, 104.) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence." (*Valdez,* at p. 104.)

As stated above with reference to defendant's *Aranda/Bruton* claim, robbery is the taking of "personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive such

person of such property . . . ." (CALJIC No. 9.40.) Both robbery and felony murder based on robbery require that the intent to rob arise before force or fear is applied. Thus, "[i]f the defendant does not harbor the intent to take property from the possessor at the time he applies force or fear, the taking is only a theft, not a robbery." (*People v. Davis* (2005) 36 Cal.4th 510, 562.) Similarly, "an intent to steal that arises *after* the infliction of the fatal wounds cannot support a felony-murder conviction." (*Id.* at pp. 564-565.) Finally, the special circumstance of murder during the commission of a robbery requires that the murder be committed "in order to advance [the] independent felonious purpose" of robbery, but the special circumstance is not established when the felony is merely incidental to the murder. (*People v. Green, supra,* 27 Cal.3d at p. 61; see *People v. Davis, supra,* 36 Cal.4th at p. 568; *People v. Horning* (2004) 34 Cal.4th 871, 907-908.)

In the present case, the prosecutor argued to the jury that a robbery had been committed because the victim's wallet, automobile, and car keys had been taken. Defendant contends there was insufficient evidence of robbery because he and his companions did not, at the time they took the victim's car keys and automobile at gunpoint, intend *permanently* to deprive the victim of his keys or his automobile, but intended instead to use the vehicle only temporarily. With regard to the wallet, defendant contends he did not share the specific intent of his codefendants to deprive the victim of his wallet. We conclude, to the contrary, that substantial evidence supports a finding that defendant committed a robbery, and that he possessed the specific intent to permanently deprive the victim at least of his automobile (and probably his wallet as well).

First, it is undisputed that defendant and his codefendants at gunpoint forced the victim from his automobile and into the trunk of the vehicle. Defendant conceded to the police that he employed the ruse of asking the victim the time in order to persuade him to lower his window; that prior to approaching the victim,

he and the others discussed "jacking" the victim — which he explained to officers meant robbing him; that he joined his codefendants in forcing the victim from his automobile and into the trunk of the vehicle at gunpoint; and that the victim left the car keys in the keyhole of the trunk, requiring defendant to retrieve them in order to drive away. He also told Jeannette Roper that the men initially had planned to, but ultimately did not, steal the victim's car stereo. Very shortly after forcing the victim into the trunk at gunpoint, defendant and his codefendants discussed the need to kill the victim, because he would be able to identify them. Defendant clearly attempted to minimize his culpability as much as possible, consistent with the evidence. Toward this end, he informed the police that he told his codefendants that rather than killing the victim, they simply should park his vehicle somewhere, leaving the victim unharmed in the trunk, but that because his codefendants repeatedly urged him to kill the victim, he did kill him — without actually wanting to do so.

Although defendant contends this evidence establishes that he did not possess the intent, at the time he took the automobile from the victim, *permanently* to deprive him of the use of his automobile, nevertheless a reasonable jury, considering this same evidence, could reject defendant's explanation as unreasonable. The jury was not required to believe defendant's claim to the police that at the time he forced the victim into the trunk at gunpoint, he intended only to temporarily borrow the victim's automobile and eventually return it.

Additionally, substantial evidence supports a finding that defendant was guilty of robbery because he intentionally aided and abetted the codefendants in taking the victim's wallet and therefore intended permanently to deprive the victim of the money contained in that wallet. The victim's wallet was found on a street other than the one where the shooting took place. The wallet contained no money except for a one-dollar bill, which was found in the "wallet portion" as

opposed to the "billfold part" of the wallet. As the prosecution argued to the jury, the circumstance that the billfold section of the wallet was empty supported an inference that money had been taken from it. There also was substantial evidence suggesting that defendant shared the intent of his codefendants to steal money from the victim's wallet. Defendant informed the detectives that one of his codefendants demanded the victim's wallet immediately after defendant and the others forced the victim from his automobile at gunpoint, all three having just discussed "jacking" the victim. The victim handed the wallet to one of the codefendants before he was forced into his trunk. A reasonable jury could infer from this evidence that defendant shared the codefendants' intent to take the victim's wallet and money at the time defendant willingly joined them in forcing the victim from his automobile and into the vehicle trunk at gunpoint.

Defendant's argument regarding the sufficiency of the evidence of the robbery-murder special circumstance fails for the same reasons that apply to his primary sufficiency-of-the-evidence argument. The sole intent required for the jury to find true the robbery-murder special-circumstance allegation is the intent to commit a robbery before or during the killing. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1079-1080; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1263.) As explained above, the evidence was sufficient to permit a reasonable jury to find that defendant shot the victim in the course of robbing him.

*(b) Kidnapping for robbery, and first degree felony-murder predicated on kidnapping for robbery*

Defendant contends the evidence was insufficient to support his conviction of kidnapping for robbery, and of first degree felony-murder to the extent the latter offense was predicated upon murder perpetrated in the commission of a kidnapping for robbery.

"Any person who kidnaps or carries away any individual to commit robbery" is guilty of kidnapping for robbery. (§ 209, subd. (b).) "Kidnapping for robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself." (*People v. Rayford* (1994) 9 Cal.4th 1, 12.)

Defendant does not challenge the sufficiency of the evidence establishing that the victim was kidnapped, but asserts that the evidence was insufficient to establish that the victim was kidnapped to facilitate the commission of a robbery. His claim of error is based upon the same arguments, discussed above, that he made regarding the asserted absence of intent to commit robbery. For the reasons already stated, defendant's related claim regarding kidnapping for robbery also must fail.

*(c) First degree felony-murder predicated on kidnapping*

Defendant contends insufficient evidence supports any verdict of felony murder predicated upon a finding that the murder was committed in the course of a kidnapping. As noted above, however, there was substantial evidence demonstrating that defendant committed the crime of kidnapping — that is, that he forced the victim into the trunk of his own automobile at gunpoint, and then transported him over a substantial distance without his consent. There also was substantial evidence indicating that defendant killed Kondrath during the commission of that kidnapping, and that he killed the victim in order to advance the commission of the kidnapping — that is, to eliminate Kondrath as a witness. (See *People v. Green, supra*, 27 Cal.3d at p. 61.) The evidence was sufficient to permit a reasonable jury to find that defendant shot the victim in the course of kidnapping him.

*7. Asserted cumulative error*

We have not identified any error that was prejudicial, whether considered separately or cumulatively. (See *People v. Salcido* (2008) 44 Cal.4th 93, 111.)

**B. Asserted Errors Affecting the Penalty Phase of Trial**

*1. Asserted "spillover" effect from denial of defendant's severance motion*

We concluded above that the trial court did not err in denying defendant's motion for severance, and that whatever error accrued from the admission of the codefendants' redacted statements at the joint trial was harmless beyond a reasonable doubt. We must address this issue again, however, because defendant claims the trial court's asserted error at the guilt phase created a "spillover" effect at the penalty phase of his trial.

Defendant contends the denial of his severance motion prejudiced him at the penalty phase of the trial because the joinder of the trial of the three defendants, and the admission of the codefendants' statements, permitted the prosecutor to refer repeatedly to defendant's primary role in the murder. According to defendant, the prosecution emphasized that he was the actual shooter — not an accomplice like his codefendants — and, because of this heightened culpability, that defendant should be sentenced to death. Defendant contends this argument was improper and highly prejudicial in light of section 190.3, factor (j), which allows the jury to consider "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."

Although the prosecutor referred to factor (j) and remarked upon defendant's primary role in committing the crimes against Kondrath, the comments were fully supported by defendant's own statement — in which he admitted robbing, kidnapping, and shooting the victim — and the testimony of

David Schindler, who saw two men fleeing the scene of the shooting. The prosecutor did not refer at the penalty phase of the trial to the redacted statements of the codefendants, which were not admitted into evidence against defendant, and the jury was instructed not to consider those statements as evidence against defendant at the penalty phase.

We concluded above that defendant was not prejudiced by any error in admitting the redacted statements of his codefendants at the guilt phase of the trial. Similarly without merit is defendant's contention that the admission of these statements at the guilt phase — and the related denial of his motion for severance — prejudiced him at the penalty phase of his trial.[14]

2. *The trial court's refusal to instruct the jury that defendant's age was a mitigating factor*

Defense counsel requested a modified instruction concerning age as a factor in mitigation. Pointing to the circumstance that defendant was 18 years of age at the time of the crime, he requested that the court modify CALJIC No. 8.85 to instruct the jury explicitly that "examples of mitigating factors include" "[t]he

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[14] Defendant contends the trial court erred in refusing to instruct the jury that evidence introduced at the guilt phase regarding defendant's criminal activity should not be considered a factor in aggravation. Defendant sought to have the trial court instruct the jury that "[e]vidence has been introduced in the guilt and penalty phases of this trial that may show that the defendant engaged in criminal activity which you may not consider as a factor in aggravation. You may consider only the crimes which I will define for you in determining whether or not the defendant has engaged in criminal activity which involves the use or the express or implied threat to use force or violence." The trial court declined to provide the jury with this requested instruction. Defendant does not explain, and we fail to discern, how providing the jury with this instruction would have obviated the asserted prejudicial "spillover" effect from the denial of severance, and because we find no "spillover" we also conclude the trial court did not err in refusing this proposed instruction.

defendant's age, immaturity, or lack of emotional development at the time of the commission of the crime." The trial court refused defendant's proffered modification and instructed the jury pursuant to the court's own modification of CALJIC No. 8.85 that "[t]he age of the defendant at the time of the crime shall not be considered as an aggravating factor."

We discern no error in either the court's own modification of the instruction, or in its refusal to instruct the jury as requested by defendant. The trial court is not constitutionally required to instruct the jury that age is relevant only to mitigation. (*People v. Panah* (2005) 35 Cal.4th 395, 499-500; *People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079.) The trial court did instruct the jury that defendant's age could not be considered as an aggravating factor, and the instructions as a whole permitted the jury to consider defendant's youth as a mitigating factor. (*People v. Panah*, *supra*, 35 Cal.4th at pp. 499-500; CALJIC No. 8.85 [instructing jury that it may consider in mitigation any "other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death"].)

*3. Admission of victim-impact testimony*

Defendant contends the trial court erred in admitting victim-impact evidence at the penalty phase of his trial, claiming the evidence was unduly prejudicial. The victim's father, Joseph Kondrath, mother, Joanna Kondrath, sister, Ronna Kondrath, and fiancée, Claudia Divito, testified concerning the deleterious impact of the victim's murder on themselves and others, how much they missed the victim, and the victim's sweet and peaceful nature.

We frequently have upheld the introduction of victim-impact evidence. "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057.) "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.' " (*Id.* at p. 1056, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

In the present case, each witness's testimony was brief and apparently was delivered without undue emotion, as far as the record demonstrates. The victim-impact evidence admitted in this case was typical of this type of evidence that we routinely have allowed, and came within the limits established for such evidence. (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 444 [family members spoke of their love of the victims and how they missed having them in their lives; photographs were presented of the victims while alive].) Admission of the victim-impact testimony received in the present case did not violate defendant's constitutional rights.

*4. Challenge to pattern instructions*

*(a) CALJIC No. 8.87*

Defendant contends the trial court erred in instructing the jury pursuant to CALJIC No. 8.87 (1989 rev.) concerning its consideration of evidence of uncharged crimes.[15] The prosecution introduced evidence of three acts of violence committed by defendant against his ex-girlfriend, Sylvia Carmona, and

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15 Language similar to former CALJIC No. 8.87 now appears in CALCRIM No. 764.

an act of violence committed by defendant against his stepfather, Lee Thomas. At the conclusion of the penalty phase, the trial court instructed the jury pursuant to the 1989 revision of CALJIC No. 8.87, which stated in relevant part:

"Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: assaults and batteries on Sylvia Carmona on July 15, 1991, July 17, 1991, and in May of 1992 and assault with a deadly weapon on Lee Thomas on May 9, 1992, which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts."

Defendant contends that the use of revised CALJIC No. 8.87 was error because its language constituted a directed verdict to the jury as to (1) whether the uncharged conduct constituted a crime, and (2) whether the evidence involved the express or implied use of force or violence or the threat of force or violence under section 190.3, factor (b). "We have held, however, that the characterization of other crimes as involving express or implied use of force or violence, or the threat thereof, is a legal question properly decided by the court." (*People v. Loker*, *supra*, 44 Cal.4th at p. 745; see *People v. Monterroso* (2004) 34 Cal.4th 743, 793.)

Defendant also contends that because the trial court instructed the jury in the terms of CALJIC No. 8.87, and failed to require unanimity regarding factors in aggravation, the penalty phase of his trial was constitutionally inadequate in that the error interfered with the jury's ability to make a reliable determination of the appropriate punishment, in violation of the Eighth Amendment of the United States Constitution. The second paragraph of CALJIC No. 8.87 informed the jury: "It is not necessary for all jurors to agree. If any juror is convinced beyond a

reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation."

Defendant acknowledges that we previously have held that nothing in the federal Constitution or in statutory law requires the penalty phase jury to agree unanimously that a particular aggravating circumstance exists. (*People v. Williams* (2008) 43 Cal.4th 584, 648-649; *People v. Berryman* (1993) 6 Cal.4th 1048, 1101-1102.) Defendant contends, however, that our prior conclusions have been abrogated by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 446 and *Ring v. Arizona* (2002) 536 U.S. 584. We previously have rejected this contention. "While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true even though the jury must make certain factual findings in order to consider certain circumstances as aggravating factors. As such, the penalty phase determination 'is inherently moral and normative, not factual . . . .' (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' (*Apprendi*, *supra*, 530 U.S. at p. 490), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings. Accordingly, our rulings rejecting the need to instruct on the presumption of innocence during the penalty phase still control." (*People v. Prieto* (2003) 30 Cal.4th 226, 263.)

*(b) CALJIC No. 8.85*

Defendant contends the trial court erred by refusing to modify the language of pattern instruction CALJIC No. 8.85,[16] which set forth the mitigating factors to be considered by the jury in making its penalty determination. Defendant sought to modify the instructions to add 22 additional specific examples of mitigating evidence such as "[w]hether the defendant was a loving and helpful man in his relationship with his friends and relatives"; "[w]hether the defendant has a calming and guiding effect upon other inmates"; and "the absence of any prior felony or misdemeanor convictions." The trial court refused to modify the standard instruction as requested by defendant and instructed the jury according to the pattern language of CALJIC No. 8.85, with the modification discussed above relating to defendant's age.

Defendant contends that asserted defects in pattern instruction CALJIC No. 8.85 prejudicially affected the jurors' understanding of their weighing function, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. We decline to reconsider our prior decisions holding that this instruction is not flawed for its failure to identify which facts may be considered aggravating and which may be considered mitigating (*People v. Cruz* (2008) 44 Cal.4th 636, 681; *People v. Valencia* (2008) 43 Cal.4th 268, 309 ["CALJIC No. 8.85 is both correct and adequate"]); that the trial court is not compelled to delete assertedly inapplicable factors from the instruction (*People v. Farnam* (2002) 28 Cal.4th 107, 191-192); and that the instruction does not " 'encourage the double counting of aggravating factors.' " (*People v. Ayala* (2000) 24 Cal.4th 243, 289.)

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16 Language similar to former CALJIC No. 8.85 now appears in CALCRIM No. 763.

*(c) Special instruction regarding the role of sympathy and mercy*

Defendant contends the trial court's refusal to give his proffered instructions regarding the consideration of sympathy and mercy violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and parallel provisions of the state Constitution. Defendant's proposed instruction informed the jury that mitigating evidence did not excuse the offense, but that "fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability."

The trial court instructed the jury pursuant to CALJIC No. 8.85, which provided, in relevant part, that the jury may consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CALJIC No. 8.85, factor (k).) The prosecutor did not argue to the jury that it should not consider sympathy or mercy. We have concluded that CALJIC No. 8.85 adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1070.) There was no error. (*People v. Wader* (1993) 5 Cal.4th 610, 663; *People v. Caro* (1998) 46 Cal.3d 1035, 1067.)

*(d) Special instructions regarding mitigating factors*

Defendant contends the trial court's refusal to give his proffered instructions concerning the distinction between (and the proper use of) aggravating and mitigating factors violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and parallel provisions of the state Constitution. These instructions would have advised the jury, in varied ways, that they might consider any evidence in mitigation — including

specifically the absence of prior felony convictions — and that any mitigating factor, standing alone, could support a determination that death was not the appropriate punishment in this case. Defendant also sought to have the jury instructed that the view of any one juror that a factor in mitigation exists is sufficient to allow any other juror to consider such factor to have been established, and that the jurors may require a degree of certainty — for proof of guilt — greater than proof beyond a reasonable doubt. Defendant contends his requested special instructions merely supplemented the general principles contained in the pattern CALJIC instructions rendered by the court.

In asserting error in the trial court's rejection of his proposed instructions, defendant contends, again, that CALJIC No. 8.85 is defective. He asserts that his proffered special instructions would have corrected those defects, but the sole specific example he provides is that one of his instructions would have informed the jury that the absence of any prior felony conviction incurred by defendant could not be treated as a factor in aggravation but *only* as mitigation. The pattern instruction, however, does not suggest that the absence of any mitigating factor should be considered in aggravation. (*People v. Page* (2008) 44 Cal.4th 1, 51.) As noted above, we repeatedly have held CALJIC No. 8.85 to be "correct and adequate." (*People v. Valencia*, *supra*, 43 Cal.4th at p. 309.) There was no error.

*(e) CALJIC No. 8.84.1*

Defendant contends he was denied his right to due process and to a reliable determination of penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because the trial court instructed the jury, pursuant to CALJIC No. 8.84.1, that it "must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise." Defendant, acknowledging that his proffered alternative set of

instructions merely supplemented the standard CALJIC instructions, sought to have the jury instructed regarding the consideration to be given to the guilt phase evidence and verdict and to the evidence of uncharged violent acts.[17] The trial court declined to give defendant's proffered instructions. Defendant asserts that the pattern instruction erroneously permitted the jury to consider in aggravation the crimes his codefendants committed against Cynthia Melson when they fired into her apartment.

Defendant's claim is without merit. Defendant told the detectives that he willingly accompanied his codefendants to obtain a gun that was to be used to fire at members of the Watergate Crips gang. Defendant drove his codefendants to the area where Cynthia Melson lived. Forensic experts testified that the shotgun shell

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17 Specifically, defendant sought the following instructions with respect to the determination of penalty:

"You may not treat the verdict and finding of first degree murder committed under special circumstances[s], in and of themselves, as constituting an aggravating factor . . . ."

"You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors."

"Evidence has been introduced in the guilt and penalty phases of this trial that may show that the defendant engaged in criminal activity which you may not consider as a factor in aggravation. You may consider only the crimes which I will define for you in determining whether or not the defendant has engaged in criminal activity which involves the use or the express or implied threat to use force or violence."

"Although evidence was presented at the guilt phase of this trial, which may have tended to establish that the defendant may have been involved in non-violent criminal activity that did not result in a felony conviction, you may not consider that evidence in determining which sentence to impose. Remember, the only facts that can be considered by you as aggravating factors are those set forth in subparagraphs (a), (b), and (c) above."

casings and wadding recovered from inside the Melson residence were from the same type of cartridge as the casings recovered from Kondrath's automobile. From this evidence, the jury was entitled to conclude that defendant aided and abetted in the firing of shots into Melson's apartment and, therefore, because that shooting constituted part of the criminal activities committed by defendant that night, the jury was entitled to consider the incident at the penalty phase of the trial. It is also beyond dispute that the incident constituted criminal activity involving the use of force — activity that therefore could be considered by the jury in aggravation pursuant to factor (b) of section 190.3.

*(f) CALJIC No. 8.88*

The trial court instructed the jury in the language of CALJIC No. 8.88,[18] which defines factors in aggravation and mitigation. Defendant asserts the court erred by refusing to give the modified version of the instruction he requested regarding the proper manner of weighing aggravating and mitigating factors.[19]

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18 Language similar to former CALJIC No. 8.88 now appears in CALCRIM No. 763.

19 Specifically, defendant sought to have the jury instructed that:

"Each juror makes an individual evaluation of each fact or circumstance offered in mitigation of penalty."

A finding of mitigation could be made by one or more members of the jury, and "any member of the jury who finds the existence of a mitigating factor may consider such a factor established, regardless of the number of jurors who concur that the factor has been established."

Only specific aggravating factors may be considered, and although *any* evidence might constitute a factor in mitigation, "[y]ou are not permitted to consider any factor as aggravating unless it is specified on the list of factors you have been given previously. There is, however, no limitation on what you may consider as mitigating."

In considering mitigating evidence, any such evidence may warrant a sentence less than death, and "you may return a verdict of life imprisonment

*(footnote continued on next page)*

We repeatedly have held that the standard version of CALJIC No. 8.88 is adequate and correct. (*People v. Boyette, supra*, 29 Cal.4th 381, 464-465; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1160-1161; *People v. Gurule* (2002) 28 Cal.4th 557, 661-662.) Defendant's proffered instructions merely restated the principles that flowed logically from the pattern instructions, and the trial court was not required to inform the jury that the sole aggravating factors it may consider are those listed in its instructions. (*People v. Berryman, supra*, 6 Cal.4th at p. 1100.)

*(g) Burden of proof*

Defendant also proffered jury instructions purporting to inform the jury regarding the respective burdens of proof required at the penalty phase.[20] The trial court properly declined to give these instructions.

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*(footnote continued from previous page)*

without possibility of parole even if you find that the factors and circumstances in aggravation outweigh those in mitigation."

20 Defendant's proffered instructions stated, in relevant part:

"A mitigating circumstance need not be proved beyond a reasonable doubt nor even by a preponderance of the evidence, and each juror may find a mitigating circumstance to exist if there is any evidence to support it."

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt as to whether the aggravating factors exist, he is entitled to have you not consider such factors in your deliberations on the appropriate penalty unless so proved. All twelve jurors must agree as to the existence of any aggravating factor before it may be considered by you. If the jury does not unanimously agree that the existence of an aggravating factor has been proven, no juror may consider it in reaching their penalty verdict."

"If you have a doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of the doubt and return a verdict fixing the penalty at life in prison without the possibility of parole."

"[E]xcept for prior violent crimes evidence and prior felony convictions under section 190.3, factors (b) and (c), the court need not instruct regarding a burden of proof . . . . [Citations.]" (*People v. Cruz*, *supra*, 44 Cal.4th at p. 681.) Because " '[u]nlike the guilt determination, "the sentencing function is inherently moral and normative, not factual" [citation] and, hence, not susceptible to a burden-of-proof quantification' " (*People v. Manriquez* (2005) 37 Cal.4th 547, 589), it is sufficient that the jury was instructed that " '[t]o 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 possibility of parole.' " (*Ibid.*) Moreover, "[t]he United States Supreme Court decisions rendered in *Ring v. Arizona* (2002) 536 U.S. 584 and *Apprendi v. New Jersey* (2000) 530 U.S. 466 do not compel a different conclusion." (*Ibid.*; see also *People v. Williams*, *supra*, 43 Cal.4th at p. 649 [the high court's decision in *Cunningham v. California* (2007) 549 U.S. 270 does not compel a different result].)

*(h) Special instruction regarding role of mitigating factors*

Finally, defendant asserts the trial court erred in refusing to give an instruction informing the jury that, with regard to the statutory aggravating factors, the "factors which I have just listed are the only factors that can be considered by you as aggravating factors[,]" but that "[a]ny one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case."

No modified instruction was warranted. The jury was instructed pursuant to CALJIC No. 8.88 regarding the weighing of aggravating and mitigating circumstances. We note, too, that in argument to the jury, the prosecution acknowledged, "if you find one factor that is mitigating, that alone can be the basis

for your returning a verdict other than death." It thus was clear to the jury that a single mitigating factor, standing alone, could justify a verdict of life imprisonment rather than a verdict of death.

*5. Asserted prosecutorial misconduct*

Defendant alleges prosecutorial misconduct occurred stemming from several remarks made by the prosecutor during closing argument. As noted above, defendant requested that the trial court instruct the jury that the absence of mitigation did not constitute aggravation, that defendant demonstrated remorse, and that defendant likely would not be a danger to others were he to be sentenced to life imprisonment without the possibility of parole. Defendant asserts that the objective of these requests, all denied by the trial court, was to preclude the prosecution from arguing contrary propositions. Defendant now contends the prosecutor's purported assertions in closing argument that the absence of mitigation constituted aggravation, that defendant failed to demonstrate any remorse, and that defendant *would* present a danger to others were he not sentenced to death, constituted misconduct.

Defendant acknowledges that he did not object to the prosecutor's closing argument, but contends that his claim of prosecutorial misconduct is not forfeited on appeal, because he requested special instructions that would have informed the jury of the converse of the prosecutor's statements. In the alternative, he urges us to review his claim pursuant to section 1259, which permits an appellate court to review a claim of instructional error in the absence of objection at trial if a defendant's substantial rights were affected. Neither of defendant's arguments for preservation of the issue has merit, and his claim is forfeited. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1315.) As we concluded above, defendant's claims of instructional error lack merit, and therefore he has not shown an abridgement of a

substantial right. In any event, a request for a special jury instruction is not the equivalent of or a substitute for a required objection to prosecutorial misconduct.

Even if defendant had preserved this claim, it lacks merit. The prosecutor is entitled to note the absence of the mitigating circumstance of remorse and may comment upon a capital defendant's potential for future dangerousness. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 160 [finding no statutory bar to a logical comment on a defendant's lack of remorse, and finding such remarks proper]; *People v. Davenport* (1985) 41 Cal.3d 247, 288 [a prosecutor's comments on a capital defendant's future dangerousness are "within the proper bounds of argument to the jury"].) Moreover, the record does not support defendant's contention that "the prosecutor argued that absence of mitigation constituted aggravation." The prosecutor, although observing that defendant did not avail himself of opportunities to succeed at home, in school, or at work, did not urge at any point that the absence of mitigating factors, including remorse, should be considered in aggravation.

*6. "Spillover" effect of guilt phase errors on penalty determination*

Defendant renews many of the same claims he made concerning the guilt phase of his trial, contending that alleged guilt-phase errors rendered the penalty determination unreliable. Specifically, he points to the asserted errors in admitting autopsy and crime scene photographs, the claimed insufficiency of the evidence supporting his convictions for kidnapping for robbery and first degree murder; asserted instructional errors concerning flight and the defense theory of the case; and the court's failure to instruct on various lesser included offenses. He claims that these asserted errors in the aggregate improperly prejudiced the jury at the penalty phase of the proceedings. As explained above, there is no merit in any of defendant's claims that error was committed at the guilt phase, and accordingly his

contention that such errors cumulatively were prejudicial at the penalty phase lacks merit.

*7. Failure to instruct the jury not to "double count" special circumstances, and related prosecutorial misconduct*

As described above, defendant requested special jury instructions that would have informed the jurors that they could not "double count" certain facts as factors in aggravation if those facts had been relied upon by the jury in determining defendant's guilt of the charged crimes, or in determining the truth of the special circumstance allegations. As noted earlier, the trial court was not required to deliver these requested special instructions.

Defendant now contends that the prosecutor misled the jury by stating that the two special circumstance findings were to be considered separately in aggravation apart from the circumstances of the crime, and that in so doing, the prosecutor urged the jury to double count the special circumstances.

Defendant did not object to the prosecutor's remarks at trial, and accordingly his claim is forfeited. (*People v. Carasi, supra,* 44 Cal.4th at p. 1315.) Even if there were no forfeiture, we would conclude that nothing in those remarks misled the jury into considering — as separate instances of aggravation — the evidence establishing the special circumstances and the special circumstances findings themselves. The prosecutor stated: "The (a) factor, which is the circumstance of the crime and the special circumstances, which were two in this case, that you the jury found, and you can consider those as aggravating factors . . . ." This isolated statement cannot logically be read as urging the jury to double count the special circumstances when considered in the context of the prosecutor's complete argument to the jury, which otherwise made clear that the circumstances of the crime should be considered in aggravation only once. " '[W]e have already concluded that the standard instructions do not inherently

encourage the double counting of aggravating factors.' " (*People v. Ayala*, *supra*, 24 Cal.4th at p. 289.) There is no reasonable likelihood that the prosecutor's isolated statement, when considered together with the instruction given to the jury regarding the proper consideration of aggravating factors, caused the jury to apply the challenged instruction in a way that violates the Constitution. (*Ibid.*) Accordingly, no special instruction regarding "double counting" was necessary. (*People v. Melton* (1988) 44 Cal.3d 713, 768-769.)

*8. Challenges to California's death penalty scheme*

Defendant contends the California sentencing scheme is constitutionally flawed because it does not require explicit findings by the jury as to which aggravating factors it relied upon in reaching a death verdict. "[N]othing in the federal Constitution requires the penalty phase jury to (1) make written findings of the factors it finds in aggravation and mitigation [citations]; (2) agree unanimously that a particular aggravating circumstance exists [citations]; (3) find all aggravating factors proved beyond a reasonable doubt or by a preponderance of the evidence [citations]; (4) find that aggravation outweighs mitigation beyond a reasonable doubt [citations]; or (5) conclude beyond a reasonable doubt that death is the appropriate penalty. [Citations.]" (*People v. Williams*, *supra*, 43 Cal.4th at pp. 648-649.) The application of these principles to the determination of penalty does not violate equal protection principles established by the Fourteenth Amendment to the United States Constitution. (*People v. Cruz*, *supra*, 44 Cal.4th at p. 681 ["capital defendants are not similarly situated to noncapital defendants, [so] the death penalty law does not violate equal protection by denying capital defendants certain procedural rights given to noncapital defendants"]; *People v. Valencia, supra,* 43 Cal.4th at p. 311; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 145-146.)

Similarly, we have considered and rejected defendant's claims that California's death penalty scheme is unconstitutional because it permits the jury to make multiple use of a single underlying felony (*People v. Gates* (1987) 43 Cal.3d 1168, 1188-1190); that unfettered prosecutorial discretion renders the death penalty scheme unconstitutional (*People v. Brown* (2004) 33 Cal.4th 382, 403); and that the 1978 death penalty statute unconstitutionally fails to narrow the class of death-eligible murders. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1141.) Defendant has not persuaded us to reconsider our prior holdings, and we decline to do so.

*9. Denial of automatic motion to modify the penalty verdict*

After the jury returned a verdict of death, defendant moved for a new penalty trial, and, alternatively, for modification of the penalty verdict under section 190.4. He contended he did not receive a fair trial because of the improper admission of the redacted statements of his codefendants at the joint trial on the issue of guilt, and because of the trial court's refusal to give defendant's requested special instructions regarding aggravating factors. Defendant also asserted that a sentence of death was unfair because the codefendants blamed him for the underlying crimes, minimizing their own role, when in actuality it was the codefendants who urged and instigated defendant to shoot the victim. The trial court denied both motions.

Defendant now contends the trial court erred because it failed to consider the lesser sentences imposed upon his codefendants, who he continues to allege are more culpable than he in the murder. Codefendant Burnett was found guilty of murder along with defendant and was sentenced to life imprisonment without possibility of parole. Codefendant Rembert was not convicted of the murder until after appellant was sentenced to death (see fn. 2, *ante*). Defendant did not present

a proportionality argument to the trial court in his motion or at the hearing on the motion, and he therefore forfeited this issue. (See *People v. Riel, supra,* 22 Cal.4th at p. 1220 [the contemporaneous objection rule applies to cases in which the modification hearing was conducted after this court's decision in *People v. Hill* (1992) 3 Cal.4th 959, 1013.)

In any event, defendant's claim is without merit. Defendant contends the trial court erred by failing to consider all applicable facts regarding defendant's involvement in the murder — most notably, that he is assertedly less culpable for the murder than his codefendants.[21] Defendant is unable to point to any evidence in the record, however — outside his own statement to the police — to support his claim, and our own examination of the record reveals that the trial court considered all of the available evidence in arriving at its decision to deny defendant's motion for new trial, or in the alternative to set aside the verdict of death.

First, the trial court specifically found that the "defendant did not commit murder while acting under extreme duress, or in fact, any duress at all," which indicates the court considered and rejected defendant's contention at trial that he killed Kondrath because of threats or compulsion exerted by his codefendants. Moreover, contrary to defendant's assertion on appeal, there is no evidence in the record to support his claim that his codefendants were "more culpable" than he in

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21 "This court's refusal to conduct intercase proportionality review of a death sentence does not violate the federal Constitution. [Citation.] But when a defendant requests intracase proportionality review, as defendant does here, we review the particular facts of the case to determine whether the death sentence is so disproportionate to the defendant's personal culpability as to violate the California Constitution's prohibition against cruel or unusual punishment." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1098-1099.)

the murder. Defendant willingly left the apartment with Burnett and Rembert, intending to assault Ron Hussar and to steal his stereo. Defendant actively participated in the carjacking involving the murder victim. Defendant drove the victim's automobile, with the victim in the trunk, to Jeffrey Howard's residence to obtain a shotgun, then to a rival gang's territory in search of rival gang members, and finally, to the residence of Cynthia Melson, where codefendants fired more shots. Finally, and most notably, it was defendant, not either of his codefendants, who shot and killed the victim even though the victim was pleading for his life. Although defendant asserts throughout his briefing that his codefendants were "more culpable" than he because he shot the victim at their urging, this assertion does not supersede the evidence in the record establishing defendant's primary role in the victim's murder.

Under these circumstances, the trial court carefully and properly performed its duty under section 190.4. No error under state law or federal constitutional law appears.

*10. Alleged cumulative error*

Defendant asserts that numerous alleged errors committed during both the guilt phase and the penalty phase of his trial, even if not individually requiring reversal of the judgment, cumulatively impacted the jury's penalty determination and require reversal of the judgment of death. We find no error, whether considered singly or cumulatively, that would warrant reversal.

*11. California methods of execution*

Defendant contends California's "default" method of execution — lethal injection — is unconstitutional because the state's failure to comply with the statutory mandate to develop proper standards for the administration of lethal injection violates his right to due process of law. He also asserts that both lethal

injection and the alternative method of execution, the administration of lethal gas, constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. As we previously have held, a challenge to the method of a future execution is not cognizable on appeal, because such a claim does not impugn the validity of the judgment. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 45; *People v. Holt* (1997) 15 Cal.4th 619, 702.)

*12. Violations of international law*

Defendant contends that the asserted denials of his state and federal constitutional rights constitute violations of international law. We have found no denial of defendant's constitutional rights, and accordingly the premise of defendant's argument fails. (*People v. Mungia*, *supra*, 44 Cal.4th 1101, 1142-1143.) Additionally, defendant implies his rights under international law were violated because he suffers from mental impairment. No evidence in the record supports this claim.

## IV.

## CONCLUSION

For the foregoing reasons, we affirm the judgment in its entirety.

GEORGE, C. J.

WE CONCUR:

KENNARD, J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.

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MEMORANDUM NUMBER 2.

To: Gary Pohlson/Tom Gleim
Re: Shaun Bruney: Additional Material for Penalty Phase Testimony
Date: May 17, 1994

I. Youth and Immaturity:

At the age of 18, when he committed the murder, he was really a child in terms of intellectual development, social maturity and psychological functioning.

Athe age of 20, now facing the possibility of execution, he is still a child in mnay ways, although he has grown and developed in other ways while incarcerated.

Basic immaturity: he lacks a basic grasp of his situation - he still does not fully understand that he faces death as a penalty.

II. Intellectual Functioning:

A degree of impairment at the time of the offense and now as a result of verbal intellectual functioning barely above the Borderline Mentally Retarded Level (70 to 79).

Wechsler Adult Intelligence Scale-Revised (WAIS-R):

| | |
|---|---|
| Verbal I.Q: | 83 |
| Perf. I.Q.: | 94 |
| Full Scale I.Q.: | 86 |

While the Full Scale I.Q. is within the low average range, the important I.Q. is the Verbal I.Q. and not the Performance. The latter has to do with capacities like eye-hand coordination,

Ex. 83-2425

## VIII

## PETITIONER'S CONFESSION WAS UNRELIABLE AND INVOLUNTARILY OBTAINED

84. The convictions and sentence of death were rendered in violation of petitioner's rights to a fair, reliable, rational, nonarbitrary, and accurate determination of guilt and penalty, to a fair trial free from unreliable and misleading evidence, to an opportunity to confront and refute adverse evidence, to the disclosure of all material exculpatory evidence, and to the effective assistance of counsel as guaranteed by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution and state law because petitioner's alleged confession, used at trial, was unreliable and obtained in violation of his rights. In addition, petitioner was deprived of his state and federal right to effective assistance of counsel because trial counsel unreasonably and prejudicially failed properly to exclude the confession. Failure to investigate improprieties surrounding petitioner's alleged confession in the case had a substantial and injurious effect upon the verdict. The entire case against petitioner rested on his redacted statements admitted at the joint trial. As a result, the jury that convicted and sentenced petitioner unfairly considered the unreliable and inadmissible confession. But for the counsels' errors, it is reasonably probable the guilt and penalty verdicts would have been favorable to petitioner.

85. As a result of deficiencies by trial counsel, there was a complete breakdown in the adversarial process. In considering these deficiencies separately and also in conjunction with other claims alleged and accompanying exhibits herein, the verdicts in the guilt phase and the penalty phase of petitioner's trial must be set aside. There is a reasonable

probability that but for these errors and omission, the outcome of petitioner's trial would have been different.

86. Counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) There is a reasonable probability that but for counsel's failings the result in the case would have been more favorable. (*Id.* at pp. 687-696.) Under Strickland, a reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Id.* at p. 694.)

87. Counsel's performance impaired the proper functioning of the criminal justice system to the point that the trial court cannot be relied on as having produced a just result. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 686.)

88. Because the death penalty is qualitatively different from any other criminal punishment, there is a corresponding difference in the need for reliability in the determination death is the appropriate punishment in a specific case. In capital cases the finality of the sentence imposed warrants protections that may not be required in other cases. The United States Supreme Court has repeatedly condemned sentencing procedures that inject unreliability into jury deliberations in capital cases. Petitioner's death sentence is based on evidence that does not meet the constitutional requirement of heightened reliability for capital cases and which was materially inaccurate. The jury was urged to convict and sentence petitioner to death based upon involuntary and unreliable evidence.

89. Petitioner alleges the following facts in support of his claim, among others to be developed after full investigation, discovery, access to subpoena power, adequate funding for investigation and experts, and a full hearing on the merits of the claim.

90. Petitioner adopts all facts contained elsewhere in this petition; said facts are incorporated by reference herein.

**A. Trial Counsel Failed to Adequately Investigate, Litigate, Object, Cross-examine, or Otherwise Adequately Challenge the Unreliable Confession**

91. The state relied solely on petitioner's statements to convict him of murder. Following petitioner's arrest on June 16, 1992, he was interrogated by Detectives Erickson and Gallagher of the Anaheim Police Department. In the course of a lengthy and tearful interrogation, petitioner allegedly confessed to his involvement in the case. A redacted version of petitioner's statement was read to the jury at the guilt trial.

92. The alleged statements constituted the state's entire case against petitioner. Trial counsel failed properly to challenge admission of petitioner's statements in the motion to exclude evidence.[9]/ At the guilt trial, counsel failed to present an opening statement, introduce evidence on petitioner's behalf, or challenge the reliability of petitioner's statements. (See VI CT 2004.) Moreover, trial counsel failed to present evidence of petitioner's mental state, mental impairment, incompetency, or mental illness, all of which had a bearing on the voluntariness and reliability of his alleged confession.

93. At the time petitioner provided the alleged statements to law enforcement officials, he was suffering from multiple mental illnesses and dysfunctions. His mental impairments prevented him from making a knowing, voluntary, and intelligent waiver of his constitutional rights.

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[9]/ Trial counsel failed to introduce evidence of petitioner's mental impairments, incompetency, or improper police techniques. Petitioner testified briefly that he did not comprehend the advisal and did not understand his Fifth Amendment rights. (5 RT 819-823.)

94. In fact, petitioner's functional deficits meant he was functioning as a 15-year old child. Dr. Jane Wells described petitioner as suffering from mental illness and mental impairment. She has serious doubts about his mental competency. (Exh. 4, declaration of Dr. Jane Wells, ¶ 42.) Due to his mental impairments and lack of competency, petitioner was unable to comprehend the nature and consequences of his so-called advisal and waiver.

95. Dr. Stephen Wells, psychologist, evaluated petitioner while he was in custody. In Dr. Wells's opinion, at the time of the offense, petitioner was impaired in terms of his intellectual and psychological functioning. Petitioner could not handle complex social situations, conflict, or stress. (AOB 30-31.) However, Dr. Wells was not called as a witness at the hearing to exclude petitioner's statement. Penalty experts Dr. Stephen Wells and Dr. Vicary indicated that if they had been asked by trial counsel, they would have testified about petitioner's impaired mental state and functioning at the guilt trial. Their testimony would have cast serious doubt on the voluntariness and reliability of petitioner's statements. (Exh. 2, declaration of Dr. William Vicary, ¶¶ 7, 8 and Exh. 3, declaration of Dr. Stephen Wells, ¶¶ 4-7.) Petitioner was eighteen years old; he had never been interrogated in connection with a serious police investigation. He was sobbing during the questioning and asked to call his mother. (VIII CT 2589-2590.) Expert testimony would have established the involuntary nature of petitioner's statements.

96. Petitioner had a long history of mental impairments that affected his thought processes. Petitioner suffered from severe stress, PTSD symptoms, depression, suicidality, homelessness, abandonment, and fear. In addition to his mental impairments and poor psychological development, fear of the codefendants and their erratic behavior left him susceptible to their influence. That led him to make statements that did not

accurately reflect his involvement in the offense. An individual with a low IQ is more susceptible to leading questions, more likely to confabulate, and more acquiescent with interrogators. (Clare & Gudjonsson (1993).) Poor assertiveness, anxiety, and poor coping skills indicate the subject can be persuaded with pressure to change his mind and recollection. (Gudjonsson (1988); exh. 7, trauma-related coerced confessions.)

97. Counsel failed adequately to investigate petitioner's background, history of trauma, developmental disabilities, comprehension and awareness of legal concepts and rights, his mental state, competency, and overall functioning. No evidence of petitioner's mental condition and impairments was presented at the motion hearing or at the guilt trial. At trial, counsel failed to challenge the voluntariness of petitioner's statements and failed to raise timely objections to the unreliable statements and police misconduct that occurred as a result of the improper advisal and interview techniques. Without conducting further investigation or presenting evidence of the limited investigation that had been conducted, the defense failed competently to represent petitioner.

98. Petitioner's statements to law enforcement were the product of coercion. Law enforcement officers' statements to petitioner, combined with petitioner's mental impairments and mental illness, resulted in petitioner's belief that he was required to speak with law enforcement. Petitioner did not comprehend his constitutional rights at the time of the advisal. He was unaware that he was a suspect in a capital murder or that his statements would form the basis for capital charges.

99. The interrogation consisted of six discrete sections or "rounds"[10]/ in which the officers attempted to elicit a full confession from petitioner in sequential order of the events on the night in question. Prior to

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[10]/ See VIII CT 2546, 2555, 2564, 2572, 2592, 2607.

advising petitioner of his *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) rights, the detectives casually asked petitioner about his tattoos, girlfriend, and baby daughter. In setting the stage, they indicated "you were arrested investigating a homicide." (VIII CT 2546.) The officers failed to inform petitioner that he was charged with murder or that he would face capital murder charges. In advising petitioner, Detective Erickson indicated an attorney could be appointed to him before questioning began.[11]/ Detective Erickson then stated to petitioner:

> We're investigating a homicide ... all the people ... indicated that you're involved in it. And this is your opportunity to tell me your side of the story.

(VIII CT 2546.) Detective Gallagher tried a softer approach:

> And I don't know whether it was your fault. I don't know whether it was Alan's fault. I don't know whether it was Scott's fault. ... And we're trying to give you an opportunity to tell your version where people don't put it all on you ... .

(VIII CT 2554.) Later, Detective Erickson told petitioner:

> It takes an upfront person to admit it and then you can deal with it * * * the only way that you are going to be able to deal with it, is to get it out.

(VIII CT 2563.) Petitioner was not informed that he was the primary focus of the homicide investigation or that he had been arrested for and would be charged with murder. The detectives did not inform petitioner that he was the principal suspect in a capital murder.

100. Through deception, the detectives pretended to assist petitioner: "And so this is your opportunity to tell me your side of the story

[11]/ Detective Erickson: "If you cannot afford an attorney, one will be appointed for you before questioning if you wish. Do you understand?" (VIII CT 2546.) The unredacted statement is discussed throughout this claim. Claims of errors based on the redacted statement are set forth *infra*.

... . We're here to listen to you." (VIII CT 2546.) "Again, we're giving you the opportunity to tell your side of the story." (VIII CT 2549.) "And we're trying to give you an opportunity to tell your version where people don't put it all on you." (VIII CT 2554.). Petitioner's so-called waiver could not have been knowing and intelligent given the lack of warning and inadequate advisal. Expert testimony would have established that the officers' deceptive conduct was intended to encourage petitioner to incriminate himself. (See *Missouri v. Seibert* (2004) ___ U.S. ___ [124 S.Ct. 2601] [failure to timely advise suspect]; *Edwards v. Arizona* (1981) 451 U.S. 477 [right to counsel during custodial interrogation]; *People v. Honeycutt* (1977) 20 Cal.3d 150 [evidence that accused was tricked or cajoled into waiver shows involuntariness]; see also Shuy, The Language of Confession, Interrogation, and Deception (Sage Pub. 1998) ch. 2.)

101. Had counsel provided effective assistance of counsel, they would have investigated petitioner's background, mental deficits, and impairments and properly challenged his alleged statements. Even if their efforts to exclude the evidence had been unsuccessful at the motion hearing, the same grounds should have been presented to the jury through effective objections, cross-examination of the state witnesses, and/or the use of expert witnesses to show 1) that petitioner's statements were involuntary and unreliable; and 2) that the interrogating detectives' techniques used in the interrogation process and discussed below constituted misconduct. (Exh. 7, literature on confessions and coerced statements.)

102. Counsels' failure adequately to investigate the basis for the involuntariness and unreliability of petitioner's alleged statements

introduced at the guilt and penalty phases,[12]/ as discussed *infra*, including petitioner's background, borderline retarded intellectual deficits, poor school performance, history of learning problems, homelessness, abandonment, depression, suicidality, under the influence of drugs and/or alcohol, pressure from the codefendants, family history, possible exposure to pesticides and other toxic chemicals, violated petitioner's fundamental rights, including the right to assistance of counsel and a reliable determination of guilt and penalty.

**B. Police Misconduct in the Interrogation**

**1. Interrogation Techniques Utilized in the Case Were Improper**

103. Detectives Erickson and Gallagher interrogated petitioner in a manner that rendered his alleged statements involuntary and unreliable. During the course of his lengthy and tearful interview, the officers pressured petitioner to agree with their version of the crime; they refused to follow up on his answers where further questioning would have yielded exculpatory evidence, they badgered petitioner; and when open-ended questions failed to generate specific information, they failed to test for the validity of his answers.

**2. Detectives Pressured Petitioner to Agree to their Version of the Scenario**

104. Petitioner's answers given in response to the questioning failed in many respects to accurately reflect the events on the night of the shooting. His answers often disclosed his effort to appease the officers who

[12]/ Trial counsel asserted in closing argument a duress defense based on petitioner's confession. (9 RT 1633-1634.) However, no affirmative evidence was introduced at the guilt trial in support of the argument.

repeatedly pressured him to supply an answer that fit the police version of the events. For example, Detective Gallagher told petitioner "Okay, we know the whole story, okay, and this is not the right story, it's a piece of the story, but it's not the right story, okay?" (VIII CT 2562.) Detective Erickson argued: "You're not remembering quite right ... ;" and "Wednesday morning. Three-thirty, you leave Alan's house. You, Alan and Scott. And I know exactly where you were going and what you were doing." (VIII CT 2550.)

105. At times, the officers repeated the questions until petitioner gave the "right" answer. Throughout the interrogation petitioner consistently stated that he did not know why he and the codefendants went to Howard's house on either occasion. (See VIII CT 2571. 2595.) Nevertheless, the officers repeatedly pressured petitioner to admit the reason the defendants went to Jeff Howard's house was to pick up a gun. In round two of the interrogation, Detective Gallagher asked "Okay. When you got to Jeff's house, what was the reason to go to Jeff's house?" (VIII CT 2561.) When petitioner failed to give the "right" answer, the officer provided the answer. "And the reason that you went over to Jeff's house was to pick up the shotgun, straight out." (VIII CT 2562.)

106. At various times, if petitioner failed to give the desired answer, the officers informed him of the "right" answer:

Q. But when you went to Jeff's house, you went specifically to get the shotgun.

A. No.

Q. Yeah.

(VIII CT 2579.) In round five of the interrogation, Detective Erickson again asked about going to Jeff Howard's residence. "Okay. Why were you going to Jeff's house?" (VIII CT 2595.) After repeatedly answering the

same question, petitioner gave an answer to satisfy his interrogators: "... he said, 'Go to Jeff's house.' ... ." (*Id.*)

107. The detectives continually asked petitioner if he had intended to go looking for Watergate Crips. Petitioner repeatedly claimed that it was possible the codefendants wanted to look for rival gang members, but that he did not know. (See VIII CT 2579.) After repeated questioning on this topic, petitioner gave up and agreed with the detectives that he was looking for Watergate Crips.

[Gallagher]: Did he go looking for some Watergate Crips?

[Petitioner]: I don't know, I know he don't get along with 'em.

[Gallagher]: Did he go looking for some Watergate Crips, or not?

[Petitioner]: I know that they came through our neighborhood, ... .

(VIII CT 2579.)

* * *

[Petitioner]: ... and I guess you could say we ... we were looking for Watergate.

[Erickson]: You were.

(VIII CT 2596.)

**3. Detectives Badgered Petitioner**

108. The detectives frequently resorted to badgering petitioner to elicit a particular answer:

[Petitioner]: Is that a 22?

[Erickson]: No, it's a 357 Magnum.

[Gallagher]: We know what we are talking about.

[Erickson]: We got the gun.

(VIII CT 2563.)

[Petitioner]: It's not ... it ain't hard to get somebody's attention. You just walk up to somebody.

[Gallagher]: And ask em what time it is, right.

[Petitioner]: (INAUDIBLE)

[Gallagher]: Ask them what time it is?

[Petitioner]: I asked him what time it was.

(VIII CT 2565.)

**4. Police Suppression of Evidence**

109. The detectives failed to follow up and allow petitioner to elaborate where his responses would have generated favorable or exculpatory evidence. Specifically, they failed to elicit information regarding the events leading up to the night of June 9, 1992; the nature of the relationship between petitioner and codefendants; petitioner's mental state at the time of the events on June 10, 1992; and his conduct at the time of the shooting. Their interview techniques and tactics constituted misconduct.

110. The detectives failed to determine petitioner's relationship with the codefendants prior to and on the night of the crime. They did not ask petitioner about his living situation; pending criminal charges that barred him from returning home; his homelessness; brief association with the codefendants; lack of gang ties; mental state at the time of the offense; and fear of the codefendants that constituted duress and coercion. (Exh. 4, declaration of Dr. Jane Wells, ¶¶ 49-52.) Had the detectives determined the nature and extent of petitioner's relationship with the codefendants,

they would have established that petitioner had only limited contact with them, had no personal interest or motive to commit any crimes that night, and could not have acted with the requisite intent. (Exh. 7, declaration of Steve Strong, ¶ 20.)

111. Petitioner's limited answers warranted clarification in order to explain the context of his actions. For example, petitioner stated that he had lived with his mother at the time, but later indicated he was staying with the codefendants: "... I been there for quite some time, but I'm not there all the time" referring to his temporary living arrangement with the codefendants. (VIII CT 2548.) Rather than inquire into this inconsistency, Detective Erickson immediately directed petitioner back to the night of the crime. Shortly thereafter, petitioner stated "Yeah, I ... I told you, I had been there off and on." (VIII CT2549.)

112. The interrogation failed to elicit critical information from petitioner regarding the nature of his relationship with his codefendants. Petitioner stated several times that the codefendants dominated and pressured him: "... I don't even know how we got involved in it, ..." (VIII CT 2564); "I wasn't saying nothing the whole time we were in the car." (VIII CT 2567), but the detectives failed to inquire about the codefendants or their role in the events, choosing instead to focus on petitioner's actions. For example, petitioner indicated that the events began at the insistence of one of the codefendants "And Nut was all drunk. And I kept telling him, 'Stay in the house. Stay in the house. You're too drunk. You're too drunk.' And he kept telling us, 'No, Nut wants to roll. Nut wants to roll.' So then you know we went over there ...." (VIII CT 2556.) There was no follow-up to allow petitioner to explain the basis for his actions, including fear, panic, anxiety, and suicidality, or the conduct of the codefendants.

113. Petitioner went to Jeff Howard's house at the insistence of a codefendant. "No...he...Nut just told me to go to Jeff's house...and he's

just...and I just...I just went over there. He didn't say where, he just say, 'Go to Jeff's house.' And I went to Jeff's house." (VIII CT 2579.) At that point, the detectives failed to inquire about petitioner's state of mind. Instead, they changed the subject, returning to it later only to try to elicit the "right" answer.

114. Toward the end of the interview, petitioner answered a question about the shooting. He stated: "... honestly, I didn't even think I hit him." (VIII CT 2605.) The detectives did not allow petitioner to explain his conduct, the pressure brought by codefendants, petitioner's mental state at the time that precluded formation of the requisite intent, or his inability to see into the car trunk and thus not realize the victim had been shot.[13]/ Instead, the officers avoided generating exculpatory evidence by using another tactic. They changed the subject and asked petitioner a wholly unrelated question: "How long did you drive around in the car?" (*Id.*) The detectives suppressed evidence that did not mesh with their version of the events.

115. Petitioner's traumatic reaction to the incident surfaced during the questioning. "... I just... I don't remember I got in the car and all of a sudden, and I was like and when they opened the trunk, and I was like 'What are you guys doing?' And I guess they made him get in the trunk. *** Nut and... Nut and Boxer were out there and I was like 'What are you guys doing? What are you guys doing?' " (VIII CT 2560.) The detectives failed to ask petitioner about his mental state or the influence of the codefendants over him.

116. The detectives failed to establish whether petitioner had any personal motive whatsoever to engage in criminal activity. The questioning

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[13]/ Petitioner's statement is supported by the opinion of a forensic expert. At the time the shot was fired, petitioner could not see into the trunk of the car. (Exh. 7, declaration of Lisa DiMeo, ¶ 5.)

also failed to establish any relationship between petitioner and witnesses involved in the events who were known to the codefendants. Jeff Howard testified at trial he hardly knew petitioner; he was a friend of the codefendants. (AOB 9). The detectives never asked petitioner about Cynthia Melson, at whose home the codefendants fired weapons. Cynthia Melson did not know petitioner. (AOB 11.)

**5. Where Open-Ended Questions Failed to Generate Specific Information, the Detectives Failed to Test for Validity**

117. The questioning frequently alternated between specific questions and open-ended questions, particularly if one form of the question failed to elicit the desired response. For example, after failing to get the desired answer about whether petitioner and the codefendants were going to steal a stereo, Detective Gallagher switched to an open-ended question then failed to test the validity of the response:

[Erickson]: Gonna steal this guy's stereo. Is that what you were going to do?

[Petitioner]: I don't steal car stereos, that's petty.

* * *

[Gallagher]: Did somebody say "Let's jack him up?"

(VIII CT 2564.)

[Gallagher]: Somebody takes it?

[Petitioner]: Either Nut or Scott.

[Gallagher]: Why's that?

[Petitioner]: I guess it's their gun.

[Gallagher]: But you say everytime you go out, somebody takes it, Nut or Scott, why?

[Petitioner]: 'Cause Watergate's trying to kill Nutcase

> ... they beat him up and put him in the trunk and broke his nose ... .
>
> [Gallagher]: Oh.

(VIII CT 2602.) Detective Gallagher failed to ask crucially important follow-up questions concerning codefendant Burnett and Watergate Crips.

118. Trial counsel failed to challenge the police interview techniques. Trial counsel failed to investigate, develop, and present evidence that the police tactics were improper and coercive, that petitioner suffered from mental impairment, history of trauma, depression, suicidality, and mental illness, and, as a result, the interrogation yielded involuntary and unreliable statements.

119. The state's evidence went unchallenged by the defense. At the guilt and penalty trials, the jury was urged to convict petitioner and sentence him to death based solely on the basis of his statement. No physical evidence or reliable eyewitness testimony tied petitioner to the crime scene, making petitioner's statement all the more powerful as a basis on which to find him guilty of capital murder. The prosecutor relied on petitioner's statement in arguing to the jury that petitioner was guilty of capital murder. (See, e.g., 9 RT 1530, 1531.) The defense presented no evidence on petitioner's behalf at the guilt trial.

120. The individual and cumulative effect of counsels' failure to competently defend petitioner with respect to his alleged statements and police tactics used to obtain his statement prejudiced petitioner by its substantial and injurious effect on the jury's determination of the verdicts at the guilt and penalty phases of petitioner's trial, and deprived the proceedings of fundamental fairness.

121. Trial counsels' failure properly to investigate, litigate, and otherwise challenge petitioner's admissions was unreasonable particularly in view of the fact that the state's case rested entirely on the alleged

statements. Trial counsels' failure to investigate, develop, and present evidence of petitioner's state of mind, his background, trauma history, impaired mental functioning, the coercive setting of the interrogation, and improper police techniques used in the course of the interview, deprived petitioner of effective assistance of counsel and the full panoply of his state and federal constitutional rights.

DECLARATION OF WILLIAM VICARY, M.D.

I, William Vicary, M.D., hereby declare:

1. I am a medical doctor licensed by the state of California. I have been duly licensed since 1975.

2. In the course of my psychiatric practice, I have been appointed through the courts to evaluate criminal defendants with respect to mental state issues. Since 1979, I have testified more than 500 times as an expert in California superior and federal courts.

3. I have conducted psychiatric evaluations of defendants in capital cases and testified about my findings at both the guilt and penalty trials.

4. In 1992, I was retained by attorney Gary Pohlson to evaluate his client, defendant Shaun Burney, who was capitally-charged and awaiting trial in Orange County, California.

5. I interviewed the defendant twice at the Orange County Jail and reviewed materials provided by trial counsel. The materials included police reports of the underlying case in which Mr. Burney was charged; the defendant's statement made to the police upon his arrest; and statements by codefendants Allen Burnett and Scott Rembert.

6. Counsel directed me to evaluate whether there was sufficient evidence to support a legal defense to the charge of murder, specifically whether the defendant was legally insane or acted under a diminished capacity at the time of the offense. In my opinion, there was insufficient evidence to support either defense.

7. However, trial counsel did not direct me to evaluate defendant's mental state in relationship to whether he suffered from duress, compulsion, coercion, or panic at the time of the shooting or whether a duress-related defense would negate the mental state necessary for first degree murder. (See *People v. Anderson* (2002) 28 Cal.4th 767, 779-780, 784, which held duress relevant to establish elements of implied malice murder and negate premeditation and deliberation.)

8. Had trial counsel asked me to evaluate the defendant's mental state relative to second degree murder, I would have relied on the matters described in this declaration, including police reports and statements made by defendant and codefendants. I would also have considered critical events, testified to at the penalty trial, that impacted defendant's development as a teenager: repeated traumas he suffered while growing up; dysfunctional quality of family life, especially lack of parental support; long term depression and suicidality; use of drugs and alcohol; and his decompensation just prior to the incident. (11 RT 1966-1972.)

9. I would have been willing to testify at the guilt trial about the events leading up to the offense and the defendant's state of mind at the time of the shooting. In my opinion, the defendant's action in firing one shot at the victim was sudden and unplanned. In his decompensated state, he acted out of fear that the codefendants might harm him. Burnett was known to be an erratic and unpredictable person particularly when he had been drinking.

10. In response to trial counsel's questioning at the penalty trial, I testified that defendant suffered from an antisocial personality disorder. (11RT 1983.) However, that diagnosis is not accurate for the reasons set forth below.

11. Under the current DSM-IV-TR criteria, defendant does not meet criteria for antisocial personality disorder because of: (1) his young

age at the time of the offense; (2) lack of emotional maturity; (3) expression of remorse for the victim and his family; (4) lack of evidence of conduct disorder beginning in childhood; and (5) conformance to social norms; he had completed high school and been employed.

I declare under penalty of perjury the foregoing is true and correct. Executed this 4th day of February, 2005, at Los Angeles, California.

WILLIAM VICARY, M.D.

DECLARATION OF STEPHEN WELLS, Ph.D.

I, Stephen Wells, Ph.D., hereby declare:

1. I am a psychologist licensed by the state of California. I also am a fellow of the American College of Forensic Psychology.

2. In 1992, I was retained by attorney Gary Pohlson to evaluate his client, Shaun Burney. Mr. Burney was in custody awaiting trial on capital charges in Orange County, California. I was directed by counsel to assess the defendant's psychological condition in relation to the case.

3. I performed a battery of psychological tests on Mr. Burney, including IQ and personality tests. In addition, I reviewed police reports, the defendant's pretrial police statement, and statements made by the codefendants. Altogether I spent approximately 30 hours on testing, interviews with the defendant, and review of documents.

4. My findings related to the defendant's state of mind at the time of the offense as well as his childhood and overall functioning were made available to trial counsel in 1993. Trial counsel did not ask me to testify at the guilt trial about Mr. Burney's state of mind at the time of the shooting.

5. I testified at the penalty trial on May 19, 1994. In the course of my testimony, I explained the psychological test results, including intellectual impairment due to low IQ; and lack of emotional maturity, impact of extremely serious psychological stressors leading up to the offense (homeless, suffering from manic depression and loss of family support), and inability to function as an adult even at the time of trial. (10 RT 1851.)

6. My testimony also encompassed circumstances of the offense. Codefendant Burnett had been drinking, acting erratically, and

pressing for the shooting of the victim. (10 RT 1854.) The codefendants manipulated Mr. Burney at the time of the offense. (10 RT 1863.) Mr. Burney never intended to kill another person; he was unable to get away from the situation, and was pressured into committing the offense. He was afraid for his own safety; he felt he would otherwise be harmed. He was also afraid the codefendants would abandon him when he was homeless and had no other place to go. (10 RT 1855.) Mr. Burney suffered from a manic depressive mental disorder; he experienced hyperactivity, inability to sleep, elevated mood, despair, and suicidality. (10 RT1856.) His judgement was impaired at the time of the offense.

7. Had I been asked by trial counsel to testify at the guilt trial, I would have testified as to all of the matters set forth in this declaration.

8. I declare under penalty of perjury the foregoing is true and correct. Executed this 8th day of February 2005, at Santa Ana, California.

Stephen Wells, OD, PhD

DR. STEPHEN WELLS PSY 6117

DECLARATION OF JANE WELLS, J.D., Ph.D.

I, JANE WELLS, declare:

1. I am a clinical psychologist licensed in the states of Colorado and California.

2. I received my Bachelor of Arts (B.A.) degree from Wellesley College in 1980. I received a law degree from Tulane Law School in 1983. I received my M.A. degree in Psychology in 1988, and Ph.D. in Psychology in 1992, both from the California School of Professional Psychology in San Diego. The California School of Professional Psychology is accredited by the American Psychological Association and is now a school within Alliant International University. I have been licensed as a clinical psychologist since 1994.

3. Throughout the course of my academic training, I gained broad experience in various aspects of clinical psychology, including crisis intervention; individual and group therapy with victims and perpetrators of child abuse, adolescents, children, and dually-diagnosed adults; and therapy, assessment and intervention with corporate employees suffering alcohol and substance abuse. Following completion of my doctoral studies, I worked as a Senior Counselor on the therapy staff of the Rancho Park Psychiatric Hospital and Residential Treatment Center in El Cajon, California, and as a Psychological Assistant at the San Diego Center for Psychotherapy (California) and the Center for Psychological and Psychiatric Services in Oceanside, California. In these positions, I conducted individual psychotherapy with adults, adolescents, and children, as well as couples therapy. I also conducted psychological evaluations of

criminal defendants, disability claimants, and learning disabled children, as well as psychological evaluations of children and adolescents for Juvenile Court and Social Services in cases involving allegations of child abuse (dependency, delinquency, adoption) and custody evaluations. I also gained experience in treatment planning and in conducting psychological evaluations of Workers' Compensation claimants to assess job-related psychological injury, premorbid functioning, and malingering.

4. From 1992 to 1995, I worked as a jury consultant in all phases of jury selection in capital criminal cases (from review and evaluation of juror questionnaires through voir dire). From 1995 to 1996, I worked as part of the Diagnostic Assessment Team (Forensic Psychology) for the Boulder County Mental Health Center in Boulder, Colorado. In that capacity, I conducted psychological evaluations of juveniles in the criminal justice system to render findings and make recommendations regarding diagnosis, treatment planning, sentencing, and placement. Since 1995, I have been in private practice in forensic psychology in Boulder, Colorado. My practice consists exclusively of psychological evaluations of adults and adolescents, primarily in criminal contexts; evaluations of custody disputes and mediation/arbitration of parenting matters.

5. I am a member of numerous professional organizations in my field, including the American Psychological Association and the American College of Forensic Examiners. I am affiliated with the Boulder Mental Health Center Child Psychological Assessment Clinic and with the Pro Bono Panel of Custody Evaluators for Boulder County Legal Services in Colorado as well as the Inter-Disciplinary Council on Child Custody. During the time I worked and practiced in the state of California, I was a member of the California and San Diego Psychological Associations.

6. I am also a member of the state bars of New Mexico and Louisiana.

7. I have presented scholarly papers in the field of psychology on numerous topics including, but not limited to, the psychological testing of adolescents in delinquency proceedings, Attention Deficit/Hyperactive Disorder in children, and developmental diagnoses in adolescents and children. My areas of specialization include assessment and evaluation of adult and juvenile criminal defendants at pre-trial, trial and sentencing stages, as well as in post-conviction proceedings; custody evaluations; evaluation of parental fitness; and evaluation and treatment of child, adolescent, and adult family members involved in child neglect and mental, physical and sexual abuse cases.

8. Since 1994, I have been retained as a psychological expert for purposes of conducting assessments related to the presence and identification of mental illness and various behavior disorders, including Posttraumatic Stress Disorder (PTSD). I have been retained for this purpose in approximately 600 legal proceedings, including criminal cases. I have been qualified as an expert and have testified in criminal cases in both state and federal courts.

9. My expertise includes the evaluation of an individual's overall psychological and cognitive functioning and assessment of deficiencies. I have also received post-doctoral training in, inter alia, the neurobiological effects of abuse and neglect in children; the practice of forensic psychology; the use of psychological tests in forensic practice; and examination of criminal defendants for various legal competencies and mental states, as well as evaluation of families in custody disputes. I also have extensive training in the administration, scoring and interpretation of various psychological tests instruments used in psychological assessment.

10. At the request of current counsel for petitioner Shaun Burney, I have been asked to assess Mr. Burney's psychological status, and to focus on his childhood, developmental history, and the effect of trauma on his

functioning. I have been asked by counsel to examine and evaluate information and evidence related to the nature and role of trauma in Mr. Burney's life and its implications for Mr. Burney's developmental history, functioning, and life course. I have been asked to form an opinion regarding the mitigating significance of this background information. Furthermore, I have been asked to consider information regarding his social history, cognitive functioning, and other evidence relevant to psychological and behavioral disorders or dysfunction to establish his level of functioning at the time of the crimes for which he stands convicted. To accomplish this task, I have relied upon the following materials: available records related to Mr. Burney's educational and medical background; prison records of his confinement on death row; reporter's transcripts of evidence presented at Mr. Burney's 1994 guilt and penalty trials; the prosecutor's closing argument; the probation report prepared following his conviction; the declarations of Dr. William Vicary, Dr. Stephen Wells, and Marilyn Cornell, M.F.T.; Dr. Stephen Wells's memorandum prepared prior to trial; the declarations of Steve Strong, investigator, trial counsel Gary Pohlson, as well as declarations from Mr. Burney's family members and other individuals; and my interviews with Mr. Burney.

11. On July 15, and October 27 and 28, 2004, I personally met with and interviewed petitioner, and also conducted relevant psychological testing, to wit, the Trauma Symptom Inventory (TSI). The TSI, a test instrument developed in 1991, is used to evaluate posttraumatic stress syndrome and other trauma, including the effects of violence and childhood abuse.

12. There is a considerable body of academic and research literature which treats many of the emergent themes in Mr. Burney's psycho-social history with which I have familiarity and upon which I have generally relied as well, including but not necessarily limited to, Perry,

*Neurodevelopmental Factors in the "Cycle of Violence"* in Osofsky, ed., Children, Youth, and Violence: The Search for Solutions (Guilford Press, N.Y. 1997), pp. 124-140; Garbarino, et. al., The Psychologically Battered Child (Jossey-Bass, Inc., 1986); and references therein which are set forth as an exhibit to the petition. "Mental illness is considered the product of a complex interaction among biological, psychological, social and cultural factors." (See Chapter 2, Culture Counts: The Influence of Culture and Society on Mental Health, U.S. Department of Health and Human Services Report, 2001, Mental Health: Culture Race, and Ethnicity — A Supplement to Mental Health: A Report of the Surgeon General [hereafter Surgeon General's Report] 2001, at p. 26.) Mental health literature is replete with evidence that certain risk factors greatly enhance the likelihood of mental dysfunction and impairment. Those risk factors include, but are not limited to, poverty, deprivation, physical and emotional abuse and neglect, violence, and mental illness. Moreover, as noted in the United States Surgeon General's 2001 Supplement to his 1999 Report on Mental Health, "The link between violence and psychiatric symptoms and illness is clear." (*Id.*, Chapter 3 at p. 62.) These factors were well known in 1992. (See Garbarino, et. al, The Psychologically Battered Child, *supra.*)

**Summary of Social History Evidence and Findings**

13. At the time of my evaluation, petitioner was a thirty-year old African-American death row prisoner who had been incarcerated at San Quentin State Prison since 1994 for the capital charges that are the subject of post-conviction proceedings before the Supreme Court of California.

14. Mr. Burney was born December 1, 1973. He was the only child of Ernestine Jordan (formerly Ernestine Burney) and David Burney.[1]/

15. Petitioner's mother met his father in 1972, shortly after she graduated from high school. At the age of 19, Ernestine and David decided to marry. They were married in February 1973. (Exh. 11, dec. of Ernestine Jordan, par. 18.)

16. Petitioner's social history indicates that his parents lived together in Virginia, Mississippi, and California. (Exh. 11, dec. of Ernestine Jordan, par. 18, 19.) Petitioner's father reports that because of his military duty, in 1973, he was transferred to Hampton, Virginia where petitioner was born. David was twice discharged from the Air Force in 1971 and 1974. He received an honorable discharge in 1971, and a general discharge under honorable conditions in 1974. He states that their first marriage ended because both parties could not get along with each other. However, following their divorce in 1978, they remarried in 1979. They divorced for a second time in 1982. (Exh. 11, dec. of David Burney, par. 21, 22.)

17. During petitioner's childhood, petitioner's mother resided in Anaheim, Tustin, and Santa Ana in Orange County, California. She remained there until shortly after petitioner's arrest in June 1992. With the exception of petitioner's early childhood and one or two relatively brief encounters with petitioner later on in his childhood and adolescence, petitioner's father had limited contact with petitioner. David contributed to petitioner's care and upbringing only marginally, and for a short time when

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[1]/ Declaration of Marilyn Cornell, MFT (hereafter Cornell declaration), an exhibit to the petition. In analyzing petitioner's social history, I have relied primarily upon the data and facts in Ms. Cornell's declaration.

petitioner lived with his father in North Carolina in 1987. The efforts he made to be a part of the boy's life were erratic and largely insignificant.

18. Petitioner's mother, Ernestine, was an ineffective parent. She had been traumatized by her mother who administered frequent beatings and who also failed to provide nurturance and guidance as a parent. This history, which Ernestine brought to her role as a parent, had a profoundly negative effect on her functioning. She was unable to provide to petitioner the nurturance, guidance, care, love, affection, and protection which parenting demands, particularly during infancy and childhood. As petitioner grew into adolescence, she was unable to provide adequate monitoring or to be a positive role model for her son. Petitioner's father had also been raised similarly; he was emotionally cut off from his mother and suffered from depression. Neither parent properly fulfilled their role as parents.

19. Petitioner's childhood was marked by numerous risk factors that may be associated with mental illness, including poverty, family chaos and instability; parental neglect and absence of parental guidance and protection; childhood physical and emotional abuse; drug and alcohol abuse; and repeated trauma as described in DSM-IV-TR (Diagnostic and Statistical Manual IV-TR (2000)), *infra,* arising from highly charged events, including his grandfather's funeral, early childhood expression of suicidal ideation, and his father's repeated abandonment of the family.

20. As the only child in his mother's home, petitioner was raised in an unstable environment. He was a neglected child and routinely lacked a healthy and supportive family environment. His family history was replete with a pattern of poverty, limited education, abuse and neglect, abandonment, depression, social isolation, family dysfunction, and likely exposure to chemicals and pesticides. (See, generally, Exh. 8, Cornell

declaration, Exh. 10, social history records, Exh. 12, family social history records, and Exh. 13, other social history records.)

21. The adverse impact of unstable familial relationships may lead to development of behavioral dysfunction. (See Garbarino, et. al., The Psychologically Battered Child, *supra*, at pp. 62-64.) A child's sense of safety and protection during the critical formative years may affect the development of a well-adjusted, intact personality.

> [T]he concomitants of psychological maltreatment are anxiety, frustration, and hopelessness. When such emotions are constant and intense, … the body … produce[s] chemicals that encourage fight or flight, … the chemical imbalance encourages options such as: addictions, allergies/asthma, depression … .

(Mignon, et. al., Family Abuse, Consequence, Theories, and Responses (Allyn & Bacon 2002) p. 103.) Petitioner's unstable home life placed him at risk for the development of psychiatric, psychological, and/or other behavioral dysfunction and he began to exhibit symptoms of such dysfunction early in his life.

22. Petitioner exhibited behavioral difficulties early in life, such as performing well below his age and grade levels in school. (Exh. 10, school records.) As early as the first grade, petitioner exhibited sufficient difficulty with schoolwork that it was urged he repeat the first grade. The records indicate that petitioner attended nine different schools during his school years, from ages 6 to 17. Numerous changes in schools may result in poor academic performance and other behavioral problems. As well, it suggests an unstable home life. Moreover, such a shifting pattern indicates that petitioner was not provided with the undergirding support that school may offer to children whose home lives and families are unstable. Coupled with the family dysfunction known to have existed in Mr. Burney's family, it is likely that it would have exacerbated any learning difficulties or other

deficits petitioner may have had. For example, his mother does not recall having contact with the schools about petitioner's performance or lack thereof. The detachment of petitioner's mother from her son's academic struggles strongly suggests that she was either unaware of and/or unable to intervene to offer him understanding or support around this critical issue.

23. Attention Deficit Hyperactivity Disorder, commonly referred to as "ADHD" or "Hyperactivity" in children is a persistent pattern of inattention and/or hyperactivity. (DSM-IV-TR, *supra*, at pp. 85-93.) Occasionally, mood disorders, anxiety disorders, dissociative disorders or substance-related disorders may better account for the symptoms that mimic ADHD. In some instances, the behaviors typically associated with ADHD may also result from a pervasive developmental disorder, a psychotic disorder, or the use of medication. In a case where learning problems persist, it is crucial that the treatment plan include an evaluation of the learning disorder and the involvement of family and school to assist the child in acquiring age-appropriate skills in self-regulation, focusing, awareness, attention and concentration. Here, petitioner suffered from learning problems as early as the first grade. He could not read even at a first grade level. The teacher was so concerned that in a note to petitioner's parents, it was recommended that he should repeat the first grade. The warning signs were there from the start and throughout petitioner's schooling as his grades worsened and his behavior became erratic in class. By 1991, his standing in high school was at the very bottom of his class; he was ranked 374 out of 378. However, throughout his school years there was no indication of a remedial plan. The school records do not indicate a program was ever developed to assist petitioner at school. (Exh. 10, school records.)

24. While, at first blush, petitioner's multiple difficulties might appear to be the result of willful misbehavior, in fact, they reflect the chaos,

trauma, and instability in petitioner's family life. It should be noted that during the early years of petitioner's life, his home environment was marred by persistent family dysfunction and his father's abandonment. Neither parent was capable of supervising, caring for, nor raising his/her child. Petitioner was also physically abused and neglected by his mother. By the time petitioner reached his school age years, his parents' relationship was extremely unstable. At the tender age of six years old, petitioner was already drowning in the pervasive instability, sense of abandonment, and the growing sense that he had no one on whom he could rely. He became depressed at his father's abandonment of the family and eventually suicidal, an extremely serious problem among young children. However, there was no treatment for his loss or depression caused by his parents' failing marriage.

25. Petitioner had no positive role models during his childhood. His mother was the only person with whom he had a close relationship. Their relationship was very problematic. She ignored petitioner's needs due, in part, to her own deficiencies as a parent as well as the pressures of raising a child as a single parent. She later covered up years of abuse and chaos by giving him material objects. In trying to get petitioner to overlook the past abuse, her actions were but another form of mistreatment. Petitioner did not receive the care, affection, and guidance he so needed from his mother. In addition, there were no male role models in his immediate or extended family. In Orange County where petitioner lived, he occasionally saw Roosevelt Smith, a close friend of the family, when he was growing up. But there were no father figures in his life or relatives to whom he could turn. He had no opportunity, through school, sports, or other activities, to form a close relationship with a positive adult role model.

26. Around the age of eleven or twelve, petitioner began using drugs and alcohol by his own report. The probation report indicates he drank beer and used marijuana. He also used LSD. Later on, within a few months of the capital charges, he ingested PCP. Such drugs can cause confusion and disorientation in abusers of the drug. (DSM-IV-TR, *supra.*) Marijuana and hallucinogens like PCP can have devastating effects on the developing brain, including attention, focus, spatiality, cognition, and mood; especially for someone suffering from petitioner's cognitive and psychological impairments.

27. By the time petitioner had reached early adolescence, his life course had, for all intents and purposes, been set because of repeated traumatic experiences. As if the dangers at home were not enough, petitioner was exposed to further trauma. By the age of 8, he had been exposed to extreme trauma at his grandfather's funeral where he witnessed the woman who had killed his grandfather try to pull him out of the casket. This was followed within a day or so by his father changing the locks on their home and refusing to let petitioner and his mother in when they returned from the funeral. Petitioner and his mother were forced to live in a motel until they could afford to find another place to live. Thus, petitioner's father abandoned him and his mother and betrayed the family, leaving petitioner and his mother essentially homeless. At the age of 9, petitioner briefly saw a doctor because his school indicated he needed counseling. His mother apparently was unaware of his need for psychological help. Petitioner was reported to be severely depressed and suicidal. But after one visit, there was no prescribed treatment, no aftercare or follow-up. Petitioner's symptoms went untreated. This was extraordinary because of the seriousness of childhood suicidality, which requires ongoing professional care and monitoring. (See literature on childhood suicidality attached to exh. 4.) During his early adolescence,

around the age of 11, petitioner began to experiment with drugs and alcohol. In this way, he medicated his depression, suicidality, and feelings of loss and abandonment. At the age of 12, an older girl assaulted him. This was a particularly traumatic experience as it involved forcible, sexual contact. He received no follow-up care or treatment of any kind. During this same period, from the age of 8 to 14, petitioner had no significant contact with his father. His life had less and less meaning as he became more and more neglected. His school records attest to his continuing problems in school, in Orange County, Jackson, Mississippi, and Kinston, North Carolina. The out-of-state school records indicate petitioner did poorly and failed to receive any assistance for his learning problems. At the age of 14, petitioner had a short-lived relationship with his father in North Carolina followed by further abandonment by his father during his adolescence. At the age of 16, petitioner witnessed a shooting while he was riding in a car with friends who were hit by the gunfire. At the age of 17, his mother became involved in an abusive relationship with Lee Thomas. At the age of 18, in the course of defending his mother against insulting behavior by Thomas, petitioner became involved in an incident with Lee Thomas. He was arrested on misdemeanor assault charges and later forced out of his home, abandoned by his mother, and was homeless.

28. Moreover, the areas of Orange County in which petitioner had lived, including Santa Ana, Tustin, and Anaheim, were beset by a broad range of problems arising from low income housing, substandard schools, limited work opportunities and resources, and neighborhood gang activity, including gangs that originated in Los Angeles. (Exh. 7, dec. of Steve Strong, par. 15; exh. 7, Orange County demographics.) Petitioner moved nearly every year from one apartment to another throughout various parts of Orange County and had few if any long lasting ties with friends or neighbors.

29. The impoverished and disadvantaged conditions in Orange County were ripe for development of gang activity. It was not long before major gang problems developed, having spilled over from the greater Los Angeles area. What followed, especially during the years that petitioner was coming of age, was an epidemic of gang-related and drug-related violence. Petitioner witnessed violence, including a car-shooting incident, which likely exacerbated the impact of his lifelong exposure to trauma. He was a passenger in a car when shots were fired. Other occupants in the car were injured. The violence and the sense of gang hysteria generated by the media and further incited by the police, reached its peak in the mid-to-late eighties, during the time petitioner was attending high school. (Exh. 7, dec. of Steve Strong, par. 15, 17.)

30. As petitioner came of age in an environment that repeatedly and in multiple ways placed him at high risk for cognitive and psychological dysfunction, his many difficulties grew. By the age of 12, petitioner was largely operating without parental supervision. (Exh. 11, dec. of Ernestine Jordan, par. 28.)

31. Around this time, in 1987, petitioner's mother contacted his father, David Burney, and asked him to take petitioner to stay with him. This was a short-lived arrangement, however. Neither petitioner nor Burney had much of a foundation upon which to build a father-son relationship. Petitioner, although removed from the chaotic and dysfunctional family system in his mother's home, was unable to adapt to another dysfunctional environment. It wasn't long before petitioner returned home to the very environment that lay at the root of his problems and dysfunction. Petitioner's school records indicate that he was unable to adjust to the environment or perform well in school. He experienced adjustment problems living with his father and his father's girlfriend. After

being in North Carolina for several months, petitioner returned home in June 1988. There was no further contact between petitioner and his father.

32. By this time in petitioner's life, his psyche was damaged by the influences and events described thus far; however, the relationship with his father, or lack of it, deprived petitioner of the most needed and crucial support. He was neither psychologically equipped nor prepared to absorb the loss of his father.

33. For petitioner, the struggle to maintain equilibrium developed into a sequelae of symptoms and behaviors consistent with the features of Posttraumatic Stress Disorder (PTSD). Posttraumatic Stress Disorder is defined by the DSM-IV-TR as

> the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate... . The person's response to the event must intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behavior)... . The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event..., persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness..., and persistent symptoms of increased arousal,... .

(DSM-IV-TR, p. 463.) At the time of petitioner's late adolescence, in 1990, PTSD was defined by DSM-III-R as the development of symptoms that follow a psychologically distressing event and are outside the range of usual human experience. The stressor is usually experienced with feelings of intense fear, terror, and helplessness.

34. In addition and prior to trial, petitioner's IQ was tested in 1992. His scores were: verbal IQ 83, performance IQ 94, full scale IQ 86.

Given that the testing was performed by Dr. Stephen Wells when petitioner was 18 years old, according to the literature that defines the protocol and factors affecting mental functioning, petitioner's mental age is calculated as: verbal IQ 14.94 years of age; performance IQ 16.92 years of age; and full scale IQ 15.48 years of age. (See Sattler, Jerome, *Assessment of Children* (1982); see also exh. 5, excerpts of Sattler, Jerome, *Assessment of Children*: *Cognitive Application* (Fourth Ed. 2001, Sattler Pub., Inc.) Based on the accepted protocol and factors (history of abuse both physical and emotional, neglect, PTSD symptoms, depression, use of illicit drugs and alcohol, and suicidality) that adversely affected petitioner's functioning, he was functioning at the age of a 15-year old. His functional deficits resulted in significant impairment. In other words, petitioner thought, made decisions, and solved problems through the eyes of a 15-year old teenager. He lacked the experience, judgment, and common sense reasoning to manage the stressors to which he was subjected. He was not functioning as an 18-year old adult. Neither the schools nor petitioner's family addressed his impaired intellectual functioning. No one undertook to work with petitioner who was receiving failing or near failing grades. That he graduated from high school means only that the schools he attended passed him through the system without assessing or resolving his learning difficulties. At the same time, petitioner suffered from a history of abuse, neglect, abandonment, trauma, depression, substance abuse, homelessness, and impaired mental functioning, all of which adversely affected his ability to function. The combined effects of drugs, specifically marijuana, LSD,and PCP, as well as alcohol on the developing brain are well known. The brain is compromised by impaired mental functioning, psychological dependence, and instability. (DSM-IV-TR, *supra*, pp. 198-209, 252-257; exh. 4, literature on the developing brain.)

35. At the time of my last session with petitioner on October 28, 2004, he explained that he continues to experience trauma from his childhood. His mood and ability to invest himself in ordinary activities fluctuates. His experience of emotion is restricted and appears artificially bright, a facade to conceal underlying depressive states. Threats to petitioner's safety and wellbeing in this environment, layered upon his significant trauma history, contributed to an entrenched state of PTSD. His condition effectively placed a moratorium on further development and his ability to be spontaneous or relaxed or express feelings and thoughts.

36. The psychological impairments and disabilities from which petitioner suffered existed prior to the time of the capital charges. In school, petitioner performed well below the norm for his age. His standing at the time of graduation from high school (ranked 374 out of 378 students) demonstrates clearly just how impaired petitioner's functioning was. He was not capable of functioning as a normal 17-year old child.

37. Petitioner was homeless at the time of the crimes for which he was convicted. Following his arrest on the current offenses on June 16, 1992, he was confined to the Orange County Jail for nearly two years awaiting trial. At the age of 18, he was incarcerated for the first time in his life. Within a few months, his mother abandoned him once more. She relocated to Louisiana and rarely saw petitioner while he was in jail. In custody, he was subjected to a volatile, crowded, and harsh environment. In this setting, petitioner re-experienced many of the traumatic and violent experiences that he had experienced outside confinement. He reported feeling unsafe and depressed. Threats to petitioner's safety and wellbeing in this environment, layered upon his significant trauma history, added to a chronic state of PTSD for which he was medicated with antidepressants. The environment was not conductive to a stable, nonthreatening routine. Petitioner's background created unique problems for him in the inmate

population, i.e., his youthfulness, lack of prior record, the capital charges, and codefendants similarly confined as well as their gang ties. Thus, petitioner's safety was jeopardized. He was required to defend himself. In closing argument, the prosecutor referenced petitioner's jail conduct as aggravation. Such an argument completely ignored the reality of the setting, the lack of adequate supervision, or safe housing for a person in petitioner's unique situation.

**Summary of Post-Conviction Psychological Test Findings**

38. In the course of my evaluation and assessment of petitioner, I conducted clinical interviews and administered the Trauma Symptom Inventory. This instrument is a written test assessment of symptoms associated with trauma. The administration of psychological testing is not the only means of evaluating trauma. Interviews of the individual and family member and review of relevant documents is essential.

39. Mr. Burney's performance on this test is consistent with the social history findings. His profile is valid and notable in its elevation on a scale measuring depression in terms of both mood and thoughts. High scores on this scale reflect frequent feelings of sadness and unhappiness and a general sense of being depressed. People who score high on this scale regard themselves as worthless and inadequate, look at the future with hopelessness and entertain thoughts of death and dying. They may cry easily and isolate themselves from others.

40. Nearing statistical significance, but only relatively elevated is his score on a scale assessing for Defensive Avoidance. People who score high here often describe a history of painful internal experiences and they try to avoid re-experiencing them. These individuals seem to affirmatively clamp down on the experience of these painful emotions and distress. In other words, they may sense a painful feeling coming on or be reminded of

some earlier traumatic event, at which point they deliberately divert their attention elsewhere to distract themselves.

**Conclusions and Opinions**

41. A number of critical themes emerge from my interviews and psychological testing of petitioner, as well as from the available information and evidence concerning petitioner's psycho-social history and cognitive and psychological functioning throughout his life. The themes and information they are based on was important mitigation to explain petitioner's involvement in the crimes, his psychological problems, and developmental difficulties. (See, e.g., Matsakis, Post Traumatic Stress Disorder (New Harbinger Publications, Inc. 1994).) Briefly summarized, those themes are: (1) A childhood characterized by impoverishment, physical and emotional neglect, physical and emotional abuse, abandonment by both parents, and overall deprivation; (2) a persistent absence of parental attention, guidance, affection, and protection that resulted in isolation and lack of sense of belonging; (3) profound immaturity and arrested development and impaired intellectual functioning; (4) childhood exposure to alcohol and illegal depressants and hallucinogens during petitioner's critical formative years; (5) exposure to community violence, including gangs and neighborhood shootings; (6) repeated traumatic events outside the range of normal human experience, including witnessing the turmoil surrounding his grandfather's funeral, the shooting of his friends when he was riding in the car with them, and his homelessness; (7) exposure to domestic violence initiated by Lee Thomas at his mother in the course of their short-lived marriage; (8) major depression and suicidal ideation as the result of being abandoned and homeless, which led to his involvement with the codefendants who directed and dominated his actions at the time of the offense; and finally, (9) the

impact of trauma and impaired mental functioning on his developing brain in institutionalized settings characterized by dangers that re-traumatized him and caused him to re-experience the stressors and traumas that led to and exacerbated his myriad impairments; and the inadequate programming and other adverse conditions of confinement resulted in institutional failure to address and provide appropriate intervention and treatment.

42. Each of these factors has critical, long-term consequences and implications for petitioner's overall psychological and mental health functioning. His psycho-social profile presents the classic risk factors for mental illness and psychiatric and psychological disorder and dysfunction. Further, I am familiar with the California legal standard of mental competency. Because petitioner suffered from serious mental impairments, he was not capable of assisting counsel within the definition of Penal Code Section 1368. Petitioner was unikely to be able to assist trial counsel due to his fragility, intellectual deficiencies, and his newness to the criminal justice system. I have serious doubts about his competency. He still has difficulty focusing; he is childlike and unable to meaningfully assist in his case. The trial experts were well aware of his deficiencies at the time of their mental health evaluations but they did not address the issue of his competency.

43. Petitioner's trauma history was compounded by events throughout his childhood. At the age of 8, he witnessed his grandfather's funeral erupt in a chaotic scene when the very person who killed him tried to pull him out of the casket; he suffered depression and suicidality at the age of 9; there was repeated abandonment, first by his father who changed the locks on his house and would not let petitioner and his mother return home after the funeral, and, later on, by his mother who sent him away and failed to work through his emotional problems that continued to escalate. By the age of 12, he sought to self-medicate with drugs and alcohol. He

was cut off from a normal childhood because of his mother's lack of structure, discipline, guidance, affection, and resourcefulness. His mother was like a child herself. She did not know how to care for petitioner. She sent him away, which made petitioner feel there was a rupture in their relationship. Even though petitioner revered his mother, he did not have a good working relationship with her due to her own poor development. He was neglected because she was unable to offer him anything of emotional resonance. She did not spoil him because she was incapable of giving him more than he needed. He never got what he needed in the first place. At the age of 12, he was sexually assaulted and again received no treatment or help of any kind. Petitioner felt betrayed and abandoned when his mother sent him to live with his father and that resulted in failure. Her decision to send him to his father represented her lack of confidence in him and her ability to tolerate him. He received the same treatment from his father, resulting, effectively, in his having nowhere to go, psychologically and literally as well. At the age of 16, he was riding in a car when it was hit by gunfire. Other occupants were hurt, but petitioner was not. He was traumatized by the event as well as by "survivor" guilt. At the age of 17, his mother remarried. She married a person with no apparent skills as a parent and someone not interested in forming a bond or relationship with petitioner. Unlike the prosecutor's claim, M. Thomas had no interest in parenting or providing a positive male role model for him. The prosecutor asserted that because petitioner was not a young child, but rather an 18-year old person, this should have made him more amenable to intervention by Mr. Thomas. In fact, it is just the opposite. At the age of 18, petitioner was developmentally not in a place to desire to form a family with this man nor to follow his direction. This led to an incident in which Lee Thomas provoked petitioner by insulting petitioner's mother. Petitioner could not stand the abusive behavior. He was charged with assault and became

homeless at the age of 18 when his mother refused to allow him to return home. She chose Thomas over her son. Petitioner's homelessness was especially traumatic, the last straw for a child without survival skills who was not mentally equipped to withstand such a devastating experience. These events are extraordinary in nature, "outside the range of human experience," and set the stage for the development of Posttraumatic Stress Disorder and other psychological and psychiatric disorders. (See also, Ochberg, ed., Post-Traumatic Therapy and Victims of Violence (Brunner/Mazel Pub. 1987).) In addition, petitioner likely was exposed, to pesticides and other toxic chemicals, either *in utero* or during his childhood, due to his parents' repeated exposure to toxic substances during their own childhood as well as his mother's constant exposure to chemicals at work during petitioner's growing years. (Exh. 9, literature on neurotoxins.)

44. Not only did his mother give up on petitioner and send him away, but also, she later chose another man over him, a man whom he did not admire or even like. This was a man who mistreated him and disrespected his mother. It must have made him feel very lowly about himself that his own mother selected such a man over him. In 1991 and 1992, petitioner witnessed repeated domestic violence and abuse by his stepfather Lee Thomas directed at his mother. Petitioner was depressed because of his mother's relationship with the freeloading, alcoholic Thomas. Petitioner pleaded with his mother to leave Thomas but she refused. She took steps to save her marriage. She invented a pregnancy that she hoped would make Thomas want to stay at home with the new baby. She was not actually pregnant but told her husband and petitioner of the intended baby. Her behavior ignored the reality of the situation and presented a psychotic scenario to petitioner which he was expected to support. It was a strange and peculiar act, confusing to a person in

petitioner's position. It was also crazy-making because petitioner had to set aside the truth and accept what did not make sense. In wanting to "have" a baby, his mother was not in touch with reality. She was naive and living in a fantasy world. Ultimately, she forced petitioner out of the home following the May 9, 1992, altercation, while she was pretending to be nine months pregnant and ready to start a new family. Petitioner was, once again, abandoned, betrayed, and homeless just as he had been as a young child in 1981, when his father forced him and his mother to leave for good. This time it was his mother, the one person who mattered in his life. The repeated trauma took its toll. There was no place for him to go. He was increasingly suicidal in the weeks and days before the shooting. His involvement in the crime was fueled by suicidal undercurrents. The shooting was the final, fateful step in a mounting situation, the culmination of a set of tragic circumstances that led to petitioner's acting out of the internal difficulties and struggles he had carried around for years.

45. It is significant that Ernestine separated from Thomas shortly after petitioner's arrest. She later divorced him. Nothing good came of her marriage to Thomas. He was not a man interested in providing a home for Ernestine and her son; rather, he took advantage of her. Ernestine freely admits she made a mistake in marrying him. He was abusive to her and committed acts of domestic violence during their short-lived relationship. Petitioner's behavior on May 9, 1992, was his attempt to protect his mother, both physically and morally, from the insults and abuse that Thomas inflicted on her. In the black culture, a challenge to the mother is a serious matter. This was something that petitioner could not tolerate. He simply could not allow Thomas to insult and abuse his mother. Under these circumstances, Thomas's disrespectful, outrageous conduct was seen by petitioner as extremely provocative and thus necessitated action on his part.

46. Petitioner's former girlfriend, Sylvia Carmona, testified at the penalty trial that early in their relationship petitioner was happy. However, his behavior changed after his mother married Lee Thomas. The incidents in aggravation involving Sylvia Carmona included shoving and hitting matches. On one occasion, petitioner choked her. Sylvia had become more like his mother because she nagged and criticized him. As she testified at trial, Sylvia was aware that during this period of time, petitioner was increasingly frustrated and depressed because of the abuse he witnessed at home. He saw his mother being victimized by Thomas, a womanizing, alcoholic, intimidating, brutish man but he was powerless to help her. Petitioner's conduct toward Sylvia was related to the tension and conflict in his own home. It was the manifestation of the stress and resentment he experienced in his family.

47. Petitioner's background includes further trauma. In his infancy, he lived in impoverished and chaotic conditions alone with his mother in Gulfport after his father left them for the first time; his mother, without any job skills or parenting skills, was forced to work part-time because she had no financial support; in early childhood petitioner moved every year or so, his mother's varying work routine precluded normal childhood activities; petitioner was exposed to abuse by Lee Thomas who, although he was unemployed, ordered petitioner, after he got off work, to do chores around the apartment that Thomas could have done; Thomas ate all the food in the home and failed to pay expenses; petitioner told Sylvia he was going to kill himself as a result of his mother's abusive marriage; the deception by his mother in marrying Thomas in the first place and then by pretending to be pregnant in an effort to save the marriage; petitioner's break-up with Sylvia; the birth of his daughter, Lee Thomas's provocation that caused the altercation on May 9, 1992; after his release from custody, in May 1992, petitioner first stayed with his friend, Roger Onofre until Mr.

Onofre's niece drowned in a jacuzzi; petitioner's homelessness led him to codefendants Burnett and Rembert who exposed petitioner to drugs and alcohol, and implicated him in the capital case.

48. Shaun Burney has classic symptoms of unremitting PTSD that were plainly in evidence at the time of his capital trial. At the time of my last interviews, on October 27 and 28, 2004, he continued to exhibit symptoms of trauma, indicating numbing and denial of feelings, a pervasive sense of dread and the feeling of not ever having been in control of his life. This establishes that at the time of the offense, Mr. Burney exhibited these same symptoms, which should have been readily apparent to a competent mental health professional or expert in possession of adequate and accurate background and life history information concerning petitioner. Petitioner's mental state had decompensated. Being kicked out of his home after his mother did not stand up for him but instead chose Thomas over him, was an act of betrayal. He had no coping abilities; he felt abandoned after having been pushed out his home; he had few resources to begin with and his level of functioning had broken down even more.

49. Petitioner became involved in situational violence due to a difficult set of circumstances. He is not the kind of person who plans ahead. He was not focused or capable of acting with precision. His actions at the time of the offense were sudden and unplanned. This is an example of an immature, poorly differentiated person acting out with no conscious or logical thought process. His internal conflicts, i.e. his homelessness, lack of family support, Burnett's erratic and repeated use of the gun the night of the incident caused petitioner to engage in emotionally-driven behavior. He is not a predator. He had a reactive personality largely due to his upbringing. Because of the way in which he was raised, he lacked structure and guidance. Throughout his childhood he had not developed problem-solving skills or the use of good judgment.

50. At the time of the offense, in his mind there were very few choices that he could make. According to his redacted statement, even when he got in the car, he drove because he didn't trust anyone else; he was trying to remain safe in a difficult situation. He tried to talk Burnett out of shooting up a house; he pleaded with Burnett to leave the victim alone. Petitioner tried to solve the problem of leaving the victim in a nonviolent fashion. Despite his impairments, he tried over and over to get Burnett to stop what he was doing. Petitioner was afraid of because he had been drinking; he turned into a completely different person. It was impossible to reason with Burnett, whose nickname was "Nut." Burnett had suffered a head injury, and seizure disorder – all of which affected and altered his behavior especially when he was under the influence of alcohol.

51. Petitioner, with no history of gang involvement or bad feelings toward anyone of Burnett's friends, was caught up in Burnett's scheme to retaliate against a former girlfriend. Burnett had recently been assaulted and injured shortly before the incident. He sought revenge against the gang who hurt him. Petitioner, because he was driving the car, unwittingly and without any prior warning or knowledge helped Burnett achieve his goal. Petitioner panicked, as his attorney argued in closing argument, and shot because he feared he would be killed if he didn't fire the gun. Petitioner was in a reactive state; his actions were a form of self-defense.

52. At the time of the shooting, petitioner tried to talk Burnett out of shooting the victim. When he was unsuccessful, he ran out of options and lost his patience. Fear took over. He was scared of Burnett. He realized that if he didn't take the weapon and fire a shot, he would risk being shot himself by Burnett. Petitioner panicked under the extreme pressure of the moment. He fired one shot and only one into the trunk of the car. Petitioner's continuing symptoms of PTSD made him susceptible

to dissociation when put on the spot to make a decision. He had a tendency to think on "automatic pilot" rather than weigh decisions carefully before acting. He had a vulnerability to impulsivity and acting out intrapsychic conflicts and struggles; and a desire to act in such a way that seemed designed to avoid or deflect additional stress or pressure.

53. All of these factors were critical to understanding petitioner's behavior on the night of the crime. The experts who evaluated petitioner conducted more of a generalized evaluation than a contextualized history of petitioner's life. They did not consider family member accounts or other sources of materials. Their findings were not well-rounded. There was too much emphasis on testing results rather than petitioner's circumstances leading up to the offense. A competent mental health expert, in evaluating petitioner's mental state at the time of the offense, would have made an assessment of his background, family history of trauma, poverty, abuse and neglect, abandonment, immaturity, impaired intellectual functioning, emotional, cognitive, physical, and psychological condition. At the time of the shooting, petitioner's mental state was severely impaired. He was under the influence of alcohol; his judgment was clouded; he was not thinking rationally. A drug expert would have been able to explain the longterm effects of alcohol and drugs on the brain and the impact on the developing brain of a young person. In combination with petitioner's low intellectual functioning, his brain was particularly vulnerable as described in the DSM-IV-TR.

54. Moreover, from my review of the records, declarations, and trial transcripts, the trial expert's finding that petitioner was antisocial is not supported by the evidence. Dr. Vicary did not have sufficient information or context to support his finding. There were many things going on in petitioner's life at the time of the offense that ruled out such a diagnosis. Petitioner had been working; he had no criminal history; and he had

graduated from high school. These are key factors in support of finding that he did not have an antisocial personality disorder.

55. Mitigation offered at the penalty trial was limited in its scope and breadth. There was no elaboration of key events discussed above, their significance, and impact on petitioner's functioning throughout his life and the ways in which his trauma history shaped his psychological condition. Mr. Burney's disorders were readily apparent from the details of his family history, and available through the school records, the declarations of his family members, in the evidence of domestic violence, abuse and neglect, community violence, and other information that could have been presented on petitioner's behalf to explain and mitigate the evidence presented against him at trial.

56. Petitioner's mental age, a matter only briefly testified to, was particularly significant in terms of understanding petitioner's overall functioning. Petitioner's cognitive impairments, including his low IQ were likely due to several major factors, none of which were elaborated on at trial. He had been a victim of ongoing abuse and neglect; he had experienced repeated traumatization; and he suffered PTSD symptoms that increasingly shut down his ability to function. These functional deficits effectively reduced his capacity to think through his actions. Because of his deficits and low IQ, his overall functioning was overestimated. He was not able to function as an adult, but as a 15-year old child. He was at a serious disadvantage because of his mental impairments. He had no life skills, judgment, capacity, or decision-making ability to overcome the adversity he had experienced in his short life. He was not capable of functioning maturely in the face of mounting frustration and overwhelming traumatization.

57. At the time of his involvement in the capital case, petitioner suffered from a serious mental health crisis. He was homeless, depressed,

anxious, and suicidal. His overall functioning was gravely impaired. His actions were those of an individual in a decompensated state. Thus, the state's argument that petitioner was not remorseful did not take into account petitioner's mental impairments. When he was in the company of others and went to Magic Mountain, the brief respite was merely an escape from his feelings of grief, loss, and despair. It is also further testament to petitioner's pronounced immaturity and propensity to mange stress by trying to escape into fantasy.

58. In the aggravating incidents involving Sylvia Carmona and Lee Thomas, there was no explanation offered of petitioner's mental condition, trauma history, or his cognitive impairments at the time. From my review of the records, he was not only depressed and increasingly frustrated by the abusive Thomas, but also he was unable to resolve interpersonal conflicts at home. Given petitioner's background, impaired mental functioning, inability to solve problems, and ongoing difficulties with his mother and stepfather, he had no coping skills and was unable to withstand the pressures imposed on him by his girlfriend and stepfather.

59. The state's argument that petitioner would be a threat to others in prison was completely unjustified, not only because of petitioner's mental health history, his background and immaturity, but also because he had no prior history of confinement. He was extremely young and immature at the time of his incarceration. At the age of eighteen, he was in custody charged with murder and facing the death penalty. The jail failed to provide any mental health treatment or care while he was in custody. The highly predictive argument was not supported by petitioner's track record.

60. The argument of future dangerousness is not borne out by petitioner's prison adjustment. His prison records show that he has been well-behaved and conducted himself in a positive manner. With structure

and relatively safe surroundings, he has demonstrated that he is able to remain discipline-free. He has not shown any potential for acting out. There have been no serious discipline problems during the entire time he has been on death row. Obviously, with structure (that was missing from his childhood) he can conform his behavior.

61. The type of information and evidence recited here is the type of evidence typically relied upon by mental health professionals and experts performing the type of assessment I have performed in this case, as well as in other more comprehensive mental health evaluations that assess mental health functioning. Essential to a valid assessment for any aspect of petitioner's mental health functioning is a comprehensive social history such as that which habeas counsel provided to me. The client himself is usually a poor historian, particularly as to the experiences in his life with potential clinical significance, and any assessment which relies solely upon the client's self–report does not comport with the professional standards adhered to by mental health experts and professionals. Thus, in order to render a clinically valid mental health evaluation, the client's social history should come not just from the client, but from other sources as well, including family members, records, documents and other evidence.

62. Without the crucial background information regarding petitioner's family and upbringing, a mental health evaluation lacks the essential factual context needed to validly interpret test findings and preliminary conclusions regarding his mental health history and functioning. Moreover, an expert's opinion without consideration of petitioner's background fails to adequately explain the dynamics involved in conduct at issue in this case.

63. The striking and overwhelming character and degree of trauma, as well as impaired mental functioning, depression, suicidal ideation, abandonment, abuse, neglect, and alcohol and drug use in

petitioner's social history had adverse and long-term implications for his functioning and behavior. This evidence is crucial to a valid assessment of his psycho-social functioning. Without this information and a clear understanding of its significance, any conclusion that petitioner is not suffering from a mental disorder or disturbance is unsupported by the known evidence regarding petitioner's history. Not only is the evidence of petitioner's mental disorder and dysfunction clear, but also it is likely that he was suffering from these disorders at the time of trial. His dysfunction and impairment implicated the full panoply of his constitutional rights including but not limited to, his competence to commit the offenses, to form the requisite mental state, to waive rights or make statements to the police, to stand trial, or to aid and assist counsel.

64. Had all the information described in this declaration been adequately investigated, developed, and presented to mental health experts at petitioner's trial, they would likely have concluded, as I have, that petitioner's history was rife with factors that placed him at high risk for mental illness and disturbance, that he in fact exhibited symptoms of such mental illness and disturbance, including but not necessarily limited to depression, PTSD, and other mood disorders, and that these disorders would have strongly supported a mental state defense at the guilt trial and mitigated the state's case against him at the penalty trial.

65. In addition to this kind of evidence being essential to a thorough mental health evaluation, it is also the type of evidence that is considered to be mitigating by capital juries and judges, as well as by courts of law. Such evidence can explain a client's upbringing or behavior or otherwise provide a basis for a sentence less than death. It can also negate the state's negative and inaccurate characterizations of the client by proving that the client's conduct or behavior is the product of lifelong and debilitating mental illness or other cognitive or psychological dysfunction

rather than of willful misconduct. In petitioner's case, the failure to present the full nature and extent of mitigating evidence left his jury with no meaningful explanation of his behavior both at the time of the crime, or understanding of his mental state, psychological condition, or behavior in mitigation and thus, no basis for returning a verdict of a lesser crime and/or rendering a sentence less than death.

66. It is my opinion that Shaun Burney exhibits symptoms of, and suffers from depression and PTSD, which, in his case, is chronic and unremitting and from his history existed at the time of the offense in 1992. Had mental health experts been presented with the information which has been provided to me, they would likely have concluded that petitioner exhibited symptoms consistent with numerous mental disorders that provided a clinical and factual basis for a mental state defense to the charges and in mitigation. This evidence would have been critical to the determination of petitioner's mental state at the time of the offense and mitigation and provided his jury with a far more reasonable basis for sparing his life.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of April, 2005, at Boulder, Colorado.

Jane M. Wells, J.D., Ph.D.

This is an interview with Shaun Kareem Burney that took place in the Detective Bureau interview room on June 16, 1992. Detectives Paul Gallagher and Georgia Erickson were interviewing.

GE: Tattoo on your chest?

SB: Yeah.

GE: And your heart on your hand. Any others?

SB: Yeah, one right here, but it never got finished. It was supposed to be a crown, but I just...I just stopped.

GE: How come? Didn't like it or what?

SB: Naw. The guy that was doing it, he started...it started looking messed up, so I just told him to stop.

GE: Um-huh.

SB: I didn't get this one finished.

GE: You did or didn't?

SB: It still needs to be finished.

GE: What's written underneath it?

SB: It used to say my name, but I covered it. Put my little girl's name down there.

GE: You have a little girl?

SB: Yeah.

GE: How old?

SB: She'll be one on the 24th of this month.

GE: Oh. Lives with the mommy?

SB: Yeah. She stays with my mom on the weekends.

GE: Um-huh.

SB: I just go visit her because, you know...right...I was staying in Garden Grove with my best friend, but two weeks ago, his

763

[redacted]

niece drowned in the jacuzzi.

GE: Oh. How sad.

SB: Yeah, it was.

GE: Um.

SB: So, I was...

GE: Happen...I mean, did it just walked away for a few seconds and or, what? Did they just crawl in?

SB: She was asleep and her mom was in the back reading a wedding invitation and usually the baby would go in her grandma's room and she'd wake up. This day she didn't. She went and she fell in the jacuzzi.

PG: Does he want anything to drink?

GE: Want something?

PG: Okay.

GE: I offered him a blanket, but he says he'll adjust.

PG: Good, I'll use it later.

GE: Yeah. Right. Uh, Shaun, my name is Detective Erickson. This is Detective Gallagher.

PG: We met.

GE: And, uh, let's see, it's Burney?

SB: Yes.

GE: And Shaun. S-H-A-U-N?

SB: Yes. My first name's Kareem.

GE: Kareem?

SB: Like in Abdul Jabar.

GE: Okay. And your date of birth?

SB: 12/1/73.

GE: And where do you live?

764

SB: In Tustin, California.
GE: And what's your address?
SB: 15651 Williams Street.
PG: Can you speak up a little. I'm having problems understanding you right here.
SB: I'm sorry.
PG: I'm sure she can't.
GE: Apartment what?
SB: 40.
GE: Okay. Do you have a phone there?
SB: 541-9770.
GE: 9 what?
SB: 9770.
GE: Okay, and you live there with your mom, you say?
SB: Yeah.
GE: And, uh...
SB: My stepdad. He's gone now, but he used to live there.
GE: Uh-huh. Where does your little baby live? With her mother?
SB: Yeah, in South Central Los Angeles.
GE: And what's your baby's mommy's name?
SB: Chiar. C-H-I-A-R.
GE: Do you know the address there?
SB: I have no idea...no idea.
GE: Telephone number there?
SB: Uh, 213...
GE: Um-huh.
SB: 754-8811.
GE: 754 what?

765

SB: 8811.
GE: 8811? I'm having a hard time hearing you, too.
SB: I'm losing my voice, seems like.
GE: Do you talk an awful lot?
PG: He just talks softly. Part of the problem.
SB: Cigarettes, probably.
GE: Like I told you this morning, you were arrested investigating a homicide. I'm required by law to read you your Miranda Warnings.
SB: Um-huh.
GE: So, pay attention. I need to have you answer yes or no, but instead of shaking your head.
SB: Okay.
GE: Okay. You have the right to remain silent. Do you understand?
SB: Yes.
GE: Anything you say may be used against you in court. Do you understand?
SB: Yes.
GE: You have the right to an attorney before and during questioning. Do you understand?
SB: Yes.
GE: If you cannot afford an attorney, one will be appointed for you before questioning if you wish. Do you understand?
SB: Yes.
GE: Okay. Uh...we're investigating a homicide that occurred Wednesday and through my investigation, all the information, all the people I've talked to, all the people that you've talked to that I have talked to, have indicated that you're

766

involved in it. And so, this is your opportunity to tell me your side of the story. Again, I've talked to a lot of people...

SB: Yeah.

GE: ...quite a few people that you have talked to, too. And you know what you've been telling people that you've been doing and they, in turn, have told me. So, uh, we're here to listen to you.

SB: Only...only thing I know about is that they found a dead body by my friend's house 'cause he just got out of the hospital. That was...I don't know. I think it was on Commercial Street. I'm not sure.

GE: Gramercy Street?

SB: And he was telling us about a dead body that was over there by his house.

GE: And who's your friend?

SB: David Wilson. He just got out of the hospital.

GE: What was he in the hospital for?

SB: Shot his foot off like an idiot.

GE: Okay. Just to let...just to let you know Shaun, Detective Gallagher and I have been working on this all...

SB: Yeah.

GE: ...quite a few straight hours.

SB: Yeah.

GE: And, uh...we've been up front with you and there was another homicide that occurred where a guy was found dead in the trunk of a vehicle. That's the one I want to talk to you about. That's the one you've been telling your friends about. That's

767

the one it's your turn to tell your side of the story.

SB: Uh...

GE: Wednesday night. What were you doing...What were you doing Thursday night? Where were you Thursday night?

SB: It was date that...

GE: That's the 9th. June the 9th.

SB: I think I was at a hotel.

GE: What hotel?

SB: Uh, the (unintelligible) motel.

GE: Okay. What time did you check out?

SB: I didn't get home 'til like 4:00 in the morning 'cause it was my girlfriend's graduation and she had a whole bunch of friends over there. And Wednesday night? Where was I? Don't know. We all went out, we came back, and I remember going to sleep at 3:00 in the morning because there was some girls at the house and we were kickin' it 'til 3:00 in the morning and I went to sleep. That's what I remember doing 'cause Thursday (unintelligible) graduation. I wasn't there 'til 5:00 in the morning. 4:00 or 5:00.

GE: Okay. I'm talking about Tuesday night.

SB: Tuesday night.

GE: You're going to talk about Tuesday night when you were over all Allen's house. On Greenleaf.

SB: Um...I...I've been there for quite sometime, but I'm not there all the time.

GE: Okay. Tuesday night.

SB: Tuesday...

GE: You're at...you're at Allen's apartment. Tuesday night.

768

SB: When we're there we...if there's no girls over there, we ain't there. We're never there. I mean, we're there, but just like last night we were there, but...

GE: Drinking beer, Tuesday night.

SB: Not me. (laugh)

GE: Then you leave. Okay. Look at me, Shaun. We talked to a lot of people.

SB: Um-huh.

GE: A lot of people, like I told you, that you have talked to. You've told these people what you did Wednesday morning, to this person in the trunk of his vehicle.

SB: Uh...I nuh, uh...

GE: We just didn't pick your name out of a hat.

SB: Oh, I know that. I mean, I think, you know, maybe just because, you know, you guys took everybody else that was in the house.

GE: We didn't take everybody in the house. We know a lot of what transpired. And again, we're giving you the opportunity to tell your side of the story. Tuesday night, we know for a fact, that you were at Allen's apartment.

SB: Yeah, I told you. I have been there off and on. And Tuesday...

GE: I don't mean off and on. Tuesday night you were there. Who was at the apartment with you Tuesday night?

SB: My friend Dwight.

GE: Dwight. Who else?

SB: Scott.

GE: Who else?

769

SB: And Allen. But, Allen was...Tuesday night, Allen had passed...that's when he had passed out drunk. Tuesday night he passed out drunk.

GE: Okay.

SB: And I remember going to sleep at 3:00 in the morning.

GE: No quite. You're not remembering quite right.

SB: That's what happened. And I remember 'cause he had drink a case of beer by hisself. That wasn't Monday, 'cause Monday I wasn't there.

GE: Wednesday morning about 3:00, you leave Allen's apartment. We have witnesses.

SB: Wednesday morning.

GE: At 3:00, you leave Allen's apartment with Allen and with Scott.

SB: Wednesday morning.

GE: Wednesday morning, 3:00, 3:30, you leave Allen's apartment.

SB: I don't remember which day it was, the one where we left to Ron's house. I don't think it was...it wasn't that late.

GE: Wednesday morning, 3:30 you leave Allen's house. You, Allen and Scott. I know exactly where you were going and what you were doing. And you know that I know.

SB: No, I don't 'cause the morning we left, we went...we went...we went to Ron's house. But, Ron wasn't there. How...wait, was he... Think Scott went to the door. Somebody went to the door. We didn't see him.

GE: Do you remember being at Allen's house Tuesday night?

SB: I remember...I remember Wednesday. I remember...I was over there Tuesday in the day. I know I was there Tuesday, sometime during the day 'cause I always come by there everyday.

770

GE: Do you remember leaving his house at 3:30 with Allen and Scott and you?

SB: Tuesday morning. Allen passed out. He was all drunk...

GE: I'm not talking about Tuesday morning. I'm talking about Wednesday morning.

SB: Nothing happened. Nothing happened.

GE: Just prolonging the inevitable...

SB: I...I...

GE: ...that's all you're doing.

SB: All I remember is that we left somewhere...somebody got their haircut...and I remember me...I...I remember me, Allen and Scott going to Ron's house, but it wasn't Wednesday morning.

GE: I'm talking about Wednesday morning. You're prolonging the inevitable.

SB: No, I'm not. I'm just telling you what I remember. I don't want to say I did something and I didn't do it. I don't want to tell you all somewhere when I wasn't.

GE: I don't want you to tell me that you were somewhere when you wasn't either. But, I know where you were Wednesday morning. You...you've talked to a lot of people since Wednesday morning. You've been busy all over town talking. Telling people what you did.

SB: I ain't done nothing.

GE: (Unintelligible). You shot the person. Why would you be going around town telling people that you did it?

SB: I don't know, but...only...only...only...only thing I know that I did wrong, it wasn't Wednesday though, and I know for a fact it wasn't Wednesday...

771

GE: What's that?
SB: And as...I went...I went and I was...I was...I was, I couldn't find a ride to my mom's house and I was gonna take her car. That's the only thing that I did. But, that wasn't Wednesday.
GE: What day was that?
SB: It was...I don't know if it was Monday or Tuesday, but I know it wasn't Wednesday because Wednesday night...couldn't have been Wednesday night because the next day, I went to Summer's graduation. No, it wasn't...now, uh, I was looking for a ride and I couldn't find no ride to my mom's house and I did go looking to take a car. But, it wasn't on Wednesday night.
GE: What night was it?
SB: I don't know.
PG: What kind of car was it?
SB: A...no, a Mazda RX7.
PG: Mazda RX7?
SB: Yeah.
PG: What color?
SB: Like a tan in color.
PG: And where'd you take it from?
SB: I didn't take it.
PG: You didn't take it?
SB: No, I didn't.
PG: So, you ended up not taking the car?
SB: I ended not taking it that night.
PG: So, you didn't do anything wrong other than think it.
SB: Well, yeah. Well...
PG: Or did you try to take it, but couldn't get it?

772

SB: Tried to take it, but I couldn't take it.
PG: Do you know what street it was on?
SB: You know that street I think is Greenleaf? It goes around like that?
PG: Um-huh.
SB: I was on this...on...on the side (unintelligible).
PG: Okay. About what year RX7 was it?
SB: Old...old...not the real old ones. Probably about a '87.
PG: It was tan?
SB: Yeah.
PG: Was it parked on the street in front of the complexes or in the carport?
SB: It was in the carport.
PG: And how'd you try to get it?
SB: I had a butter knife. And uh...and uh, hotwired the car.
PG: Okay. Were you able to get in?
SB: I opened the door and then I was just like...I ain't even...I was like, I ain't going to take this car, I ain't gonna go to jail for GTA.
PG: Uh-huh.
SB: And I just left and I went back up to the house.
PG: Did you have to...to, uh...was the door unlocked or locked?
SB: It was locked.
PG: And how'd you open it? With a butter knife?
SB: (Unintelligible)
PG: How you do that?
SB: I put the butter knife in the keyhold and just whoof...
PG: Works that easy, huh?

773

SB: Yeah.
PG: Remind me not to buy an RX7. Okay.
SB: But, other than that, that's it.
PG: And that was what day?
SB: I think it might have been Tuesday. I know it was Tuesday, 'cause I...
PG: Tuesday during the day?
SB: Naw, it was like at night. Like...
PG: How late?
SB: About 12 or 1 because I came back inside and I went to sleep.
PG: You went back inside where?
SB: I went to...back to Allen's house and I just went to sleep. Right there.
PG: Did you have something to drink that night?
SB: I don't drink.
PG: At all?
SB: Oh, I drink like I'll drink a beer, but I don't drink like...
PG: Like they do.
SB: Uh-uh.
PG: Okay. Like Detective Erickson's been saying here, Shaun, uh...you know, this thing happened. Okay? And, I don't know whether it was your fault. I don't know whether it was Allen's fault. I don't know whether it was Scott's fault. Okay? But, everybody's talking about it and, you know, naturally, we're getting different versions and we're trying to give you an opportunity to tell your version where people don't put it all on you if it doesn't all belong on you type.

774

thing. You know what I'm saying?

SB: Yeah.

PG: But, there's no question that you were there. There's no question that you were involved. You've talked to enough people and we've talked to them, and we sort of already have your version of what happened. Okay? But, we need to hear it from you. And we need...we need to clear up some points with you, but we can't sit in here and play this game of you don't know nothing, okay? Because we know that's not true. And we can prove that easy enough and you know that. All right? So, let's kind of dispense with that bullshit and talk about what happened, what went wrong. You know, things happen. Things get out of hand sometime. And I think that's what happened here. But, we need to talk about it. We need to, you know, sit down and hash this out. Now you and Allen and Scott were over at Allen's place and they must've been drinking pretty good from what I hear. Especially, Allen. By the way, you call Allen, Nut? That's what everybody else calls him, so I just wanted to know if you refer to Nut, we're talking about Allen?

SB: Okay.

PG: You guys left, okay? And you all left wearing some rubber gloves, is that right?

SB: I had taken them from the hospital.

PG: You had taken them from the hospital?

SB: (Unintelligible)

PG Was that when, uh, earlier in the week or the week before when whoever shot himself in the foot?

775

SB: When we were at the hospital and everybody was playing with the rubber gloves and we just (unintelligible).

PG: Okay. So, you guys put these rubber gloves on and you went out. About what time? More or less.

SB: Between 2 and 3. 'Cause I remember I was laying on the floor.

PG: Okay. So, tell us what happened. What were you guys talking about? What's going on?

SB: I don't know. The guy who...the one guy who blew his foot off like the week before it happened. When he blew his foot off, he asked somebody to give him a ride to the hospital and they wouldn't take him. So, you know...I don't know. He just laid on the floor for like a half hour bleeding when he could have been at the hospital. I don't know, he just...I don't know, he just went to that guy's house.

PG: Okay. Who is that guy?

SB: This guy named Ron. You know, we went over there. I remember Nut was drunk. I wasn't drunk. I was, you know. We just went over there. We was gonna to...we was gonna beat him up, I guess. Whatever. We was gonna beat him up. That was all...I tried, but I kept telling them to stay in the house...stay in the house. You're too drunk. You're too drunk. And he kept telling us Nut wants to roll, Nut wants to roll. So then, you know, we went over there, (unintelligible), so we were just standing outside. And then, you know, they wanted me to take a car. I just took the car.

PG: Okay. Now, where does Ron live?

SB: I think in the Seawind Apartments (unintelligible).

PG The what wind?

776

SB: The Seawind.
PG: What's street that on?
SB: On...on the other side of (unintelligible) like I was telling you by the bridge.
PG: Uh-huh. Okay. Now, closer to Euclid, closer to the...the dead end, right about in the middle?
SB: Yes. Right behind...
PG: Okay.
SB: ...the little street that turns (unintelligible).
PG: So, you guys are standing out there waiting for Ron to show himself and what happens? This dude comes out?
SB: Huh, they just, you know. Ain't even (unintelligible) come out and so, they (unintelligible) and they kept telling them take the car from him, you gonna take the car from him and I'm like, I'm not taking no car from him. I'm not taking no car from him.
PG: What'd they want the car for?
SB: I don't know. They's like, take the car from him. Take the car from him. I'm like, I'm not taking no more cars. Man, I told you, I ain't taking no more cars.
PG: Who's saying this?
SB: Nut was just telling...I was just telling them. Nut was talking to me. He was all drunk. He was being stupid. I was like, I ain't taking no more cars. Nut, you're drunk. You don't now what you doing. He's like, just take me a car. Just take me a car. So...I was walking around. I was looking for a car to take. And, we went through the apartments. We were standing out there. It was just like...

777

like...I don't know I remember some guy going to his car. Just like rushing him.

PG: Okay. Did you know this guy? Never seen him before?

SB: And we rushed him, you know.

PG: Uh.

SB: He had the keys and I just take the keys and everybody jumped in the car and I drove to the corner and I got out and went back through the apartments to see if Ron was gonna come out. And they just told me, you gonna go? And I was like, I really don't wanna go. I don't wanna go. And they just like, come on. So, then we went to our friend's house early in the morning and we were over there and then, it was I don't know, I think it was like, uh, almost gonna be 4:00 and then I just...I...I...I just told them, take me back to the house, you know, 'cause I want to get in this "G" ride. 'Cause, uh...terrible experience, you know. I went back to the house and after that, I don't know who was driving the car or what, but I got out and I waited 'cause I thought they were just going to go down the street or whatever to park the car. I was standing out there and I was standing out there and they ain't come back and so I just went upstairs. I went upstairs, and I was like Dwight, you know, them niggers call or anything? He's like naw. So, I was waiting downstairs for them...I was waiting downstairs because I didn't know where they went. Then, like, it was about an hour, I stayed outside for about an hour. I went back upstairs and they had like ten minutes after I got in the house and then Boxer came in the house.

778

PG: Now, who's Boxer?
SB: Scott.
PG: Scott? What do they call you?
SB: Cuckoo.
PG: Cool?
SB: Cuckoo.
PG: Okay. So, they came in the house and what happened?
SB: Then I just asked them, whats you all do with that car? And they just like we just parked and I was like oh, whatever, you know, I ain't paying no attention. And then, I think, the next day, that's when David came home. They's like...no, as a matter a fact, in the morning, David called me he's like...he's all hey, man and have you guys been down by my mom's house? I was like no, why, what's up and he said they found a dead body over there. I like, what? And I thought he was playing around. He was like, yeah, they found a dead body over there. And I was just tripping. I just asked him, I said, hey, you know, where'd you guys park that car? And they said we just parked it down the street and I was like, oh, all right and that was it and no more was said about (unintelligible).
PG: When you talked about...when David talked about finding the dead body, was this body supposed to be in the car or what?
SG: Naw, he just...he just asked us. Hey, have you guys been down by my mom's house 'cause I remember that day, I think it was German, he had came up and said there's a whole bunch of police down there on my street. We was like yeah? He was like yeah, so (unintelligible) the police down there. Then, I

779

talked to this girl that lives across the street behind the... behind the alley, she's like, there's a lot of police over here. Man, I found out that, you know...I guess it was a dead body over there or something.

PG: Okay. Let's go back to where this guy comes out and he gets in...in his car. What kind of car has he got?

SB: I don't know. A white car.

PG: A white car? Was it big car? Little car?

SB: (Unintelligible). It looked like, uh...what's the name of that car? Like a fox.

PG: Like a fox? Okay. And he comes out and he gets in his car. Did he get all the way in before you rushed him?

SB: No. Like open the door and I guess rushed him.

PG: Okay. Now, when you say you rushed him, what'd you do?

SB: I remember...I just like I remember I grabbed him and his keys fell and then I don't know who picked up the keys. One of us picked up the keys. I just...I just...I don't remember. I got in the car and all of a sudden, and I was like and they opened the trunk and I was like what are you guys doing and I guess they made him get in the trunk.

PG: Who made him get in the trunk?

SB: Nut and Boxer were out there and I was like, what are you guys doing? What are you guys doing? Let's go. Let's go. And then the trunk just closed. I, uh...you know, I didn't know that he was in the trunk and shit. I was like, hey, where's the guy and they was like, he's in the trunk. Ah, man. That's when I wanted to get out of the car, like no man, you know. Then I drew it. Went down to our friend's house and

780

came back.

PG: Who's your friend you went to?

SB: This guy Jeff's house.

PG: Where is his house?

SB: It's pretty close to...somewhere by the police station. I don't know where exactly, but...

PG: Um-huh.

SB: And then, I was like man, uh...I want out and I just went back over there to the neighborhood and I got out of the car.

PG: Okay. When you got to Jeff's house, what was the reason to go to Jeff's house?

SB: 'Cause he...Jeff...like...uh...we were at...Jeff's was over at the house with us and, uh, he was...he was telling us something about his girlfriend or his wife or something. One of our friends, Ray, had told this other girl something about him being married. And then, uh...I got a beeper. I don't know where it is now. And Jeff had paged me and he's...he's like...what you niggers doing? I was like nothing, nothing. And he was asking us if we was going to Ron's house and I was like, I don't know, we might. And so we was just driving around in the car doing nothing. You know, we just went over to Jeff's house.

PG: When you...when you say you have a beeper, what...what does your beeper look like? What kind of beeper is it?

SB: It's a clear beeper. West Coast Paging.

PG: Okay. Do you know your number?

SB: 479-8973.

PG: Let's...let's back up a little bit to the part where you rush

781

him. Okay? And...

SB: It was just like...like...

PG: Go ahead and sit down first 'cause I want to tell you something! We're doing pretty good here as far as talking about this, but we're still lying a lot. Okay? Shaun, it ain't gonna do any good, okay? We...

SB: I'm telling you what...

PG: Okay, just let me finish.

SB: All right.

PG: We know the whole story. Okay? And this is not the right story. It's a piece of the story, but it's not the right story. Okay? You left out the fact that you guys didn't just rush this guy, there was a gun involved. Okay?

SB: There wasn't.

PG: Yeah, there was a gun involved.

SB: I'm telling you, none of us had a gun.

PG: All right. I'm telling you, you did. All right? And the reason that you went over to Jeff's house was to pick up the shotgun. Straight out. And you're leaving that out. Okay? And then you go along and you're leaving more and more stuff out, okay? Now, it's not going to work, Shaun. It's not going to work. We've talked to too many people, we got too much of the story now. And it's just going to show you out to be a liar and you know what that looks like?

SB: (Unintelligible)

PG: Everybody makes mistakes. Okay? And you very...you very obviously made one here; Allen very obviously made one and Scott did. But lying about it ain't gonna fix it.

782

SB: Mess up my damn life here.
PG: We gotta talk about it and we gotta talk about it all. Not just a piece of it, not just the parts you want to tell us.
SB: Well, what is that...I know none of us had a gun. None of us had. I know I didn't have no gun. And Nut was too drunk to have a gun. And I know...I know Scott didn't have a gun.
PG: That's not true. Detective Erickson's got some photos here for you, you may recognize these.
SB: Was it a 22?
GE: No, this is a 357 magnum.
PG: We know what we're talking about.
GE: We got the gun.
PG: We just picked that up today.
GE: You know, everybody makes mistakes. But, it takes an upfront person to admit it. And then you can deal with it. Once you admit it, and then you can deal with it. When I'm telling you you're lying, we've talked to a lot of people.
SB: I believe you. (Unintelligible)
GE: Okay. We want you to be up front with us. You know your mistake. The only way that you're going be able to deal with it, is to get it out.
PG: What happened? What went wrong?
GE: The guy fight you?
PG: What went wrong? I know you all didn't start out to do this. Where did it get screwed up?
GE: Someone (unintelligible) you into doing it, Shaun?
SB: (Crying).
PG: What happened?

783

SB: Oh, man. I know what happened, but I just don't...
GE: You don't know how to start telling us?
SB: (Crying)
PG: Take it one little piece at a time.
SB: Oh, man.
GE: The three of you left the apartment, right? Where were you going?
SB: We were going to Ron's place, but somehow or another we ended up fucking whatever. Being stupid, I guess.
GE: Going to steal this guy's stereo? Is that what you were going to do?
SB: I don't steal car stereos. That's petty.
GE: Okay.
SB: I don't...I don't even know how...how he got involved in it. That's...that's just...that's it.
PG: Did somebody say let's jack him up? Who said that?
SB: I don't think...I don't think it was Allen. I don't know.
PG: Did you and Not talk about that?
SB: Talk about what?
PG: Let's jack him up.
SB: I wasn't...I wasn't even really talking 'cause I was...I was...I was...I was...I was mad. I was like...I was just, you know outside with them. And, I don't know. It's just like being somewhere that you didn't want to be, but you were there.
GE: Is that what you were mad about?
SB: Yeah.
GE: Had the gun?
SB: I didn't have the gun.

784

GE: Who had the gun?
SB: Honestly, I don't know who had the gun. Well, when we took the car I know I didn't.
GE: How'd you get the guy's attention?
SB: It's not...it ain't hard to get somebody's attention.
GE: I know.
SB: Just walk up to somebody.
GE: Ask 'em what time it is, right? Ask 'em what time it is?
SB: I asked him what time it was.
GE: You did? Did he roll down the window and tell you?
SB: Yeah.
GE: What happened?
SB: His door wasn't...when I asked him what time it was, his door wasn't even locked or nothing and when...and I just...and I asked him what time it was and I was standing right next to the door and I asked him what time it was and, you know, I don't think he heard me. I don't know. And he just looked at me and I asked him what time it was, then door just flew open. He just got out and, I think, "Nut" was on this side me and Scott on this side of me.
GE: What happened?
SB: I got him into the trunk.
GE: How'd you get him into the trunk?
SB: I told him to get in the trunk and he just got in the trunk. He got in the trunk.
GE: Shaun, I know you want to tell the truth. I know you do.
SB: That's how he got in the trunk. I told him to get in the trunk. I said get in the trunk and he got in the trunk.

785

GE: Just like that?
SB: Just like that.
PG: Was Nut holding the gun then?
SB: (Unintelligible). When Nut told him to get in the trunk, he was just like uh-huh...I remember. He was saying some...I don't remember, he was saying something...he was tell...he was saying something. I don't remember what he was saying. But, I just told him to get in the trunk and he just got in the trunk. He just got in the trunk.
GE: Who opened the trunk?
SB: The guy opened the trunk.
GE: How did he open the trunk?
SB: With just...I don't know. The trunk was all flat. I didn't even seen no keyhole and he just, I guess, it's like...it's like flat and the keyhold thing goes in, but if it ain't locked, it...it...you could just like push it in to open. Just pushed it and it opened and he got in the trunk.
GE: Didn't put up a fight, didn't try to run, nothing, huh?
SB: No.
GE: What happens after the guy gets in the trunk?
SB: I went down the street.
GE: Who was driving?
SB: Me.
GE: You? Where was Nut sitting?
SB: Back on the passenger...
GE: And how 'bout Boxer?
SB: He was sitting shotgun.
GE: Where were you guys going?

786

SB: At first nowhere, and I just driving around.
GE: Talking?
SB: I wanted...I was like where...I was like what are we doing? I was like eh...let's take Nut in the house. Let's take Nut in the house. It was like naw, naw. And then, I don't know, somehow or other we ended up at Jeff's house. I was downstairs and Nut was upstairs. And him and Jeff were talking.
GE: Then what happened?
SB: I guess that's when he got the shotgun.
GE: You guess?
SB: Oh, that's when he got the shotgun.
GE: You saw him with the shotgun?
SB: I didn't know it was the shot...I just seen a big ole rifle.
GE: Then what happened?
SB: Then, they wanted to go back to Ron's house again.
GE: Was this guy in the back of the trunk?
SB: Yeah. Nut was telling. I wasn't saying nothing the whole time we were in the car.
GE: What happened? Somebody was saying something in the car. What were they talking about?
SB: I don't know. They were sing...they kept singing this song and Nut was yelling/telling, can you hear me? Can you hear me? I said yeah, I can hear you, so shut up. Let me go. Let me go.
GE: What'd Nut say?
SB: He was still like...the guy was a jerk, you know, shut up. Shut up. And the guy wasn't even saying anything. And Nut, can you hear me? Says yeah. Like shut up.

787

GE: Then what happened?

SB: We just drove around, I guess. I guess, Nut was going to blast and rush. I don't know even why we got that damned thing. Nut was drunk. He wanted to go get the gun. And we wen and just drove around. We drove around and I was like, and then, we went back to Jeff's house and gave him the shotgun back.

GE: Who shot the shotgun?

SB: I think Nut shot it. I wasn't (unintelligible). I think Nut shot the shotgun.

GE: Oh. The shotgun goes off, it's pretty loud.

SB: I wasn't...I know, it is loud.

GE: Okay.

SB: When...when he shot the shotgunm I wasn't...I wasn't...I wasn't on the same street with him. I was...I was down the street.

GE: Well, then you lost me on your story 'cause you were driving around and around.

SB: Yeah, we were driving around and then...I don't know, he was drunk and when he's drunk, I don't like...I don't like being around...I like being around him 'cause he's a hommie and everything. But, when he's drunk, you can't talk to him. Can't reason with him. It's like right before we went to Jeff's house, where'd we go? We went...I don't know where we...there's park around here somewhere.

GE: Quite a few parks around here.

SB: And we went and they got out the car and I turned the corner and I went down the street, and I was turning around and

788

that's when I heard a shot. I heard gunshots. Came back, went to Jeff's house, 'cause we were right around this neighborhood. Went to Jeff's house and gave him that big old gun back.

GE: How many times did Nut shot...shoot the gun? The shotgun.

SB: Like twice.

GE: And he was way in the park and you were driving around?

SB: Naw, I was just like...I wanted...like I turned to turn around and he just...he was drunk. When...when he drunk, he don't understand. No reason.

GE: You don't understand. We found a shotgun shell in the car. That means the gun had to be shot from the car.

SB: Naw. Didn't shoot the gun out of the car. (Unintelligible) everything. We did not shoot that shotgun in the car.

GE: How'd the shotgun casing get in the car?

SB: I have no idea. Maybe when he...when he shot, he picked it up or something. But, he didn't shoot the shotgun in the car.

GE: So, you returned the shotgun?

SB: Yeah.

GE: Then what happens? Guy still in the trunk of the car? What happens?

SB: I don't know. When they got out...they got out, I was scared. Well every...I was...I was horrified. Then we seen the police and we were just driving around. And we went over there and I was just going to leave the car and just go back to the house. But, it didn't happen like that.

GE: What happened?

SB: That's when I knew...that's when I knew that I think...I

789

think...(unintelligible), but that's when I seen all of them and I stopped the car. I said maybe I...as I, you know, we were...we were sitting right there and I'll be damned...let's go, let's go. And then Boxer sitting in car and I was like, let's go, let's go. And then like...and that guy in the trunk seen us.

GE: Who's saying that?

SB: Nut was telling us like he seen us. I was like, so what? So what? He seen us. And I was like, so what? So what? You know, just leave him...just leave him in the trunk, so what, who cares? And then, he's like, all right. So, I went right there by the freeway, like right...you could see the freeway from the street. We drove right there and I got out the car. Everybody got out the car. I was like, let's go and he's like, I'm telling you nigger, he seen us, he seen us. I said, so what? So what? So, like I remember...we...we first were going to jump the fence and we did it and we were standing there and I was like what we gonna do? What we gonna do? And, next thing you know, I heard...I heard...I heard a gunshot and I just ran home.

GE: Hum?

SB: 'Cause I remember just hearing the blast and I just broke. I don't know what happened. I just ran.

GE: You know, Shaun, each time that you give a different scenario of what happens, each time you get a little bit more truthful. But, each time you're still lying. If that were the case, why were you telling people that you shot the guy? You did tell people that, didn't you?

790

SB: Just to seem like a bad ass.
PG: Hum?
GE: Just to make yourself look like a bad ass? Is that what you said?
PG: Think so.
GE: I don't think so. Ready to take it from the top again only being more truthful this time? People don't go around saying that they shot somebody in the head just to appear like a bad ass.
PG: That's not what you told Dwight.
SB: Dwight?
PG: Um-huh.
SB: Big Pookie?
PG: Um-huh. That ain't what you told him. That ain't what you told Jeff.
SB: I didn't even talk to Jeff about it.
GE: I think you did.
SB: I didn't. I did not talk to Jeff about it. (Unintelligible).
PG: Yup. Somebody talked to him.
SB: Jeff about it.
GE: The three of you left the apartment with your gloves on, right?
SB: Um-huh.
GE: Why?
SB: 'Cause the guy around there wouldn't take our friend to the hospital. I guess we were going to take stuff out of his car. I don't know. He had a stereo in his car.
GE: But, you didn't go to his car to take the stereo?
SB: Yeah, we did.

791

GE: You did take his stereo?
SB: No, we didn't.
GE: Well, I'm confused. Now, you put the gloves on to go take Ron's stereo. You're saying, you did take his stereo?
SB: No, we didn't. We didn't. I had...I had...I had (unintelligible).
GE: Pardon me?
SB: I had...I had those rubber gloves on when I...when I walked out of the house.
GE: I know you did.
SB: Just walked out of the house.
GE: You had the rubber gloves on, Nut had rubber gloves on, and Boxer did. All three of you. You had something in mind leaving the house with rubber gloves on.
SB: We were going to take Ron's car stereo.
GE: Why didn't you then?
SB: Because when we got down there, I don't know, it's like ...(unintelligible) we didn't see his car, so we went up to his house.
GE: Then what happened?
SB: That's when we just walked around the neighborhood. Walk around the neighborhood.
GE: With these rubber gloves on. What were you planning on doing with the rubber gloves on walking around the neighborhood?
SB: I don't even know...I don't even know why we didn't take them off.
GE: That's what I'm asking you.
SB: I was...I had my hands in my pocket. I had my hands in the

792

jacket pocket and I was just walking right out there and they were behind me and I got to the front gate. I was just standing there and I said, let's go home. But, we didn't go home.

GE: No, you didn't. You contact this guy in the car.

SB: I contact him?

GE: You asked him what time it was.

SB: Yeah, I did.

GE: You did. Why did you ask him what time it was?

SB: Because we were still out there (unintelligible).

GE: I can't hear you.

SB: It wasn't Boxer 'cause he wasn't really talking. Uh, he goes, let's take his car. I was like, I'm not taking his car and he said, come on, come on, just walk me over there and I just walked over there. We was all together. All the time. And, uh...I just asked him what time is it? Tha t's when he got snatched out of his car, he...he...he...he...do...do what I say...

GE: I think if I had this pointed at my head, I'd get out of the car, too.

SB: Uh, all I know...he said is dude I asked him what time is it and he didn't hear me.

GE: So, you asked him again.

SB: I asked him what time was it? That's when the door just flew open. When the door came open, I went back and I was like, get in the trunk, get in the trunk, and he just got in the trunk. Closed the trunk.

GE: This is where you're not being truthful.

793

PG: The gun's already out.
GE: You're pointing the gun at the guy and you're telling him to get in the trunk.
SB: I didn't have the gun. I didn't have no gun. I just asked...Ijust asked, I said, what time is it? And he looked...looked at me. I don't know. I thought...I don't know. He just looked at me.
GE: Why did you ask him what time it was?
SB: 'Cause...'cause Nut had already said, you know, let's jack him.
GE: Let's jack him. What does 'let's jack him' mean?
SB: We want to take his car. Let's jack him for his car.
GE: Okay.
PG: Everybody that I've ever talked to, let's jack him means 'let's rob him'. That what it means to you?
SB: Let's jack him.
PG: And so, let's jack him for his car means let's rob him for his car?
SB: Yeah, he just said, let's jack him.
PG: Okay.
SB: And I just...you know, I...I know Nut was on this side, but he kept walking into me and then that's when I walked up to him and I knocked on the window and I said, what time is it? And he didn't hear me. He rolled down the window...what time is it? Then, that's the door...I was standing in the middle and like the door just like came open and I don't know. The guy was saying something like, I don't know...he was just like, take the car, I think that's what he said. Take the car, just don't hurt me, just don't hurt me.

794

PG: Couldn't it have been that the door flew open because somebody stuck a gun in the window?

SB: I was...I was...I was...when we're...when I...when it...when it was happening, we walked up to the car I was tripping. I wasn't even paying no attention. I asked him what time is it? 'Cause I didn't think they were going take...I didn't think, you know, I didn't think...

PG: Okay, could it have been that somebody stuck a gun in the window?

SB: It could be. But, I...

PG: Windows rolled down a little bit?

SB: Yeah, he did roll down his window.

PG: Somebody stuck a gun in the window.

SB: I wasn't paying any attention to him. All's I know is the door came open and he just...and I was telling him to get in the trunk, get in the trunk.

PG: Well, the door flew open 'cause he saw the gun.

GE: He's telling you, don't hurt me, don't hurt me. Why would he be saying that unless there was a gun pointed at him?

SB: Take the car, just don't hurt me.

GE: Just don't hurt me. Who had the gun?

PG: We know the gun's there.

SB: I...I...I wasn't...

PG: Okay?

SB: ...when I...when I walked up to the car, I wasn't paying attention. I was just like...I was just like, oh, my God. I didn't even believe that we were, you know, we were thinking like that.

795

PG: Shaun, you were paying attention.
SB: I mean, I was paying attention, but I wasn't like...
PG: You know, I've had stuff happen and she's had stuff happen and you've had stuff happen. When this kind of stuff goes down, man, your eyes get this big and you take everything in. It's like slow motion. Okay, you knew the gun was there. The dude knew the gun was there. That's why the door flew open. Man, he is all too willing to do what anybody is asking of him right now. You know that as well as I do. The gun was there, right? What?
SB: Yeah, it was.
PG: Okay.
SB: When it happened...when it happened, I don't know...I wasn't paying attention. I just remember the door opening.
PG: Okay, but the gun was there. Why can't you tell us that? We already know it. You know. You're jerking us around with stuff we already know. A lot of these questions, we're just trying to see whether or not you're telling us the truth. Everytime you lie, we know it already. You should know enough from sitting in this room this time we've been sitting here, that we know a lot.
SB: (Unintelligible)
PG: Okay? I feel like almost I was there at this point. Okay, so let's quit screwing around with all this stuff. We could sit in here for hours, but there's no need for that. Okay, now the gun get stuck in the window, right?
SB: Yeah.
PG: And the dude gets out and he says, don't hurt me, don't hurt

me. Okay. Now, who tells him to get in the trunk?

SB: Nut told him to get in the trunk.

PG: Nut tells him to get in the trunk. Does he still have his own keys?

SB: The...

PG: Or do you have the keys now? Did he drop the keys? Where'd the keys go?

SB: When he got...when Nut told him to get in the trunk, he opened...he opened the trunk.

PG: He opened the trunk. Okay.

SB: He opened the trunk.

PG: And then he gets inside by himself?

SB: (Unintelligible)

PG: Okay. And that's 'cause the gun's pointed at him. He don't want to get hurt. That right?

SB: Yeah.

PG: Okay. So, he gets in the trunk. Now, who took the keys from him?

SB: They're at the top.

PG: They're in the top. Okay. So, where are you standing right now?

SB: This is the car. I was standing like at this side...and I was standing like this.

PG: And where is Nut?

SB: Nut was in the middle of the trunk and Boxer was on the sidewalk. And then, like when he got in the trunk, I think...I think Scott closed the trunk and I seen the keys and I just grabbed them and I got in the car.

797

PG: And you grabbed the keys?
SB: (Unintelligible)
PG: Okay. Did you just decide to drive. Did Nut tell you to drive? Did Boxer tell you to drive? What's the deal?
SB: I don't know because...I don't know. Because I never been in a "G" ride before. I don't trust nobody driving.
PG: Okay. Now who's got the gun at this point?
SB: Boxer...uh, Boxer or Nut...or one of them. I don't know who had it when we got in the car. I don't know who had it. I just went over to Jeff's house. When we got out of the car, he got the shotgun.
PG: Okay. Now before you even get there, you guys start to drive and right away you're already talking about 'this dude seen us, man'.
SB: No.
PG: Um-huh.
SB: Uh-uh. Nut was talking to him. I don't now, 'cause I had a...I had a...I had this...the hood part of the jacket on my head and I think I had it (unintelligible).
PG: But, when you went to Jeff's house, you went specifically to get the shotgun.
SB: No.
PG: Yeah.
SB: No. Nut just told me to go to Jeff's house. So, I just went over there. He didn't say why. He just said go to Jeff's house. We went to Jeff's house. We went to Jeff's house.
PG: Okay. And then you went somewhere and supposedly Nut gets out of the car and shoots his shotgun.

798

SB: Yeah.
PG: Did he go looking for some Watergate Crypts?
SB: I don't know. I know he don't get along with them.
PG: Did he go looking for some Watergate Crypts or not?
SB: I knew they came to the neighborhood...came through our neighborhood.
PG: Um-huh.
SB: Just around the neighborhood.
PG: What neighborhood? Theirs?
SB: Where Nut lives.
PG: Where's Nut live?
SB: Over there on Glen...Glenoaks. They had came through the neighborhood and they came through (unintelligible).
PG: When?
SB: I think it was the same...it was the same day.
PG: So is Nut looking for these guys?
SB: Yeah, I guess. He's...
PG: Did he find them.?
SB: Um-um.
PG: Then, why'd he shoot the shotgun?
SB: 'Cause he was fucking drunk. Being stupid.
PG: Okay. Where'd he shoot it at?
SB: I guess in the air 'cause I didn't hear him hitting them.
PG: Guess where?
SB: In the air 'cause I didn't hear like (unintelligible).
PG: Okay, where is he when he shoots it?
SB: I don't know. I...I...I...when he...when he got out the car with the shotgun, I went and I turned around and he just boom,

799

boom.

PG: Okay, where were you at when you stopped the car then he got out...he got out the car?

SB: We got the shotgun, we went down...this be by the railroad tracks. And then we were on the railroad tracks and we turned and then we went to Glenoaks, the back side. The back side of the apartments and turned on through the middle. Then like, not like right before you get up...there's a street like this and there's a bridge and you come over and there's an alley and there's a street.

PG: Uh-huh.

SB: Like we went over the bridge, I think (unintelligible), and I turned and I went in there and that's when I heard a shotgun (unintelligible). But, I know he didn't shoot at nobody. He didn't shoot at nobody. Probably just shooting in the air like a stupid.

PG: So, he didn't get out the car to shoot it?

SB: Yeah, he did.

PG: Thought you said when you went over the bridge...

SB: Yeah, and I said when I went over...

PG: ...to the corner...

SB: When I went over the bridge, like right when we go over the bridge there's an alley and then there's a...I think it's Commercial Street. I get out the car and I went to...

PG: The bridge of what?

SB: There's like a...a riverbed that goes and there's like a bridge...

GE: You mean Chippewa?

SB: Yeah, that's the street. Chippewa. Right there on that bridge. I went over that bridge and I...that's when we got out of the car and he just started blastin'.

PG: Okay.

SB: I don't know who or what. I didn't see nobody out there to shoot at.

PG: Then he gets back in the car with the shotgun?

SB: Yeah, we went back to take it to Jeff's house.

PG: And you took it back over to Jeff's.

GE: Why are you shooting the gun when...shooting the shotgun, were you holding the gun?

SB: Um-um. I didn't have...I didn't the gun. I was driving.

GE: So, that means Scott had the gun.

SB: Yeah. 'Cause Nut had the shotgun and I had nothing.

GE: So, Scott had the gun. Okay. So, then what happens?

SB: We were at Jeff's house, we were there for awhile. That's when, like...that's when we started like so what...what are we gonna do with the car? You know, the guy's in the trunk. You know, just like, what are we gonna do with him? Just like...let's just, you know, drop it off on the freeway or something. Just leave him on the freeway (unintelligible).

PG: Which freeway?

SB: I ain't seen no...I was just like, let's just leave the car on the freeway.

PG: Tell me about the part where you guys were going to go out to Pomona off the canyon road or somewhere.

SB: You know, that wasn't even talked about going out to Pomona. That wasn't...I don't remember nobody talking about Pomona. I

just...I just remember saying let's leave the car on the freeway. (Unintelligible).

PG: Apparently, some people remember it different.

SB: They weren't talking to me about it./ (unintelligible) Canyon. We was there for awhile and I was just like, you know, what are we gonna do, what are we gonna do? And I just said, come on, let's go, let's go. We can go take the car in, you know. That's why we were all in there by Gilbert High School. (Unintelligible).

PG: Then what happened? Huh?

SB: Smoke him. We blasted that guy in the trunk, I guess.

GE: You said you smoked. Isn't that what you said?

SB: I said we smoked him.

PG: Tell me how that happens? You all got out of the car...

SB: Before I got out of the car, Nut said I'm gonna blast.

PG: Who said that?

SB: Nut said I'm gonna blast him.

PG: What'd you say?

SB: Don't wanna do it.

PG: What'd Boxer say?

SB: Boxer wasn't saying nothing. Wasn't saying nothing was just sitting.

PG: What happened?

SB: We got out of the car then. We just standing there 'cause I was like...naw, man, don't do this shit...don't do it. Shit got crazy.

PG: Okay. When you got the keys, how's he get the trunk open?

SB: It wasn't locked. It was just closed. The trunk was not locked. It was just closed.

802

PG: Now wait a minute. How could you have the trunk closed, but not locked?

SB: All you gotta do is close the trunk down.

PG: So, why didn't this dude just get out?

SB: How you gonna get out of the trunk from the inside?

PG: Exactly. Have you ever been able to walk up to a trunk lid and, without the keys, just open it up? Just grab it and open it up? Naw, you need the keys, man.

SB: No. Have you ever...have you ever seen the back of a...a...a...what kind of kind of car (unintelligible). You don't need a key to open that trunk. It's like the glove compartment. You know like how the glove compartment's locked, you need the key to open it but if it's unlocked you just turn it to open it? That's how it works. The trunk was just closed.

PG: So, you don't need a key to open this trunk to this car?

SB: No, not if he ain't locked. It wasn't locked. The trunk was just closed.

PG: So, who opened the trunk?

SB: We got out of the car...we got out of the car and we're all standing at the back of the car. I opened the trunk... I opened the trunk and then I closed it. I was like...I was like no man and so then like we're just talking.

PG: What did the guy do or say when you opened the trunk?

SB: He didn't...he didn't say nothing. He just...he just like laying there.

PG: Um-huh.

SB: I closed the trunk and I...

PG: He didn't say nothing when you opened the trunk up?
SB: He didn't...he didn't say nothing. He did not say a word.
PG: He look at you?
SB: I wasn't looking at him. I just know he didn't say nothing. I opened the trunk. I wasn't looking at him. And I was like, naw, man. Can't do this. And I was like, you gotta kill him, you gotta kill him.
PG: So, then what happened?
SB: I killed him.
PG: Did you open the trunk again?
SB: Not all...
PG: Not all the way. Part of the way? And what did the guy say this time?
SB: I just...I just remember hearing him, say you know, don't hurt me.
PG: Did he try to protect himself or anything?
SB: No. I wasn't looking at him. I just remember him saying, don't hurt me.
PG: Okay. You opened the trunk part of the way. Then what happened?
SB: By that time, I...I didn't have...I didn't have...I didn't have any gloves. I had socks on.
PG: And?
SB: We were arguing. I was like, you know. The trunk...the trunk wasn't all the way opened, you know. I had my arm...I had my arm like so it wouldn't open all the way.
PG: Um-huh.
SB: And I was like naw, man. I was like no, no. You know? You know, do it, you know. Just leave him there. He won't...you

804

know, he won't say nothing, he won't say nothing. But Nut kept saying, no, you gotta kill him, you gotta kill him. And, I remember, I think Scott had a gun and Nut...Scott had a gun and he handed it to Nut. I was like...we're gonna kill him, we're gonna him.

PG: Scott said that?

SB: No. Scott wasn't saying nothing. You know? He was talking, but he wasn't saying...you know, you know. And so, Nut was drunk. I was like, nigger you drunk. You ain't gonna do nothing. All's we got to do, just leave, just leave.

PG: Was Scott saying, no you don't have to kill him?

SB: Scott wasn't saying nothing. He was...

PG: You said he was talking.

SB: All right. I mean like...like if we would talk to him like you know. He's just like where we going? You know? But, he wasn't talking about, you know. And Nut was saying, gotta kill him. I was just like naw, man. Uh-uh.

PG: So, Scott handed Nut the gun...

SB: We were...we were...we were out there and he's like, gotta smoke him, gotta smoke him. He said, he seen me, he seen me. It's like screw him. The trunk was open...

PG: You open up the trunk? You take your arm off it?

SB: It was...

PG: How'd you open it?

SB: The trunk? It was like...it was like I had my arm on it like this, but it wasn't closed. All you had to do is lefts your arm up an it will open. I had my arm like...and I let the trunk up and he just...blasted into the trunk.

805

PG: Who? Who, Shaun? It's the hardest part right here, man. You finish this part, it's done.

SB: (Unintelligible).

PG: How many times did you shoot him?

SB: Fired one gunshot.

PG: One gunshot? How many does the gun hold?

SB: Two or three. I think, two.

PG: How many did you have in there?

SB: It was loaded.

PG: So, two or three?

SB: Yeah.

PG: But, you only fired once?

SB: I remember one gunshot.

PG: What's that?

SB: I remember one gunshot.

PG: Is it that hard to admit? Tell me something. I have a question about this. Apparently, the guy had a wound in the arm?

GE: His hand.

PG: In his hand? Now, you say you only fired one gunshot. But, he apparently ended up with two wounds?

GE: You shot him, right?

SB: When we were at the back of the trunk, it was all of us.

PG: Everybody's there. I grant you. And...and you know like you said, everybody's there.

SB: I was standing beside the trunk. I opened the trunk and I just...I remember. I was standing beside the trunk and I just...I saw him going like that.

806

GE: You shot him.
PG: Nut didn't shoot him, man. That just what we talked about not two, three minutes ago. Okay, let's not go backwards.
SB: I know. I know.
PG: Okay. You shot...
SB: I'm just telling you what I saw.
PG: And, I'm telling you what...
SB: I'm telling you what I saw.
PG: Yeah.
SB: And so then, you know, we stood there.
GE: Do you remember seeing the guy take cover with his hand? Look at me, Shaun. Do you remember seeing the man take cover with his hand?
SB: (Sobbing)
GE: He was shot through the hand into his head. He took cover, Shaun.
SB: I don't remember. I didn't look at him. I'm telling you. I didn't look at him.
GE: I know you didn't. That's what you told people. You shot him, but you didn't look at him. Do you remember telling people that? You opened the trunk, you pointed in, and the guy went like this. Remember? Remember? You shot him. Didn't you? Shaun.
PG: You already said yeah. Just say it a little louder, so she can hear you. So, she can stop asking you the same question over and over again.
GE: Shaun.
SB: (Unintelligible)

807

PG: Now, take a minute to compose yourself and we're gonna start from the beginning and cut out all the bullshit.
SB: I did everything.
PG: Hum?
SB: I did everything.
PG: We know that, but we gotta go right from the beginning.
SB: I know I want to say that nobody else did it. I did it.
GE: Tissue.
SB: (Crying). I did it. Please you just don't all goddamn, I'm so fucking sorry. If somebody fucking did this to my little girl, goddamn. (Crying).
PG: Okay, man. Try and pull yourself together.
SB: I guess I'm going to the pen. The fuckin' pen. Damn. Be right there with the rest of my damned family.
PG: (Unintelligible)
GE: Shaun, do you need some...
SB: No, ma'am.
PG: Let's take a minute and let him get himself together.
SB: What are those pictures of?
GE: These?
PG: More pictures of the (unintelligible). Just get yourself together for a minute. Do you want something to drink?
SB: (Unintelligible). The only thing I want to do is call my mom.
PG: Okay. Take care of that when we're done here.
(Pause)
PG: You don't want nothing to drink? Just wait a couple minutes for her to get back. Let me ask you a question while she's out there. You were talking about a jacket that you had.

808

What jacket is this?

SB: It wasn't...it wasn't my jacket. It was just a black jacket.

PG: Whose jacket is it?

SB: I don't know. Allen had a whole bunch of them at the house. (Unintelligible)

PG: Hum?

SB: A lot of my friends have them. It was just somebody's that was at the house. I don't know whose it is.

PG: You said it had a hood?

SB: All those jackets have hoods on them.

PG: What do you mean, all of those jackets? What kind of jacket is it?

SB: I don't know. They're just like...(unintelligible) black jackets.

PG: Like the Raiders jacket-type thing?

SB: Naw, not like starter. They're just...

PG: Yeah.

SB: You seen what cholos wear, like long black jackets with fur inside of them?

PG: Yeah.

SB: Yeah.

PG: Fur or like white cottony stuff?

SB: No. Not the white cotton stuff. Not the levi jacket.

PG: Yeah.

SB: It's a black...

PG: That's what you know what I'm talking about.

SB: Not those kind of jackets. Comes down to about right here.

PG: Uh-huh.

809

SB: It's large. It looks kind a like one of those Raider jackets, but it isn't. It's just a...

PG: Not as heavy or lighter or what?

SB: It's heavy. A little bit heavy.

PG: Okay. Just hang for her and we'll go through it once.

SB: How long can I get?

PG: 'Til you finished with it. I really don't know...uh,

SB: (Unintelligible)

PG: She's the case detective. I don't know what your record looks like. I don't know what...

SB: That don't have nothing to do with it though, does it?

PG: I think everything affects it a little bit and I have never stopped to try and second guess what, you know, when it comes to sentencing of things, I don't understand it at all. I don't understand the formula they use. I don't understand any of that.

GE: Did you need something to drink?

PG: He says no. I think we'll just take it one time...

SB: Can I go to the bathroom?

PG: ...from start to finish. Do you have to go desperate?

SB: Yeah.

PG: Okay. We're gonna have to put the handcuffs back on you to do that. Put them...put them in front for right now. That's about the only way that I know that you could go. Let's see if you can get someone to...

GE: Yeah.

PG: Hang tight. We gotta go by the rules here. To do that, we have to have two people.

810

GE: Could you go with Paul into the restroom? Okay.

(Pause)

GE: Ready to take it from the top, Shaun? Okay. You're over at Allen's apartment.

SB: And we left. We left to go...to go take this guy's stereo. The guy that wouldn't help our friend who got shot. His car wasn't there...went over to his house, he wasn't there. So, you know, we were outside and Allen told me he wanted to take a car 'cause Watergate (unintelligible) to our neighborhood. He was drunk and I guess he just say he wanted to go look for them, you know. So, I seen this one guy. He was going out to his car. He got in his car and so I walked up to the window and I asked him what time it was. Then I snatched him out of the car. That's when I put him in the trunk and I was driving the car.

GE: Okay. Slow down a little bit. You see the guy get in the car and go up and you ask him what time it is.

SB: Yeah, that's right. I asked him twice. And the second time, that's when I snatched him out of the car.

GE: Okay. Who has the gun at this time?

SB: Uh...

GE: Be truthful. Come on.

SB: I asked him the time. I passed...I think I passed the gun and then I...

GE: You...you passed the gun?

SB: I...I...I gave it to Scott and then, when I asked him what time it was, he like he didn't hear me and like Scott was standing on this side of me and I was like in the middle of

811

the window and Allen was on this side...or Allen was like more at the back of the car and knocked on the window the second time. He told me but, you know. (Unintelligible) and I said, what time is it and that's when he rolled down the window and the gun came in the car from this way and that's when they snatched him out of the car and then put him in the trunk and I be driving the car.

GE: Okay. Slow down a second. You're going a little bit too fast for me. Scott has the gun and Nut's at the back...

SB: Nut wasn't...

GE: ...right.

SB: When I...when I knocked on the window and he rolled it down, Nut wasn't all the way...all right, now look he walked back kinda' side of me and that's when the door opened. When the door opened, I went back this way. And that's when Nut just snatched him out of the car. And that's when we all... we all walked to the back of the trunk. Then they put him in the trunk and I got in the car.

GE: How'd they open the trunk?

SB: Well, the guy opened the trunk.

GE: With his keys?

SB: Yes. 'Cause I remember the keys being in the top of the trunk.

GE: So, Scott pointed the gun at him?

SB: I think so.

GE: You think so?

SB: Yeah.

GE: Well, did Nut point the gun at him?

SB: No, 'cause Nut grabbed him.

812

GE: Did you point the gun at him?
SB: I was...
GE: Scott.
SB: I was talking to him.
GE: Okay. So, the three of you tell him to get in the trunk of the car?
SB: Nut told him to get in the trunk. I was...I'd a just left him there. Just left him standing there.
GE: So, he gets in the trunk of the car? Then what happened?
SB: That's when we drive...we drive around (unintelligible).
GE: You were driving?
SB: Yes, ma'am.
GE: Where's Nut?
SB: He's in the back seat.
GE: Is Scott riding with shotgun?
SB: Yeah, 'cause Nut was drunk.
GE: When'd you take the wallet from the guy?
SB: I didn't take the wallet.
GE: Who took his wallet from him?
SB: I remember he handed...he handed it to Nut, I think. There was some credit card or something. I don't know. (Unintelligible)
GE: Why did the guy give him the credit or hand the wallet to Nut?
SB: 'Cause Nut told him, give me your money.
GE: Okay. So, Nut has the wallet and you're driving to Jeff's house. Who's going through the glovebox?
SB: Think, Scott. He was sitting shotgun, Scott.
GE: Why were you going to Jeff's house?

813

SB: Nut said, that's what Nut say. He say go to Jeff's house. I didn't even ask him. I just went over there.
GE: Why? Why...what did he want to go to Jeff's house?
SB: He just told me he said, go to Jeff's house. Just like that. He said, go to Jeff's house. And I said, all right. Where's he live? 'cause I know he lives somewhere around here, but I didn't really know my way around here, (unintelligible). I just drove over there. And then get out the car and that's when he came back with the shotgun.
GE: Nut got out of the car by himself?
SB: Scott got out of the car, but he didn't go...go upstairs. He was right there.
GE: And you stayed in the car?
SB: And I was just sitting in the car.
GE: Okay. How long was everyone gone?
SB: Above five minutes, ten minutes, five minutes.
GE: Okay. When he comes back to the car, what does he have?
SB: Big ole'...look like a rifle. But, it was a shotgun.
GE: Then, what happened?
SB: We got back in the car. We went back to our neighborhood and I guess, you could say we're...we were looking for Watergate, okay?
GE: You what?
SB: We were looking for Water...well, Allen was. 'Cause they don't mess with me. You know.
GE: So, they're looking for Watergate?
SB: Yeah, 'cause they had came through the neighborhood.
GE: What happens then?

814

SB: I went down...went down Glenoaks and turned on Chippewa and when I turned on Chippewa, they, Watergate, drive like three or four Cadillacs, and we...and Nut said he seen the Cadillac. A blue Cadillac like the one there. And then when I went over the bridge to...when I...I wasn't going fast. I went over the bridge and Nut got out of the car...and that's when I turned...I think it's by my street...I turned and turned down to turn the car around and that's when I heard gunshots. Just got back in the car and went back to Jeff's house. We took the gun back over there.

GE: Then what happened? Who brought the gun up...or the shotgun up to Jeff's house? Who took it upstairs?

SB: Nut.

GE: You two waited in the car?

SB: Uh...well...Nut got out of the car and took the gun upstairs and me and Scott got out of the car.

GE: And then what happened?

SB: And he went upstairs and it was taking a long time. So, I got out the car and I went upstairs...

GE: You left the guy in the trunk?

SB: Yes. I went upstairs and (unintelligible). We went up there and, uh, Jeff was telling us about what you all doing coming around so late and that's what was taking so long. He was yelling at Nut. It was like what you doin' come...he said, I thought you all went on over. And Nut was like, nuh-uh, things like I seen some waterbugs. And I guess...I guess that's what he thought, he was shooting at but Nut was drunk you know, he don't know. And so we were up there. We were just talking and Jeff was just telling

us (unintelligible). Then we left That's when we went over there. (Unintelligible)

GE: You drove?

SB: Yeah, I drove the whole time.

GE: Now, where is Nut sitting?

SB: Nut was in the back the whole time.

GE: Scott was in the passenger?

SB: Yeah.

GE: Then what happened?

SB: And we got back in the car from Jeff's house the second time. And Nut was like falling asleep in the back seat of the car. And I was like, we gonna take this car, we gonna take this car? And, I think, I should've just dropped it off on the freeway. You know, we might have to walk home, but let's just drop him off on the freeway (unintelligible). You know, it was like...

SB: (Unintelligible)

GE: Don't know what you did, huh? Who else did you tell?

SB: The only person I told Dwight, my girlfriend.

GE: What's your girlfriend's name?

SB: Summer.

GE: When'd you tell her?

SB: (Unintelligible)

GE: (Unintelligible), huh? It's a heavy burden.

SB: So much, the burden is just (unintelligible) I know that no matter what I do, it won't help, you know. I took somebody's (unintelligible) because I wouldn't felt that good if somebody took my daughter away from me (unintelligible). All I can say

816

is I'm sorry and I know sorry don't help.

GE: Who eventually got the gun?

SB: I don't know. I didn't see it until we got into the house. I don't know who got it. All's I know...when we got to the house, I just laid on the floor. I was just laying on the floor.

GE: When'd you take off your rubber glove?

SB: I took it off when I was...when I was over at Jeff's house. I had my socks on.

GE: You took your rubber gloves off at Jeff's house and (unintelligible).

SB: (Unintelligible)

GE: How about the other two? Did they keep their rubber gloves on?

SB: Nut did.

GE: Why'd you...

SB: Scott...

GE: Why'd you...

SB: Scott did.

GE: Why'd you take off your gloves?

SB: 'Cause when I...when I got out of the car, we went back to Jeff's house for the second time, I was going to stay over there, and I just took them off and I threw them away (unintelligible). I ended up not staying and the gloves were already messed up.

GE: Why'd you put the socks on your hands?

SB: Fingerprints.

GE: You said the gloves were messed up. Why, did you tear them?

SB: Yeah.

817

GE: You lost your tip to one of them?
SB: I don't know. I had (unintelligible). When I was trying to take it off, it ripped across the palm. 'Cause I was trying to take it off neat and it ripped across the palm. I think this fingertip...
GE: Ripped off, huh?
PG: Where'd you toss your gloves at over there?
SB: (Unintelligible). Big garbage can.
PG: Downstairs.
GE: When you three left Allen's apartment, who had the gun?
SB: I have no idea. (Unintelligible). I thinks..I think Scott, but I ain't sure. Well, you know what? Yes, Scott, 'cause I remember we're at the house (unintelligible).
PG: Whose gun is it?
SB: I don't know.
PG: Is it just there at the house?
SB: No, it was just...it was just there. I guess (unintelligible).
PG: Where do they normally keep it?
SB: When they put it up, I never pay attention. But, like everytime we go out, there's something...
PG: Somebody takes it?
SB: Could be Nut or Scott.
PG: Why is that?
SB: I guess they did it.
PG: But you say everytime you go out, somebody takes it. Nut or Scott. Why?
SB: 'Cause Watergate's trying to kill Nut case. They beat him up and put him in the trunk. Broke his nose.

818

PG: Oh.
SB: (Unintelligible) at the park. Put a gun to my head.
PG: Besides the jacket, what were you wearing?
SB: I think some black pants. Um, I don't remember. Alls I know is I had on a black jacket. I don't even remember what pants I had on...black pants on.
PG: What (unintelligible).
SB: ...black pants on.
PG: Some what?
SB: Black pants.
PG: What...what shoes?
SB: Michael Jordan's.
PG: Michael Jordan's. Look like this kinda' or black or what?
SB: Black hightops.
PG: Black hightops? Were they out at the house?
SB: Yeah, they got Michael Jordan on the bottom of them. You know like this?
PG: Yeah.
SB: Those are the only shoes I had.
GE: That guy in the trunk. He had to be saying something, kicking, yelling, doing something when you were driving around.
SB: No.
GE: No?
SB: No.
GE: When you opened up the trunk before you shot him he had to have said something.
SB: Don't heard me. That's all's I remember. (Unintelligible) he kept...

819

PG: If you're standing at the back of the trunk and he's laying in the trunk, which way's he laying? This way or this way?

SB: His head was towards...toward the driver's. I.driver's...driver's....His head was on the same side of the step.

PG: That's this way?

SB: 'Cause I remember...'cause I remember when it...like when he (stuttering) got in the trunk, he went like this.

PG: Um-huh.

SB: (Unintelligible)

PG: Okay. And when you said that you opened up the trunk and put the gun in, how high did you open the trunk up?

SB: Like this...the trunk opens up, like this...just like here.

PG: And where'd you put the gun?

SB: I didn't. I just...

PG: Well, I mean. How did...how'd you know you weren't going to shoot him in the elbow?

SB: I didn't. Just...shot him.

PG Okay, well. If you got...if you got in the trunk of the car here. Let's see. Okay. Where abouts are you standing?

SB: Right...right here.

PG: More or less. Right here? Okay. And where did you put the gun?

SB: I was just...'cause we were...we hadn't got in the trunk I remember which way he lay. Just went like this.

PG: So, kind of draw for me where your arm went. Like that way? So, where his head would be? 'Cause you said he was laying...his head would be here?

820

SB: Yeah, when...
PG: His body would be here?
SB: Yeah, like, when...when...when I was talking to him, you could tell that, you know, like this way...this is his voice and that's...
PG: And what was the reason that you did that?
SB: Did what?
PG: Shot towards that direction.
SB: (Unintelligible)
PG: So it'd just be one shot or...
SB: No, 'cause I didn't...I didn't...I didn't want to shoot him. I just, you know, I just...I just...I didn't want to see...I didn't want to see his face. I just opened the trunk and I just...just shot him.
GE: I guess why...what Detective Gallagher is asking is, if you knew his head was that way, why'd you shoot towards his feet?
SB: I didn't even think. Honestly, I didn't think I hit him.
GE: How long did you drive around in the car?
SB: I don't know.
GE: Do you remember where the wallet was tossed out of the car?
SB: All's I remember Nut saying about a credit card or something. He threw it out the window, but I wasn't paying attention.
GE: Where are the car keys to the car?
SB: I have no idea. Sewer somewhere.
GE: Went in the sewer? Did you throw them in there when you ran away?
SB: I didn't throw them. When I got out of the car, I...I gave them to Scott.

821

GE: Gave the keys to Scott. You gave the gun to Nut.
SB: I don't know. When I shot, I don't know who I gave the gun to. All's I remember is I just handed it to somebody and I ran. I wasn't even...I wasn't even looking.
GE: How long were you back at the apartment before Nut and Boxer got back,?
SB: I waited...I waited...I waited downstairs (unintelligible).
GE: About how long did you wait? Five minutes?
SB: About five, ten minutes. Not that long.
GE: When you walked in...the three of you walked in, Dwayne was there?
SB: Dwight?
GE: Dwight, excuse me. Dwight was there. What was Boxer wearing?
SB: I don't remember. But, I had on a black jacket. That's all's I knew is all of us had a little black jackets on over our clothes.
PG: The next day and the days after this, what...what did you guys do as far as the gun was concerned? I mean, you knew you had to get it out of there.
SB: All I knew, (unintelligible). I don't even think we brought it to the house.
PG: Okay. What about the following day?
SB: I don't know. I just...I just asked...I just asked him where's that gun and he's like, it's gone. That's it.
PG: Who said that?
SB: (Unintelligible)
PG: But, he didn't tell you what they did with it?
SB: No.

822

PG: Do you know where it finally ended up?
SB: No, I don't.
PG: Do you know where we found it at?
SB: No. No, I don't.
GE: When you leave the apartment with gloves on and a gun, you know you're gonna run into trouble, right?
SB: I didn't know they had the gun. I did not know. I...
GE: Okay.
SB: My intentions were going...going to Ron's. Now, is it...just like my mom says. Trouble is so easy to get into. It's hard to get out of.
GE: It sure is.
SB: Now, I'm finding it out.
GE: When the three of you put the guy in the trunk of the car and you're driving away, was Nut talking about that you had to kill him? He was talking about it then, wasn't he? What was he saying?
SB: Gotta kill him...that's what he was drunk he just...he said he seen us. Gotta kill him.
GE: Why didn't you stop the car and get out and leave?
SB: It sounds easy to do, but it...
GE: I know...I...I don't make...I don't mean to make it sound so easy. I'm just curious. Now, you act like you didn't want to do it. And so, I was curious why didn't you just...
SB: When he's...most of the time when Nut talks and he's drunk, I don't...I don't pay him no attention 'cause he's just being stupid. That's how he is. I don't know. When he gets a drink, turns into a totally different person. You know, I

wasn't even paying no attention to Nut 'cause I knew he was drunk. I knew he was drunk.

PG: Well, when he's drunk standing outside of the trunk of the car telling you, you gotta kill him, you gotta kill him, and he hands you the gun, why didn't you just hand it back to him and say, then kill him, Nut.

GE: Especially when he was acting stupid when he talked.

SB: 'Cause...I don't want him to shoot me by accident.

GE: You have the gun. Why didn't you just keep it and tell him...

SB: He's just like...just like...

PG: Is he your homeboy?

SB: You know. You kick back with him. You know. Then, he my homey...you know. Their friends and everything, but...

PG: Do you think they're looking to see if you're down for them?

SB: I don't know they ain't down for me...(unintelligible). I don't know. They're from the Santana town. I ain't from the Santana town. I don't know.

GE: How much did you have to drink that night?

SB: I don't drink.

GE: You didn't have anything to drink at all?

SB: A beer.

GE: One beer.

SB: Yeah, one beer.

GE: Not one of those 40 ouncers.

SB: No. Not a...I can't finish a 40.

GE: Okay.

SB: I'd be throwing money.

GE: Okay. So, you said one, what 12 ounce?

824

SB: Yeah. A can of Miller.
GE: Did you smoke anything? Doing dope or anything like that?
SB: No. I mean...I mean I did smoke weed, but I didn't that night.
GE: Not that night. Nut really was downing them?
SB: Nut was blasted. But that's not...that's...he wakes...he goes to sleep drunk and wakes up drunk. Doesn't...
PG: How about Scott?
SB: He had drinks some beer, but he wasn't...
GE: He wasn't out of control.
SB: He wasn't (unintelligible) like...
GE: Anything else you want to tell us?
PG: You're thinking. Might as well get it off your chest.
SB: Naw, I was just thinking about my little girl.
PG: Nothing else you want to say?
SB: (Unintelligible)
GE: You want to step outside for a few minutes?
SB: Yeah.
PG: Wait here for a minute. Get back with you.

END OF TAPE

Doc. 4521P/4525P

825

change as a result of what happened to his son.

DEFENDANT'S STATEMENT

The defendant was interviewed at the Orange County Jail on August 4, 1994. He stated that at the time of the instant offense his "life had gone downhill." He was not living at home anymore because he did not get along with his step-father and he had told his mother he wanted to kill himself. He stated he was put in a position of having to take care of himself, even though he was not prepared for it. He indicated that he was hanging around with bad friends and had gotten involved with gang-bangers who belonged to the "Crips" gang. The defendant stated that he had known his co-defendant Allen Burnett for about six months prior to being arrested. Although he was not living with Allen Burnett and Scott Rembert, he had stayed at their apartment.

The defendant stated that the night of the instant offense, they did not start out with the idea of stealing a car and that it "just happened." He stated that he felt pressured into going along with things because he was the "new person in the gang." He indicated that when he was interviewed he told police he shot the victim and he was "not sure" why he went to trial. He stated he did not testify at the trial or during the penalty phase. He wanted the Judge to know that he feels badly about what happened and thinks about what it would be like if it was him who was dead and his mother going through what the victim's mother is going through. He stated that if he could change what happened, he would. He indicated that he was going through a "hard time in his life," particularly with regard to family problems. He stated that this was no excuse and no reason to take out his frustrations, however. He did not feel he could blame his co-defendants either.

A: I didn't have a gun.
Q: Who had the gun?
A: Honestly, I don't know who had the gun. Well when we took the car home I know I didn't.
Q: How did you get the guy's attention?
A: It's not... it ain't hard to get somebody's attention. You just walk up to somebody.
Q: And ask em what time it is, right?
A: (INAUDIBLE)
Q: Ask them what time it is?
A: I asked him what time it was.
Q: You did? And did he roll down the window and tell you?
A: Yeah.
Q: What happened?
A: His door...wasn't when I asked him what time it was...his door wasn't even locked or nothing.
Q: Okay.
A: And then I just asked him what time it was, and I was standing right next to, and when I asked him what time it was, and you know, I don't think he heard me... I don't know. And he just looked at me, and I asked him what time it was and then the door just flew open. He just got out and, and I think that "Nut" was on this side of me and Scott was on this side of me.
Q: What happened?
A: (INAUDIBLE) just put him in the trunk.
Q: How did you get him in the trunk?
A: Nut told him to get in the trunk. And he just got in the trunk, he got into the trunk.

Q: Shaun, I know you want to tell the truth, I know you do.
A: That's how he got into the trunk, Nut told him to get into the trunk. He said, 'Get into the trunk' and he got into the trunk.
Q: Just like that?
A: Just like that.
Q: (from Gallagher) was Nut holding the gun then?
A: (INAUDIBLE) When Nut told him to get into the trunk, he was just like, unh-hunh, unh-hunh, I don't remember he was saying something, I don't remember, he was saying something, he was telling... he was saying something... I don't know what he was saying but Nut just told him to get into the trunk and he just got into the trunk, he just got into the trunk.
Q: (from Erickson) Who opened the trunk?
A: The guy opened the trunk.
Q: How did he open the trunk?
A: Just... I don't know... the trunk was all flat, I didn't even see no keyhole, and he just... I guess... it's like...it's like flat and the keyhole thing goes in, but if it ain't locked it...it you could just like push it into open, he just pushed it and it opened and he got in the trunk.
Q: Didn't put up a fight, didn't try to run, nothing, huh?
A: No.
Q: What happens after the guy gets in the trunk?
A: We went down the street.
Q: Who was driving?
A: Me.
Q: You? Where was Nut sitting?
A: Back... on the passenger...

Q: And how about Boxer?
A: He was sitting shotgun.
Q: Where were you guys going?
A: At first, nowhere, you know, we's just driving around.
Q: Talking?
A: No. I wanted to...I was like man...I was like, 'What are we doing,' I was like, 'Man, let's take Nut in the house. Let's take Nut in the house.' Nut was like, 'Naw, naw.' And then, I don't know, somehow or another we ended up at Jeff's house. And I was downstairs and Nut went upstairs and him and Jeff were talking.
Q: Then what happened?
A: I guess that's when he got the shotgun.
Q: You guess?
A: No, that's when he got the shotgun.
Q: You saw him with the shotgun?
A: I didn't know it was a shotgun. I just seen a big ol' rifle.
Q: Then what happened?
A: Then we were going to go back to Ron's house, again (INAUDIBLE)...
Q: Was this guy in the back of the trunk?
A: Yeah. (INAUDIBLE) I wasn't saying nothing the whole time we were in the car.
Q: So what happened? Somebody was saying something in the car. What were they talking about?
A: I don't know...they were singing...they kept singing this song and Nut was yelling, telling 'em, 'Can you hear me? Can you hear me?' And he's like, 'Yeah, I can hear you.' He's like, 'Aw Shutup' (INAUDIBLE)

same question over and over again.
Q: (from Erickson) Shaun...
A: Yes, (INAUDIBLE).
Q: (from Gallagher) Now take a minute and compose yourself, and we want to start from the beginning and cut out all the bullshit.
A: I did everything (INAUDIBLE)
Q: Hmmm?
A: I did everything.
Q: We know that, but we gotta go right from the beginning, okay?
A: (INAUDIBLE) (CRYING) I know, I want to say, I want to say that nobody else, I did it.
Q: (from Erickson) Tissue?
A: (CRYING LOUDLY) (INAUDIBLE) I did it please you just don't all (INAUDIBLE) Goddam, (INAUDIBLE) I'm so fucking sorry. If somebody fucking did this to my little girl, goddam.
Q: (from Gallagher) Okay man, try and pull yourself together.
A: I guess I'm going to the pen... the fucking pen. Damn. I'll be right there with the rest of my damn family.
Q: Let's just try to chill for a minute.
Q: (from Erickson) Shaun, do you need some?
A: No ma'am.
Q: Okay.
Q: (from Gallagher) Let's take a minute and let him get himself together.
A: Deep shit. What are those pictures of?
Q: (from Erickson) These?
Q: (from Gallagher) More pictures of the gun. Let's get yourself together for a minute. Do you want something to drink?

A: Unh...I...I remember he handed it...he handed it to Nut, I think...in the c...he opened it and it was some credit card or something...I don't know, some (INAUDIBLE)
Q: Okay. Why did the guy hand the credit card or hand the wallet to Nut?
A: 'Cause Nut told him,'Give me your money.'
Q: Okay. So Nut has the wallet?
A: Uhm-hmm.
Q: And you're driving to Jeff's house?
A: Yeah.
Q: Who's going through the glove box?
A: Think Scott...he was sitting shotgun, Scott was...
Q: Okay. Why were you going to Jeff's house?
A: Nut said...that's what Nut say, he say, 'Go to Jeff's house.' I didn't even ask him. I just went over there.
Q: Why? Why? What did he want to go to Jeff's house?
A: He just told me...he said, 'Go to Jeff's house,' just like that, he said 'Go to Jeff's house.' And I said, 'Alright.' And I was just like, 'Where...where's he live?' 'Cause I knew he lives somewhere around here but I don't even know where around here (INAUDIBLE) ...And I was like, 'Where's he live?' And I was just driving and I just drove over there, and Nut got out of the car and that's when he came back with the shotgun.
Q: Nut got out of the car by himself?
A: Scott got out of the car, but he didn't go...go up the stairs. He was just right there.
Q: And you stayed in the car?
A: I was just sitting in the car.

Q: Okay, how long was Alan gone?
A: 'Bout five minutes...ten minutes...five minutes.
Q: Okay. When he comes back to the car, what does he have?
A: Big ol'...it looked like a rifle, but it was a shotgun.
Q: Then what happened?
A: Got back in the car and we went back to our neighborhood and I guess you could say we...we were looking for Watergate.
Q: You were.
A: We were looking for Water...well Alan was...cause don't mess with me...he was looking for 'em.
Q: So you're looking for Watergate?
A: Yeah. 'Cause they had came through the neighborhood.
Q: What happens then?
A: Went down...went down Glenoaks and we turned on Chippewa and when I turned on Chippewa, they...Watergate they driving...they drive like three or four Cadillacs at least. Nut said he seen the Cadillac...a blue Cadillac like the one they had, you know but I went over the bridge too...and I tried...I wasn't going fast...I went over the bridge and Nut got out of the car and that's when I turned...I think it's by my Street...and I turned and...turned down at to...turn the car around and that's when I heard gunshots and just got back in the car and went back to Jeff's house. We taked the gun back over there.
Q: Then what happened? Who...who brought the gun up or the shotgun up to Jeff's house? Who took it upstairs?
A: Nut.
Q: You two waited in the car?

A: Unh... well Nut got out of the car and he took the gun upstairs and then Scott got out of the car.
Q: And then what happened?
A: Then... then they were upstairs... they were taking a long time, so I got out of the car and I went upstairs.
Q: You left the guy in the trunk.
A: Yeah, and I went upstairs and we were just (INAUDIBLE) ... up there and unh... Jeff was telling ... telling us about, 'What you all doing coming to my house so late?' and that was taking so long... he was yelling at Nut was like, 'What you all doing com--?' He said, 'I thought you all went home.' And Nut was like, 'Naw.' And he was like, 'I seen some waterbugs.' And I guess... and I guess that's what he thought he was shooting at but Nut was drunk, he don't even know and so we were up there, we were just talking and then Jeff (INAUDIBLE) and we left. That's when we went over there...
Q: You drove?
A: Yeah, I drove the whole time.
Q: Now where is Nut sitting?
A: Nut was in the back the whole time.
Q: Scott was in the passenger?
A: Yeah.
Q: Then what happened?
A: Then we got back in the car from Jeff's house the second time and Nut was like falling asleep in the back seat of the car. And I was just like, 'So, where are we going to take this car... where are we going to take this car?' And I's just like, 'Let's just drop it off on the freeway.' You know we might have to walk home,

but let's just drop it off on the freeway, anything I don't care. And Nut was like, 'Naw, he, you know, he's seen us... gotta kill him.' And I was like, 'Man, you're stupid, you're drunk, you're drunk.' He was like, 'I'm serious, I'm serious... he's seen us, he's seen all of us... we gotta kill him.' So then that's when we went over there by Gilbert High School and then we... we didn't know... you know... we didn't know what we were gonna do. We went there and Nut just kept telling us, 'Gotta kill him, gotta kill him.'

Q: Scott have the gun still?

A: Yeah, I think so.

Q: Then what happened?

A: (INAUDIBLE) ... and we weren't sure what we were gonna do, and then this... he just... he just gave me the gun.

Q: Scott gave you the gun?

A: When... when... when we were at Gilbert, Scott had gave it to Nut, 'cause Nut was like, 'We gotta kill him.' And I's like, 'No, no, no, no.' And then we got by the fence and Nut gave me the gun and said, 'Gotta kill him.'

Q: What did you do?

A: I opened the trunk and I didn't want to do it and I was just standing there and I was like, 'You gotta kill him, you gotta kill him.' And I opened the door and I just... I didn't look at him... just... just shot and I ran.

Q: How did you get back home?

A: Jumped the fence and went down the end... went down the railroad tracks.

Q: Right next to the freeway? The underpass?

A: I went... I went over the fence and it goes down and then there's like some trains.
Q: Umm-hmm.
A: And I just... I went (INAUDIBLE).
Q: How did Nut and Scott get home?
A: Went the s-- they all... all...they when I shot, I left then 'cause I (INAUDIBLE)... I left them, I just ran. I remember Nut blew out the fence 'cause he was all drunk and I... I didn't look back, I just left... I just ran... I ran... I ran... I ran... I ran down a hill and I ran back up and I was right there by the trains.
Q: Did you go back to the apartment?
A: I was waiting to see where they were at.
Q: Did you still have the gun with you?
A: I shot and I just... I don't know... I just... I just... I just... remember that I shot and I don't know what... I just gave them to one of them and I ran... I jumped the fence and I ran.
Q: What did you do with the gun?
A: I didn't have the gun, after I shot I gave it to them, I don't know what happened to it... I just... I gave it to them (INAUDIBLE) and I ran. And then Nut fell.
Q: You get back to the apartment, then what happens?
A: (INAUDIBLE)... go right back up there, just waited up there... (INAUDIBLE).
Q: Told them what you did, hunh? What else did you tell them?
A: The only person I told was Dwight and my girlfriend.
Q: What's your girlfriend's name?
A: Summer.
Q: When did you tell her?

A: Uhm...the next day...(INAUDIBLE)
Q: (INAUDIBLE) huh?
A: (INAUDIBLE)
Q: It's a heavy burden.
A: (INAUDIBLE)...ain't so much. The burden is just that...I know that no matter what I do now, no matter, you know...I know that I took somebody's son away from 'em...and I wish what...because I wouldn't have felt that good if somebody took my daughter away from me. I can't change what I did in the past, but all I can just say is, 'I'm sorry.' And I know 'sorry' don't help.
Q: Who eventually got the gun?
A: I don't know...I didn't see it 'til we got into the house. I don't know who...I don't know who got it. All's I know is when I got back to the house I just laid on the floor. I was just laying on the floor.
Q: When did you take off your rubber gloves?
A: I took 'em off when I was...when I was over at Jeff's house and I put em...I had my socks on.
Q: You took your rubber gloves off at Jeff's house and you had your gl--or your...
A: (INAUDIBLE)
Q: ...socks on. How about the other two, did they keep their rubber gloves on?
A: Nut did.
Q: Why'd...
A: Sc--
Q: Why'd...
A: Sc...Scott did.

Q: Why'd you take off your gloves?
A: 'Cause when all I was...went out to...when I got out of the car...we went back to Jeff's house for the second time, I was just gonna stay over there. And I just took 'em off and I threw 'em away and I's just like, I end...I ended up not staying and the gloves were already messed up.
Q: Why'd you put the socks on your hands?
A: Fingerprints.
Q: You said the gloves were messed up, what, they tear?
A: Yeah.
Q: Lost your tip to one of them?
A: I don't know...it had (INAUDIBLE)...it ripped across when I was trying to take it off, it ripped across the palm...Cause I was trying to take it off neat and it ripped it across the palm. And I remember I think this fingertip.
Q: Ripped off, hunh? (LONG PAUSE)
Q: (from Gallagher) Where'd you toss your gloves at over there?
A: I don't know...in a...big garbage can that was right there.
Q: The dumpster?
Q: (from Erickson) When you three left...Alan's apartment, who had the gun?
A: I...I have no idea. (INAUDIBLE)...I think Sc...I think Scott but I ain't sure. Unh...you know what? Yeah, Scott because...'cause I remember we're at the house then Nut gave Scott (INAUDIBLE)
Q: (from Gallagher) Whose gun is it?
A: I don't know.
Q: Is it just there at the house?

A: No, it was just...it was just there, I guess it's one of his, I don't know whose it is...
Q: Where do they normally keep it?
A: I know...I kn...when they put it up I never pay attention but like everytime we go out or something...
Q: Somebody takes it?
A: Either Nut or Scott.
Q: Why's that?
A: I guess it's their gun.
Q: But you say everytime you go out, somebody takes it, Nut or Scott, why?
A: 'Cause Watergate's trying to kill Nutcase...they beat him up and put him in the trunk and broke his nose...
Q: Oh.
A: Dropped him off at the park. Put a gun in my head okay.
Q: Besides the jacket, what were you wearing?
A: I think...think some black pants. Uh I don't remember. 'Cause I know I had on a black jacket but I don't remember what pants I had on... black pants on.1
Q: What's--
A: Some black pants--on
Q: Some what?
A: Black pants.
Q: What...what shoes?
A: My Michael Jordans.
Q: Michael Jordans.
A: Yeah.
Q: Look like this kinda? Or black or what?

Q: Do you know where it finally ended up?
A: No, I don't.
Q: Do you know where we found it at?
A: No. I have no idea.
Q: Okay.
Q: (from Erickson) When you leave the apartment with gloves on and a gun, you know that you are going to run into trouble right?
A: I didn't know they had the gun. I did not know. I was--
Q: Okay.
A: My intentions were going... going to Ron's and that was it, just like my mom says, 'Trouble is so easy to get into, it's hard to get out of it.'
Q: It sure is.
A: And now I'm finding out.
Q: When the three of you put the guy in the trunk of the car, and you're driving away, was Nut talking about that you had to kill him. He was talking about it then, wasn't he? What was he saying?
A: Gotta kill him, that's what he... he was drunk... he just... gotta kill him... he said, 'He's seen us, gotta kill him.'
Q: Why didn't you stop the car, get out and leave?
A: It sounds easy to do, but it--
Q: I know... I know I ... I don't make... I don't mean to make it sound so easy, I'm just curious. You know, you act like you didn't want to do it, and so I'm just curious, why didn't you just--
A: When he's... most of the time... when Nut talks and he's drunk... I don't know... I don't pay him no attention 'cause he is just being stupid... that's how he is...I don't know... when he gets drunk turns into a totally different person, you know, I

wasn't even paying no attention to Nut, 'cause I knew he was drunk... I knew he was drunk.

Q: (from Gallagher) Well, when he is drunk and standing there outside of the trunk of the car telling you, 'We gotta kill him, we gotta kill him.' and he hands you the gun, why didn't you just hand it back to him and say, 'Then kill him, Nut.'

Q: (from Erickson) Especially if he is acting stupid when he is drunk.

A: 'Cause I didn't want him to shoot me by accident.

Q: If you had the gun, why didn't you just keep it and tell him...

A: It's just like... just like...

Q: (from Gallagher) Is he your homeboy?

A: We--you know, you we kick back with 'em, you know... they ain't my homys, I... you know... they're friends and everything... but...

Q: You think they're looking to see if you're down for them?

A: I know they ain't down for me (INAUDIBLE) they ain't down for nobody. I don't know...they're from the Santana Town. I ain't from the Santana Town. I don't know.

Q: (from Erickson) How much did you have to drink that night?

A: I don't drink.

Q: You didn't have anything to drink at all?

A: A beer.

Q: One beer?

A: Yeah, one beer.

Q: Well, not one of those 40 ouncers.

A: No, not a fo--I can't finish a 40 ouncer.

Q: Okay.
A: I'll be throwing money.
Q: Okay, so you just had one, what 12 ounce?
A: Yeah, a can of Miller.
Q: Okay. Do you smoke anything, do any dope, anything like that?
A: No, I mean I did smoke weed, but I didn't that night.
Q: Not that night. Nut really was downing them.
A: Nut was blasted. But that's not that's--he wakes up...he goes to sleep drunk and wakes up drunk...doesn't...
Q: (from Gallagher) How about Scott?
A: He had drank some beer, but he wasn't...
Q: (from Erickson) He wasn't out of control?
A: He wasn't all like...
Q: Anything else you want to tell us.
Q: (from Gallagher) You're thinking.
A: Naw.
Q: You might as well get it off your chest.
A: Naw, I was just thinking about my little girl.
Q: Nothing else you want to say?
A: Nothing else happened.
Q: (from Erickson) You want to step outside for a few minutes.
(INAUDIBLE)
Q: (from Gallagher) (INAUDIBLE)...here for a minute? Get back with you.
(INVESTIGATORS LEAVE THE ROOM)
(AUDIO TAPE ENDS)

just...I just remember saying let's leave the car on the freeway. (Unintelligible).

PG: Apparently, some people remember it different.

SB: They weren't talking to me about it./ (unintelligible) Canyon. We was there for awhile and I was just like, you know, what are we gonna do, what are we gonna do? And I just said, come on, let's go, let's go. We can go take the car in, you know. That's why we were all in there by Gilbert High School. (Unintelligible).

PG: Then what happened? Huh?

SB: Smoke him. We blasted that guy in the trunk, I guess.

GE: You said you smoked. Isn't that what you said?

SB: I said we smoked him.

PG: Tell me how that happens? You all got out of the car...

SB: Before I got out of the car, ~~Nut~~ OFTO said I'm gonna blast.

PG: Who said that?

SB: ~~Nut~~ OFTO said I'm gonna blast him.

PG: What'd you say?

SB: Don't wanna do it.

PG: What'd ~~Boxer~~ TOO say?

SB: ~~Boxer~~ TOO wasn't saying nothing. Wasn't saying nothing was just sitting.

PG: What happened?

SB: We got out of the car then. We just standing there 'cause I was like...naw, man, don't do this shit...don't do it. Shit got crazy.

PG: Okay. When you got the keys, how's he get the trunk open?

SB: It wasn't locked. It was just closed. The trunk was not locked. It was just closed.

2650

know, he won't say nothing, he won't say nothing. But ~~Nut~~ OFTO kept saying, no, you gotta kill him, you gotta kill him. And, I remember, I think ~~Scott~~ TOO had a gun and ~~Nut~~ OFTO.. ~~Scott~~ TOO had a gun and he handed it to ~~Nut~~ OFTO. I was like...we're gonna kill him, we're gonna kill him.

PG: ~~Scott~~ OFTO said that?

SB: No. ~~Scott~~ OFTO wasn't saying nothing. You know? He was talking, but he wasn't saying...you know, you know. And so, ~~Nut~~ TOO was drunk. I was like, nigger you drunk. You ain't gonna do nothing. All's we got to do, just leave, just leave.

PG: Was ~~Scott~~ OFTO saying, no you don't have to kill him?

SB: ~~Scott~~ OFTO wasn't saying nothing. He was...

PG: You said he was talking.

SB: All right. I mean like...like if we would talk to him like you know. He's just like where we going? You know? But, he wasn't talking about, you know. And Nut was saying, gotta kill him. I was just like naw, man. Uh-uh.

PG: So, ~~Scott~~ OFTO handed ~~Nut~~ TOO the gun...

SB: We were...we were...we were out there and he's like, gotta smoke him, gotta smoke him. He said, he seen me, he seen me. It's like screw him. The trunk was open...

PG: You open up the trunk? You take your arm off it?

SB: It was...

PG: How'd you open it?

SB: The trunk? It was like...it was like I had my arm on it like this, but it wasn't closed. All you had to do is lefts your arm up an it will open. I had my arm like...and I let the trunk up and he just...blasted into the trunk.

2653

GE: Gave the keys to ~~Scott~~ Otto. You gave the gun to ~~Nut~~ Too.

SB: I don't know. When I shot, I don't know who I gave the gun to. All's I remember is I just handed it to somebody and I ran. I wasn't even...I wasn't even looking.

GE: How long were you back at the apartment before ~~Nut and Boxer~~ the others got back,?

SB: I waited...I waited...I waited downstairs (unintelligible).

GE: About how long did you wait? Five minutes?

SB: About five, ten minutes. Not that long.

GE: When you walked in...the three of you walked in, Dwayne was there?

SB: Dwight?

GE: Dwight, excuse me. Dwight was there. ~~What was Boxer wearing~~ Otto?

SB: ~~I don't remember. But, I had on a~~ black jacket. That's all's I knew is all of us had a little black jackets on over our clothes.

PG: The next day and the days after this, what...what did you guys do as far as the gun was concerned? I mean, you knew you had to get it out of there.

SB: All I knew, (unintelligible). I don't even think we brought it to the house.

PG: Okay. What about the following day?

SB: I don't know. I just...I just asked...I just asked him where's that gun and he's like, it's gone. That's it.

PG: Who said that?

SB: (Unintelligible)

PG: But, he didn't tell you what they did with it?

SB: No.

2670

PG: Do you know where it finally ended up?

SB: No, I don't.

PG: Do you know where we found it at?

SB: No. No, I don't.

GE: When you leave the apartment with gloves on and a gun, you know you're gonna run into trouble, right?

SB: I didn't know they had the gun. I did not know. I...

GE: Okay.

SB: My intentions were going...going to Ron's. Now, is it...just like my mom says. Trouble is so easy to get into. It's hard to get out of.

GE: It sure is.

SB: Now, I'm finding it out.

GE: When the three of you put the guy in the trunk of the car and you're driving away, was ~~Nut~~ OFTO talking about that you had to kill him? He was talking about it then, wasn't he? What was he saying?

SB: Gotta kill him...that's what he was drunk he just...he said he seen us. Gotta kill him.

GE: Why didn't you stop the car and get out and leave?

SB: It sounds easy to do, but it...

GE: I know...I...I don't make...I don't mean to make it sound so easy. I'm just curious. Now, you act like you didn't want to do it. And so, I was curious why didn't you just...

SB: When he's...most of the time when ~~Nut~~ OFTO talks and he's drunk, I don't...I don't pay him no attention 'cause he's just being stupid. That's how he is. I don't know. When he gets a drink, turns into a totally different person. You know, I

2671

GE: You weren't drunk.

AB: Uh-uh.

GE: Who was at your apartment with you?

AB: There was me, uh...Pokie, and others and that's it. Uh...me, some others and, uh, Dwight. And uh...I don't know, I was in the room about to go to sleep and they said that they were going to go do something. I can't remember 'cause I was drinking and I told them I didn't want to go and they wanted me to go 'cause I was all drunk and stuff. And we went over there and then we snatched that man out of his car and told him get in the trunk. And then I don't really remember what happened. I just know one of the others shot that man in his head.

GE: You saw him shoot the man in the head?

AB: I don't know if he shot him in the head, but that's what the papers said and everything. I know he opened the trunk and the man was like naw...naw. (Unintelligible) shoot him and he shot him in the trunk and he said, "Aw, fuck it." I don't know. I know I didn't kill that man.

GE: Okay. Uh, when you were at the apartment and they were telling you, you know, that they wanted to...to go and what did they tell you they wanted to go do?

AB: They was about to go take a Ron's speakers on his car 'cause everybody was pissed off at Ron. 'Cause our other friend got shot in the foot and everybody said that it was Ron's fault because he didn't want to come to the apartment to pick us up, so we had to walk out the apartment with the guns. This was like

over the weekend.

GE: Uh-huh.

AB: And the gun went off and shot him in the foot. I don't know. He probably...his name is David.

GE: David.

AB: Um-huh. So, everybody was all pissed off at him and they wanted to beat Ron up and so others were [redacted] gonna go over there and steal his speakers for us to get back at him. And I was gonna go with them and shit, but then I don't know.

GE: About what time did you leave your apartment or do you remember?

AB: I don't remember.

GE: All three of you had rubber gloves on.

AB: Yeah.

GE: Okay. Did you put the rubber gloves on before you left the apartment?

AB: Yeah.

GE: Okay. And why did you put the gloves on?

AB: Because if you was to touch somebody's car, we don't want you to get the fingerprints off of there.

GE: Okay. So, you go over to Ron's house?

AB: No, we went to his carport and his car wasn't there.

GE: Okay. So, then what happened?

AB: Then, there was, uh,...for a car, you know, to get some speakers out of, after that. And then we walked out on the street and then I seen that man sitting right there. And I went over to the

AB: Uh, like about 10:00 at night.

PG: And when did you stop drinking? Right up until the time you left or did you drink...

AB: I drank 'til about 2:30 and I was on the phone for about an hour.

PG: Okay. How about the other guys? Do you remember what they drank?

AB: Naw. They was just drinking.

PG: Okay. Uh, do you do any drugs?

AB: Um-uh. Smoke weed every now and then, but I don't like...

PG: Did you smoke any weed that night?

AB: Um-uh.

PG: Okay. Now, you said something about when you were talking about one of the things...you said something about that they had told you...I guess you were talking about Allen and...I'm sorry, one of the others and the other one. . .

AB: Um-huh.

PG: ...uh, this stuff that you're telling us, is this stuff that you remember or what you've been told?

AB: This is stuff that I remember.

PG: You remember specifically?

AB: Uh-huh.

PG: Okay.

AB: Yeah.

PG: Okay. I just wanted to clarify that 'cause I wasn't sure. Uh, when...when you guys went out, when you went out to do...to do, uh, Rob's stereo speakers or whatever...

AB: Uh-huh.

PG: ...and you couldn't find, uh, the car and, uh, whatnot...where were you guys when you first saw this guy?

AB: Where were we at? We were on the street. We were on Glenoaks...

PG: Uh-huh.

AB: Glenoaks, yeah.

PG: Okay, where was his car? Was it...

AB: It was parked.

PG: Parked?

AB: I guess he was warming his car up or something, like he was just getting home...

PG: Parked out in the street? Parked in his carport or...

AB: Parked on the street.

PG: Parked on the street?

AB: Um-huh.

PG: And where were you guys in relation to his car when you first saw him?

AB: We were coming out the...see, his car's over here...we were coming out the apartments.

PG: Okay. And as you guys approached him, was there some conversation?

AB: One of the others asked him what time it was.

PG: I mean, even before that amongst yourselves? Do you remember talking about, uh, with...all you guys talking and saying let's...let's jack him up?

AB: I'm pretty sure we did. I know we're not talking esp. We

PG: Just once? And when he pointed the gun into the trunk, how did he do that?

AB: He just pointed it. What do you mean?

PG: Okay, well. This is the whole trunk of the car...

AB: Um-huh.

PG: ...and you're standing in the middle of the trunk.

AB: Um-huh.

PG: From where you were standing, how did you see him point? Okay. This being the whole trunk and you're standing in the middle...

AB: Okay.

PG: You're one of the others.

AB: Okay. Well he's holding like this and he shot like...I guess like this...

PG: Like that?

AB: Down or like this and down. Something like that.

PG: So, towards the area of the guy's face or head?

AB: I don't know. I couldn't even tell you. All right, yeah, 'cause he's...

PG: Where the hands were? Where you saw the hands?

AB: Um-huh.

GE: You said the hands were crossed.

AB: He was like this...you know, like...

GE: Um-huh.

AB: ...that, kind of.

GE: Um-huh.

PG: Okay. And you said that you heard him say fuck it?

AB: No, that was after...after...like it was you gotta go. And then after he slammed the trunk down, he was like...no, this is cuckoo and he started cuckooin' and shit, you know, fuck it...like nobody care anyway.

PG: Okay. Uh, the gloves that you were wearing, what did you do with those?

AB: I flushed mines down the toilet.

PG: At your house?

AB: Um-huh.

PG: Okay.

GE: What about one of the others?

AB: I don't know what the hell he did with his. I just know 'cause I went in there to go earl and I flushed them down the toilet when I went in there to...

PG: So, you had yours the whole time 'til you got back to the apartment?

AB: Um-huh.

PG: How 'bout the other one, did you know what he did with his or anything?

AB: No, I didn't deal with his.

PG: Okay. What, uh, what were you wearing?

AB: What was I wearing?

PG: Yeah.

AB: I was wearing some Croaker Sacks, and some black khakis, and a Malcolm X shirt, a black one.

PG: A black Malcolm X shirt.

GE: Okay, so who was at the apartment with you? This is Tuesday night.

SR: Me, some others and Cookie or Dwight, whatever his name is.

GE Okay.

SR: That's it. When we left the house, that's all that was there when we left the house, then we returned.

PG: See, that's where we got...

GE: I could barely hear you. Okay. So, some others...

SR: ...and Dwight.

GE: Dwight and you were at the apartment. Then what happened?

SR: Well, we left besides Dwight. He stayed there. The rest you guys know.

GE: Okay. When you left, you had rubber gloves on, right?

SR: Yes.

GE: Okay. Where were you headed when you left the apartment?

SR: To go get a thing from down the street.

GE: A radio from a particular person by the name of...

SR: Ron.

GE: Okay. You go to Ron's to get what, a stereo?

SR: Yeah. His car wasn't there, so we were coming back home. On the way back home, we took the street back home to the apartment and they saw that guy in the car and I don't know which one brought it up first, but they talked about going over there and jacking him and doing whatever.

GE: Okay. You're saying that the others were talking about jacking him...

one, was it because one of the others wanted to shoot the guy or he didn't want the guy shot? Which?

SR: I think they were arguing about who was going to shoot him.

GE: One of the others wanted to shoot him because he didn't get to shoot the gun up in the air, you're saying?

PG: What was the other one's reason for wanting to shoot him?

SR: I don't know.

GE: You had told us earlier about conversation about going out to some canyon or something. When did that take place? Do you remember telling us about that?

SR: That's over there by Jeff's house.

GE: Okay. After you dropped off the shotgun? Could this be on the second visit?

SR: Yeah, I think so.

GE: You think so?

SR: On the way to Jeff's house. On the way to Jeff's house. Not on the second visit to Jeff's house...to Jeff's house, I believe.

GE: Okay. So, on the first trip to Jeff's house is when you were talking?

SR: Second.

GE: The second visit to Jeff's house. Who's talking about going out to the canyon?

SR: I don't know.

GE: Were you talking about it?

SR: I don't even know anything about it.

shotgun?

SR: Um...

GE: Did you say it?

SR: No.

GE: Did one of the others say it?

SR: I don't know. I don't know if one of the others or the other one said it.

PG: What, as best as you can remember, what was said exactly?

SR: Go to Jeff's. Pick up the shotgun. It can't be traced.

PG: And so, prior to that, somebody already talked about shooting this guy. I mean...I'm sitting here it seems logical, but I'm asking you what you recall being said.

SR: Yeah, it seems logical, but I don't remember exactly how each and every event and every conversation took place and what he said what I just don't.

PG: Okay. Well, then, is it safe to say your impression of the conversation if you can't remember the exact conversation, your impression of the conversation was that this guy was gonna have to be killed because he saw your faces and that it's best to go to Jeff's and get the shotgun because the shotgun can't be traced.

SR: Yeah, that's it.

PG: Yes? Is that your impression? Okay. Then when was the decision made once you get to Jeff's and you get the shotgun, when was the decision made to go bust a cap off a window in Watergate territory?

SR: One of the others brought that stupid idea up.

PG: Why? Now, I know why...

SR: That's why. That's why.

PG: ...but I'm asking you why. Was he pissed off?

SR: Because of what happened earlier sometime this year with him and them.

PG: Okay. Why didn't you guys go get rid of this guy first? Why'd you take him along?

SR: I don't know.

PG: I mean, that's just the point that I'm mildly curious about because I'm thinking you guys are in a "G" ride. Anytime, anything can happen. You know, you go through a stop sign, something crazy like that on the way to Santa Ana. The police pull you over and you got some guy banging on the lid of the trunk. That's not a good situation in a "G" ride.

SR: Nothing happened like that, though.

PG: It didn't happen like that, though. Nobody was concerned about the fact that this guy was in the trunk for this portion of the ride?

SR: I was, but I was...I don't know. I was...I wasn't gonna say nothing. I was.....

PG: We heard you weren't saying too much. Uh, did this...when you guys were busting the caps over in Santa Ana there, did the guy in the trunk say anything?

SR: No, nothing.

PG: I mean, I'm figuring he's gotta be wiggin'. You know, if

he asked somebody to give him a ride to the hospital and they wouldn't take him. So, you know...I don't know. He just laid on the floor for like a half hour bleeding when he could have been at the hospital. I don't know, he just...I don't know, he just went to that guy's house.

PG: Okay. Who is that guy?

SB: This guy named Ron. You know, we went over there. I remember one of the others was drunk. I wasn't drunk. I was, you know. We just went over there. We was gonna to...we was gonna beat him up, I guess. Whatever. We was gonna beat him up. That was all...I tried, but I kept telling them to stay in the house...stay in the house. You're too drunk. You're too drunk. And one of them kept telling us that another one wants to roll, the other one wants to roll. So then, you know, we went over there, (unintelligible), so we were just standing outside. And then, you know, they wanted me to take a car. I just took the car.

PG: Okay. Now, where does Ron live?

SB: I think in the Seawind Apartments (unintelligible).

PG The what wind?

SB: The Seawind.

PG: What's street that on?

SB: On...on the other side of (unintelligible) like I was telling you by the bridge.

PG: Uh-huh. Okay. Now, closer to Euclid, closer to the...the dead end, right about in the middle?

PG: Then what happened? Huh?

SB: Smoke him. We blasted that guy in the trunk, I guess.

GE: You said you smoked. Isn't that what you said?

SB: I said we smoked him.

PG: Tell me how that happens? You all got out of the car...

SB: Before I got out of the car, one of the others said I'm gonna blast.

PG: Who said that?

SB: One of the others said I'm gonna blast him.

PG: What'd you say?

SB: Don't wanna do it.

PG: What'd the other one say?

SB: The other one wasn't saying nothing. Wasn't saying nothing was just sitting.

PG: What happened?

SB: We got out of the car then. We just standing there 'cause I was like...naw, man, don't do this shit...don't do it. Shit got crazy.

PG: Okay. When you got the keys, how's he get the trunk open?

SB: It wasn't locked. It was just closed. The trunk was not locked. It was just closed.

PG: Now wait a minute. How could you have the trunk closed, but not locked?

SB: All you gotta do is close the trunk down.

PG: So, why didn't this dude just get out?

SB: How you gonna get out of the trunk from the inside?

PG: Exactly. Have you ever been able to walk up to a trunk lid and, without the keys, just open it up? Just grab it and open it up? Naw, you need the keys, man.

SB: No. Have you ever...have you ever seen the back of a...a...a...what kind of kind of car (unintelligible). You don't need a key to open that trunk. It's like the glove compartment. You know like how the glove compartment's locked, you need the key to open it but if it's unlocked you just turn it to open it? That's how it works. The trunk was just closed.

PG: So, you don't need a key to open this trunk to this car?

SB: No, not if he ain't locked. It wasn't locked. The trunk was just closed.

PG: So, who opened the trunk?

SB: We got out of the car...we got out of the car and we're all standing at the back of the car. I opened the trunk... I opened the trunk and then I closed it. I was like...I was like no man and so then like we're just talking.

PG: What did the guy do or say when you opened the trunk?

SB: He didn't...he didn't say nothing. He just...he just like laying there.

PG: Um-huh.

SB: I closed the trunk and I...

PG: He didn't say nothing when you opened the trunk up?

SB: He didn't...he didn't say nothing. He did not say a word.

PG: He look at you?

SB: I wasn't looking at him. I just know he didn't say nothing. I opened the trunk. I wasn't looking at him. And I was like, naw, man. Can't do this. And I was like, you gotta kill him, you gotta kill him.

PG: So, then what happened?

SB: I killed him.

PG: Did you open the trunk again?

SB: Not all...

PG: Not all the way. Part of the way? And what did the guy say this time?

SB: I just...I just remember hearing him, say you know, don't hurt me.

PG: Did he try to protect himself or anything?

SB: No. I wasn't looking at him. I just remember him saying, don't hurt me.

PG: Okay. You opened the trunk part of the way. Then what happened?

SB: By that time, I...I didn't have...I didn't have...I didn't have any gloves. I had socks on.

PG: And?

SB: We were arguing. I was like, you know. The trunk...the trunk wasn't all the way opened, you know. I had my arm...I had my arm like so it wouldn't open all the way.

PG: Um-huh.

SB: And I was like naw, man. I was like no, no. You know? You know, do it, you know. Just leave him there. He won't...you

know, he won't say nothing, he won't say nothing. But one of the others kept saying, no, you gotta kill him, you gotta kill him. And, I remember, I think the other one had a gun and one of the others...the other one had a gun and he handed it to one of the other. I was like...we're gonna kill him, we're gonna kill him.

PG: One of the others said that?

SB: No. One of the others wasn't saying nothing. You know? He was talking, but he wasn't saying...you know, you know. And so, the other one was drunk. I was like, nigger you drunk. You ain't gonna do nothing. All's we got to do, just leave, just leave.

PG: Was one of the others saying, no you don't have to kill him?

SB: He wasn't saying nothing. He was...

PG: You said he was talking.

SB: All right. I mean like...like if we would talk to him like you know. He's just like where we going? You know? But, he wasn't talking about, you know. And one of the others was saying, gotta kill him. I was just like naw, man. Uh-uh.

PG: So, one of the others handed the other one the gun...

SB: We were...we-were...we were out there and he's like, gotta smoke him, gotta smoke him. He said, he seen me, he seen me. It's like screw him. The trunk was open...

PG: You open up the trunk? You take your arm off it?

SB: It was...

PG: How'd you open it?

SB: The trunk? It was like...it was like I had my arm on it like this, but it wasn't closed. All you had to do is lefts your arm up an it will open. I had my arm like...and I let the trunk up and he just...blasted into the trunk.

PG: Who? Who, Shaun? It's the hardest part right here, man. You finish this part, it's done.

SB: (Unintelligible).

PG: How many times did you shoot him?

SB: Fired one gunshot.

PG: One gunshot? How many does the gun hold?

SB: Two or three. I think, two.

PG: How many did you have in there?

SB: It was loaded.

PG: So, two or three?

SB: Yeah.

PG: But, you only fired once?

SB: I remember one gunshot.

PG: What's that?

SB: I remember one gunshot.

PG: Is it that hard to admit? Tell me something. I have a question about this. Apparently, the guy had a wound in the arm?

GE: His hand.

PG: In his hand? Now, you say you only fired one gunshot. But, he apparently ended up with two wounds?

GE: You shot him, right?

to get out of.

GE: It sure is.

SB: Now, I'm finding it out.

GE: When the three of you put the guy in the trunk of the car and you're driving away, was one of the others talking about that you had to kill him? He was talking about it then, wasn't he? What was he saying?

SB: Gotta kill him...that's what he was drunk he just...he said he seen us. Gotta kill him.

GE: Why didn't you stop the car and get out and leave?

SB: It sounds easy to do, but it...

GE: I know...I...I don't make...I don't mean to make it sound so easy. I'm just curious. Now, you act like you didn't want to do it. And so, I was curious why didn't you just...

SB: When he's...most of the time when one of the others talks and he's drunk, I don't...I don't pay him no attention 'cause he's just being stupid. That's how he is. I don't know. When he gets a drink, turns into a totally different person. You know, I wasn't even paying no attention to the other one 'cause I knew he was drunk. I knew he was drunk.

PG: Well, when he's drunk standing outside of the trunk of the car telling you, you gotta kill him, you gotta kill him, and he hands you the gun, why didn't you just hand it back to him and say, then kill him.

GE: Especially when he was acting stupid when he talked.

SB: 'Cause...I don't want him to shoot me by accident.

ON THE RIGHT.

AND MY MOTHER WAS SLEEPING DOWNSTAIRS ON THE COUCH. SHE ALWAYS SLEPT ON THE COUCH.

Q AND HOW MANY -- WHEN YOU SAY SHOT, DID YOU ACTUALLY HEAR SOME SHOTS?

A YEAH.

Q HOW MANY?

A FIVE, SIX; I DON'T KNOW EXACTLY HOW MANY.

Q DO YOU RECALL TELLING THE POLICE IT WAS FOUR BLASTS?

A I DON'T KNOW. I DON'T REMEMBER EXACTLY WHAT I TOLD THEM, BECAUSE I WAS SHOOK UP.

Q IS IT POSSIBLE YOU TOLD OFFICER COTTRELL, WHO CAME OUT FROM WESTMINSTER, THERE WAS FOUR BLASTS?

A IT'S POSSIBLE. I DON'T REMEMBER WHAT I TOLD HIM.

Q AFTER HEARING THE BLASTS, DID YOU HEAR A VOICE?

A YES.

Q AND WHAT DID YOU HEAR THAT VOICE SAY?

A "FUCK YOU."

Q DID YOU RECOGNIZE THAT VOICE?

A YES.

Q WHOSE VOICE WAS THAT?

A ALLEN.

Q IS THAT ALLEN BURNETT HERE IN COURT?

CONVERSATION WITH SHAUN BURNEY THAT SHAUN TOLD HER THAT HE HAD SHOT A GUY IN THE HEAD AND PLACED HIM IN THE TRUNK OF HIS VEHICLE?

A. YES, SHE DID.

Q. DID SHE ALSO TELL YOU THAT THEY INITIALLY WERE GOING TO STEAL THE VICTIM'S CAR STEREO?

A. YES.

Q. AND DID SHE TELL YOU THAT AFTER THE INITIAL CONVERSATION WITH SCOTT REMBERT THAT WHEN SHE TALKED TO HIM LATER JUNE 12TH AFTER THAT THEY DID NOT DISCUSS THE HOMICIDE?

A. THAT'S CORRECT.

MR. BRENT: I HAVE NO OTHER QUESTIONS AS OF THE THESE ISSUES. THERE'S MORE WE NEED TO DO BUT COUNSEL WANTED SOME TIME FOR THAT.

THE COURT: OKAY. SO.

MR. HORAN.

MR. HORAN: THEN I'LL DEFER UNTIL AFTER THAT, THEN, IF THAT'S ALL RIGHT WITH THE COURT.

THE COURT: MR. FREEMAN.

MR. FREEMAN: WELL, I -- LET'S SEE. YOUR HONOR, I DIDN'T UNDERSTAND THE PROCEDURE.

THE COURT: APPARENTLY SHE'S GOING TO TESTIFY LATER ON AS TO OTHER ISSUES OF MORE INTEREST TO THE DEFENSE, APPARENTLY. PROSPECTIVE DEFENSES. WHY DON'T YOU CONFER WITH MR. BRENT AND SEE WHAT YOU ARE TALKING ABOUT.

MR. POHLSON: I HAVE QUESTIONS NOW. I DON'T KNOW

A. PROBABLY A LITTLE LONGER.

Q. NOW, SPECIFICALLY WE WILL GO RIGHT TO EARLY -- THE EARLY MORNING HOURS OF SATURDAY APRIL THE 25TH.

DID YOU HAVE OCCASION AT THAT TIME TO GO TO CENTINELLA PARK IN THE CITY OF SANTA ANA?

A. YEAH.

Q. AND THAT'S LOCATED AT ABOUT EDINGER AND FAIRVIEW?

A. UH-HUH.

Q. DID YOU DRIVE THERE?

A. NAH, I DIDN'T DRIVE.

Q. WHO DROVE?

A. MY FRIEND DEE.

Q. DEE?

A. DEE.

Q. IS THAT A GIRL OR A GUY?

A. A GUY. DERREK.

Q. IS IT WHITE?

A. I DON'T KNOW HIS LAST NAME.

Q. ANYONE ELSE GO BESIDES DERREK AND YOURSELF?

A. UM, TWO GIRLS AND, UM, SCOTT.

Q. ALL RIGHT. SO THE FIVE OF YOU THEN AND DERREK'S DRIVING AND YOU GO TO THIS -- YOU GO TO THE PARK.

AND THE REASON FOR GOING TO THE PARK AT THE EARLY MORNING HOURS OF APRIL THE 25TH, WHAT WAS THE REASON?

A. BECAUSE, UM, BECAUSE HE WAS BEAT UP.
Q. WHO?
A. ALLEN. MY -- HIS--
Q. EXCUSE ME. YOU HAD INFORMATION TO THAT EFFECT?
A. YEAH.
Q. ALL RIGHT. AND THAT'S THE -- THAT WAS THE MOTIVATING FORCE THAT CAUSED THIS GROUP OF PEOPLE THAT YOU JUST DESCRIBED FOR US TO GO TO THE PARK?
A. YES.
Q. AND WHEN YOU GOT THERE WHAT -- DESCRIBE FOR THE COURT AND THE JURY WHAT DID YOU SEE AT THE PARK?
A. HE WAS LAYING ON THE GROUND BEAT UP.
Q. DO YOU RECALL IN CENTINELLA PARK WHERE HE WAS LAYING ON THE GROUND BEAT UP?
THAT IS, WAS IT IN THE PARKING AREA WHERE THE CARS PARK?
A. UM, IT WAS -- I GUESS SO. MOST LIKELY. BECAUSE IT WAS -- IT WAS ON SOME CEMENT.
Q. WAS IT? ALL RIGHT.
AND THEN DID ALL OF YOU GET OUT OF THE CAR TOO AND GO OVER TO WHERE HE WAS?
A. AH, YES.
Q. NOW, DO YOU KNOW WHETHER OR NOT HE WAS CONSCIOUS OR SEMI-CONSCIOUS?
A. I'M NOT -- I DON'T REMEMBER.

Q. DO YOU REMEMBER PICKING HIM UP OR HELPING HIM OFF THE GROUND?

A. YES.

Q. DID YOU NOTICE ANY BRUISES AND ABRASIONS ABOUT HIS BODY?

A. NO, NOT REALLY.

Q. ANY BLOOD?

A. JUST, YOU KNOW, JUST A LITTLE BIT.

Q. AND SMELL ALCOHOL ON HIM?

A. YES.

Q. AND AS YOU GET -- AS YOU'RE REACHING HIM AND PICKING HIM UP OFF THE GROUND, WHAT OCCURS AFTER THAT?

A. WE PUT HIM IN THE CAR.

Q. WELL. ALL RIGHT. THEN WHAT HAPPENS?

A. AND WE DROVE OFF AND THE POLICE ROLLED UP.

Q. YOU ARE ALL ROLLING OUT OF THE PARK AND THEN THE SANTA ANA POLICE ROLL UP?

A. YEAH.

Q. AND THEN THE OFFICERS FROM THE SANTA ANA POLICE DEPARTMENT INVESTIGATE WHAT'S THIS OR AT LEAST THEY STOP THE CAR FOR INVESTIGATION?

A. UM-HUM.

Q. IS THAT FAIR; IS THAT RIGHT?

A. YES.

Q. AND MR. BROUSSARD, THEN AT THAT TIME DOES MR. BURNETT THEN GO TO THE SANTA ANA POLICE DEPARTMENT WITH THE

STREET, AND SOMEHOW THE VICTIM ENDED UP AT THE SANTA ANA POLICE DEPARTMENT.

Q AND YOU THEN WENT TO SANTA ANA POLICE DEPARTMENT PURSUANT TO RECEIVING THAT INFORMATION?

A YES, I DID.

Q WHEN YOU GOT THERE, WERE YOU THEN INTRODUCED TO OR SHOWN THE SO-CALLED VICTIM IN THE CASE?

A YES, I WAS.

Q AND WHAT WAS HIS NAME?

A ACCORDING TO THE REPORT, HIS NAME WAS ALLEN DEAN BURNETT.

Q DO YOU RECOGNIZE HIM TODAY?

A NO, I DO NOT.

Q AND WHY DON'T YOU YOU DESCRIBE FOR THE JURY WHAT OCCURRED AT THE SANTA ANA POLICE DEPARTMENT WHEN YOU WERE BROUGHT INTO THE LOCATION WHERE MR. BURNETT WAS?

A ACCORDING TO THE DETAILS OF MY REPORT AND ALSO MY OWN PERSONAL RECOLLECTION, WHEN I ARRIVED AT THE POLICE DEPARTMENT IN SANTA ANA, THEY BASICALLY GAVE ME A BRIEF RUNDOWN OF WHAT HAD OCCURRED AND WHAT THEY HAD.

AT THIS POINT I TALKED TO THE VICTIM, MR. BURNETT, AND HE BASICALLY TOLD ME THAT --

MR. HORAN: OBJECTION; ANYTHING HE SAYS IS

HEARSAY.

THE COURT: SUSTAINED.

NEXT QUESTION.

BY MR. FREEMAN:

Q FOLLOWING YOUR CONVERSATIONS AND PURSUING THE INVESTIGATION THAT YOU WENT ON, PURSUANT TO WHAT SANTA ANA TOLD YOU THEN, YOU CONCLUDED THAT NO FOLLOW-UP WORK WAS NEEDED?

A IN WHAT SENSE?

Q THEY GAVE YOU A STORY THAT AN ASSAULT AND BATTERY MAY HAVE OCCURRED IN YOUR JURISDICTION?

A THAT IS CORRECT.

Q AND YOU WENT DOWN THERE TO CHECK IT OUT?

A THAT'S CORRECT.

Q AND YOU CHECKED IT OUT AND FOUND THERE WASN'T SUFFICIENT INFORMATION FOR YOU TO PURSUE IT ANY FURTHER; IS THAT THE WAY IT WENT?

A THAT'S CORRECT.

Q YOU MADE AN OBSERVATION, PHYSICAL OBSERVATION THAT YOU SAW THERE AT THE SANTA ANA POLICE DEPARTMENT?

A NOT ONLY A PHYSICAL OBSERVATION, OR A VISUAL OBSERVATION, I ALSO ASKED HIM IF HE FELT ANY PAIN, ANYTHING LIKE THAT.

Q DID HE HAVE AN ODOR OF ALCOHOL IN AND ABOUT HIS PERSON?

A YES, HE DID.
Q DID HE APPEAR TO BE UNDER THE INFLUENCE TO YOU?
A YES, HE DID.
Q DID YOU NOTICE AT ALL ANY BRUISES AROUND ANY PART OF HIS BODY?
A AS FAR AS I CAN RECALL, NO.
Q AND SO THEN YOU REMOVED YOURSELF FROM THE SCENE AT ABOUT WHAT TIME?
A I WOULD HAVE TO ESTIMATE SOMETIME BETWEEN THREE O'CLOCK AND SIX O'CLOCK THAT MORNING.
Q SIX O'CLOCK IS WHEN YOU WROTE THE REPORT?
A THAT'S WHEN I SUBMITTED THE REPORT FOR APPROVAL.
Q IS THAT THE TOTAL OF YOUR RECOLLECTION OF THIS INCIDENT THAT TOOK PLACE ON THE EARLY MORNING HOURS OF APRIL 26, 1992?
A IT IS.
MR. FREEMAN: ALL RIGHT. THANK YOU.
THE COURT: CROSS EXAMINE?

CROSS EXAMINATION *

BY MR. BRENT:
Q INVESTIGATOR, NOT USED TO THE D.A. CROSS EXAMINING, ARE YOU?
A NO, SIR.
THE COURT: TEAR HIM UP.

QUESTION IS WERE THEY ARMED WHILE MR. BURNEY USED A GUN? IN OTHER WORDS, THAT'S WHAT'S CALLED VICARIOUSLY ARMED; WHETHER, IN FACT, THEY, BASED ON THE DIFFERENT LEGAL THEORIES OF GUILTY OF MURDER, WERE THEY VICARIOUSLY ARMED; IN OTHER WORDS SHARING MR. BURNEY'S USE OF THE GUN.

NOW, SEEMS SIMPLE AND HOPEFULLY, IT WILL BE SIMPLE, BUT IT'S GONNA TAKE SOME TIME TO MAKE IT MAKE SOME SENSE.

I WANT TO TALK ABOUT FIRST DEGREE MURDER AND SECOND DEGREE MURDER AND THE VARIOUS THEORIES THAT APPLY TO THAT. IT'S LIKE THE OLD SAYING, THERE'S MORE THAN ONE WAY TO SKIN A CAT. TERRIBLE SOUNDING SAYING, BUT YOU KNOW WHAT IT MEANS; MORE THAN ONE WAY TO ARRIVE AT A DESTINATION. MORE THAN ONE WAY; THOSE ARE THE VARIOUS THEORIES OF MURDER.

SECOND DEGREE MURDER IS THE KILLING OF A HUMAN BEING, THE UNLAWFUL KILLING -- OPPOSED TO LAWFUL, WHICH WOULD BE SELF-DEFENSE. YOU YOU CAN ALL THINK OF SITUATIONS WHERE IT WOULD BE LAWFUL TO TAKE THE LIFE OF ANOTHER HUMAN BEING. JUST BECAUSE SOMEONE KILLS ANOTHER HUMAN DOESN'T AUTOMATICALLY MEAN THAT IT'S UNLAWFUL. AND SELF-DEFENSE IS AN EXAMPLE, DEFENSE OF FAMILY MEMBERS, YOU KNOW WHAT I MEAN BY THAT.

SO MURDER IS THE UNLAWFUL KILLING OF A HUMAN BEING WITH MALICE AFORETHOUGHT. THOSE ARE OLD

ANCIENT WORDS. BOY, YOU'RE GOING TO BE STRUGGLING WITH THOSE WORDS, AREN'T YOU. NO, YOU'RE NOT. OKAY? BECAUSE ALL MALICE AFORETHOUGHT MEANS THERE'S AN INTENT TO KILL. IT'S SIMPLIFIED FOR YOU, IT'S RIGHT IN THE INSTRUCTIONS.

EXPRESS MALICE MEANS INTENT TO KILL. THERE IS ALSO WHAT'S KNOWN AS IMPLIED MALICE. NO NEED TO WORRY ABOUT THAT. THAT'S WHERE SOMEONE DOES AN INTENTIONAL ACT, DON'T MEAN TO KILL, BUT IT'S DONE WITH RECKLESS INDIFFERENCE TO HUMAN LIFE. DON'T NEED TO WORRY ABOUT THAT HERE. I'M NOT MAINTAINING THAT THIS WAS ANYTHING BUT AN INTENTIONAL KILLING.

OBVIOUSLY, WHEN YOU HOLD A GUN WITHIN SIX INCHES OF SOMEONE'S HEAD, THAT'S AN INTENTIONAL KILLING. COMMON SENSE TELLS US THAT IF YOU HAVE ONLY THOSE FACTS ALONE, YOU KNOW IT'S AN INTENTIONAL KILLING.

SO IF THAT'S ALL YOU HAD, IT WOULD BE SECOND DEGREE MURDER. SO WHAT MAKES A MURDER A FIRST DEGREE MURDER? WELL, THERE'S TWO WAYS TO GET THERE. ONE IS THE UNLAWFUL KILLING OF A HUMAN BEING WITH MALICE AFORETHOUGHT; IN OTHER WORDS, AN INTENT TO KILL. AND YOU ADD ON TO THAT THE WORDS WE KNOW, THE WORDS WE KNOW FROM READING AND FROM MOVIES; PREMEDITATION AND DELIBERATION.

AND YOU'RE GONNA HAVE THE INSTRUCTION -- I

WON'T READ IT RIGHT NOW; BUT AGAIN, I BELIEVE, BASED ON THE EVIDENCE, IT'LL BE COMMON SENSE FOR YOU.

PREMEDITATION-DELIBERATION MEANS THAT IT'S CONSIDERED BEFOREHAND, THERE'S A WEIGHING OF THE REASONS TO KILL OR NOT KILL, AND IN WEIGHING THOSE, ONE DECIDES TO KILL ANYWAY.

IT'S OPPOSED TO SECOND DEGREE MURDER WHICH DOES NOT REQUIRE PREMEDITATION-DELIBERATION AND UNFORTUNATELY WE HAVE MORE THAN ONE CASE, THERE ARE A COUPLE OF PEOPLE WERE IN A BAR AND HAD A FEW DRINKS AND STARTED GETTING INTO A FIGHT, SOMEBODY PULLS OUT A GUN AND SHOOTS SOMEBODY, YOU KNOW, AND NOT EVEN THINK ABOUT IT. THEY DON'T EVEN THINK ABOUT IT, IT JUST KIND OF HAPPENS. THEY HAVE AN INTENT TO KILL, ALL RIGHT -- WELL, THIS IS DIFFERENT. TO BUMP IT UP TO FIRST DEGREE MURDER, THERE'S SOME CONSIDERATION, THERE'S SOME WEIGHING. AND I'M NOT TRYING TO PICK OUT CERTAIN PARTS OF THE INSTRUCTION AND LEAVE OTHERS. PLEASE LOOK AT THE WHOLE INSTRUCTION WHEN YOU GET IT.

BUT YOU'LL READ IT AND YOU'LL UNDERSTAND THE DIFFERENCE. THE LAW DOESN'T TRY TO MEASURE THE AMOUNT OF TIME, DOESN'T SAY YOU HAVE TO THINK OF IT A MINUTE OR AN HOUR, FOR A DAY, DOESN'T TELL YOU THAT. THEY LEAVE THAT TO YOUR COMMON SENSE AND YOUR COMMON EXPERIENCE. BUT HAS THAT PROCESS TAKEN PLACE? THAT'S ONE THEORY OF FIRST DEGREE MURDER, AND I'LL SUBMIT TO

THOMAS BROTHERS MAP TO SHOW YOU -- NOT TOO FAR FROM HERE, YOU KNOW WHERE DAISY STREET IS. DO I KNOW THAT BURNETT WENT DOWN THERE? NO.

BURNEY TELLS US THAT THIS BLASTING OF THE GUNS AT THESE WATERGATES, TOOK PLACE UP IN THE AREA OF CHIPPEWA, NOT TOO FAR OFF THIS PICTURE.

REMBERT TELLS US HE DOESN'T KNOW WHERE IT TOOK PLACE, BUT IT WAS IN A NEIGHBORHOOD UNFAMILIAR TO HIM.

DO THEY ALL THREE REALLY MEAN THE GOING DOWN TO WESTMINSTER TO SHOOT AT CYNTHIA MELSON? PROBABLY, FOLKS. PROBABLY. I WOULD LIKE TO TELL YOU THERE WERE TWO SEPARATE INCIDENCES HERE, BUT I'M NOT GOING TO, BECAUSE I DON'T HAVE -- OTHER THAN THEIR WORDS, AND I DON'T BELIEVE EVERYTHING, BASED ON THIS EVIDENCE, OBVIOUSLY, THEY SAID AND NEITHER DO YOU -- DID THEY HAVE THE TIME TO GO BOTH PLACES, IF IT WAS SANTA ANA? I DON'T KNOW. MAYBE.

DID THEY HAVE THE BULLETS TO SHOOT BOTH PLACES? WELL, SOMETHING TELLS US NO. SOMEONE TELLS US NO. AGAIN, IT'S A LITTLE PIECE.

JEFF HOWARD TALKS ABOUT LOADING THE SHOTGUN WITH THREE SHELLS. JEFF HOWARD WASN'T THE MOST FORTHCOMING WITNESS. A LITTLE OF WHAT HE SAID YOU CAN TAKE WITH A GRAIN OF SALT ON THE STAND. HE WAS HOSTILE, HE WAS HOSTILE WITH EVERYBODY.

WE'RE ALL HERE ABOUT, IS THE WHAT HAPPENS WHEN THEY GET OUT ON GLENOAKS.

NOW, THIS IS A -- THE THEORIES FOR PROSECUTION AS I TOLD YOU ARE PRINCIPALS. YOU WILL GET THIS AS INSTRUCTION 3.00:

"THE PERSONS CONCERNED IN THE COMMISSION OR ATTEMPTED COMMISSION OF A CRIME WHO ARE REGARDED BY LAW AS PRINCIPALS IN THE CRIME THUS COMMITTED OR ATTEMPTED AND EQUALLY GUILTY THEREOF INCLUDE:

"THOSE WHO DIRECTLY AND ACTIVELY COMMIT OR ATTEMPT TO COMMIT THE ACT CONSTITUTING THE CRIME.

"THOSE WHO WOULD AID AND ABET."

SO WE HAVE THIS AIDING AND ABETTING THEORY. THE ACTIVE PARTICIPANTS, AS HAS BEEN POINTED OUT, THE EVIDENCE IS THAT THE ACTUAL SLAYER, THE ONE WHO FIRED THE GUN IN THIS CASE, IS MR. BURNEY. AND THE QUESTION THAT YOU MUST WRESTLE WITH, WITH ALL OF THESE ACTIVITIES THAT TAKE PLACE ONCE THEY GET OUT TO GLENOAKS, ARE THE OTHER PARTIES AIDERS AND ABETTORS?

NOW, I WILL ASK YOU TO AS YOU'RE, AS YOU'RE DECIDING THE FATE OF MR. REMBERT, I WOULD ASK YOU TO LOOK AT INSTRUCTION 3.01 AND REFLECT IN YOUR OWN MIND AND HEART AND SOUL AS TO WHETHER OR NOT HE'S AN AIDER AND ABETTOR.

C 94692. WE THE JURY IN THE ABOVE ENTITLED ACTION FIND THE DEFENDANT SHAUN KAREEM BURNEY GUILTY OF THE CRIME OF FELONY, TO WIT, VIOLATION OF SECTION 211 OF THE PENAL CODE OF THE STATE OF CALIFORNIA, SECOND DEGREE ROBBERY, AS CHARGED IN COUNT I OF THE INDICTMENT. DATED MAY 11TH 1994, DARLENE V. PARKER, FOREPERSON.

WE THE JURY IN THE ABOVE ENTITLED ACTION FIND THE DEFENDANT SHAUN KAREEM BURNEY GUILTY OF THE CRIME OF FELONY, TO WIT, VIOLATION OF SECTION 207(A) OF THE PENAL CODE OF THE STATE OF CALIFORNIA, KIDNAPPING, AS CHARGED IN COUNT TWO OF THE INDICTMENT. DATED MAY 11, 1994, DARLENE V. PARKER FOREPERSON.

WE THE JURY IN THE ABOVE ENTITLED ACTION FIND THE DEFENDANT SHAUN KAREEM BURNEY GUILTY OF THE CRIME OF FELONY, TO WIT, VIOLATION OF SECTION 209(B) OF THE PENAL CODE OF THE STATE OF CALIFORNIA, KIDNAPPING FOR ROBBERY, AS CHARGED IN COUNT THREE OF THE INDICTMENT. DATED MAY 11TH, 1994, DARLENE V. PARKER, FOREPERSON.

WE THE JURY IN THE ABOVE ENTITLED ACTION FIND THE DEFENDANT SHAUN KAREEM BURNEY GUILTY OF THE CRIME OF FELONY, TO WIT, VIOLATION OF SECTION 187(A) OF THE PENAL CODE OF THE STATE OF CALIFORNIA, MURDER IN THE FIRST DEGREE, AS CHARGED IN COUNT FOUR OF THE INDICTMENT. DATED MAY 11TH, 1994, DARLENE V. PARKER FOREPERSON.

WE THE JURY IN THE ABOVE ENTITLED ACTION FIND IT TO BE TRUE THAT THE DEFENDANT SHAUN KAREEM BURNEY

USED A FIREARM, TO WIT, A HANDGUN, AT THE TIME OF THE COMMISSION OF THE OFFENSE ALLEGED IN COUNT FOUR OF THE INDICTMENT. DATED MAY 11TH, 1994, DARLENE V. PARKER, FOREPERSON.

WE THE JURY IN THE ABOVE ENTITLED ACTION FIND IT TO BE TRUE THAT THE SPECIAL CIRCUMSTANCES EXIST, TO WIT, MURDER WHILE ENGAGED IN THE COMMISSION OR ATTEMPTED COMMISSION OF A ROBBERY, AS ALLEGED IN THE INDICTMENT. DEFENDANT SHAUN KAREEM BURNEY. DATED MAY 11TH, 1994, DARLENE V. PARKER, FOREPERSON.

WE THE JURY IN THE ABOVE ENTITLED ACTION FIND IT TO BE TRUE THAT THE SPECIAL CIRCUMSTANCES EXIST, TO WIT, MURDER WHILE ENGAGED IN THE COMMISSION OR ATTEMPTED COMMISSION OF A KIDNAPPING OR KIDNAPPING FOR ROBBERY, AS ALLEGED IN THE INDICTMENT. DEFENDANT SHAUN KAREEM BURNEY. DATED MAY 11TH, 1994. DARLENE V. PARKER FOREPERSON.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE, THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS ALLEN DEAN BURNETT, THE SECOND, DEFENDANT. CASE NUMBER C 94692, VERDICT. WE THE JURY IN THE ABOVE ENTITLED ACTION FIND THE DEFENDANT ALLEN DEAN BURNETT, THE SECOND, GUILTY OF THE CRIME OF FELONY, TO WIT, VIOLATION OF SECTION 211 OF THE PENAL CODE OF THE STATE OF CALIFORNIA, SECOND DEGREE ROBBERY, AS CHARGED IN COUNT I OF THE INDICTMENT. DATED MAY 11TH, 1994, DARLENE V. PARKER, FOREPERSON.

Q TALKED ABOUT HIS IMMATURITY?

A YES.

MR. VIEFHAUS: NOTHING FURTHER.

MR. BRENT: NO QUESTIONS. THANK YOU.

THE COURT: YOU MAY STEP DOWN. YOU'RE EXCUSED.

MR. BRENT: MAY SHE BE ON CALL, YOUR HONOR?

THE COURT: YES, SUBJECT TO RECALL.

MR. BRENT: THANK YOU.

THE COURT: NEXT WITNESS.

LEE ERNEST THOMAS,

CALLED AS A WITNESS, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WILL YOU PLEASE STATE YOUR FULL NAME FOR THE RECORD.

THE WITNESS: LEE ERNEST THOMAS SENIOR.

THE CLERK: SPELL YOUR LAST NAME, PLEASE.

THE WITNESS: THOMAS.

THE CLERK: THANK YOU. YOU MAY HAVE A SEAT AT WITNESS STAND.

DIRECT EXAMINATION

BY MR. BRENT:

Q MR. THOMAS, I WANT TO REFER YOU BACK TO MAY 9TH OF 1992, AND WERE YOU MARRIED TO ERNESTINE THOMAS ON THAT DATE?

A YES, I WAS.

Q AND WERE YOU LIVING AT 15651 WILLIAMS, NUMBER 40,

IN TUSTIN?

A YES, I WAS.

Q AND AT THAT TIME WAS THE DEFENDANT IN THIS CASE, SHAUN BURNEY, LIVING AT THE RESIDENCE WITH YOU?

A YES, HE WAS.

Q I'D LIKE IT IF YOU COULD TELL THE COURT AND THE JURY ABOUT AN INCIDENT THAT TOOK PLACE BETWEEN YOU AND MR. BURNEY ON THAT DATE.

WAS THAT IN THE EVENING ON THAT DATE, FIRST OF ALL?

A YES, IT WAS.

Q OKAY. AND IF YOU COULD TELL US WHAT HAPPENED?

A FIRST OF ALL, ME AND SHAUN AND ONE OF HIS LADY FRIENDS SITTING IN THE HOUSE TALKING AND I MADE A COMMENT ABOUT LADY WITH A BIG BUTT ON TV.

Q OKAY.

A AND THEN FOLLOWING THAT I SAID, "YOU KNOW, TODAY COMING FROM WORK I SEEN A LADY HAD A BUTT SO BIG I JUST STOPPED." THE STOP SIGN WAS THERE AND THAT WAS ALL THAT WAS SAYING, KIND OF LAUGHED IT OFF.

ERNESTINE WAS GOING TO THE STORE. I LEFT THE HOUSE, WENT DOWN TALKING TO THE NEIGHBORS, AND I HEARD TWO YELLS OF ERNESTINE CALLING MY NAME. SO I TOLD MY NEIGHBOR, I SAID, "I THINK I BETTER GO SEE WHAT'S WRONG." AS I GOT TO THE DOOR AND OPENED THE DOOR, I HEARD THE STATEMENT, "FUCK THAT NIGGER." AND IT CAME FROM SHAUN.

Q OKAY.

A SO I QUESTIONED, "HEY, MAN, WHAT'S WRONG?" AND HE WAS GOING UP THE STAIRWAY, SO I SAID, "WHY FUCK ME? WHAT'D I DO?" AND THIS TIME HE TURNED AROUND AND HIT ME IN THE FACE.

SO INSTEAD OF BOTHERING HIM, I TURNED AROUND AND WALKED DOWNSTAIRS. AND I TOLD ERNESTINE AS I MET HER, I SAID, "I THINK YOU BETTER HAVE A TALK WITH SHAUN BECAUSE HE JUST HIT ME." WELL, THIS TIME HER BACK WAS TO ME AND SHAUN CAME OUTSIDE WITH A KNIFE. SHE LOOKED AT HIM AND SHE SEEN IT COMING. SHE YELLED AT HIM, "SHAUN, DON'T DO THIS," AND SHE WAS STANDING BETWEEN ME AND HIM. HE CAME AT ME WITH THE KNIFE IN THIS FASHION (INDICATING.)

Q YOU'RE HOLDING OUT YOUR ARM TO THE RIGHT?

A TO THE RIGHT SIDE.

Q THANK YOU.

A AS IF HE'S GOING TO SWING TO THE LEFT.

AT THIS TIME I SEEN THAT ERNESTINE WAS BETWEEN THE TWO OF US. I TOOK HER IN THE BACK AND PUSHED HER TO MY RIGHT. AT THE SAME TIME I PUSHED HER TO THE RIGHT I ROLLED TO THE RIGHT. AND HIS HAND WITH THE KNIFE HIT ME IN THE BACK, NOT CUT ME.

Q YOU WERE TRYING TO PUSH YOUR WIFE OUT OF THE WAY?

A YES, I WAS.

Q GO AHEAD.

A AT THIS POINT SHAUN CAME AT ME. I PICKED UP A

LARGE ROCK AND I SAID, "MAN, IF YOU MISS ME, I'LL KILL YOU."

ERNESTINE TRIED TO COOL HIM DOWN. I SAID, "MAN, THE BEST THING FOR ME TO DO IS GET OUT OF HERE." I WENT TO GET MY VOLKSWAGEN AND PULLED IT ACROSS. AT THIS TIME I WENT UPSTAIRS TO GET MY CLOTHES.

AT THIS TIME HE SLASHED MY TIRES, KICKED IN THE SIDE OF MY VOLKSWAGEN AN INCH, CREASED THE TOP OF IT. I CAME DOWNSTAIRS WITH THE HANDLE BECAUSE I WAS GOING TO HURT HIM. THAT MAD.

SO HE CAME BACK AGAIN AND I WENT UPSTAIRS AND CALLED THE COPS. ERNESTINE TOOK HER SON AND HIS FRIEND AND TOOK OFF WITH THEM.

Q OKAY. NOW, YOU HAD --

MR. BRENT: THAT'S ALL THE QUESTIONS I HAVE. THANK YOU.

THE COURT: MR. VIEFHAUS, YOU MAY INQUIRE.

MR. VIEFHAUS: THANK YOU.

CROSS-EXAMINATION

BY MR. VIEFHAUS:

Q MR. THOMAS, HOW ARE YOU TODAY?

A JUST FINE.

Q WHAT'S YOUR OCCUPATION?

A I'M A MAINTENANCE MAN.

Q AND ARE YOU RETIRED?

A MILITARY, YES.

Q AND WHAT WAS YOUR OCCUPATION IN THE MILITARY?

ON THE LANDSCAPING TRUCK ONE SUMMER AND HE WORKED. TWELVE YEARS OLD, HE PROBABLY SHOULDN'T HAVE BEEN, BUT HE WANTED TO WORK. HE WORKED ALL SUMMER LONG.

AND WHAT I DIDN'T KNOW IS AT THE END OF THE SUMMER, HE ASKED ME FOR SOME MONEY FOR CLOTHES. AND I SAID, "WELL, WHAT DID YOU DO WITH ALL YOUR MONEY THAT YOU EARNED?" AND HE SAID, "WELL, DAD, WE ALL HAD A GOOD TIME, MY FRIENDS AND I." HE WAS JUST GENEROUS. HE JUST HELPED EVERYBODY THAT SUMMER TO HAVE A REAL GOOD SUMMER.

SO THAT WAS MY SON. HE WAS A VERY GENEROUS, VERY GENEROUS YOUNG MAN; SOMEBODY YOU COULD TALK TO, SOMEBODY YOU'D REALLY BE PROUD TO BE WITH.

Q OKAY. I'M GOING TO ASK YOU TWO QUESTIONS NOW. THEY SOUND SIMILAR; THEY'RE A LITTLE DIFFERENT. SO IF YOU'D LISTEN CLOSELY.

IS THERE ANYTHING SPECIFICALLY ABOUT THE WAY HE WAS KILLED THAT HAS AFFECTED YOU?

A YES. I'M SURE SOME OF THE LADIES AND GENTLEMEN, YOU PROBABLY HAVE CHILDREN OF YOUR OWN, AND, YOU KNOW, YOU ALWAYS REMEMBER WHEN YOU BRING THAT NEW BABY HOME AND YOU WANT TO PROTECT THEM AND YOU'RE THERE AS A PARENT TO MAKE SURE THAT NO HARM COMES TO YOUR CHILD.

HERE I FIND OUT THAT MY SON HAS BEEN KIDNAPPED, THROWN INTO THE TRUNK OF HIS CAR. HE LOVED HIS CAR. DRIVEN AROUND, THE TRUNK OPENED AND HE'S BEGGING FOR HIS LIFE. AND THIS GUY JUST PUTS A GUN TO HIS HEAD AND KILLS HIM FOR NO

REASON AT ALL. I MEAN, WHERE WERE THESE LAWYERS? WHERE WAS YOUR HONOR HERE TO UPHOLD AN OBJECTION? WHO WAS THERE TO PROTECT HIM?

I WASN'T THERE. I HAVE TO LIVE WITH THIS EVERY DAY. I SHOULD HAVE BEEN THERE. I DIDN'T RAISE MY SON TO BE A VICIOUS ANIMAL, TO BE A KILLER. MAYBE I'M GUILTY. HE WAS A HARMLESS, PEACE-LOVING KID. HE DIDN'T KNOW WHAT TO DO.

HE DID THE RIGHT THING. HE WAS TOLD, IF THIS HAPPENS TO YOU, YOU AGREE. YOU GO ALONG WITH IT BECAUSE PEOPLE ARE HUMAN BEINGS. PEOPLE HAVE SENSE. THEY HAVE LOGIC. HE DID THE RIGHT THING AND FOR THAT, THEY BLEW HIS HEAD OFF.

I THINK ABOUT THAT EVERY MORNING. I WANT TO BE THERE. I HAVE A GRANDFATHER'S CLOCK IN MY HOME THAT JOEY AND I HAVE ADMIRED, BOTH OF US. AND ON THE MORNING OF JUNE 10TH, THAT CLOCK STOPPED AT EXACTLY 5:01 A.M. FOR NO REASON. WE'VE HUNG AN ANGEL ON THAT CLOCK BECAUSE I KNOW THAT'S WHEN HE WAS SHOT AND I KNOW HE WAS PROBABLY CALLING FOR MY NAME TO HELP HIM, TO BE THERE BECAUSE I WAS ALWAYS THERE AND I COULD DO NOTHING.

Q ALL RIGHT. THANK YOU VERY MUCH.

MR. BRENT: NO OTHER QUESTIONS.

THE COURT: DO YOU HAVE ANY QUESTIONS?

MR. VIEFHAUS: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU'RE EXCUSED WITH THE COURT'S THANKS.

THE WITNESS: THANK YOU.

Chrystal A. Farrell, CSR #4627

MR. BRENT: CALL RONNA KONDRATH.

RONNA KONDRATH,

CALLED AS A WITNESS, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WILL YOU PLEASE STATE YOUR FULL NAME FOR THE RECORD?

THE WITNESS: RONNA JEAN KONDRATH.

THE CLERK: WILL YOU SPELL YOU FIRST AND LAST NAME, PLEASE?

THE WITNESS: R-O-N-N-A, K-O-N-D-R-A-T-H

THE CLERK: THANK YOU. YOU MAY HAVE A SEAT AT THE WITNESS STAND.

DIRECT EXAMINATION

BY MR. BRENT:

Q MISS KONDRATH, CAN YOU TELL US WHAT YOUR RELATIONSHIP IS TO JOEY KONDRATH?

A I'M HIS OLDER SISTER. HE'S GOT ANOTHER OLDER SISTER BESIDES ME AND AN OLDER BROTHER, AND TWO -- A YOUNGER BROTHER AND A YOUNGER SISTER.

Q ALL RIGHT. SO YOU'RE THE THIRD IN THE FAMILY; HE'S THE FOURTH CHILD?

A RIGHT.

Q I WANT TO ASK YOU SOME SPECIFIC QUESTIONS. FIRST, I WANT TO ASK YOU WHERE WERE YOU WHEN YOU FOUND OUT ABOUT HIS DEATH?

A WELL, I WAS AT WORK. I WAS WORKING IN A

RESTAURANT AND MY OLDER SISTER CALLED AND SHE SAID, "JOEY'S BEEN MISSING. HAVE YOU HEARD FROM HIM TODAY?"

I SAID, "NO, I HAVEN'T HEARD FROM HIM AT ALL." I SAID, "I'M SURE HE'S FINE." AND I THOUGHT BECAUSE HIS CAR WAS MISSING TOO, AND I THOUGHT, I HAD COSIGNED WITH HIM FOR THE CAR SO I THOUGHT, WELL, IF ANYONE -- IF SOMETHING WOULD HAVE HAPPENED, THEY PROBABLY WOULD HAVE CALLED ME BECAUSE THE CAR WAS ON MY NAME TOO AND MY PHONE NUMBER WAS LISTED.

SO, I SAID, "I'M SURE HE'S PROBABLY FINE," AND I HUNG UP. AND I JUST GOT A WEIRD FEELING AND SO I DROVE TO MY FATHER'S HOUSE. AND I JUST -- ON THE WAY YOU JUST START THINKING THE WORST. AND I GOT THERE AND MY LITTLE BROTHER WAS THERE AND HE WAS CRYING.

SO MY PARENTS CAME HOME, MY DAD AND HIS WIFE. THEY HAD ALREADY CALLED THE ANAHEIM POLICE DEPARTMENT AND REPORTED HIM MISSING. AND THE POLICE HAD CALLED AND SAID, "DOES ANYONE HAVE A KEY TO HIS CAR?" AND I THINK CLAUDIA WAS THE ONLY ONE THAT HAD A SPARE KEY. AND THEN THEY CALLED BACK A FEW MINUTES LATER AND THEY SAID, "IF YOU COME DOWN, WE CAN OFFER YOU" -- THEY SAID THEY'D OFFER US A FULL EXPLANATION OF WHAT HAPPENED.

SO WE GOT IN THE CAR AND WE WERE ALL REALLY OPTIMISTIC, AND WE THOUGHT, OH, GREAT, THEY FOUND HIM. THEY KNOW WHERE HE IS. EVERYTHING WILL BE FINE.

WE WALKED INTO THE ANAHEIM POLICE STATION AND I JUST REMEMBER IT WAS A REALLY WEIRD LOOK WHEN WE SAID WE

WERE HERE TO SEE SO-AND-SO. AND THEN WE WALKED UP THESE STAIRS AND ALL I REMEMBER SEEING IS MY YOUNGER SISTER, CAROLYN, JUST REALLY HYSTERICAL IN TEARS, AND THEN I KNEW. AND THAT'S WHERE I FOUND OUT, A DETECTIVE TOLD US THAT THERE WAS A BODY IN THE CAR.

Q OKAY. HOW WAS THE DEATH, HOW WAS KNOWING THAT HE DIED, HOW HAS THAT AFFECTED YOU?

A WELL, I FEEL VERY EMPTY. I FEEL THERE'S A HOLE INSIDE OF ME. I FELT MAYBE BECAUSE I WAS THE THIRD AND HE WAS THE FOURTH THAT -- WELL, I FELT MORE CONNECTED TO HIM. I FEEL THAT MY TWO BROTHERS CONNECT REAL WELL AND MY TWO SISTERS CONNECT REAL WELL, AND I JUST FELT LIKE HE WAS THE ONE THAT I CONNECTED WITH, THAT I COULD TALK TO, THAT UNDERSTOOD ME.

AND A LOT OF TIMES -- I HAVE A LOT OF DREAMS, AND IT'S A RECURRING DREAM THAT I HAVE, THAT IN MY DREAM I FIND OUT THAT HE HAS A.I.D.S. AND I'M SO HAPPY BECAUSE HE JUST HAS A.I.D.S. AND I'M JUST SO HAPPY THAT THAT'S ALL IT IS. HE'S NOT DEAD. AND I WAKE UP AND I HAVE THAT FEELING THAT OH, HE DIDN'T DIE, HE'S NOT DEAD. AND REALITY SETS IN AND I REALIZE THAT HE IS DEAD.

I CRY ALMOST EVERY DAY. JUST DRIVING HOME I THINK ABOUT THE THINGS HE'LL NEVER GET TO DO AND THE THINGS I'LL NEVER GET TO TELL HIM, THE PEOPLE HE'LL NEVER GET TO MEET. HE HAS A NEPHEW THAT WAS BORN A YEAR AGO AND HE'LL NEVER GET TO MEET HIM, AND HE'LL NEVER GET TO HAVE CHILDREN.

AND I THINK HOLIDAYS ARE REALLY HARD. THEY'RE JUST NOT THE SAME. AND 4TH OF JULY IS -- I THINK WAS ONE OF HIS FAVORITE HOLIDAYS AND IT'S REALLY HARD AROUND THAT TIME.

I WANT TO JUST FEEL -- I GUESS WHAT HAPPENED TO HIM, IT SCARES ME AND I THINK THAT I'M A BITTER PERSON, MORE SO, OR HARDENED. I'M MORE AFRAID. I WORRY. EVEN IF MY SISTER IS GETTING HOME LATE, OR SHE GOES TO WORK AND SHE'S LATE -- WE PANICKED SATURDAY BECAUSE HER WORK CALLED AND SHE WAS LATE, AND WE JUST WORRY. I THINK IT MAKES YOU WORRY MORE. AND JUST MISSING THAT PERSON AND JUST WANTING TO SHARE THINGS WITH HIM AND KNOWING THAT YOU CAN'T.

MR. BRENT: THANK YOU. I HAVE NO OTHER QUESTIONS.

THE COURT: DO YOU HAVE ANY QUESTIONS?

MR. VIEFHAUS: NO QUESTIONS, YOUR HONOR.

THE COURT: THANK YOU.

MR. BRENT: CALL CLAUDIA DIVITO, YOUR HONOR.

CLAUDIA DIVITO,

CALLED AS A WITNESS, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WILL YOU PLEASE STATE YOUR FULL NAME FOR THE RECORD.

THE WITNESS: CLAUDIA DIVITO.

THE CLERK: WILL YOU SPELL YOUR LAST NAME, PLEASE.

THE WITNESS: D-I-V-I-T-O.

THE CLERK: THANK YOU. YOU CAN HAVE A SEAT AT THE WITNESS STAND.

DIRECT EXAMINATION

BY MR. BRENT:

Q MISS DIVITO, I WANT TO ASK YOU ON JUNE 10TH, 1992, WHAT WAS YOUR RELATIONSHIP TO JOEY KONDRATH?

A JOEY WAS MY FIANCE.

Q HOW LONG HAD YOU KNOWN HIM UP UNTIL THAT DATE?

A ABOUT A YEAR-AND-A-HALF.

Q AND HOW LONG HAD YOU BEEN ENGAGED?

A SIX MONTHS.

Q I WANT TO SHOW YOU WHAT I REQUEST BE MARKED NEXT IN ORDER, YOUR HONOR. I DON'T KNOW WHAT NUMBER WE'RE AT.

THE COURT: NUMBER 52.

BY MR. BRENT:

Q SHOW YOU WHAT'S BEEN MARKED AS EXHIBIT NUMBER 52 AND ASK YOU IF YOU RECOGNIZE THAT PHOTOGRAPH?

A YES, I DO.

Q WHO ARE THE PEOPLE IN THAT PHOTOGRAPH?

A THAT'S JOE AND MYSELF.

Q WHEN WAS THIS PHOTOGRAPH TAKEN?

A MAY, AROUND MAY 17TH.

Q OF WHAT YEAR?

A 1992.

Q AND WHAT WAS THE REASON FOR TAKING THE PHOTOGRAPH?

A WE WANTED TO HAVE SOMETHING SPECIAL TO GIVE TO HIS MOM AND HIS DAD AND HIS AUNT AND MY PARENTS FOR

CHRISTMAS.

Q NOW, I WANT TO ASK YOU, MISS DIVITO, FIRST OF ALL, WHERE WERE YOU WHEN YOU FOUND OUT ABOUT JOEY'S DEATH?

A AT THE ANAHEIM POLICE STATION WHERE THEY TOLD US.

Q OKAY. ALL RIGHT. HOW DID THE NEWS CAUSE YOU TO FEEL AT THAT TIME?

A I REMEMBER GETTING UP OUT OF THE CHAIR AND BANGING MY HANDS AGAINST THE WALL BECAUSE I COULDN'T BELIEVE THAT HE WAS GONE. AND I REMEMBER SOMEONE TOOK ME BACK, I THINK IT WAS MY MOM, JUST SAT ME BACK DOWN AND TOLD ME TO CALM DOWN AND TO PULL MYSELF TOGETHER. I FELT VERY BAD. I FELT LIKE I HAD LOST A VERY BIG PART OF MY LIFE. I LOST MY BEST FRIEND AND MY SOULMATE. JOEY AND I WERE BEST FRIENDS. WE WERE ALWAYS TOGETHER AND I LOVED HIM VERY DEARLY. I STILL DO, AND I MISS HIM VERY MUCH.

Q CAN YOU TELL US A LITTLE BIT ABOUT YOUR RELATIONSHIP WITH HIM?

A THE FIRST DAY JOEY AND I MET, WE SAT AND TALKED AND TALKED FOR HOURS IT SEEMED. WE KNEW THAT WE WERE DESTINED TO SPEND THE REST OF OUR LIVES TOGETHER. SOMETHING TOLD US. WE DIDN'T KNOW WHAT IT WAS, BUT THAT WOULD BE OUR NEXT STEP.

JOEY AND I WERE VERY POSITIVE TOWARDS ONE ANOTHER. WHEN I FELT DOWN, HE WAS ALWAYS THERE FOR ME, AS WELL AS FOR ALL HIS OTHER FRIENDS. JOEY HAD MANY FRIENDS WHICH BECAME MY FRIENDS IN TURN AND THEY TAKE VERY GOOD CARE

OF ME. HE WAS ALWAYS THERE FOR ME WHEN I WAS GOING THROUGH SOME HARD TIMES, AND I TRIED TO BE THERE FOR HIM WHEN HE WAS GOING THROUGH SOME HARD TIMES.

WE COMPLIMENTED EACH OTHER SO WELL. PEOPLE WOULD GET WORRIED WHEN THEY'D SEE US APART. THEY THOUGHT WE'D BROKEN UP, BUT JOE AND I KNEW THAT WOULD NEVER HAPPEN. WE WERE A TEAM. WE LOVED EACH OTHER VERY MUCH AND WE LOOKED FORWARD TO LIFE TOGETHER. WE WERE LOOKING FOR A HOUSE AT THE TIME OF HIS DEATH. WE KNEW WE COULDN'T AFFORD IT, BUT HECK, WE WERE GONNA TRY.

WE HAD A NAME PICKED OUT. WE WERE HOPING TO HAVE A SON AND I TOLD HIM THAT I WANTED TWINS TO GET IT ALL OUT OF THE WAY, AND HE THOUGHT THAT WAS FUNNY. AND WE HAD PICKED OUT ZACHARY RUSSELL FOR A SON, IF WE WERE TO HAVE A SON. I WANTED STEPHANIE IF IT WAS A GIRL, AND WE REALLY WANTED A LIFE TOGETHER, AND I NEVER THOUGHT THAT IT WOULD COME TO THIS.

THE TYPE OF PERSON JOEY WAS, HE COULD PUT A SMILE ON YOUR FACE JUST BY SMILING AT YOU. HE COULD TELL YOU A FUNNY JOKE. HE WAS VERY GOOD AT THAT. HE WOULD HAVE TAKEN COMEDY 101 IN COLLEGE IF THEY OFFERED IT. AND HE WANTED TO BE A PROFESSIONAL BOWLER AND YOU COULDN'T TALK HIM OUT OF IT.

HE WAS A VERY SPECIAL PERSON IN MY LIFE. HE CHANGED MY LIFE. WHEN MY MOTHER WAS IN A BAD MOOD, I'D CALL HIM AND TELL HIM, "YOU HAVE TO GET DOWN HERE RIGHT AWAY. MY

MOM IS IN A BAD MOOD." AND HE'D COME OVER, WALK IN THE DOOR AND PUT A BIG SMILE ON HER FACE. AND THIS HAS AFFECTED HER AS MUCH AS IT HAS AFFECTED ALL OF US. SHE SAW HIM AS HER OWN SON AND CARED FOR HIM VERY MUCH.

I WANT, IF I MAY, TO SHOW YOU THIS CARD THAT JOEY MADE FOR ME.

Q OKAY.

A IT HAS MY NAME IN GOLD GLITTER ON THE FRONT, AND HEARTS, AND IT'S SOMETHING YOU WOULD PROBABLY GET FROM A CHILD IN KINDERGARTEN, AND MAYBE THAT'S WHY IT'S SO IMPORTANT TO ME. BUT IT SAYS, "JUST A LITTLE CARD TO REMIND YOU THAT I LOVE YOU AND I MISS YOU."

AND HE WROTE ME A VERY LONG LETTER ON THE INSIDE AND IF I MAY, I'D LIKE TO READ A LITTLE PARAGRAPH.

Q OKAY.

A "YOU ARE ONE IN A MILLION, SO UNSELFISH, ALWAYS SACRIFICING YOURSELF FOR OTHERS. I ONLY HOPE THAT BY THE DAY I DIE I CAN BE AS WONDERFUL A PERSON AS YOU ARE. I AM THE LUCKIEST MAN ALIVE. I MUST BE. I FEEL BLESSED BY GOD'S OWN HAND TO HAVE BECOME A PART OF YOUR WORLD."

Q WHEN WAS THAT DATED?

A AND THAT'S DATED APRIL 4TH, 1992.

MR. BRENT: I HAVE NO OTHER QUESTIONS. THANK YOU.

THE COURT: DO YOU HAVE ANY QUESTIONS?

MR. VIEFHAUS: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU CAN STEP DOWN. YOU'RE EXCUSED WITH THE

COURT'S THANKS.

THE WITNESS: THANK YOU.

NEXT WITNESS PLEASE.

MR. BRENT: THANK YOU.

JOANNA KONDRATH,

CALLED AS A WITNESS, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD.

THE WITNESS: JOANNA LOUISE KONDRATH.

THE CLERK: WILL YOU PLEASE SPELL YOUR FIRST AND LAST NAME, PLEASE.

THE WITNESS: J-O-A-N-N-A, K-O-N-D-R-A-T-H.

THE CLERK: THANK YOU. YOU CAN HAVE A SEAT AT THE WITNESS STAND.

DIRECT EXAMINATION

BY MR. BRENT:

Q MRS. KONDRATH, WHAT'S YOUR RELATIONSHIP TO JOEY KONDRATH?

A I'M HIS MOTHER.

Q I WANT TO ASK YOU A FEW QUESTIONS IF I MAY. I FIRST WANT TO ASK YOU HOW DID THE NEWS OF HIS DEATH ON JUNE 10TH OF 1992 CAUSE YOU TO FEEL?

A SHOCKED. UNBELIEVABLE. I THOUGHT THEY HAD THE WRONG PERSON. COULDN'T BELIEVE IT COULD BE JOEY OR COULD BE ANYBODY RELATED TO ME.

Q AND CAN YOU TELL US A LITTLE BIT ABOUT YOUR

RELATIONSHIP TO HIM?

A I LOVED MY SON VERY MUCH, BUT I ALSO LIKED HIM. HE LIVED AT HOME WITH ME. WE HAD A GOOD RELATIONSHIP. I'VE NEVER SEEN HIM AS HAPPY IN HIS WHOLE LIFE AS HE WAS BECAUSE HE HAD CLAUDIA. HE HAD A JOB HE LIKED AND HE WAS GOING BACK TO SCHOOL AND HE HAD HIS FUTURE PLANNED OUT FOR HIM.

Q WAS THERE ANYTHING ABOUT THE WAY HE WAS KILLED THAT HAS AFFECTED YOU?

A THE BRUTALITY OF IT. JOEY WAS THE TYPE OF PERSON THAT ALWAYS FOUND GOOD IN EVERYBODY AND HE -- I DON'T WANT TO USE THE WORD ~~PASSIVIST~~ pacifist, BUT HE AVOIDED FIGHTS AND ARGUMENTS AND CONFLICTS AT ALL COSTS. I MEAN, HE WOULD HAVE GIVEN ANYTHING TO ANY OF THEM IF THEY WOULD HAVE JUST LET HIM ALONE. IF IT WOULDN'T HAVE BEEN ENOUGH, HE WOULD HAVE COME BACK IN THE HOUSE AND WOKE ME UP AND WOKE THE NEIGHBORS UP AND TOOK UP A COLLECTION OR CARS TO GIVE THEM JUST TO KEEP PEACE AND TO KEEP EVERYBODY HAPPY AND JUST LET HIM ALONE. CA7

Q OVERALL, HOW WOULD YOU SAY THAT HIS DEATH HAS AFFECTED YOU?

A YOU KNOW, IT FEELS LIKE THERE'S A HOLE IN MY HEART THAT WILL NEVER BE CLOSED. THERE ISN'T A DAY GOES BY THAT I DON'T THINK ABOUT HIM AND THAT I DON'T MISS HIM. AND IT'S JUST LIKE YOUR LIFE IS NEVER THE SAME. YOUR LIFE IS NEVER WHOLE AGAIN. THERE'S JUST ALWAYS A PART OF YOU THAT'S GONE.

WHICH IS A TEST USED IN THE CORRECTIONAL FIELD FOR CLASSIFYING INMATES. AND IN ORDER TO GUARD AGAINST MALINGERING OR FAKERY, I, IN EVERY CRIMINAL EVALUATION, USE A TEST CALLED THE STRUCTURED INTERVIEW OF REPORTED SYMPTOMS. THIS IS A TEST THAT'S DESIGNED TO SHOW IF A CRIMINAL DEFENDANT OR DEFENDANT IN ANY CASE IS FAKING, DECEIVING, PRETENDING TO HAVE MENTAL SYMPTOMS WHICH ARE NOT REAL.

THIS WAS THE COMPREHENSIVE GROUP OF TESTS THAT I USED.

Q BASED ON YOUR ADMINISTRATION OF THESE TESTS, DID YOU COME UP WITH SOME OPINIONS REGARDING MR. BURNEY?

A YES, I DID.

Q AND THESE ARE OPINIONS REGARDING HIS MENTAL STATE, HIS PERSONALITY, HIS EMOTIONS, THAT KIND OF THING?

A YES, THAT'S RIGHT.

Q COULD YOU TELL US WHAT THOSE OPINIONS ARE?

A FIRST, I BELIEVE THAT WHEN HE COMMITTED THE MURDER AT AGE OF EIGHTEEN, AND NOW FACING THE POSSIBILITY OF EXECUTION, THAT HE WAS A CHILD AT THAT TIME IN TERMS OF INTELLECTUAL DEVELOPMENT, SOCIAL MATURITY, PSYCHOLOGICAL FUNCTIONING, AND REMAINS PRETTY MUCH A CHILD AT THIS POINT.

Q WHAT DO YOU MEAN BY THAT?

A WELL, I MEAN THAT HE NOT JUST CHRONOLOGICALLY, BUT IN TERMS OF HIS LEVEL OF MATURITY, HIS ABILITY TO UNDERSTAND COMPLEX SITUATIONS IN LIFE, HIS ABILITY TO UNDERSTAND HOW TO DEAL WITH COMPLEX SOCIAL SITUATIONS, HIS

ABILITY TO DEAL WITH PSYCHOLOGICAL CONFLICTS AND STRESSES AND PRESSURES THAT MIGHT HAVE PUSHED HIM IN A DIRECTION THAT WAS NOT TYPICAL OF HIS NORMAL FUNCTIONING.

HE, I BELIEVE, FOUND HIMSELF IN A SITUATION AT THE MOMENT, THE MOMENTS BEFORE THE ACT WAS COMMITTED, IN WHICH IF HE HAD BEEN A MORE MATURE PERSON, HE MIGHT HAVE THOUGHT OF SOME WAY OUT OF THIS SITUATION, MIGHT HAVE THOUGHT OF SOME WAY TO AVOID THE PRESSURES THAT HE FELT WERE BEING PUT UPON HIM BY ONE OF THE CO-DEFENDANTS TO COMMIT THE ACT, THE DANGER THAT HE FELT HE MIGHT BE IN, THE FEAR OF REJECTION AND ABANDONMENT BY THESE FRIENDS. HE MIGHT HAVE BEEN ABLE TO WORK HIS WAY OUT OF THAT TRAGIC SITUATION IF HE HAD BEEN A MORE MATURE PERSON.

Q NOW, YOU'RE NOT JUST TALKING ABOUT THE FACT THAT HE WAS EIGHTEEN AT THE TIME, RIGHT?

A I'M TALKING ABOUT THE FACT THAT HE WAS A FAIRLY IMMATURE EIGHTEEN-YEAR-OLD.

Q HOW DO YOU COME TO THAT CONCLUSION?

A FROM ALL OF MY INTERVIEWS, WHICH LOOKED AT VARIETY OF DIFFERENT ASPECTS OF HIS FUNCTIONING. FOR EXAMPLE, IN TERMS OF INTELLECTUAL FUNCTIONING, I MENTIONED THAT I FELT THAT HE WAS IMMATURE IN THAT SENSE. WHILE HIS IQ LOOKED AT AS A WHOLE IS IN THE DULL NORMAL RANGE, IF ONE LOOKS AT THE PARTICULAR INTELLECTUAL CAPACITIES THAT RELATE TO HOW ONE DEALS WITH A COMPLICATED SITUATION, THERE HE DOES NOT FUNCTION AT A VERY HIGH LEVEL. HIS WHAT'S CALLED VERBAL

ONE GIVES A FUCK ANYWAY," OR SOMETHING LIKE THAT.

A YES.

Q WHAT DOES THAT SAY TO YOU?

A WELL, IT SAYS A NUMBER OF THINGS TO ME. IT'S MY BELIEF THAT AT THE TIME OF THE EVENTS, THAT HE WAS EXPERIENCING THE SYMPTOMS OF A DEPRESSIVE -- MANIC DEPRESSIVE MENTAL DISORDER. HE HAS HAD A NUMBER OF PERIODS IN HIS LIFE WHEN HE'S EXPERIENCED DEPRESSIVE OR SUICIDAL SYMPTOMS, HAS BEEN TREATED FOR THIS, BUT UNFORTUNATELY, WAS NEVER TREATED EFFECTIVELY. IF HE'D BEEN TREATED EFFECTIVELY, WE MIGHT NOT BE SITTING HERE TODAY.

BASED ON INTERVIEWING HIM AND MY ANALYSIS OF THE SITUATION, I THINK HE WAS EXPERIENCING MIXED MANIC AND DEPRESSIVE SYMPTOMS WHICH WERE ATTRIBUTED TO BY ENORMOUS STRESSES THAT HE WAS UNDER. I THINK HE WAS EXPERIENCING SUCH SYMPTOMS AS HYPERACTIVITY, INABILITY TO SLEEP, A LOT OF GRANDIOSITY, AN ABNORMALLY ELEVATED MOOD AT TIMES, A TENDENCY TO GET INVOLVED; EXCESSIVE INVOLVEMENT IN THINGS THAT RESULT IN PAINFUL CONSEQUENCE FOR ONESELF AND OTHERS AND AT THE SAME TIME, DEPRESSIVE SYMPTOMS ALTERNATING ON DIFFERENT DAYS IN WHICH HE FELT ABSOLUTE DESPAIR, FELT THERE WAS NO HOPE IN HIS LIFE, THAT HE WAS HELPLESS TO DO ANYTHING ABOUT IT. HE HAD SUICIDAL FEELINGS, WHICH HE TALKED ABOUT WITH HIS MOTHER.

I BELIEVE HE HAS A MENTAL DISORDER IN WHICH HE EXPERIENCES AT DIFFERENT PERIODS OR ALTERNATING SYMPTOMS OF

MANIA AND DEPRESSION, AND THESE WERE ALSO EXACERBATED BY HE HAS, I THINK, PERSONALITY DISORDER AS WELL AND HAD BEEN AFFECTED BY A NUMBER OF TRAUMATIC EVENTS AND STRESSES LEADING UP TO, LITERALLY, THE DAY OF THE MURDER.

Q OKAY, LET'S TALK ABOUT THAT, TRAUMATIC EVENTS. WHAT DO YOU MEAN BY THAT?

A EVENTS IN THE COURSE OF A PERSON'S LIFE WHICH LEAVE AN EXTREMELY PAINFUL STAMP ON THE PERSON AND THEN WHICH AT LATER TIMES CAN EVOKE FEELINGS WHICH THEN ONE CAN'T CONTROL OR DIRECT ONE TO ACTIONS THAT ARE VERY UNCHARACTERISTIC AND NOT TYPICAL OF THE PERSON.

WHAT I'M REFERRING TO ARE THINGS SUCH AS AT THE AGE OF EIGHT, A VERY CRUCIAL DEVELOPMENTAL AGE FOR CHILDREN IN WHICH MUCH IS FORMING IN TERMS OF SELF-IDENTITY, SELF-ESTEEM, A VIEW OF THE WORLD, HE HAD THE EXPERIENCE WHICH I CONSIDER NOTHING BUT TRAUMATIC OF COMING HOME WITH HIS MOTHER FROM HIS GRANDMOTHER'S FUNERAL TO THE FAMILY HOME IN SANTA ANA AND FINDING THAT THE FATHER HAD CHANGED THE LOCKS ON THE APARTMENT, HAD KICKED THEM OUT FROM IT, WAS LIVING WITH ANOTHER WOMAN.

WHEN I THINK MYSELF WHAT THAT MEANS, TO COME HOME TO ONE'S HOME AFTER THE DEATH OF A LOVED ONE AND FIND THAT ONE HAS BEEN BETRAYED, ABANDONED BY ONES PARENT, I THINK THAT THIS CAST A MARK ON HIM ALWAYS, THE FEAR OF REJECTION BY OTHERS; EXCESSIVE REACTION TO ABANDONMENT OR SEPARATION THEN BECAME VERY MUCH A PART OF HIS MAKE UP AND ALL THE

EXPERIENCE OF REJECTION, OF ABANDONMENT, SIMPLY BEING COMMITTED TO A LIFE, LIVING IN A PLACE, GOING TO SCHOOL AND YOU KNOW, JUST IN A MOMENT, YOUR FATHER KICKS YOU OUT AND YOU'RE AWAY.

AT THE AGE OF SEVENTEEN HE WAS IN A CAR THAT WAS SPRAYED WITH GUNSHOTS BY, AS FAR AS I KNOW, UNKNOWN SHOOTERS. THE TRAUMA OF BEING IN SUCH A SITUATION, THE THREE INDIVIDUALS WHOM HE WAS WITH WERE HIT BY THE GUN FIRE, HE WAS NOT. I THINK FROM TALKING WITH HIM THAT WAS A RATHER TERRIFYING AND TRAUMATIC EVENT ONLY A BIT MORE THAN A YEAR BEFORE THE MURDER IN THIS CASE.

AND THEN FINALLY, AT AGE EIGHTEEN, ONLY ABOUT LESS THAN A MONTH BEFORE THE MURDER HERE, HIS VERY CLOSE RELATIONSHIP WITH HIS MOTHER WAS BROKEN WHEN STEPFATHER, THE WOMAN SHE HAD MARRIED, ENTERED THE HOUSEHOLD. VERY SERIOUS PROBLEMS AROSE SIMPLY BY VIRTUE OF HIS PRESENCE; BUT ALSO, HIS PARTICULAR CHARACTERISTICS, ACCORDING TO SHAUN, THERE WAS PHYSICAL ABUSE OF HIS MOTHER WHICH HE WAS UNABLE TO PREVENT BY THE STEPFATHER, AND THEN THE EVENTS SURROUNDING HIS ALTERCATION WITH HIS FATHER WHICH SENT HIM OUT OF THE HOME JUST BEFORE THE KILLING HERE.

I THINK THESE WERE TRAUMATIC EVENTS THAT WOULD SIMPLY OVERWHELM MANY AN IMMATURE, NOT ESPECIALLY BRIGHT, TO A CERTAIN EXTENT MENTALLY ILL PERSON'S ABILITY TO DEAL WITH COMPLEX SITUATIONS, TO DEAL WITH CONFLICT, TO RESOLVE PROBLEMS ON THE SPUR OF THE MOMENT, AND THAT THIS TOOK ITS

YEARS HE'S BEEN DECOMPENSATING MENTALLY AND IN HIS SOCIAL ADJUSTMENT. PART OF THE PROBLEM WAS THAT HE WAS REGULARLY CONSUMING SIGNIFICANT AMOUNTS OF ALCOHOL AND MARIJUANA AND THAT WAS MAKING THINGS WORSE, THAT WASN'T MAKING THINGS BETTER. AND THEN IN THE DAYS AND WEEKS PRIOR TO THIS CRIME, THIS PROCESS CONTINUED. SO THAT WHAT WE HAVE AND HAD AT THE TIME OF THE CRIME WAS AN INDIVIDUAL THAT WAS FRUSTRATED, PSYCHOLOGICALLY MIXED UP, DEPRESSED, SUICIDAL, AND IN SOME WAYS KIND OF AT THE END OF HIS ROPE.

Q WELL, LET'S TAKE THEM ONE BY ONE. WHAT DO YOU MEAN BY TRAUMATIC BACKGROUND AND HOW DID THAT AFFECT THE DEFENDANT?

A WELL, I THINK YOU COULD START WITH HIS FATHER WHO WAS BASICALLY A NON-PARENT. HE WAS SELDOM HOME, IRRESPONSIBLE, MAKING PROMISES THAT WERE NOT KEPT, FOOLING AROUND WITH OTHER WOMEN, FINALLY ABRUPTLY TOOK OFF WITH ANOTHER WOMAN WHEN THE DEFENDANT WAS IN HIS MIDDLE CHILDHOOD. THIS WAS QUITE DEVASTATING TO THE FAMILY.

THEN WE'VE GOT THE DEFENDANT'S MOTHER WHO WHEN THE DEFENDANT WAS A LITTLE KID, USED TO BEAT THE HELL OUT OF HIM ALL THE TIME -- SWITCHES, EXTENSION CORDS, BASEBALL BATS -- AND YET, WHEN HE GOT BIGGER, SHE WENT THE OTHER WAY AND HE COULD DO NO WRONG, AND SHE WAS OVER PROTECTIVE AND OVER INDULGENT. SHE ALSO WAS KIND OF A WORKAHOLIC AND SHE WASN'T AROUND THAT MUCH EITHER, SO HE'D SPEND A LOT OF TIME AT HOME WHEN HE WAS A LITTLE KID WATCHING TV BY HIMSELF.

THEN WE GET THE STEPFATHER WHO, VERY MUCH UNLIKE THE FATHER, IS NOT PASSIVE BUT VERY AGGRESSIVE; FORMER D.I. IN THE MARINES WHO TRIED TO KICK THE DEFENDANT'S ASS. THERE WERE CONFLICTS, YELLING, SCREAMING, FIGHTS BETWEEN MOTHER AND STEPFATHER IN WHICH HE'D WIND UP IN THE MIDDLE; STEPFATHER WOULD THREATEN HIM.

FINALLY, HE WENT BACK TO STAY WITH HIS DAD, I THINK IN THE SOUTH, AND HE WAS ABLE TO ADJUST THERE FOR A LITTLE WHILE, BUT THERE WERE CONFLICTS AGAIN IN THE HOME AND HE WOUND UP GETTING KICKED OUT. SO HE HAD TO COME BACK TO HIS MOTHER'S; CAME BACK HERE, STAYED THERE FOR AWHILE; PROBLEMS WITH STEPFATHER AND MOTHER; FIGHT WITH STEPFATHER; HE'S KICKED OUT. SO NOW HE'S BASICALLY HOMELESS; HAS TO STAY WITH FRIENDS.

IT'S ALSO TRUE THAT HE HAD THIS LONG-TERM RELATIONSHIP WITH THIS GIRLFRIEND WHO SOUNDS LIKE SHE'S LIKE MOTHER. SHE'S VERY PERFECTIONISTIC, NAGGING, CRITICIZING, YELLING, COMPLAINING, ON HIS CASE ALL THE TIME; SO THAT IN A WAY, HE DOESN'T HAVE ANYBODY THAT HE FEELS THAT HE CAN TRUST, THAT HE CAN CONFIDE IN, THAT HE CAN FEEL COMFORTABLE WITH.

Q AND THIS IS WHAT YOU'RE BASICALLY CALLING A TRAUMATIC BACKGROUND; IS THAT RIGHT?

A THAT'S RIGHT. IT'S A SERIES OF EVENTS GOING ON OVER A PERIOD OF YEARS IN WHICH HE'S KIND OF KICKED AROUND AND NEGLECTED AND ABUSED. IT'S NOT A PRESCRIPTION FOR A

A YES, I WAS IMPRESSED WITH THAT. EVEN WHEN HE WAS BEING INTERROGATED BY THE POLICE HE SEEMED TO BE VERY SORRY ABOUT WHAT HE HAD DONE AND WAS ACTUALLY CRYING.

Q WHAT ABOUT WHEN HE TALKED WITH YOU, DID HE EXPRESS REMORSE?

A YES, HE DID. THERE WERE TEARS IN HIS EYES WHEN HE DESCRIBED WHAT HE HAD DONE, AND IT WASN'T JUST ONCE OR TWICE THAT THAT HAPPENED, BUT I HAD COME BACK TO THAT SUBJECT SEVERAL TIMES IN MY HOURS THAT I SPENT WITH HIM AND EACH TIME I COULD SEE THE TEARS IN HIS EYES AND HE SEEMED TO BE VERY SORRY AT THE FACT THAT HE HAD KILLED THIS YOUNG MAN AND HURT THIS YOUNG MAN'S FAMILY AND THAT HE HAD HURT HIS OWN FAMILY IN SUCH A TRAGIC SENSELESS MANNER.

Q DOCTOR, WITHOUT GETTING INTO A LOT OF PSYCHOLOGICAL TERMS, OR PSYCHOBABBLE, OR WHATEVER, DO YOU HAVE KIND OF LIKE A DIAGNOSIS OR SOMETHING ABOUT HIS MENTAL STATUS, MR. BURNEY'S MENTAL STATUS?

A WELL, I THINK THAT HE WOULD HAVE MORE THAN ONE DIAGNOSIS OR LABEL. I THINK THE NUMBER ONE LABEL WOULD BE DEPRESSION. I THINK DR. WELLS, BECAUSE OF SOME OF THE ELEMENTS IN THE PSYCHOLOGICAL TESTING, SAID THAT HE WAS KIND OF MANIC DEPRESSIVE. FROM A MEDICAL POINT OF VIEW, THERE'S A LOT MORE EVIDENCE OF HIM BEING DEPRESSED THAN HIM BEING MANICKY, BEING HYPER AND GLEEFUL AND STAYING UP FOR DAYS AT A TIME WITHOUT SLEEP AND SO FORTH.

BASICALLY WHAT WE'VE GOT IS WE'VE GOT A PERSON

THAT'S BEEN UNHAPPY, FRUSTRATED, DEPRESSED, EVEN SUICIDAL EVER SINCE HE WAS A LITTLE KID. THAT'S THE MAIN STORY HERE. THE MANICKY STUFF I THINK IS WHEN HE GETS STRESSED OUT IS THAT HE CAN ACT IN A VERY IMPULSIVE, RECKLESS, FOOLHARDY WAY, EITHER DOING SOMETHING SELF-DESTRUCTIVE OR DOING SOMETHING HARMFUL TO OTHER PEOPLE, USUALLY PEOPLE IN HIS OWN CIRCLE, FAMILY MEMBERS, HIS GIRLFRIEND, FOR EXAMPLE.

Q THERE'S A TERM ANTISOCIAL PERSONALITY DISORDER. THAT'S KIND OF A DIAGNOSIS?

A RIGHT. THAT WOULD BE ONE OF THE OTHER LABELS OR DIAGNOSES THAT I THINK WOULD BE APPROPRIATE HERE. THAT WOULD BE PROBABLY THE SECOND THING, IS THAT HE DOES HAVE THESE ANTISOCIAL TRAITS OR ANTISOCIAL ASPECTS OF HIS ADJUSTMENT. HIS ANTISOCIAL PERSONALITY DISORDER, A MENTAL DISORDER? YES IT IS. ARE THESE PEOPLE SICK? YES THEY ARE. YOU LOOK IN THE TEXTBOOKS AND YOU'LL SEE. I MEAN, THEY'RE RIGHT ALONGSIDE THE OTHER PERSONALITY DISORDERS, ALL RIGHT? ONE CALLED BORDERLINE PERSONALITY DISORDER, SADISTIC PERSONALITY DISORDER, PASSIVE-AGGRESSIVE PERSONALITY DISORDER; AND THEN SOME OF THE SICKER ONES, PARANOID PERSONALITY DISORDER. DO THESE PEOPLE NEED TO BE SEEN BY PSYCHOLOGISTS AND PSYCHIATRISTS? YES, THEY DO.

AND THEN THE THIRD LABEL THAT I THINK WE WOULD PUT HERE WOULD BE ALCOHOL AND DRUGS. HAS HE GOT A PROBLEM WITH ALCOHOL AND DRUGS? WELL, IF YOU'RE SITTING AROUND ALL THE TIME DRINKING AND SMOKING MARIJUANA, IS THAT GOOD FOR

WORD THAT'S SAID IN THERE. IF I CAN ANSWER QUESTIONS, I WILL; IF I CANNOT ANSWER QUESTIONS, BECAUSE OF LEGAL RESTRICTIONS, I WILL JUST TELL YOU THAT I WON'T BE ABLE TO.

COUNSEL ARE INVITED TO STAND IN THE DOORWAY OF CHAMBERS, AND THEY'RE NOT INVITED TO ASK ANY QUESTIONS AT THAT TIME. I'LL ADMONISH YOU FULLY AS TO WHAT'S EXPECTED OF YOU IN THAT REGARD IN JUST A MOMENT.

THE CLERK WILL NOW READ THE VERDICT IN ITS ENTIRETY.

THE CLERK: (READING:)

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE. THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS SHAUN KAREEM BURNEY, DEFENDANT. CASE NUMBER C-94692, DETERMINATION OF PENALTY.

"WE THE JURY IN THE ABOVE ENTITLED ACTION FIND THAT THE APPROPRIATE PENALTY TO BE IMPOSED UPON THE DEFENDANT, SHAUN KAREEM BURNEY, DEATH. VICTIM, JOSEPH KONDRATH.

"DATED MAY 25, 1994.

DARLENE B. PARKER, FOREPERSON."

THE COURT: HAVING WAIVED ARRAIGNMENT FOR THE VERDICT, THE COURT NOW STATES AS FOLLOWS:

"THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. SHAUN KAREEM BURNEY, ALSO SHOWN AS KAREEM RAYSHUN BURNEY.

"CASE NUMBER C-94692.

"COMMITMENT (MURDER) JUDGMENT OF DEATH, DEATH WARRANT (PENAL CODE SECTIONS 1193 AND 1227.)

"TO THE SHERIFF OF ORANGE COUNTY AND TO THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN:

"BE IT REMEMBERED THAT ON THE 29TH DAY OF JULY, 1992, AN INDICTMENT NUMBERED C-94692 WAS DULY FILED AGAINST THE DEFENDANT, SHAUN KAREEM BURNEY, ALSO KNOWN AS KAREEM RAYSHUN BURNEY, BY THE DISTRICT ATTORNEY OF ORANGE COUNTY, CHARGING SAID DEFENDANT WITH:

"ONE COUNT OF ROBBERY (SECOND DEGREE) IN VIOLATION OF PENAL CODE SECTION 211 AND 212.5(B) AND 213(A)(2);

"ONE COUNT OF KIDNAPPING IN VIOLATION OF PENAL CODE SECTION 207(A);

"ONE COUNT OF KIDNAPPING FOR ROBBERY IN VIOLATION OF CALIFORNIA PENAL CODE

SECTION 209(B);

"ONE COUNT OF MURDER IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 187(A);

"IT BEING CHARGED AND ALLEGED THAT THE SAID MURDER WAS COMMITTED UNDER THE FOLLOWING SPECIAL CIRCUMSTANCES, TO WIT:

"ONE SPECIAL CIRCUMSTANCE ALLEGATION PURSUANT TO CALIFORNIA PENAL CODE SECTION 190.2(A)(17)(I) (MURDER IN THE COMMISSION OF ROBBERY;)

"ONE SPECIAL CIRCUMSTANCE ALLEGATION PURSUANT TO PENAL CODE SECTION 190.2(A)(17)(II) (MURDER IN THE COMMISSION OF THE CRIME OF KIDNAPPING OR KIDNAPPING FOR ROBBERY;) AND IT IS BEING FURTHER ALLEGED THAT:

"WHILE IN THE COMMISSION OF SAID MURDER, KIDNAPPING, KIDNAPPING FOR ROBBERY, AND ROBBERY, DEFENDANT, SHAUN KAREEM BURNEY, ALSO KNOWN AS KAREEM RAYSHUN BURNEY, PERSONALLY USED A FIREARM, WITHIN THE MEANING OF PENAL CODE SECTION 1203.6(A)(1) AND 12022.5(A).

"THEREAFTER, DEFENDANT WAS FULLY ARRAIGNED ON THE 3RD DAY OF AUGUST, 1992, AND ENTERED A PLEA OF NOT GUILTY TO CHARGES

OF MURDER, KIDNAPPING, KIDNAPPING FOR ROBBERY, AND ROBBERY, AND DENIED THE SPECIAL CIRCUMSTANCES AND PENALTY ENHANCING ALLEGATIONS AS SET FORTH IN THE INDICTMENT.

"THEREAFTER, ON THE 19TH DAY OF APRIL, 1994, THE DEFENDANT AND HIS ATTORNEY BEING PRESENT, THE CASE CAME ON FOR TRIAL AND THE SELECTION OF THE JURY WAS COMMENCED.

"ON THE 27TH OF APRIL, 1994, THE TRIAL JURY AND TWO ALTERNATES WERE DULY AND REGULARLY IMPANELED AND SWORN IN TO TRY THE ABOVE-ENTITLED CASE. THAT THEREAFTER, EVIDENCE WAS DULY PRESENTED TO THE TRIAL JURY AS TO THE ISSUES RAISED BY THE DEFENDANT'S PLEAS OF NOT GUILTY, AND HIS DENIAL OF THE SPECIAL CIRCUMSTANCES AND PENALTY ENHANCING ALLEGATIONS CHARGED IN THE INDICTMENT, ARGUMENT WAS MADE TO SAID TRIAL JURY BY THE PROSECUTION AND DEFENSE, AND THE COURT INSTRUCTED SAID TRIAL JURY AS TO THE LAW APPLICABLE TO THE CASE.

"THEREAFTER, ON THE 9TH DAY OF MAY, 1994, THE PROSECUTION DISMISSED THE ENHANCEMENT WITHIN THE MEANING OF PENAL CODE SECTION 1203.06(A)(1) AND 12022.5(A) AS TO COUNTS ALLEGING KIDNAPPING, KIDNAPPING FOR

ROBBERY, AND ROBBERY. THE ENHANCEMENT REMAINED ON THE COUNT ALLEGING MURDER.

"THEREAFTER, ON THE 16TH DAY OF MAY, 1994, THE TRIAL JURY RENDERED VERDICTS OF GUILTY AS FOLLOWS:

"ONE COUNT OF ROBBERY (SECOND DEGREE) IN VIOLATION OF CALIFORNIA PENAL CODE SECTIONS 211 AND 212.5(B) AND 213(A)(2);

"ONE COUNT OF KIDNAPPING IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 207(A);

"ONE COUNT OF KIDNAPPING FOR ROBBERY IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 209(B);

"ONE COUNT OF MURDER OF THE FIRST DEGREE IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 187(A);

"FOUND THE SPECIAL CIRCUMSTANCES AS SET FORTH IN THE INDICTMENT TO BE TRUE AS FOLLOWS:

"ONE SPECIAL CIRCUMSTANCE ALLEGATION PURSUANT TO CALIFORNIA PENAL CODE SECTION 190.2(A)(17)(I) (MURDER IN THE COMMISSION OF ROBBERY);

"ONE SPECIAL CIRCUMSTANCE ALLEGATION PURSUANT TO CALIFORNIA PENAL CODE SECTION 190.2(A)(17)(II) (MURDER IN THE COMMISSION

OF THE CRIME OF KIDNAPPING OR KIDNAPPING FOR ROBBERY); AND THE SAME TRIAL JURY FOUND IT TO BE TRUE THAT:

"WHILE IN THE COMMISSION OF THE SAID MURDER, THE DEFENDANT, SHAUN KAREEM BURNEY, ALSO KNOWN AS KAREEM RAYSHUN BURNEY, PERSONALLY USED A FIREARM WITHIN THE MEANING OF 1203.06(A)(1) AND 12022.5(A).

"THEREAFTER, ON THE 18TH DAY OF MAY, 1994, PURSUANT TO PENAL CODE SECTION 190.3, EVIDENCE WAS PRESENTED ON BEHALF OF THE PEOPLE AND THE DEFENDANT AS TO WHETHER THE PENALTY SHALL BE DEATH OR LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE.

"THEREAFTER, FOLLOWING ARGUMENTS OF BOTH COUNSEL AND INSTRUCTIONS ON THE LAW BY THE COURT ON THIS ISSUE, THE SAID TRIAL JURY ON THE 25TH DAY OF MAY, 1994, DID RETURN A FINDING THAT THE PENALTY SHALL BE DEATH.

"THEREAFTER, ON THE 16TH DAY OF SEPTEMBER, 1994, THE DEFENDANT'S MOTION FOR MODIFICATION OF THE VERDICT AND FINDING IMPOSING THE DEATH PENALTY WAS HEARD BY THE COURT. COURT THEN REVIEWED THE EVIDENCE HERETOFORE PRESENTED. THE COURT CONSIDERED, TOOK INTO ACCOUNT, AND WAS GUIDED BY THE

AGGRAVATING AND MITIGATING CIRCUMSTANCES REFERRED TO IN CALIFORNIA PENAL CODE SECTION 190.3.

"THE COURT THEN FOUND THAT THE JURY'S VERDICTS AND FINDINGS WERE NOT CONTRARY TO LAW, AND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES. THE COURT THEN DENIED THE DEFENDANT'S MOTION FOR MODIFICATION OF THE VERDICTS AND FINDINGS IMPOSING THE DEATH PENALTY.

"WHEREUPON, ON THE 16TH DAY OF SEPTEMBER, 1994, THE DEFENDANT'S COUNSEL STATED THERE WAS NO LEGAL CAUSE WHY SENTENCE SHOULD NOT NOW BE PRONOUNCED. COURT THEN FOUND THAT THIS WAS NOT AN UNUSUAL CASE WITHIN THE MEANING OF PENAL CODE SECTION 1203(E), PROBATION WAS DENIED AS TO ALL COUNTS, AND THE COURT PRONOUNCED JUDGMENT AS FOLLOWS:

"SHAUN KAREEM BURNEY, ALSO KNOWN AS KAREEM RAYSHUN BURNEY, IT IS THE JUDGMENT AND SENTENCE OF THIS COURT THAT FOR THE OFFENSE OF MURDER AS CHARGED IN THE INDICTMENT OF WHICH YOU PREVIOUSLY, TO WIT, ON MAY 16, 1994, WERE FOUND GUILTY, THE JURY HAVING FOUND THE ONE OFFENSE OF MURDER TO BE

IN THE FIRST DEGREE AND THE JURY HAVING RETURNED AND FOUND TRUE THE SPECIAL CIRCUMSTANCE ALLEGATION OF MURDER IN THE COMMISSION OF ROBBERY, AND THE SPECIAL CIRCUMSTANCE ALLEGATION OF MURDER IN THE COMMISSION OF THE CRIME OF KIDNAPPING OR KIDNAPPING FOR ROBBERY, AS ALLEGED IN THE INDICTMENT PURSUANT TO PENAL CODE SECTION 190.2(A)(17)(I) AND 190.2 (A)(17)(II) RESPECTIVELY, AND THE PENALTY ENHANCEMENT ALLEGATION THAT THE DEFENDANT PERSONALLY USED A FIREARM DURING THE COMMISSION OF THE CRIME OF MURDER; AND THE JURY HAVING PREVIOUSLY, TO WIT, ON MAY 25TH, 1994, FOUND THE PENALTY SHALL BE DEATH; AND THIS COURT HAVING, ON THE 16TH DAY OF SEPTEMBER, 1994, DENIED YOUR MOTION AND APPLICATION FOR MODIFICATION OF VERDICT AND FINDINGS IMPOSING THE DEATH PENALTY, FINDING THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, AND THE APPROPRIATE SENTENCE IS DEATH; IT IS THE ORDER OF THIS COURT THAT YOU SHALL SUFFER THE DEATH PENALTY, SAID PENALTY TO BE INFLICTED WITHIN THE WALLS OF THE STATE PRISON AT SAN QUENTIN, CALIFORNIA, IN A

MANNER PRESCRIBED BY LAW AND AT A TIME TO BE FIXED BY THIS COURT IN THE WARRANT OF EXECUTION.

"YOU ARE REMANDED TO THE CARE, CUSTODY AND CONTROL OF THE SHERIFF OF CALIFORNIA TO BE BY HIM DELIVERED TO THE WARDEN OF THE STATE PRISON AT SAN QUENTIN, CALIFORNIA, WITHIN TEN DAYS FROM THE DATE HEREOF, IN THE USUAL COURSE OF HIS DUTIES, FOR THE EXECUTION OF THE SENTENCE ON THE OFFENSE OF ONE COUNT OF MURDER IN THE FIRST DEGREE CONTAINED IN THE INDICTMENT OF WHICH YOU HAVE BEEN FOUND GUILTY AND THE SPECIAL CIRCUMSTANCES HAVING BEEN FOUND TO BE TRUE, TO BE HELD BY HIM PENDING A FINAL DETERMINATION OF YOUR APPEAL ON THIS MATTER, WHICH IS AUTOMATIC, AND SAID SENTENCE TO BE EXECUTED UPON FINAL DETERMINATION OF SAID APPEAL, AND YOU ARE TO BE HELD BY HIM DURING SAID PERIOD OF TIME, UNTIL FURTHER ORDER OF THIS COURT. IT IS SO ORDERED.

"THEREFORE, THIS IS TO COMMAND YOU, THE SHERIFF OF SAID ORANGE COUNTY, AS PROVIDED IN SAID JUDGMENT, TO TAKE SHAUN KAREEM BURNEY, ALSO KNOWN AS KAREEM RAYSHUN BURNEY, TO THE STATE PRISON OF THE STATE OF

CALIFORNIA AT SAN QUENTIN, CALIFORNIA, AND DELIVER HIM INTO THE CUSTODY OF THE WARDEN OF SAID STATE PRISON; AND THIS

"FURTHER, IS TO COMMAND YOU, THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN, CALIFORNIA, TO HOLD IN YOUR CUSTODY THE SAID SHAUN KAREEM BURNEY, ALSO KNOWN AS KAREEM RAYSHUN BURNEY, PENDING THE DECISION OF THIS CAUSE ON APPEAL, AND ON THE JUDGMENT HEREIN BECOMING FINAL, TO CARRY INTO EFFECT THE JUDGMENT OF SAID COURT AT A TIME AND ON A DATE TO BE HEREAFTER FIXED BY THE ORDER OF THIS COURT, WITHIN THE STATE PRISON, AT WHICH TIME AND PLACE YOU SHALL THEN AND THERE PUT TO DEATH THE SAID SHAUN KAREEM BURNEY, ALSO SHOWN AS KAREEM RAYSHUN BURNEY, IN THE MANNER AND MEANS PRESCRIBED BY LAW.

"IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AS JUDGE OF THE SAID SUPERIOR COURT, AND HAVE CAUSED THE SEAL OF SAID COURT TO BE AFFIXED HERETO.

"ALL OF THIS DONE IN OPEN COURT THE 16TH DAY OF SEPTEMBER, 1994. ROBERT R. FITZGERALD, JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE

COUNTY OF ORANGE."

COURT DETERMINES THIS DEFENDANT HAS BEEN IN CUSTODY 724 DAYS; THAT SHOULD IT EVER BE AN ISSUE, THAT THERE ARE 362 GOOD TIME AND WORK TIME DAYS, FOR A TOTAL CREDIT OF 1,086 DAYS.

DEFENDANT IS NOW REMANDED TO THE SHERIFF.

THAT CONCLUDES THE PROCEEDINGS ON MR. BURNEY. MY COMPLIMENTS TO BOTH SIDES.

MR. BRENT: THANK YOU, YOUR HONOR.

THE COURT: THE COURT STAYS SENTENCE ON ALL REMAINING COUNTS.

THE COURT: WE'LL BE IN RECESS FOR FIVE MINUTES

THE DEFENDANT: IT'S NOT OVER YET, MOTHERFUCKER!

(PROCEEDINGS CONCLUDED.)

Chrystal A. Farrell, CSR #4627

☒ Identification
☒ In Evidence

EXHIBIT NO. BBB

☐ Plaintiff ☒ Defendant
☐ Petitioner ☐ Respondent
☐ _____

_____
SIGNATURE-Atty/Party introducing sensitive Exhibit.

Case No. C-94692

People
Plaintiff

vs.

Burney, Shaun
Defendant

Marked for Identification
Date 5-24-94

Received in Evidence
Date 5-24-94

ALAN SLATER, Executive Officer and Clerk

By Rebecca Lash, Deputy

F0182-529 (R1/94)

NOTE: THIS ITEM IS A PERMANENT RECORD OF THE COURT.
DO NOT REMOVE FROM COURTROOM.

2542

Q: (from Detective Erickson) Got a tattoo on your chest?
A: Yeah.
Q: And a heart on your hand, any others?
A: Yeah, one right here but it never got finished. It was supposed to be a crown but I just...I just stopped.
Q: How come?...didn't like it or what?
A: No. The guy that was doing it, he started...it started lookin messed up so I just told him to stop.
Q: Unh-hunh.
A: I didn't get this one finished.
Q: You did or didn't?
A: It still needs to be finished.
Q: What's that...what's written underneath it?
A: It used to say my name but I covered it up. Put my little girl's name down there.
Q: You have a little girl?
A: Yeah.
Q: How old?
A: She'll be one on the 24th of this month.
Q: Oh. Lives with her mommy?
A: Yeah. She stays with my mom on the weekends and I just go visit her because you know. Right, well I was staying in Garden Grove with my best friend but two weeks ago his niece drown in a jacuzzi.
Q: Oh. That's sad.
A: Yeah it was. So...
Q: (INAUDIBLE) I mean did it just walk away for a few seconds and what...did the baby just crawl in?

A: She was asleep and her mom was in the back reading a wedding invitation. And usually the baby will go into her grandma's room when she wake up. This day she didn't. She went in and she fell in the jacuzzi.
Q: (from Detective Gallagher) You want anything to drink?
A: (INAUDIBLE)
Q: (from Gallagher) Okay.
Q: (from Erickson) I offered him a blanket but he said (INAUDIBLE)...
A: (from Gallagher) Good, I'll use it later.
Q: (from Erickson) Alright. Shaun my name's Detective Erickson this is Detective Gallagher.
Q: (from Gallagher) We met.
A: Okay.
Q: (from Erickson) And a let's see, it's Burney?
A: Yeah.
Q: And Shaun...S-H-A-U-N?
A: Yeah, that's what my mom calls me. My first name is Kareem.
Q: Corrine?
A: Kareem like in Abdul-Jabbar.
Q: Okay, and your date of birth?
A: Twelve-one-seventy-three.
Q: And where do you live?
A: In Tustin...California.
Q: What's your address?
A: 15651 Williams Street.
Q: (from Gallagher) Can you speak up a little. I'm having problems understanding you right here.

A: I'm sorry.
Q: I'm sure she can't.
Q: (from Erickson) Apartment what?
A: Forty.
Q: Okay. You have a phone there?
A: 501-9770.
Q: Nine what?
A: 9770.
Q: Okay and you live there with your mom, you say?
A: Yeah.
Q: And unh...
A: My step-dad. He's...he's gone now but he used to live there.
Q: Unh-hunh. Where does your little baby live?...with her mother?
A: Yeah.
Q: Where's that?
A: South Central Los Angeles.
Q: And what's your...unh...baby's mommy's name?
A: Chiara...C-H-I-A-R-A...(INAUDIBLE).
Q: You know the address there?
A: I have no i...no idea.
Q: Telephone number there.
A: Unh...213-754-8811.
Q: 754 what?
A: 8811.
Q: 8811? I'm having a hard time hearing you, too.
A: I'm losing my voice, it seems like.
Q: Do you talk an awful lot?

Q: (from Gallagher) He just talks soft. That's part of the problem.
Q: (from Erickson) Like I told you...unh...this morning, you were arrested investigating a homicide. I'm required by law to re...read you your Miranda warnings.
A: Umm-hmm.
Q: Okay. So pay attention. I need to, have you answer, you know, yes or no but instead of shaking your head.
A: Okay.
Q: Okay. You have the right to remain silent. Do you understand?
A: Yes.
Q: Anything you say may be used against you in court? Do you understand?
A: Yes.
Q: You have the right to an attorney before and during questioning. Do you understand?
A: Yes.
Q: If you cannot afford an attorney, one will be appointed for you before questioning if you wish. Do you understand?
A: Yes.
Q: Okay...uhm...we're investigating a homicide that occurred Wednesday, and through my investigation, all the information, all the people I've talked to, all the people that you've talked to that I have talked to have indicated that you're involved in it. And so this is your opportunity to tell me your side of the story. Again, I've talked to a lot of people...
A: Yeah...

Q: Quite a few of the people that you have talked to, too. And you know what you've been telling people that you've been doing. And they in turn have told me. So...unh...we're here to listen to you.

A: The only...only thing I know about is...unh...that they found a dead body by my friend's house, 'cause he just got out of the hospital. That was...uhm I think it was on Grammercy Street, ain't sure.

Q: Grammercy Street?

A: And he was telling us about a dead body that was over there by his house.

Q: And who's your friend?

A: David Wilson.

Q: Okay.

A: He just got out of the hospital.

Q: What was he in the hospital for?

A: Shot his foot up, like an idiot.

Q: Okay. Just to...just to let you know, Shaun, Detective Gallagher and I have been working on this all...quite a few straight hours. And...uhm...we're being up-front with you and there was another homicide that occurred where a guy is found dead in the trunk of a vehicle. That's the one I want to talk to you about. That's the one you've been telling your friends about. That's the one it's your turn to tell your side of the story.

A: Unh...

Q: Wednesday night. What were you doing...what were you doing Thursday night? Where were you Thursday night?

A: It was the date that...?

Q: That's the ninth. June the ninth.
A: I was in...I think I was at a hotel.
Q: What hotel?
A: Unh...that's the (INAUDIBLE) motel.
Q: Okay, what time did you check out?
A: Umm...I didn't get home 'til like four o'clock in the morning, 'cause it was my girlfriend's graduation, and she had a whole bunch of friends over there.
Q: Okay.
A: And Wednesday night, where was I at?...where was I at?... (INAUDIBLE)...We all went out, til we came back and I remember going to sleep at three o'clock in the morning, because there were some girls at the house. And we were kicking it 'til three o'clock in the morning, and I went to sleep. That's what I remember doing, 'cause Thursday I know (INAUDIBLE) graduation, I wasn't there until like five in the morning, four or five.
Q: Okay, I'm talking about Tuesday night.
A: Tuesday night.
Q: I'm talking about Tuesday night when you were over at Alan's house on Greenleaf.
A: Yeah. Uhm...I...I been there for quite some time, but I'm not there all the time.
Q: Okay Tuesday night.
A: Tues...unh...
Q: And you're at...you're at Alan's apartment, Tuesday night.
A: When we're there, we...if there's no girls over there, we ain't there. There...we're never there. I mean we're there but...just like last night we were there but...

Q: Drinking beer Tuesday night.
A: Not me. Unh.
Q: Then you leave...okay, look at me, Shaun. We've talked to a lot of people.
A: Unh-hunh.
Q: A lot of people, like I told you, that you have talked to. You've told these people what you did Wednesday morning to this person in the trunk of his vehicle.
A: Unh...I kn...unh...
Q: We just didn't pick your name out of the hat.
A: Oh, I know that. I mean...I thought, you know, maybe just because you know, you guys took everybody that was in the house.
Q: No, we didn't take everybody in the... We know a lot of what transpired. And again, we're giving you the opportunity to tell your side of the story. Tuesday night, we know for a fact that you were at Alan's apartment.
A: Yeah, I...I told you, I had been there off and on. And Tuesday, I...
Q: I don't...I don't mean off and on. Tuesday night, you were there for a... Who was at the apartment with you Tuesday night?
A: My friend Dwight.
Q: Dwight? Who else?
A: And Scott.
Q: Who else?
A: And Alan. But Alan wa...Tuesday night Alan had passed...that's when he had passed out drunk. Tuesday night, he passed out drunk.
Q: Okay.
A: And I remember going to sleep at three o'clock in the morning.

Q: Not quite. You're not remembering quite right.
A: That's what happened. That's what happened. And I remember 'cause he had drank a case of beer by himself. That wasn't Monday, 'cause Monday I wasn't there.
Q: Wednesday morning, about three o'clock, you leave Alan's apartment...We have witnesses.
A: Wednesday morning?
Q: At three o'clock. You leave Alan's apartment with Alan and with Scott.
A: Wednesday morning?
Q: Wednesday morning. Three o'clock...three thirty, you leave Alan's apartment.
A: I don't remember which day it was, but one morning we left to Ron's house, but it wa...I don't think it was that...it wasn't that late.
Q: Wednesday morning. Three-thirty, you leave Alan's house. You, Alan and Scott. And I know exactly where you were going and what you were doing. And you know that I know.
A: No I don't cause the morning we left, we went...we went...we went to Ron's house. Ron wasn't there. Uhm...wait...was he... think Scott went to the door... Somebody went to the door. We didn't see (INAUDIBLE)
Q: Do you remember being at Alan's house Tuesday night?
A: I remember...I remember being there Wednesday. I remember...I was over there Tuesday in the day. I know I was there Tuesday sometime during the day 'cause I always come by there every day.
Q: Do you remember leaving his house at three-thirty with Alan

and Scott and you?

A: Tuesday morning, Nut passed out...he was...he was...

Q: I'm not talking about Tuesday morning. I'm talking about Wednesday morning.

A: Nothing happened...nothing happened. (INAUDIBLE)

Q: You're just prolonging the inevitable...

A: I remember...All's I remember...

Q: That's all you're doing?

A: All I remember is that we left somewhere, somebody got their hair cut. And I remember me...I...I remember me Alan and Scott going to Ron's house. But it wasn't Wednesday morning.

Q: I'm talking about Wednesday Morning. You're prolonging the inevitable.

A: No, I'm not. I'm just telling you what I remember. I don't want to say I did something that I didn't do...or tell you all I was somewhere when I wasn't.

Q: I don't want you to tell me some...that you were somewhere when you wasn't either. But I know where you were Wednesday morning. You... you've talked to a lot of people since Wednesday morning. You've been busy all over town talking. Telling people what you did.

A: I didn't do nothing. I didn't do anything.

Q: Who shot the person? Why would you be going around town telling people that you did it?

A: I don't know (INAUDIBLE). Only. Only...only...only thing I know that I did wrong. It was, it was a Wednesday though. And I know a fact it was a Wednesday.

Q: What's that?

A: And that's...I went...I went and unh I was, I was, I was...I couldn't find a ride to my mom's house and I was gonna take a car. That's the only thing I did. But that wasn't Wednesday.
Q: What day was that?
A: It was a...I don't know if it was Monday or Tuesday but I know it wasn't Wednesday because Wednesday night...couldn't have been Wednesday night because the next day I went to Summer's graduation. No it wasn't...I...I was looking for a ride and I couldn't find a ride to my mom's house and I did go looking to...to take a car, but it wasn't on Wednesday night.
Q: What night was it?
A: I don't know. It was...
Q: (from Gallagher) What kind of car was it?
A: A Toy...unh...no a Mazda RX-7.
Q: Mazda RX-7?
A: Yeah
Q: What color?
A: Like a tan in color.
Q: And where did you take it from?
A: I didn't take it.
Q: You didn't take it?
A: No, I didn't.
Q: So you ended up not taking the car?
A: I ended up not taking it that night...
Q: So then you didn't do anything wrong other than think it?
A: Well, yeah...well..
Q: Or did you try to take it and couldn't get it?
A: Try to take it but I couldn't get it so...

Q: Do you know what street it was on?
A: What street is...that...I think it's Green... Greenleaf. It goes around like that.
Q: Umhum
A: I was on this si--on the side by the (INAUDIBLE).
Q: Okay. About what year RX-7 was it?
A: Old...old...not the real old ones. Probably about a '87.
Q: It was tan?
A: Yeah.
Q: Was it parked on the street in front of the complexes or in the carport?
A: It was in a carport.
Q: And how'd you try to get it?
A: I had a butter knife and unh...and uh I hot-wire cars.
Q: Okay. Were you able to get in?
A: I opened the door and then I was just like...I ain't even...I was just like...I ain't going to take this car...I ain't going to go to jail for GTA. And I just left. I went back up to the house.
Q: Did you have to...to...unh...was the door unlocked or locked?
A: It was locked.
Q: And how'd you open it?...with the butter knife? How do you do that?
A: Put the butter knife in the key-hole and just open.
Q: Oh. It works that easy, huh?
A: Yeah.
Q: Remind me not to buy an RX-7. Okay...
A: But other than that, that's it...
Q: And that was what day?

A: I think it might have been Tuesday. Yeah it was Tuesday 'cause I know...
Q: Tuesday during the day?
A: No, it was like at night, like...
Q: How late?
A: I went out about twelve or one because I came back inside and I went asleep.
Q: You went...back inside where?
A: I went to...back to Alan's house and I just went to sleep right there.
Q: Did you have something to drink that night?
A: I don't drink.
Q: At all?
A: Well, I drink...like I'll drink a beer, but I don't drink like...
Q: Like they do?
A: Uhm-uhm.
Q: Okay. Like Detective Erickson's been saying here, Shaun...uhm...you know, this thing happened. Okay? And I don't know whether it was your fault. I don't know whether it was Alan's fault. I don't know whether it was Scott's fault. Okay? But everybody's talking about it. And, you know, naturally, we're getting different versions. And we're trying to give you an opportunity to tell your version where people don't put it all on you if it doesn't all belong on you type thing. You know what I'm saying?
A: Yeah.
Q: But there's no question that you were there. There's no

question that you were involved. You've talked to enough people and we've talked to them that we sorta already have your version of what happened. Okay? But we need to hear it from you. And we need, we need to clear up some points with you. But we can't sit in here and play this game of you don't know nothing. Okay? Because we know that's not true. And we can prove that easy enough and you know that. Alright?

A: Yeah.

Q: So let's kind of dispense with that bullshit and talk about what happened, what went wrong. You know, things happen, things get out of hand sometime. And I think that's what happened here. But we need to talk about it. We need to, you know, sit down and hash this out. Now you and Alan and Scott were over at Alan's place and they must've been drinking pretty good, from what I hear.

A: (INAUDIBLE)

Q: Especially Alan. And by the way, you call Alan "Nut"? That's what everybody else calls him so I just want to know if you refer to "Nut" we're talking about Alan?

A: Yeah (INAUDIBLE)

Q: Okay...(INAUDIBLE)

A: Okay. You guys left, okay? And you all left wearing some...some rubber gloves, is that right?

A: Yeah, we had taken 'em from the hospital.

Q: You had taken them from the hospital?

A: Yeah, we were just farting around with 'em the whole day.

Q: Was that when earlier in the week...er...the week before when whoever shot himself in the foot...

A: One day we were at the hospital everybody was playing with the

rubber gloves and we just had them.
Q: Okay. So you guys put these rubber gloves on and you went out about what time? More or less.
A: Between two and three, 'cause I remember I was laying on the floor.
Q: Okay. So tell us what happened. What were you guys talking about? What's going on?
A: I don't know...the guy who went...the one guy who blew his foot off, like the week before it happened, when he blew his foot off, we asked somebody to give him a ride to the hospital and they wouldn't take him so, you know, I don't know, he just laid on the floor for like a half hour bleeding when he could have been at the hospital. I don't know, we just...I don't know, we just went to that guy's house.
Q: Okay. Who is that guy?
A: This guy named Ron, you know, we went over there, and unh...unh...I remember Nut was drunk, I wasn't drunk. I was, you know, I was just...we just went over there. We was gonna...we was gonna beat him up, I guess. Whatever, we's gonna beat him up. And Nut was all drunk. And I kept telling him, 'Stay in the house. Stay in the house. You're too drunk. You're too drunk'. And he kept telling us, 'No, Nut wants to roll. Nut wants to roll.' So then you know we went over there... the guy wouldn't come outside, so we were just standing outside. And then, you know, they wanted me to take a car. (INAUDIBLE) I just took the car for em.
Q: Okay. Now where does Ron live?
A: I think in the Sea Wind Apartments. I ain't sure.
Q: The what Wind?

A: The Sea Wind.
Q: What street's that on?
A: Uhm...uhm...on the other side of Greenleaf like I was telling you, by the ditch.
Q: Okay. Now...closer to Euclid, closer to the dead-end, right about in the middle?
A: Yeah. Right about in the middle of the street where it turns (INAUDIBLE)...
Q: Okay. So you guys are standing out there, waiting for Ron to show himself.
A: Right.
Q: And what happens? This dude comes out...
A: I don't know...they just, you know...he didn't...he never...he wouldn't come out, so (INAUDIBLE) was standing on the stairs and...and Nut kept telling me 'take a car for me, nigger, take a car for me.' It's like, naw man I'm not taking no car for you. I'm not taking no car for you.
Q: What'd they want the car for?
A: I don't know. It's like 'take a car for me, take a car.' I'm like, man I'm not taking no more cars, man. I told you I ain't taking no more cars.
Q: Who was saying this?
A: Nut was just telling...I was telling them, you know...Nut was talking to me, he was all drunk, he was being stupid, I was like man, I ain't taking no cars for you. You're drunk nigger. You don't know what you're doing. He's like, 'just take me a car, just take me a car.' So...I was walking around and I was looking for a car to take. And we went...we went through the apartments...and we

were standing out there...and it was just like...like I don't know...I just remember some guy going to his car...and we just like...we rushed him...

Q: Okay. Did you know this guy?

A: No.

Q: Never seen him before?

A: And we rushed him and...and unh...you know, unh he had the keys and I just took the keys...and...everybody jumped into the car...I drove...drove to the corner, and I got out and I went back through the apartments to see if Ron was gonna come out. And then they just told me, you know, you gonna go. And I's like, 'I really don't wanna go. I don't wanna go.' And they just like 'Come on.' So then...I don't know...we went to our friend's house... and...in the morning...and we were over there and then it was...I don't know...it was I think it was like...unh...almost going to be four o'clock. Then I just...I's...I's just told them you know take me back to the house, you know. 'Cause I'm not...I don't want to get in this G Ride...'cause I terrible experience you know. I went back to the house, then after that I don't know who was driving the car or what, but I got out and I waited 'cause I thought they was just going to go down the street or whatever to park the car...unh...I was standing out there, and I was standing out there. And they ain't come back so I just went upstair, I went upstairs and I's like is like Dwight You know, 'Did them niggers call or anything?' It's like naw. So I was waiting downstairs for 'em, waiting downstairs 'cause I didn't know where they went. Then like...it was about an hour, I...stayed outside for about an hour. I went back up stairs and they had like...like ten minutes after I

got in the house, then that Boxer came in the house.
Q: Now who's Boxer?
A: Scott.
Q: Okay. So they came into the house and what happened?
A: I just...then I just asked 'em, I say 'whats did you all do with that car'. And he's like, we just parked and I was like oh well whatever, you know, I aint even pay no attention. And then I think the next day that's when David came home. And he's like...no...matter of fact, in the morning, David called me in and he's like, he's all, 'Hey, man, any you guys been down by my mom's house?' I was like 'No, why, what's up?' He's like 'they found a dead body over there.' And I like, 'What?' And I thought he was playing around. And he was like, 'Yeah, they found a dead body over there.' And I was just trippin'. I just asked him, I said 'Hey, you know, where'd you guys park that car?' And they went..they said 'We just parked it down the street' and I'm like, 'Alright'. And that was it. And no more was said about it...
Q: When you talked about...when David talked about finding the dead body, was this body supposed to be in the car or what?
A: No, he just...he just asked us, 'Hey have you guys been down by my mom's house', 'cause I remember that day, I think it was Jeremy, he had came up and he said 'There's a whole bunch of police down there on my street.' And I was like, 'Yeah?' And he's like, 'Yeah,' so I (INAUDIBLE) the police down there. Then I talked to this girl that lives across the street behind the alley. She's like, 'Yeah there's a whole lot of police over there.' And then I found out that, you know, and I guess it was a dead body over there or something.

Q: Okay. Let's go back to where this guy comes out and he gets in...in his car. What kind of car has he got?
A: I don't know, a white car.
Q: A white car? Was it a big car, little car?
A: (INAUDIBLE) What kind of car. It looked like a... like a...like a...what is the name of that car? Like a fox I think...
Q: Like a fox? Okay. And he comes out and he gets in his car, did he get all the way in before you rushed him?
A: No, it's like he and opened the door and I guess we rushed him.
Q: Okay. And when you say you rushed him, what did you do?
A: I remember I just like I remember and I grabbed him and his keys fell and then I don't know... I think... I don't know who picked up the keys, but one of us picked up the keys and then I just...I just...I don't remember I got in the car and all of a sudden, and I was like and when they opened the trunk, and I was like, 'What are you guys doing?' And I guess they made him get in the trunk.
Q: Who made him get in the trunk?
A: Uhm...well...Nut and Box...Nut and...Nut and Boxer were out there and I was like, "What are you guys doing? What are you guys doing? Let's go, let's go.' And the trunk just closed and I uh, you know, I didn't know that he was in the trunk and shit. And I's was like, 'Hey where the guy man?' And they's like, 'He's in the trunk.' I'm like, 'Ah man.' That's when I just wanted to get outa the car. I's like, 'No, man, no.' Then I grew it. Went down to our friend's house and came back...
Q: Who's your friend you went to?

A: Went to unh...this guy Jeff's house.
Q: Where's his house?
A: It's o...it's pretty close to somewhere...it's by this police station, I don't know where exactly, but it's around here somewhere. Then...then I was like, 'Man, uh,' I want out. And I just...I just went back over there to the neighborhood, and I got out of the car.
Q: Okay. When you got to Jeff's house, what was the reason to go to Jeff's house?
A: 'Cause he...Jeff like...the...when we were at...we were at...Jeff was over at the house with us. And unh...he was telling us, he was telling us something about his girlfriend or his wife or something. One of our friends, Ray had told his, this other girl something about him being married and then unh I got a beeper, I don't know where it is now and Jeff had paged me and he's he's, like 'What's you niggers doing over there?' Nothing. Nothing. And he's asking us if we was going to Ron's house and I was like, 'Yeah, I don't know, we might.' And so I had like, we's just.. we was just driving around in the car doing nothing and you know we just went over to Jeff's.
Q: When you, when you say you have a beeper, and what does your beeper look like, what kind of beeper is it?
A: It's a clear beeper. West Coast Paging.
Q: Okay, you know your number?
A: Yeah, 479-8973.
Q: Let's let's back up a little bit to the part where you rush him, okay? And...
A: It was just like...like

Q: Go ahead and sit down first cause I...I want to tell you something. We're are doing pretty good here as far as talking about this, but we're are still lying a lot. Okay? Shaun, it ain't going to do any good. Okay? We know...
A: I'm telling you what I...
Q: Okay, just let me finish...
A: Alright...
Q: Okay, we know the whole story, okay, and this is not the right story, it's a piece of the story, but it's not the right story, okay? You left out the fact that you guys didn't just rush this guy, there was a gun involved, okay?
A: None of us...
Q: Yeah, there was a gun involved...
A: I'm telling you none of us had a gun...
Q: Alright, I'm telling you you did, alright? And the reason that you went over to Jeff's house was to pick up the shotgun, straight out. And you're leaving that out. Okay, then as you go along, and you're leaving more and more stuff out, okay? Now, it's not gonna work, Shaun, it's not gonna work, we've talked to too many people, we've got too much of the story now. And it's just going to show you out to be a liar, and you know what that looks like?
A: (INAUDIBLE) Fuck up (INAUDIBLE)
Q: (from Erickson) Hunh?
Q: (from Gallagher) Everybody makes mistakes, okay? And you very, you very obviously made one here. Alan very obviously made one and Scott did. But lying about it isn't going to fix it.
A: Fucked up, messed up my damn life.

Q: We got to talk about it, and we got to talk about it all, not just a piece of it, not just the parts you want to tell us...
A: Well what is that (INAUDIBLE) I know none of us had a gun, none of us had, I know I didn't have no gun. And Nut was too drunk to have a gun and I know, I know Scott didn't have a gun.
Q: That's not true. Detective Erickson's got some photos here for you. You may recognize these.
A: Is that a 22?
Q: (from Erickson) No, it's a 357 Magnum.
Q: (from Gallagher) We know what we are talking about.
Q: (from Erickson) We got the gun.
Q: (from Gallagher) We just picked that up today.
Q: (from Erickson) Now, everybody makes mistakes. It takes an upfront person to admit it and then you can deal with it, once you admit it, you can deal with it. We're not telling you any lies, we've talked to a lot of people.
A: I believe you, (INAUDIBLE).
Q; Okay, we want you to be upfront with us, you made a mistake, the only way that you are going to be able to deal with it, is to get it out.
Q: (from Gallagher) What happened? What went wrong?
Q: (from Erickson) The guy fight back?
Q: (from Gallagher) What went wrong, man, I know you all didn't start out to do this. Where did it get screwed up?
Q: Someone (INAUDIBLE) you into doing it, Shaun.
A: (INAUDIBLE) (Crying)
Q: (from Gallagher) What happened?
A: I don't...I don't... I don't know what happened, but it's...

Q: (from Erickson) You don't know how to start telling it?
A: (Crying)
Q: (from Gallagher) Take it one little piece at a time.
A: Oh man
Q: (from Erickson) The three of you left the apartment, right?
A: Yeah.
Q: Where were you going?
A: To the corner (INAUDIBLE), but some how or another, we ended up fucking, fucking whatever, being stupid, I guess.
Q: Gonna steal this guy's stereo. Is that what you were going to do?
A: I don't steal car stereos, that's petty.
Q: Okay.
A: I don't even... I don't even know how how we got involved in it, that that's just that's it.
Q: (from Gallagher) Did somebody say, 'Let's jack him up?' Who said that?
A: I think... I think it was Alan, but I don't know.
Q: Did you and Nut talk about that?
A: Talk about what?
Q: Let's jack him up.
A: I wasn't... I wasn't even really talking, 'cause I was...I was... I was... I was... I was mad and I was like... I was just you know... I was just outside when... then I know it was just like being somewhere that you didn't want to be, but you were there.
Q: (from Erickson) Is that what you were mad about?
A: Yeah.
Q: Had the gun?

A: I didn't have a gun.
Q: Who had the gun?
A: Honestly, I don't know who had the gun. Well when we took the car home I know I didn't.
Q: How did you get the guy's attention?
A: It's not... it ain't hard to get somebody's attention. You just walk up to somebody.
Q: And ask em what time it is, right?
A: (INAUDIBLE)
Q: Ask them what time it is?
A: I asked him what time it was.
Q: You did? And did he roll down the window and tell you?
A: Yeah.
Q: What happened?
A: His door...wasn't when I asked him what time it was...his door wasn't even locked or nothing.
Q: Okay.
A: And then I just asked him what time it was, and I was standing right next to, and when I asked him what time it was, and you know, I don't think he heard me... I don't know. And he just looked at me, and I asked him what time it was and then the door just flew open. He just got out and, and I think that "Nut" was on this side of me and Scott was on this side of me.
Q: What happened?
A: (INAUDIBLE) just put him in the trunk.
Q: How did you get him in the trunk?
A: Nut told him to get in the trunk. And he just got in the trunk, he got into the trunk.

Q: Shaun, I know you want to tell the truth, I know you do.
A: That's how he got into the trunk, Nut told him to get into the trunk. He said, 'Get into the trunk' and he got into the trunk.
Q: Just like that?
A: Just like that.
Q: (from Gallagher) was Nut holding the gun then?
A: (INAUDIBLE) When Nut told him to get into the trunk, he was just like, unh-hunh, unh-hunh, I don't remember he was saying something, I don't remember, he was saying something, he was telling... he was saying something... I don't know what he was saying but Nut just told him to get into the trunk and he just got into the trunk, he just got into the trunk.
Q: (from Erickson) Who opened the trunk?
A: The guy opened the trunk.
Q: How did he open the trunk?
A: Just... I don't know... the trunk was all flat, I didn't even see no keyhole, and he just... I guess... it's like...it's like flat and the keyhole thing goes in, but if it ain't locked it...it you could just like push it into open, he just pushed it and it opened and he got in the trunk.
Q: Didn't put up a fight, didn't try to run, nothing, huh?
A: No.
Q: What happens after the guy gets in the trunk?
A: We went down the street.
Q: Who was driving?
A: Me.
Q: You? Where was Nut sitting?
A: Back... on the passenger...

Q: And how about Boxer?
A: He was sitting shotgun.
Q: Where were you guys going?
A: At first, nowhere, you know, we's just driving around.
Q: Talking?
A: No. I wanted to...I was like man...I was like, 'What are we doing,' I was like, 'Man, let's take Nut in the house. Let's take Nut in the house.' Nut was like, 'Naw, naw.' And then, I don't know, somehow or another we ended up at Jeff's house. And I was downstairs and Nut went upstairs and him and Jeff were talking.
Q: Then what happened?
A: I guess that's when he got the shotgun.
Q: You guess?
A: No, that's when he got the shotgun.
Q: You saw him with the shotgun?
A: I didn't know it was a shotgun. I just seen a big ol' rifle.
Q: Then what happened?
A: Then we were going to go back to Ron's house, again (INAUDIBLE)...
Q: Was this guy in the back of the trunk?
A: Yeah. (INAUDIBLE) I wasn't saying nothing the whole time we were in the car.
Q: So what happened? Somebody was saying something in the car. What were they talking about?
A: I don't know...they were singing...they kept singing this song and Nut was yelling, telling 'em, 'Can you hear me? Can you hear me?' And he's like, 'Yeah, I can hear you.' He's like, 'Aw Shutup' (INAUDIBLE)

Q: What'd Nut say?
A: He was just telling the guy was a jerk, you know, 'Shut-up, shut-up.' And the guy wasn't even saying nothing and Nut 'Can you hear me?' Say, 'Yeah. He, like shut-up.'
Q: Then what happened?
A: We just drove around, I guess, I guess Nut was going to blast and rush and Ron...I don't even know...I don't know why we got that...that damn thing gun...just...Nut was drunk...he wanted to go get the gun...got the gun and we went...and just drove around...we drove around and I was like...and then we went back to Jeff's house and gave him the shotgun back.
Q: Who shot the shotgun?
A: I think Nut shot it...I wasn't...when...unh...I think Nut shot the shotgun.
Q: Well, the shotgun goes off.
A: I wasn't.
Q: It is pretty loud.
A: I know it is loud.
Q: Okay.
A: When...when he shot the shotgun...I was'nt...I was'nt...I wasn't on the same street with him...I was...I was down the street.
Q: Well, then you lost me on your story, 'cause you were driving around and around.
A: Yeah, we were driving around and then...I don't know, he was drunk...he was...damn...when he's drunk I don't like...I don't like being around...I like being around him 'cause he's a homey and everything, but when he's drunk...can't talk to him...can't reason with him. And like right before we went to Jeff's house...where'd

we go?...we went down...went...I don't know where...like there's a park around here somewhere.

Q: Quite a few parks around here.

A: And we went...and they got off the car and I turned the corner and I went down the street and I was turning around and that's when... I heard...I heard a shot...I heard gunshots. Came back...went to Jeff's house, 'cause we were right around this neighborhood...went to Jeff's house and we gave him the big...that big ol' gun back.

Q: How many times did Nut shot...shoot the gun, the shotgun?

A: Like twice...goosh, goosh.

Q: And he was way in the park and you were driving around?

A: No, I's just like...I went...like I turned...I to turned around...and he just...he was drunk and when...when he's drunk, he don't understand. No reason...

Q: You don't understand, we found a shotgun shell in the car. That means the gun had to be shot from the car.

A: Naw, we didn't shoot the gun out of the car. I put that on everything (INAUDIBLE)...we did not shoot that shotgun in the car.

Q: Then how'd the shotgun sh--casing get in the car?

A: I have no idea. Maybe when he sh...when he shot it he picked it up or something, but he didn't shoot the shotgun in the car.

Q: So you returned the shotgun?

A: Yeah.

Q: Then what happened? The guy's still in the trunk of the car. What happens?

A: I don't know...when...they got out...they got out...I was scared... well everybody...I was...I was horrified...then we seen

the police and we were just driving around...and we went... I think to Gilbert High School, and we went over there and I was just going to leave the car and just go back to the house...but it didn't happen like that.

Q: What happened?

A: That's when I knew...that's when I knew that...I wa...ha...I...I think...I think...I ain't sure what happened...but that's when I seen all of them and I stopped the car...I seen the guy...and it's like...if you know...we were...we were sitting right there and I was like, 'Damn.' I's like so, 'Let's go, let's go.' And then Boxer was sitting in the car and I's like, 'Let's go, let's go.' And then like 'that guy in the trunk seen us'.

Q: Who's saying that?

A: Nut was telling us like, 'He seen us.' I was like, 'So what, so what.' Like, 'He's seen us.' And I's all, 'So what, so what, just...you know just leave him in...just leave him in the trunk, so what, who cares.' And then he's like, 'Alright.' So I went...we were right there by the freeway, like right, you could see the freeway from the street. Drove right there and I got out the car...everybody got out of the car. I was like, 'Let's go.' And he's like, 'I'm telling you nigger, he seen us, he seen us.' I said like, 'So what, so what.' So like all I remember we...at first we were gonna jump the fence...and we did it and we're standing there and I was like, 'Well, what are we gonna do? What are we gonna do?' And next thing you know, we just... we just heard...heard...heard gunshots and I just ran home...(INAUDIBLE)

Q: Hunh?

A: Alls I remember is that I heard a blast and I just broke.

Don't know what happened...just ran.

Q: You know, Shaun, each time that you give a different scenario of what happens, each time you get a little bit more truthful, but each time you're still lying. If that were the case, why were you telling people that you shot the guy? You did tell people that, didn't you?

A: Just to seem like a bad ass.

Q: (from Gallagher) Hunh?

Q: (from Erickson) Just to make yourself look like a bad-ass, is that what you said?

A: (INAUDIBLE)

Q: I don't think so...Are you ready to take it from the top again, only being more truthful this time? People don't go around saying that they shot somebody in the head just to appear like a bad-ass.

Q: (from Gallagher) That's not what you told Dwight.

A: Dwight?

Q: Unh-hunh.

A: Big Pookie?

Q: Unh-hunh. That isn't what you told him. That isn't what you told Jeff.

A: Didn't even talk to Jeff about it.

Q: (from Erickson) I think you did.

A: I didn't...I did not talk to Jeff about it. He's just like what happened.

Q: (from Gallagher) Yup, somebody talked to him.

A: It's like you know how shit happen. I didn't talk to Jeff about it.

Q: (from Erickson) The three of you left the apartment with your gloves on, right?
A: Unh-hunh.
Q: Why?
A: 'Cause the guy Ron that wouldn't take our friend to the hospital... we were gonna...I guess we were gonna take stuff out of his car...I don't know, he had a stereo in his car.
Q: But you didn't go to his car to take the stereo.
A: Yeah we did.
Q: You did take his stereo?
A: No, we didn't...we didn't...
Q: Well, I'm confused. Now you put the gloves on to go take Ron's stereo and you're saying you did take his stereo?
A: No we didn't, we didn't. I had...I had...I had a (INAUDIBLE) (YAWN)...
Q: Pardon me?
A: I had...(INAUDIBLE) I had those rubber gloves on when I when I walked out of the house.
Q: I know you did.
A: Just walked out of the house.
Q: You had the rubber gloves on? Nut had rubber gloves on and Boxer did. All three of you. You had something in mind leaving the house with rubber gloves on.
A: We were gonna go take Ron's car stereo.
Q: Why didn't you? Then
A: Because when we got down there...I don't know it's like...he parked... he parked his car...we didn't see his car so that's when we went up to his house.

Q: Then what happened?
A: (YAWN) That's when we just walked around the neighborhood...walk around the neighborhood.
Q: With these rubber gloves on. What were you planning on doing with rubber gloves on, walking around the neighborhood?
A: I don't even...I don't even know why we didn't take 'em off.
Q: That's what I'm asking you.
A: I was...I had my hands in my pocket...I had my hands in the jacket pocket and I's just walking around right out there...and they were behind me and I got to the front gate and all just standing there and I's...'Let's go home.' But we didn't go home.
Q: No, you didn't. You ta--contact this guy in the car.
A: I contact him?
Q: You asked him what time it was.
A: Yeah, I did.
Q: You did. Why did you ask him what time it was?
A: Because when we're sitting up there, we seen all those cars go...and I...I... I'm pretty sure (INAUDIBLE)...it was just like...
Q: I can't hear you.
A: Uhm...it wasn't Boxer 'cause he wasn't really talking. Unh...he goes, 'Let's take his car.' I's like, 'We're not taking his car.' And he said, 'Come on, come on, just walk me over there.' And I just walked over there...we was all together whole time...and uhm...we just asked him, 'What time is it?' That's when he got like snatched out of his car. He...he...he he do do what I say he didn't even...
Q: I think if I had this pointed at my head, I'd get out of the car, too.

A: Uhm...all I know is his door...I asked him, 'What time is it?' and he didn't hear me...
Q: So, you asked him again?
A: I asked him, 'What time is it?' And that's when the door just flew open...and unh...and when the door come open, I went back, and Nut was like, 'Get in the trunk, get in the trunk.' And he just got in the trunk closed the trunk.
Q: This is where you're not being truthful.
Q: (from Gallagher) The gun's already out.
Q: (from Erickson) You're pointing the gun at the guy and you're telling him to get into the trunk.
A: I didn't have the gun. I did not have no gun. I just asked...I said, 'What time is it?' And he's...he looked at me...I don't know...I thought...I don't know...he just looked at me.
Q: Why'd you ask him what time it was?
A: 'Cause...'cause...Nut had already said, you know, let's jack him.
Q: Let's jack him? What does 'Let's jack him' mean?
A: We wanted to take his car, so let's jack him for his car.
Q: Okay.
A: (INAUDIBLE)
Q: (from Gallagher) Everybody that I've ever talked to, 'Let's jack him' means 'Let's rob him.' Is that what it means to you?
A: Let's jack him.
Q: Let's jack him. And so 'Let's jack him for his car' means 'Let's rob him from his car?'
A: Yeah...it means...said, 'Let's jack him'.
Q: Okay.

A: It just...you know, I know Nut was on this side...'cause he kept walking into me. And then that's when I walked up to him and I just knocked on the window and I said, 'What time is it?'...you know, he rolled down the window and said, 'What time is it?' Then that's when the door...I was standing in the middle and like the door just like came open and he's like...I don't know, the guy was saying something but I don't know what he was just like, 'Take the car.' I think that's what he was saying, 'Take the car, just don't hurt me, just don't hurt me.'

Q: Couldn't it have been that the door flew open because somebody stuck a gun in the window?

A: I don't...we were...I was...we were...when it...when it was happening...we walked up to the car, I was tripping, I wasn't even paying no attention to...I just like, 'What time is it?' 'Cause I didn't think they were going to take the guy or anything, you know, or anything...

Q: Well, could it have been that somebody stuck a gun in the window?

A: It could've been, but I...

Q: The window was rolled down a little bit?

A: Yeah, he did roll down his window.

Q: Somebody stuck a gun in the window.

A: I wasn't paying any attention to him. Alls I know is the door came open and he just... And Nut was just telling him to get in the trunk, get in the trunk.

Q: Well, the door flew open 'cause he saw the gun.

Q: (from Erickson) He's telling you, 'Don't hurt me, don't hurt me. Why would he be saying that unless there's a gun pointed at

him?
A: He was just like, 'Take the car, just don't hurt me.'
Q: Just don't hurt me. Who had the gun?
Q: (from Gallagher) We know the gun's there.
A: I...I...I...wasn't...
Q: Okay?
A: When...when...when I walked up to the car, I wasn't paying attention, I was just like, I was just like, 'Oh my God...I...I didn't even believe that we were, you know, we were thinking like that.
Q: Shaun, you were paying attention.
A: I mean, I was paying attention, but I wasn't like...
Q: You know, I've had stuff happen, she's had stuff happen...
A: I believe you...
Q: And you've had stuff happen. When this kind of stuff goes down, man, your eyes get this big and you take everything in, it's like slow-motion. Okay, you knew the gun was there. The dude knew the gun was there. That's why the door flew open...man...he is all too willing to do what anybody is asking of him right now. You know that as well as I do. The gun was there, right?
A: (INAUDIBLE)
Q: What?
A: I don't know.
Q: Okay...
A: When it hap...when it happened, I don't know, I wasn't paying attention, I just remember the door opening.
Q: Okay, but the gun was there. Why can't you tell us that? We already know it. You know. You're jerking us around with stuff we

already know. Alot of these questions, we're just trying to see whether or not you're telling us the truth. Every time you lie we know it already. You should know enough from sitting in this room this time we've been sitting here that we know alot.

A: (INAUDIBLE)

Q: I wa--I feel like almost I was there at this point. Okay, so let's quit screwing around with all this stuff. We could sit in here for hours, but there's no need for that. Okay, now the gun gets stuck in the window, right?

A: Yeah it's...yeah.

Q: Okay, and the dude gets out and he says, 'Don't hurt me, don't hurt me.' Okay. Then who tells him to get in the trunk?

A: Nut told him to get in the trunk.

Q: Nut tells him to get in the trunk? Does he still have his own keys?

A: The...

Q: Or do you have the keys now? Did he drop the keys? Where did the keys go?

A: When he got out...when Nut told him to get in the trunk, he opened...he opened the trunk.

Q: He opened the trunk?

A: Yeah.

Q: Okay.

A: Yeah, he opened the trunk.

Q: And then he gets inside by himself? Okay, and that's 'cause the gun's pointed at him. He don't want to get hurt. Alright?

A: Yeah.

Q: Okay, so he gets in the trunk. Now, who took the keys from

him?
A: There in the top.
Q: There in the top? Okay. So where are you standing right now?
A: I'm like...this is the car...I'm standing like at this side of it. I'm standing like this.
Q: And where's Nut?
A: Nut was in the middle of the trunk and Boxer was on the sidewalk. And then, like when he got in the trunk, I think...I think Scott closed the trunk and I seen the keys and I just grabbed them, I got in the car...
Q: You grabbed the keys? Okay. Did you just decide to drive? Did Nut tell you to drive? Did Boxer tell you to drive? What's the deal?
A: I don't know because...I don't know...Because I never been in a "G" ride before and I don't trust anybody to drive.
Q: Okay. Now, who's got the gun at this point?
A: Uhm...Boxer..unh...Boxer or Nut, one of 'em, I don't know who had it when we got in the car. I don't know who had it. I just know we went to Jeff's house and when Nut got out of the car he got the shotgun.
Q: Okay, now, before you even get there, you guys start to drive and right away you're already talking about, 'This dude's seen us, man.'
A: No.
Q: Unh-hunh.
A: Unh-unh. Nut was talking to him...unh...I don't know 'cause I had a I had a and I had this the hood part of the jacket...on my head...and I had a and...I think I had a (INAUDIBLE) driving

(INAUDIBLE)...
Q: But when you went to Jeff's house, you went specifically to get the shotgun.
A: No.
Q: Yeah.
A: No...he...Nut just told me to go to Jeff's house...and he's just...and I just...I just went over there. He didn't say where, he just say, 'Go to Jeff's house.' And I went to Jeff's house. We went to Jeff's house.
Q: Okay. And then you went somewhere and supposedly Nut gets out of the car and shoots his shotgun.
A: Yeah...
Q: Did he go looking for some Watergate Crips?
A: I don't know, I know he don't get along with 'em. I...
Q: Did he go looking for some Watergate Crips, or not?
A: I know that they came through our neighborhood, came through our neighborhood.
Q: Uhm-hmm.
Q: (from Erickson) Uhm-hmm.
A: So we were just around the neighborhood.
Q: (from Gallagher) What neighborhood? Theirs?
A: Where Nut lives.
Q: Where's Nut live?
A: Over there on Glen Glenoak or (INAUDIBLE) they had come through the neighborhood and they came through (INAUDIBLE).
Q: When?
A: I think it was the same...it was the same day.
Q: So is Nut looking for these guys?

A: Yeah, I guess...he didn't...
Q: Did he find them?
A: Hunh-unh.
Q: Then why did he shoot the shotgun?
A: 'Cause he was fucking drunk, being stupid.
Q: Okay. Where did he shoot it at?
A: I guess in the air 'cause I didn't hear it hit nothing.
Q: Guess where?
A: In the air 'cause I didn't hear the...hear like no...
Q: Okay, where is he when he shoots it?
A: I don't know...I...I wasn't...when he...when he got out the car with the shotgun, I went in and I turned around and he just, 'boom, boom...'
Q: Okay, where were you at when you stopped the car and he got out, he got out of the car?
A: (INAUDIBLE)...we got the shotgun, we went down this street by the railroad tracks. And I remember we were following the railroad tracks and then we turned...went up and went through Glenoaks, the backside...backside of the apartments and I turned to the left, then like not...not like right before you get up...like how...there's a street like this and then there's a bridge and you come over and there's a alley and there's a street.
Q: Uhm-hmm.
A: Like we went over the bridge, and I think he thought he seen a...and I turned and I went in there and that's when I heard a shotgun (INAUDIBLE) But I know, he didn't shoot at nobody. He didn't shoot at nobody. He...probably just shooting at the air like a stupid.

Q: So he didn't get out of the car to shoot it?
A: Yeah, he did.
Q: I thought you said when you went over the bridge...
A: Yeah I said when I went...
Q: ...turned the corner...
A: ...yeah, when I went over the bridge, like right when we go over the bridge there's a alley. And then there's, a I think it's Commercial Street... out of the car and I went to that street...
Q: The bridge of what?
A: There's like a...a riverbed that goes, you know, and there's like a bridge, I don't know what street...
Q: You mean Chippewa (from Erickson) (INAUDIBLE)
A: Yeah, that is the street Chippewa. Right yeah went over the bridge, and I went over that bridge and that's where we found the car...and he just started blasting.
Q: (from Gallagher) Okay.
A: I don't know...at who or what...I didn't see nobody out there to shoot at.
Q: Then he gets back in the car with the shotgun?
A: Yeah and then we went back, took it to Jeff's house.
Q: You took it back over to Jeff's.
Q: (from Erickson) While he was shooting the gun, were you hold--shooting the shotgun, were you holding the gun?
A: Hunh-unh. I didn't have it...I didn't have the gun. I was driving.
Q: So that means Scott had the gun?
A: Yeah, yeah, 'cause Nut had the shotgun. And I had no gun.
Q: So Scott had the gun.

A: (INAUDIBLE)
Q: Okay. So then what happened?
A: We went back to Jeff's house and we were there for awhile and that's when like... that's when we started like so what you know... what are we going to do with the car...like you know...the guy's in the trunk and you know... just like what are we gonna to do with him and I's like, 'Let's just... you know... drop it off on the freeway or something... just leave it on the freeway...you know on the freeway.
Q: (from Gallagher) Which freeway?
A: I didn't say no s... I's just like, 'Let's just leave the car on the freeway' you know.
Q: Tell me about the part where you guys were going to go out to Pomona off the canyon road somewhere.
A: What? No, that wasn't even talked about going out to Pomona, that wasn't... I don't remember nobody talking about Pomona. I just...I just remember saying, 'Let's leave the car on the freeway'... I said, 'Let's leave the car on the freeway.'
Q: Apparently some people remember it different.
A: I don't know they weren't talking to me about it (INAUDIBLE) canyon so we was there for awhile and I was just like... you know, 'So what are we gonna do... what are we gonna to do' and then I just said, ' Come on let's go let's go' and we go take the car (INAUDIBLE) and that's when we all were there by Gilbert high school... drove back over there.
Q: Then what happened?
A: (INAUDIBLE)
Q: Hunh?

A: We blasted that guy in the trunk I guess.
Q: (from Erickson) You said you smoked him, isn't that what you said?
A: I said we smoked him?
Q: (from Gallagher) Tell me how that happens. You all got out of the car...
A: Before we got out of the car Nut said, 'I'm gonna blast him'.
Q: Who said that?
A: Nut said, 'I'm gonna blast him'.
Q: What did you say?
A: Don't wanna do it.
Q: What did Boxer say?
A: Boxer wasn't saying nothing... wasn't saying nothing... he was just sitting (INAUDIBLE).
Q: So what happened?
A: We got out of the car and then we was just standing there 'cause I... I was like, 'Naw man don't don't do this shit don't do it'. Shit got crazy.
Q: Yeah, but you got the keys. How does he get the trunk open?
A: It wasn't locked...it was just closed. Trunk was not locked, it was just closed.
Q: Now wait a minute...how could you have the trunk closed but not locked?
A: Alls you gotta do is close the trunk down.
Q: So why didn't this dude just get out?
A: How you gonna get out of that trunk from the inside?
Q: Exactly...
A: 'Cause I...

Q: Have you ever been able to walk up to a trunk lid without the keys, just to open it up, just grab it and open it up? Naw, you need the keys man.
A: No, have you ever s...have you ever seen the back of a...of...unh... what kind of car is that (INAUDIBLE)...you don't need a key to open that trunk. It's like the glove compartment. You know like how the glove compartment's locked and you need the key to open it but if it's unlocked, you could just turn it and open it...that's how it was. The trunk was just closed.
Q: So you don't need a key to open this trunk to this car?
A: No, not if it ain't locked...and it wasn't locked. The trunk was just closed.
Q: So who opened the trunk?
A: We got out of the car...we got out of the car and we're all standing at the back of the car and I...I opened the trunk. I opened the trunk and then I closed it and I's like...I's like, 'No, man.' And so then, I...Like we're just talking.
Q: What did the guy do or say when you opened the trunk?
A: He didn't...he didn't...he didn't say nothing...he just..he was just like laying there.
Q: Umm-hmm.
A: And I closed up the trunk and I's like...
Q: He didn't say nothing when you opened the trunk up?
A: He didn't...he didn't say nothing. He did not say a word.
Q: Did he look at you?
A: I wasn't looking at him, I just know he didn't say nothing...opened the trunk, I wasn't looking at him...and I's like, 'Naw, man, can't do this.' And I's like, you gotta kill him, you

gotta kill him.'

Q: So then what happened?

A: Killed him.

Q: Did you open the trunk again?

A: Yeah..not all the way...

Q: Not all the way.

A: Not all...

Q: Part of the way. And what did the guy say this time?

A: I just heard...I just remember hearing him say, you know, 'Don't hurt me.'

Q: Did he try to protect himself or anything?

A: No I wasn't looking at him...just...I just remember him saying, 'Don't hurt me.'

Q: Okay, you opened the trunk part of the way. Then what happened?

A: By that time, I didn't have...I didn't have...I didn't have the gloves...I had socks on...and...

Q: Yeah?

A: And we were arguing, I was like...you know, the trunk...the trunk wasn't all the way open...I had my arm...I had my arm on it so it wouldn't open all the way.

Q: Umm-hmm.

A: And I was like, 'No, man,' I was like, 'No, no, no,' you know, dude, you know, 'just leave him there, he won't, you know he won't say nothing, he won't say nothing.' But Nut kept saying, 'No, gotta kill him, gotta kill him.' And then I remember I think Scott had the gun and I'm ain't sure Nut Scott had the gun and he handed it to Nut, and I was like, 'We gonna kill him, we gonna kill him.'

Q: Scott said that?
A: No...Scott wasn't saying nothing...you know, he was talking but he wasn't saying you know...you know...and so Nut was drunk. I's like, 'Nigger, you drunk. We aint gotta do nothing. Alls we gotta do is just leave, just leave.'
Q: Was Scott saying, 'No, you don't have to kill him?'
A: Scott wasn't saying nothing. He was...
Q: You said he was talking...
A: Right...I mean like...like if we would talk to him like you know...he's just like, 'Where we going?' You know, but he wasn't talking about you know...and when Nut was saying, 'We gotta kill him,' I was just like, 'Naw, man, hmm-umm.'
Q: So Scott handed Nut the gun?
A: We were just...we were just..we were out there and he's like, 'Gotta smoke him, gotta smoke him.' He said, 'He seen me, he seen me,' just like that. I just remember the trunk was open.
Q: You opened up the trunk?
A: (INAUDIBLE)
Q: You take your arm off it?
A: It was...
Q: How did you open it?
A: The trunk? It was like...it was like I had my arm on it like this but it wasn't closed. Alls you had to do was lift your arm up and it will open I had my arm like up. And...I let the trunk up...and he just... you know...you know...blasted into the trunk.
Q: Who? Who Shaun? It's the hardest part right here, man. You finish this part, it's done.
A: (INAUDIBLE)

Q: How many times did you shoot?
A: Shot one gunshot.
Q: One gun shot? How many does the gun hold?
A: Two or three...I think two.
Q: How many did you have in there?
A: It was loaded...hmm...
Q: So two or three?
A: Yeah.
Q: But you only fired once?
A: I only heard one gunshot...
Q: What's that?
A: I only heard one gunshot. (INAUDIBLE)
Q: Is it that hard to admit? (LONG PAUSE) Tell me something, I have a question about this. Apparently, the guy had a wound in the arm...
Q: (from Erickson) In his hand.
Q: (from Gallagher) In his hand? And you said you only fired one gunshot. But he apparently ended up with two wounds?
Q: (from Erickson) (INAUDIBLE) shot you right?
A: We were at the back of the trunk...it was...it was all of us...hmm...
Q: (from Erickson) Okay.
Q: (from Gallagher) Everybody's there, I grant you. And, and, you know like you said, everybody's there...
A: I was standing on the side...I was standing on the side of the trunk...I opened the trunk and I just...I remember...remember...I was standing by the side of the trunk...and I just...I remember Nut's arm going like that.

Q: (from Erickson) You shot him.
Q: (from Gallagher) Nut didn't shoot him, man. That's just what we talked about here not two three minutes ago, okay, let's not go backwards.
A: I know, I know.
Q: Okay, you shot him.
A: I'm just... I'm just telling you what I saw...
Q: I'm telling you...what
A: I'm telling you what I saw...
Q: Yeah...
A: And so then... you know... we're stood there.
Q: (from Erickson) Do you remember seeing the guy take cover with his hand? Look at me Shaun.
A: (CRYING)
Q: Do you remember seeing the man take cover with his hand?
A: (CRYING)
Q: He was shot through the hand, into his head...
A: (CRYING)
Q: He took cover...
A: (CRYING) All I remember was...
Q: Shaun...
A: I didn't look at him, I'm telling you, I didn't look at him.
Q: I know you didn't, that's what you told people. You shot him, but you didn't look at him. Do you remember telling people that? You opened the trunk, you pointed in and the guy went like that, remember... remember? You shot him, didn't you? Shaun.
Q: (from Gallagher) You already said, 'Yeah.' Just say it a little louder so she can hear you. So she can stop asking you the

same question over and over again.
Q: (from Erickson) Shaun...
A: Yes, (INAUDIBLE).
Q: (from Gallagher) Now take a minute and compose yourself, and we want to start from the beginning and cut out all the bullshit.
A: I did everything (INAUDIBLE)
Q: Hmmm?
A: I did everything.
Q: We know that, but we gotta go right from the beginning, okay?
A: (INAUDIBLE) (CRYING) I know, I want to say, I want to say that nobody else, I did it.
Q: (from Erickson) Tissue?
A: (CRYING LOUDLY) (INAUDIBLE) I did it please you just don't all (INAUDIBLE) Goddam, (INAUDIBLE) I'm so fucking sorry. If somebody fucking did this to my little girl, goddam.
Q: (from Gallagher) Okay man, try and pull yourself together.
A: I guess I'm going to the pen... the fucking pen. Damn. I'll be right there with the rest of my damn family.
Q: Let's just try to chill for a minute.
Q: (from Erickson) Shaun, do you need some?
A: No ma'am.
Q: Okay.
Q: (from Gallagher) Let's take a minute and let him get himself together.
A: Deep shit. What are those pictures of?
Q: (from Erickson) These?
Q: (from Gallagher) More pictures of the gun. Let's get yourself together for a minute. Do you want something to drink?

A: (INAUDIBLE) I'm alright. The only thing I want to do I want to call my mother.

Q: Okay, take care of that when we're done here.

Q: You don't want nothing to drink? Let's wait a couple of minutes for her to get back. Let me ask you a question while she's out there. You were talking about a jacket that you had... what jacket is it?

A: I don't know... it wasn't... it wasn't my jacket...it was just a black jacket.

Q: Whose jacket is it?

A: I don't know, Alan had... a whole bunch of them at the house, like two or three of them. (INAUDIBLE)

Q: Hmmm.

A: A lot of my friends have them... it was just one of somebody's who's at the house... I don't know whose it was.

Q: You said it had a hood?

A: All the jackets have a hood to 'em.

Q: What do you mean of all of those jackets? What kind of jacket is it?

A: I don't know... they're just like... long black jackets.

Q: Like the Raiders jacket type thing?

A: Naw, not like Starter jackets though... they're just... you seen what Cholos wear... like long black jackets... with fur inside of 'em.

Q: Yeah.

A: Yeah.

Q: Fur... or like white cottony stuff...

A: No, not the white cotton stuff...not the Levi jacket.

Q: Yeah.
A: It's a black...
Q: You know what I'm talking about.
A: Yeah, not those kind of jackets... it just like comes down to about right here.
Q: Unh-hunh.
A: It long and it looks really like... It looks kinda like one of those Raider jackets, but it isn't... it's just a plain...
Q: It's not as heavy or lighter...or what.
A: It's heavy... a little bit heavy.
Q: Okay. Just hang for her and we'll go through it once.
A: How long can I get when we get finished with it?
Q: I really don't know... you know... I don't know... umm. She's the case detective, I don't know what your record looks like, I don't know what the....
A: That don't have nothing to do with it, does it?
Q: I think everything affects it a little bit, and I have never stopped to try and second guess what, you know, when it comes to sentencing of things, I don't understand it at all, I don't understand the formula they use, I don't understand any of that.
Q: (from Erickson) Did you need something to drink?
Q: (from Gallagher) He says, 'No'. Okay, we'll just take it one time through...
A: Can I go to the bathroom?
Q: ...from start to finish.
Q: (from Erickson) He says he needs to go to the bathroom.
Q: (from Gallagher) Do you have to go desperate?
A: Yeah.

Q: Okay, we are going to have to put the handcuffs back on you to do that. (INAUDIBLE). We gotta go by the rules here. To do that we have to have two people.

A: (INAUDIBLE).

Q: (from Erickson) (INAUDIBLE) Follow him to the restroom. Okay.

(SUSPECT IS TAKEN FROM THE ROOM)

(SUSPECT IS BROUGHT BACK INTO THE ROOM)

Q: (from Erickson) Okay.

A: Alright.

Q: Okay. You ready to take it from the top, Shaun? Okay. You are over at Alan's apartment.

A: Yeah...we left...we left to go...to go take this guy's stereo...the one that (INAUDIBLE) ...got shot. And his car wasn't there. We went over to his house and he wasn't there...so, you know, we're outside...and Alan told me that he wanted to take a car, 'cause Watergate had came to our neighborhood and he was drunk, and I guess, and he just say he wanted to just go look for 'em, you know, so we seen this one guy...he was going out to his car...he got in his car. That's when I walked up to the window and I asked him what time it was. Then Nut snatched him out of the car and that's when we put him in the trunk, and I was driving the car.

Q: Okay, slow down a little bit. Did you see the guy get in the car? And, you go up and you ask him what time it is.

A: Yeah. That' when...I...I asked him twice...second time, that's when... unh...when Nut snatched him out of the car.

Q: Okay. Who had the gun at this time?

A: Unh...

Q: Be truthful, come on.

A: Unh...When I asked what time...I...I as...I asked...I...I asked...I think I passed it to Scott I...
Q: You passed the gun?
A: Yeah...I...I...put...I gave it to Scott and then like when I asked him what time it was, like he didn't hear me and like Scott was standing on this side of him and I was like in the middle of the window, and Alan was on this side...or Alan was like more at the back of the car...and...and I knocked on the window a second time. And he told me but, you know, he like, you know, (INAUDIBLE)... and I said, 'What time is it?' That's when he rolled down the window. And the guy came (INAUDIBLE)...this way. And that's when Nut snatched him out of the car and put him in the trunk...and I was driving the car.
Q: Okay. Slow down a second. You're going a little bit too fast for me. Scott has the gun and Nut's at the back...
A: Nut was wasn't (INAUDIBLE) ...when I... when I knocked on the window and he rolled it down... Nut wasn't all the way (INAUDIBLE)...the side that's when the door... when the door opened... I went back this way... and that's when Nut just snatched him out of the car... and that's when we all...we all walked to the back of the trunk and they put him in the trunk and I got in the car.
Q: How'd they open the trunk?
A: The guy opened the trunk.
Q: With his keys?
A: Yeah. 'Cause I remember the keys being in the top of the trunk.
Q: So Scott pointed the gun at him?

A: I think so.
Q: You think so?
A: Yeah.
Q: Or did Nut point the gun at him?
A: No.
Q: No?
A: No...Nut...'cause Nut grabbed him...
Q: Did you point the gun at him?
A: I was.
Q: Scott.
A: I was talking to him.
Q: Okay. So the three of you tell him to get in the trunk of the car?
A: Nut told him to get in the trunk...I was...I woulda just left him there...just left him standing there.
Q: So he gets in the trunk of the car. Then what happened?
A: That's when we went driving...driving around (INAUDIBLE)...Jeff.
Q: You were driving?
A: Yes, Ma'am.
Q: Where's Nut?
A: In the back...seat.
Q: Scott riding with shotgun?
A: Yeah...and Nut was drunk.
Q: When did you take the wallet from the guy?
A: I didn't take the wallet.
Q: Who took his wallet from him?

A: Unh...I...I remember he handed it...he handed it to Nut, I think...in the c...he opened it and it was some credit card or something...I don't know, some (INAUDIBLE)
Q: Okay. Why did the guy hand the credit card or hand the wallet to Nut?
A: 'Cause Nut told him,'Give me your money.'
Q: Okay. So Nut has the wallet?
A: Uhm-hmm.
Q: And you're driving to Jeff's house?
A: Yeah.
Q: Who's going through the glove box?
A: Think Scott...he was sitting shotgun, Scott was...
Q: Okay. Why were you going to Jeff's house?
A: Nut said...that's what Nut say, he say, 'Go to Jeff's house.' I didn't even ask him. I just went over there.
Q: Why? Why? What did he want to go to Jeff's house?
A: He just told me...he said, 'Go to Jeff's house,' just like that, he said 'Go to Jeff's house.' And I said, 'Alright.' And I was just like, 'Where...where's he live?' 'Cause I knew he lives somewhere around here but I don't even know where around here (INAUDIBLE) ...And I was like, 'Where's he live?' And I was just driving and I just drove over there, and Nut got out of the car and that's when he came back with the shotgun.
Q: Nut got out of the car by himself?
A: Scott got out of the car, but he didn't go...go up the stairs. He was just right there.
Q: And you stayed in the car?
A: I was just sitting in the car.

Q: Okay, how long was Alan gone?
A: 'Bout five minutes...ten minutes...five minutes.
Q: Okay. When he comes back to the car, what does he have?
A: Big ol'...it looked like a rifle, but it was a shotgun.
Q: Then what happened?
A: Got back in the car and we went back to our neighborhood and I guess you could say we...we were looking for Watergate.
Q: You were.
A: We were looking for Water...well Alan was...cause don't mess with me...he was looking for 'em.
Q: So you're looking for Watergate?
A: Yeah. 'Cause they had came through the neighborhood.
Q: What happens then?
A: Went down...went down Glenoaks and we turned on Chippewa and when I turned on Chippewa, they...Watergate they driving...they drive like three or four Cadillacs at least. Nut said he seen the Cadillac...a blue Cadillac like the one they had, you know but I went over the bridge too...and I tried...I wasn't going fast...I went over the bridge and Nut got out of the car and that's when I turned...I think it's by my Street...and I turned and...turned down at to...turn the car around and that's when I heard gunshots and just got back in the car and went back to Jeff's house. We taked the gun back over there.
Q: Then what happened? Who...who brought the gun up or the shotgun up to Jeff's house? Who took it upstairs?
A: Nut.
Q: You two waited in the car?

A: Unh... well Nut got out of the car and he took the gun upstairs and then Scott got out of the car.
Q: And then what happened?
A: Then... then they were upstairs... they were taking a long time, so I got out of the car and I went upstairs.
Q: You left the guy in the trunk.
A: Yeah, and I went upstairs and we were just (INAUDIBLE) ... up there and unh... Jeff was telling ... telling us about, 'What you all doing coming to my house so late?' and that was taking so long... he was yelling at Nut was like, 'What you all doing com--?' He said, 'I thought you all went home.' And Nut was like, 'Naw.' And he was like, 'I seen some waterbugs.' And I guess... and I guess that's what he thought he was shooting at but Nut was drunk, he don't even know and so we were up there, we were just talking and then Jeff (INAUDIBLE) and we left. That's when we went over there...
Q: You drove?
A: Yeah, I drove the whole time.
Q: Now where is Nut sitting?
A: Nut was in the back the whole time.
Q: Scott was in the passenger?
A: Yeah.
Q: Then what happened?
A: Then we got back in the car from Jeff's house the second time and Nut was like falling asleep in the back seat of the car. And I was just like, 'So, where are we going to take this car... where are we going to take this car?' And I's just like, 'Let's just drop it off on the freeway.' You know we might have to walk home,

but let's just drop it off on the freeway, anything I don't care. And Nut was like, 'Naw, he, you know, he's seen us... gotta kill him.' And I was like, 'Man, you're stupid, you're drunk, you're drunk.' He was like, 'I'm serious, I'm serious... he's seen us, he's seen all of us... we gotta kill him.' So then that's when we went over there by Gilbert High School and then we... we didn't know... you know... we didn't know what we were gonna do. We went there and Nut just kept telling us, 'Gotta kill him, gotta kill him.'

Q: Scott have the gun still?

A: Yeah, I think so.

Q: Then what happened?

A: (INAUDIBLE) ... and we weren't sure what we were gonna do, and then this... he just... he just gave me the gun.

Q: Scott gave you the gun?

A: When... when... when we were at Gilbert, Scott had gave it to Nut, 'cause Nut was like, 'We gotta kill him.' And I's like, 'No, no, no, no.' And then we got by the fence and Nut gave me the gun and said, 'Gotta kill him.'

Q: What did you do?

A: I opened the trunk and I didn't want to do it and I was just standing there and I was like, 'You gotta kill him, you gotta kill him.' And I opened the door and I just... I didn't look at him... just... just shot and I ran.

Q: How did you get back home?

A: Jumped the fence and went down the end... went down the railroad tracks.

Q: Right next to the freeway? The underpass?

A: I went... I went over the fence and it goes down and then there's like some trains.
Q: Umm-hmm.
A: And I just... I went (INAUDIBLE).
Q: How did Nut and Scott get home?
A: Went the s-- they all... all...they when I shot, I left then 'cause I (INAUDIBLE)... I left them, I just ran. I remember Nut blew out the fence 'cause he was all drunk and I... I didn't look back, I just left... I just ran... I ran... I ran... I ran... I ran down a hill and I ran back up and I was right there by the trains.
Q: Did you go back to the apartment?
A: I was waiting to see where they were at.
Q: Did you still have the gun with you?
A: I shot and I just... I don't know... I just... I just... I just... remember that I shot and I don't know what... I just gave them to one of them and I ran... I jumped the fence and I ran.
Q: What did you do with the gun?
A: I didn't have the gun, after I shot I gave it to them, I don't know what happened to it... I just... I gave it to them (INAUDIBLE) and I ran. And then Nut fell.
Q: You get back to the apartment, then what happens?
A: (INAUDIBLE)... go right back up there, just waited up there... (INAUDIBLE).
Q: Told them what you did, hunh? What else did you tell them?
A: The only person I told was Dwight and my girlfriend.
Q: What's your girlfriend's name?
A: Summer.
Q: When did you tell her?

A: Uhm...the next day...(INAUDIBLE)

Q: (INAUDIBLE) huh?

A: (INAUDIBLE)

Q: It's a heavy burden.

A: (INAUDIBLE)...ain't so much. The burden is just that...I know that no matter what I do now, no matter, you know...I know that I took somebody's son away from 'em...and I wish what...because I wouldn't have felt that good if somebody took my daughter away from me. I can't change what I did in the past, but all I can just say is, 'I'm sorry.' And I know 'sorry' don't help.

Q: Who eventually got the gun?

A: I don't know...I didn't see it 'til we got into the house. I don't know who...I don't know who got it. All's I know is when I got back to the house I just laid on the floor. I was just laying on the floor.

Q: When did you take off your rubber gloves?

A: I took 'em off when I was...when I was over at Jeff's house and I put em...I had my socks on.

Q: You took your rubber gloves off at Jeff's house and you had your gl--or your...

A: (INAUDIBLE)

Q: ...socks on. How about the other two, did they keep their rubber gloves on?

A: Nut did.

Q: Why'd...

A: Sc--

Q: Why'd...

A: Sc...Scott did.

Q: Why'd you take off your gloves?
A: 'Cause when all I was...went out to...when I got out of the car...we went back to Jeff's house for the second time, I was just gonna stay over there. And I just took 'em off and I threw 'em away and I's just like, I end...I ended up not staying and the gloves were already messed up.
Q: Why'd you put the socks on your hands?
A: Fingerprints.
Q: You said the gloves were messed up, what, they tear?
A: Yeah.
Q: Lost your tip to one of them?
A: I don't know...it had (INAUDIBLE)...it ripped across when I was trying to take it off, it ripped across the palm...Cause I was trying to take it off neat and it ripped it across the palm. And I remember I think this fingertip.
Q: Ripped off, hunh? (LONG PAUSE)
Q: (from Gallagher) Where'd you toss your gloves at over there?
A: I don't know...in a...big garbage can that was right there.
Q: The dumpster?
Q: (from Erickson) When you three left...Alan's apartment, who had the gun?
A: I...I have no idea. (INAUDIBLE)...I think Sc...I think Scott but I ain't sure. Unh...you know what? Yeah, Scott because...'cause I remember we're at the house then Nut gave Scott (INAUDIBLE)
Q: (from Gallagher) Whose gun is it?
A: I don't know.
Q: Is it just there at the house?

A: No, it was just...it was just there, I guess it's one of his, I don't know whose it is...
Q: Where do they normally keep it?
A: I know...I kn...when they put it up I never pay attention but like everytime we go out or something...
Q: Somebody takes it?
A: Either Nut or Scott.
Q: Why's that?
A: I guess it's their gun.
Q: But you say everytime you go out, somebody takes it, Nut or Scott, why?
A: 'Cause Watergate's trying to kill Nutcase...they beat him up and put him in the trunk and broke his nose...
Q: Oh.
A: Dropped him off at the park. Put a gun in my head okay.
Q: Besides the jacket, what were you wearing?
A: I think...think some black pants. Uh I don't remember. 'Cause I know I had on a black jacket but I don't remember what pants I had on... black pants on.1
Q: What's--
A: Some black pants--on
Q: Some what?
A: Black pants.
Q: What...what shoes?
A: My Michael Jordans.
Q: Michael Jordans.
A: Yeah.
Q: Look like this kinda? Or black or what?

A: Black high-tops.
Q: Black high-tops? Were they out at the house?
A: Yeah, they got Michael Jordan on the bottom of 'em...you know, like this.
Q: Yeah.
A: They were the only shoes I had.
Q: (from Erickson) That guy in the trunk...he had to be saying something, kicking, yelling, doing something when you were driving around.
A: No.
Q: No?
A: No.
Q: When you opened up the trunk, before you shot him, he had to have said something.
A: 'Don't hurt me.' That's alls I remember. Kept saying, 'Don't hurt me,' kept saying it...
Q: (from Gallagher) Okay, you're standing at the back of the trunk and he's laying in the trunk, which way is he laying, this way or this way?
A: His head was towards the...towards the drivers...driv--...driv--his head was on the same side as the steering wheel...
Q: That's this way?
A: 'Cause I remember...'cause I remember when like when they...when he ("stuttering") got in the trunk, he went like this...
Q: Umm-hmm.
A: ...so he had to be laying like this.
Q: Okay. And when you said that you opened up the trunk and put

the gun in, how high did you open up the trunk up?
A: Like it...the trunk opens...I just...just like that.
Q: And where'd you put the gun?
A: I didn't, I just--
Q: Well, I mean how did, how did you know you weren't going to shoot him in the elbow?
A: I didn't. I just...shot him.
Q: Okay, well, if you got...if you got the trunk of the car here, let's say, okay, whereabouts are you standing?
A: Like right--
Q: More or less. Right here? Okay. And where did you put the gun?
A: I's just...because when he...when he had got in the trunk, I remember which way he lay and I just sl--I just went like this.
Q: So, kinda draw for me where your arm went...
A: That way.
Q: Like that way?
A: Yeah.
Q: So where his head would be?
A: Yeah.
Q: 'Cause you said he was laying...his head would be here.
A: Yeah, when--
Q: And his body would be here?
A: Yeah, like when...when...when Nut was talking to him, you could tell that he was like this way 'cause his voice (INAUDIBLE)
Q: And what was the reason that you did that?
A: Did what?
Q: Shot towards that direction.

A: Towards--
Q: So it would just be one shot or--
A: No, I...'cause I didn't...I didn't...I didn't wanna shoot him. I just, you know, I just, I just, I didn't wanna see...I didn't wanna see his face. I just opened the trunk and I just, I just shot.
Q: (from Erickson) I guess why...what Detective Gallagher is asking is if you knew his head was that way, why didn't you shoot towards his feet?
A: I didn't even think...I...honestly I didn't even think I hit him.
Q: How long did you drive around in the car?
A: About an hour.
Q: Do you remember where the wallet was tossed out of the car?
A: Unh...Alls I remember is Nut saying something about a credit card or something...we'll throw it out the window, but I wasn't paying attention when he threw it out the window.
Q: Where are the car keys to the car?
A: I have no idea. Sewer somewhere...
Q: Where? A sewer?
A: Yeah.
Q: Did you throw them there when you ran away?
A: I didn't throw them, when I got out of the car, I gave I.... I gave 'em to Scott.
Q: You gave the keys to Scott, you gave the gun to Nut.
A: No, no, when I shot... I don't know... who I handed the gun to... all's I remember is just handed it to somebody and I ran. Just... I wasn't even... I wasn't even looking.

Q: How long were you back at the apartment, before Nut and Boxer got back?
A: I wait--I waited... I waited downstairs for them (INAUDIBLE) ...
Q: About how long did you wait? Five minutes?
A: About five... ten minutes, not that long.
Q: When you walked in... the three of you walked in Dwayne was there?
A: Dwight?
Q: Dwight, excuse me. Dwight was there? What was unh Boxer wearing?
A: I don't know... we all had on those black jackets, that's alls I knew... is just all of us had on those black jackets on.
Q: (from Gallagher) What (INAUDIBLE) ... did you wear?
A: Nothing.
Q: The next day and the days after this what... what did you guys do as far as the gun was concerned? I mean you knew you had to get it out of there.
A: All I knew... I don't even think Box-- I don't even think (INAUDIBLE)
Q: Okay, what about the following days?
A: I don't know... I just.... I just asked... I just asked him (INAUDIBLE) where's that gun? And he's like, 'It's gone.' and that's it.
Q: Who said that?
A: Boxer told me that he said, 'It's gone.'
Q: But he didn't tell you what they did with it?
A: No.

Q: Do you know where it finally ended up?
A: No, I don't.
Q: Do you know where we found it at?
A: No. I have no idea.
Q: Okay.
Q: (from Erickson) When you leave the apartment with gloves on and a gun, you know that you are going to run into trouble right?
A: I didn't know they had the gun. I did not know. I was--
Q: Okay.
A: My intentions were going... going to Ron's and that was it, just like my mom says, 'Trouble is so easy to get into, it's hard to get out of it.'
Q: It sure is.
A: And now I'm finding out.
Q: When the three of you put the guy in the trunk of the car, and you're driving away, was Nut talking about that you had to kill him. He was talking about it then, wasn't he? What was he saying?
A: Gotta kill him, that's what he... he was drunk... he just... gotta kill him... he said, 'He's seen us, gotta kill him.'
Q: Why didn't you stop the car, get out and leave?
A: It sounds easy to do, but it--
Q: I know... I know I ... I don't make... I don't mean to make it sound so easy, I'm just curious. You know, you act like you didn't want to do it, and so I'm just curious, why didn't you just--
A: When he's... most of the time... when Nut talks and he's drunk... I don't know... I don't pay him no attention 'cause he is just being stupid... that's how he is...I don't know... when he gets drunk turns into a totally different person, you know, I

wasn't even paying no attention to Nut, 'cause I knew he was drunk... I knew he was drunk.

Q: (from Gallagher) Well, when he is drunk and standing there outside of the trunk of the car telling you, 'We gotta kill him, we gotta kill him.' and he hands you the gun, why didn't you just hand it back to him and say, 'Then kill him, Nut.'

Q: (from Erickson) Especially if he is acting stupid when he is drunk.

A: 'Cause I didn't want him to shoot me by accident.

Q: If you had the gun, why didn't you just keep it and tell him...

A: It's just like... just like...

Q: (from Gallagher) Is he your homeboy?

A: We--you know, you we kick back with 'em, you know... they ain't my homys, I... you know... they're friends and everything... but...

Q: You think they're looking to see if you're down for them?

A: I know they ain't down for me (INAUDIBLE) they ain't down for nobody. I don't know...they're from the Santana Town. I ain't from the Santana Town. I don't know.

Q: (from Erickson) How much did you have to drink that night?

A: I don't drink.

Q: You didn't have anything to drink at all?

A: A beer.

Q: One beer?

A: Yeah, one beer.

Q: Well, not one of those 40 ouncers.

A: No, not a fo--I can't finish a 40 ouncer.

Q: Okay.
A: I'll be throwing money.
Q: Okay, so you just had one, what 12 ounce?
A: Yeah, a can of Miller.
Q: Okay. Do you smoke anything, do any dope, anything like that?
A: No, I mean I did smoke weed, but I didn't that night.
Q: Not that night. Nut really was downing them.
A: Nut was blasted. But that's not that's--he wakes up...he goes to sleep drunk and wakes up drunk...doesn't...
Q: (from Gallagher) How about Scott?
A: He had drank some beer, but he wasn't...
Q: (from Erickson) He wasn't out of control?
A: He wasn't all like...
Q: Anything else you want to tell us.
Q: (from Gallagher) You're thinking.
A: Naw.
Q: You might as well get it off your chest.
A: Naw, I was just thinking about my little girl.
Q: Nothing else you want to say?
A: Nothing else happened.
Q: (from Erickson) You want to step outside for a few minutes. (INAUDIBLE)
Q: (from Gallagher) (INAUDIBLE)...here for a minute? Get back with you.
(INVESTIGATORS LEAVE THE ROOM)
(AUDIO TAPE ENDS)