No. _____

IN THE

Supreme Court of the United States

TRACY CAIN,

Petitioner,

v.

RON DAVIS,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRACY DEARL CAIN, *Petitioner-Appellant*, v. KEVIN CHAPPELL, Warden, *Respondent-Appellee.*	No. 13-99008 D.C. No. 2:96-cv-02584-ABC OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted August 2, 2016
Pasadena, California

Filed September 13, 2017

Before: Diarmuid F. O'Scannlain, Johnnie B. Rawlinson, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Rawlinson

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of a habeas corpus petition in a death penalty case.

The petitioner was convicted after a jury trial and sentenced to death for two counts of first-degree murder, burglary, and robbery. Distinguishing *Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007), the panel held that the petitioner was not denied procedural due process through inadequate notice of an attempted rape special circumstance, and his constitutional rights were not violated when the prosecutor presented this special circumstance to the jury.

The panel expanded the certificate of appealability to include additional claims but held that these claims lacked merit. The panel held that the petitioner did not establish guilt-phase ineffective assistance of counsel in his attorney's concession of guilt on the burglary counts, failure to object to the attempted rape special circumstance, or failure to investigate and present voluntary intoxication and mental health defenses.

The panel held that the petitioner did not establish penalty-phase ineffective assistance in counsel's failure to investigate and present mitigating evidence based on the petitioner's substance abuse, neurological and psychological problems, and family background. The panel concluded that

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

the petitioner did not establish an Eighth Amendment claim based on intellectual disability under *Atkins v. Virginia*.

COUNSEL

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Kim Aarons (argued) and A. Scott Hayward, Deputy Attorneys General; Lance E. Winters, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Office of the Attorney General, Los Angeles, California; for Respondent-Appellee.

OPINION

RAWLINSON, Circuit Judge:

In this death penalty case, Petitioner Tracy Cain (Cain) challenges the district court's denial of his federal habeas petition. Cain was convicted and sentenced to death for the murder of a couple, William and Modena Galloway, who resided in a home next to Cain's father. The district court denied Cain's habeas petition, but granted a certificate of appealability (COA) on Cain's claim that he did not receive adequate notice of the attempted rape special circumstance. We affirm the district court's denial of Cain's habeas petition.

I. BACKGROUND

In a criminal complaint, Cain was charged with the first-degree murders of the Galloways. The complaint further alleged special circumstances premised on multiple murder, rape or attempted rape, robbery or attempted robbery, and burglary in connection with Mrs. Galloway's murder. With respect to the rape special circumstance, Special Allegation No. 4 provided:

> It is further alleged that the murder of Modena Shores Galloway was committed by defendant, Tracy Dearl Cain, while the defendant was engaged in the commission or attempted commission of the crime of rape, in violation of Penal Code section 261, within the meaning of Penal Code section 190.2(a)(17).

The complaint also alleged special circumstances based on multiple murder, burglary, and robbery or attempted robbery associated with Mr. Galloway's murder. Cain was also separately charged with the offenses of rape, burglary, and robbery.

A second amended information alleged the same basic offenses and special circumstances, albeit with some additional details. Unlike the original criminal complaint, the amended information did not specifically allege attempted rape as a special circumstance. Instead, Special Allegation 6 stated:

> It is further alleged that the murder of Modena Shores Galloway was committed by

> defendant, Tracy D. Cain, while the defendant was engaged in the commission of rape in violation of Penal Code Section 261, within the meaning of Penal Code Section 190.2(a)(17).

Cain did not raise any pre-trial objections to the allegations in the amended information addressing the attempted rape special circumstance. *See People v. Cain*, 892 P.2d 1224, 1248 (Cal. 1995) (In Bank) (explaining that, after the prosecution's rebuttal, "the *trial court raised the issue* of whether the information had provided defendant with sufficient notice of the attempted rape basis of the special circumstance") (emphasis added).

The evidence at trial established that the Galloways lived next door to Cain's father. *See id.* at 1233. Mr. Galloway, who was sixty-three years old, suffered from poor health and a back injury, and "had a habit of keeping large amounts of cash in his house." *Id.*

During the relevant period, Cain's father went on a trip, leaving Cain and his younger brother, Val, at the residence. *See id.* at 1234. On the night of the Galloways' murders, Cain and Val had a party at their father's house. *See id.* Ulysses Anthony Mendoza (Mendoza), Floyd Clements (Clements), David Cerda (Cerda), Rick Albis (Albis), and Kevin Walker (Walker) attended the party. *See id.*

Mendoza testified that Cain was agitated and upset during the party. Cain threatened Mendoza and others when he was unable to find ten dollars that was missing, and kicked a hole in a door because he was angry with his brother.

Mendoza related that, at approximately 11:00 pm, Cain asked Mendoza to accompany him to the 7-Eleven to purchase beer. As they were walking to the 7-Eleven, Cain asked Mendoza if he "wanted to help him burglarize or rob that house next door to his house." According to Mendoza, Cain stated that he wanted to burglarize the residence "so he can get thousands." Mendoza refused because he "[d]idn't have the nerve."

At the 7-Eleven, Mendoza and Cain met Richard Willis (Willis) and Willis' friend, Shawn. Cain asked them if they had any cocaine. While riding in Shawn's vehicle, Cain made a "strangling motion" to Mendoza, after which Mendoza asked to be dropped off for fear that "something foolish would happen." Mendoza returned to the Cain residence.

When Cain arrived at the residence, he "called [Mendoza] a pussy . . . [b]ecause [Mendoza] wouldn't help him." Mendoza then saw Cain and Cerda leave the residence. Cerda returned to the Cain residence alone. At some point, Val asked Cerda to check on his brother. After a few seconds or minutes, Cerda returned without Cain. When Cain eventually returned to the residence, he "had blood on his hat, inner part of his hat, on his cheek, on his right foot, [and] on his pant leg." Cain stated that "he had thousands" and Mendoza recalled that Cain had "a lot of money in his left palm." Cain also remarked that he "blipped somebody."

The next morning, Mendoza observed Cain sleeping in a recliner in the living room. Mendoza noticed that Cain had $500 next to him on a table. Mendoza also observed that Cain's "knuckles were torn up." Later in the day, Mendoza and Cain went shopping. Cain paid cash for new basketball

shoes, a hat, and a car stereo. According to Mendoza, Val asked Cain if he had killed someone and Cain responded, "That's on them. . . ."

The following day, Mendoza attended a barbecue at the Cain residence. During the barbecue, Cain threatened Mendoza if he refused to let Cain use his truck. Mendoza noticed that Cain had placed a box in the truck containing rags, sticks, and wires. Cain subsequently disposed of the box near the beach.

Dr. Frederick Lovell, Chief Medical Examiner for Ventura County, performed an autopsy on Mr. Galloway's body. Dr. Lovell observed numerous bruises on Mr. Galloway's body and "hemorrhage over the entire left side of [his] head from front to back on bone, and . . . hemorrhage in and around the brain underneath." Dr. Lovell stated that there was a minimum of thirteen separate blows on Mr. Galloway's body and that Mr. Galloway died from trauma to his brain.[1]

Dr. Ronald O'Halloran, Assistant Medical Examiner for Ventura County, examined Mrs. Galloway's body. Dr. O'Halloran observed "multiple injuries on [Mrs. Galloway's] face." Mrs. Galloway suffered "a baselar skull fracture" and "a hemorrhage in the space around the brain." Dr. O'Halloran determined that Mrs. Galloway died from "traumatic head injuries."

[1] The evidence reflected that "[a] broken child's rocking chair, splattered with blood and missing a rocker and an armrest support, was found next to Mr. Galloway's body in the hallway." *Cain*, 892 P.2d at 1236.

Dr. O'Halloran observed Mrs. Galloway "lying on her back on the bed . . . with her feet and legs extending over the side of the bed." According to Dr. O'Halloran, Mrs. Galloway's "legs were spread wide apart, exposing her genital area; and she was nude from the waist down." There was also "a pillow lying over her head" and "blood splatters on the wall." "There was moist fluid coming out of her vaginal area, and . . . a streak of brownish-red material that appeared to be blood coming from or coming from close to her vaginal area."

During Mrs. Galloway's autopsy, Dr. O'Halloran "surgically removed the vagina and examined it" for injuries. Dr. O'Halloran discovered "a one centimeter long tear . . . inside the vaginal opening. . . ." Due to the lack of hemorrhage, Dr. O'Halloran opined that he may have caused the tear during his examination. Dr. O'Halloran also noted that the absence of injuries did not preclude a finding that Mrs. Galloway was raped.

Edwin Jones (Jones), a criminalist, testified as a hair expert. Jones determined that fifteen hairs found in Mrs. Galloway's panties, pajama bottom, slipper socks, and pajama top were microscopically similar to Cain's hair samples. Jones eliminated Mendoza, Cerda, and Clements as sources of the pubic hairs found on Mrs. Galloway's body. Jones also performed a chemical analysis of enzymes in the hair samples and determined that he could not eliminate Cain.

Dr. Bruce Woodling testified as an expert on sexual assault. Dr. Woodling related that he had examined approximately 2,000 sexual assault victims. After examining Mrs. Galloway, Dr. Woodling concluded that Dr. O'Hallaron's testimony that he may have caused the vaginal

tear was not a "likely explanation." Dr. Woodling related that he had never observed a similar tear during removal and examination of the vagina in the rape cases in which he participated. Dr. Woodling opined that the laceration was "a classic injury of a forced penile-type penetration . . ."

Detective Billy Tatum of the Oxnard Police Department testified that he investigated the Galloway homicides. Detective Tatum spoke with Mendoza and did not observe any injuries on Mendoza's hands. Detective Tatum subsequently obtained an arrest warrant for Cain and interviewed Cain at the police station. The tape recorded interview was played to the jury.

During the taped interview, Cain initially stated that he remained at his residence on the night of the Galloways' murders, except to go to the store, and "stayed at home" the following day. Cain related that he found out about the Galloways' murders on the following Monday, when he returned home from work. Cain explained that the bruise on his shoulder was from his girlfriend and the cuts on his fingers were from playing with his dog.

Cain eventually admitted that he went into the Galloways' residence, but denied committing the murders. After inquiring if the police had any evidence that Cain "killed them," Cain admitted that he and other individuals entered the residence on Saturday to "wipe[ ] away the fingerprints." Cain also eventually acknowledged that he was in the Galloways' residence during the murders, and he asserted that Albis placed a pillow cover over Mrs. Galloway's face. Cain mentioned that Cerda and Mendoza hit Mr. Galloway and Mendoza struck Mr. Galloway with a chair. According to Cain, his fingerprints may have been on the chair because he

"picked it up and . . . moved it." Cain conveyed that he did not know who raped Mrs. Galloway, but that Albis struck her in the hallway and placed her on the bed.

Detective Tatum testified that there was a malfunction in the audio tape during the interview, and the tape "just stopped playing . . . on Side 1." During the malfunction, Cain admitted to stealing $500 from the Galloways' residence.

Prior to jury deliberations, the trial court expressed concern about the attempted rape special circumstance. Specifically, the trial court observed that the information did not specifically charge attempted rape, although the information charged attempted robbery. Cain's counsel responded:

> But to be quite candid about it, I've read Section 190.2 numerous times. I'm aware it says commission or attempted commission. I can't in good conscience say that I am surprised at this late date. I think it's clear the entire thrust of the testimony from all the doctors was an actual rape . . . I'm aware of the section. I'm aware how it is plead, and I'm aware of these jury instructions. And I'm not going to sit here and pretend that I'm surprised and I'm going to holler foul at the D.A. at this late time. . . . I was aware and I heard [the prosecutor] and I could have objected but I didn't because I think that he's entitled to argue under Section 190.2 commission or attempted commission. . . . But I don't think Tracy Cain and the defense is [sic] prejudiced. . . .

Based on counsel's statement, the trial court did not pursue the issue further.

The trial court instructed the jury that it could find the special circumstance if "the murder was committed while the defendant was engaged in or was an accomplice in the commission or attempted commission of a burglary[,] a robbery or a rape" and that "the defendant intended to kill a human being or intended to aid another in the killing of a human being[.]" The trial court also instructed the jury that "the special circumstance referred to in these instructions is not established if the burglary, robbery or rape was merely incidental to the commission of the murder."

The jury found Cain guilty of first-degree murder, burglary, and robbery, but acquitted Cain on the rape charge. The jury determined that Cain murdered Mr. Galloway during the commission or attempted commission of burglary and robbery. The jury also concluded that Cain murdered Mrs. Galloway during the commission or attempted commission of rape, burglary, and robbery.

During the penalty phase, Anita Parker (Parker) testified that she was assaulted by Cain. According to Parker, Cain struck her in the head with a tire iron and kicked her during an altercation.

Nicholas Perez (Perez), a juvenile detention officer, related that Cain hit him with his fist as Perez was escorting Cain. According to Perez, his nose was broken and he required six stitches above his left eye.

David Wheat (Wheat), a state prison supervisor, testified on Cain's behalf. Wheat informed the jury that, when Cain

was incarcerated, he was permitted to work on a fence crew, a position reserved for inmates with no discipline problems. In his reports, Wheat rated Cain with the "highest number" available due to Cain's good "work habits."

Reynaldo Duran (Duran), a training specialist with the Arizona State Department of Corrections, supervised a ground crew to which Cain was assigned. Duran reported that Cain was rated highly for his cooperation, effort, and responsibility.

Wilma Cain (Wilma), Cain's stepmother, testified that Cain was one of eleven children and that Cain's mother died during the Jonestown massacre. Wilma described Cain as a "typical boy" growing up. Wilma conveyed that she was shocked that Cain was convicted of the Galloways' murders because "it didn't sound like Tracy[.]" Wilma related that Cain "got along with everybody."

Persey Cain (Persey), Cain's father, also testified that Cain's mother died at Jonestown. Persey described Cain as "a good kid" and a "typical . . . boy" during his youth. Persey was shocked by the crime because "it didn't sound like Tracy Cain[.]" Persey related that Cain had "never been in any kind of problem other than . . . car theft."

In his penalty-phase closing argument, Cain's counsel emphasized that the prosecution never demonstrated that Cain premeditated or planned to murder the Galloways and that there was "no deliberate killing." Defense counsel also argued that Cain was severely impaired due to his drug use before the murders. His counsel maintained that "[w]e know he was intoxicated. Witness after witness came in and testified. . . . He was using crack. . . . [T]he truth is he was

impaired." Cain's counsel contrasted the Galloways' murders with specific cases of brutal, premeditated homicides. He asserted that, in contrast to those cases, Cain was "drug-impaired" and "act[ed] in a rage reaction" without any premeditation. He argued that Cain's mother died when Cain was young; that Cain failed to finish school; and that Cain lacked many advantages described by the prosecution. In addition, defense counsel focused on positive reports Cain received while incarcerated.

Defense counsel emphasized that Mendoza was never arrested and that Cerda did not face the death penalty or "life without parole." Defense counsel remarked that Cain was "the only one that's going to end up in jail for the rest of his life, whether he gets the gas chamber in jail or whether he dies in jail." Cain's counsel argued that life in prison was the proper punishment given the circumstances of life in prison. Finally, Cain's counsel argued that:

> [a]n unplanned, drug-impaired act with no foreseen consequences has cost Tracy Cain his life. But . . . there still is value in his life. He proved it in prison before. He proved it with his prison records, and he can prove it again if you give him the chance.

The jury sentenced Cain to death based on his first-degree murder of Mrs. Galloway and the multiple murder, attempted rape, burglary, and robbery special circumstances. The jury also sentenced Cain to death for the first-degree murder of Mr. Galloway and special circumstances involving robbery and burglary.

On direct appeal, the California Supreme Court affirmed Cain's convictions and sentence. *See Cain*, 892 P.2d at 1276. Relevant to this appeal, the Court rejected Cain's claim that he received inadequate notice of the attempted rape special circumstance. *See id.* at 1248–49. The Court held:

> We find no statutory error in the language used to allege the rape special circumstance. Although consistency in the form of charging special circumstances is preferable, the rape special circumstance as alleged satisfactorily charged defendant and was not misleading. Under the statute, the rape special circumstance specifically includes that the crime was committed during the attempted commission of a rape. The information specifically referred to the statute defining the special circumstance. Under these circumstances, the rape special-circumstance allegation provided the express notice of the charges against defendant required under state law in a capital case.

Id. at 1249 (citations and internal quotation marks omitted). The Court emphasized Cain's counsel's acknowledgment that he was not surprised by the prosecution's arguments and the jury instructions premised on attempted rape. *See id.* The Court observed:

> since the information was sufficient to provide the required notice, and defendant's counsel stated defendant was neither surprised nor prejudiced by the argument and instructions relating to attempted rape as the

> basis of the rape special circumstance, defendant's constitutional right to notice of the charges against him was not compromised.

Id. (citations omitted). The Court rejected Cain's related arguments that the information was constructively amended to include attempted rape, and that his counsel was ineffective in failing to object to the attempted rape special circumstance. *See id.* at 1249 n.17.

Cain subsequently sought federal habeas relief. In Claim 1(6) of his third amended habeas petition, Cain asserted that he did not receive constitutionally adequate notice of the attempted rape special circumstance and that the prosecution engaged in prosecutorial misconduct when it argued the special circumstance to the jury. In Claim 3(7), Cain contended that his constitutional rights were violated when the state trial court instructed the jury on the attempted rape special circumstance.

The district court denied Cain's claims, but granted a certificate of appealability "as to Claims 1(6) and 3(7) regarding the constitutional adequacy of Petitioner's notice of the attempted rape special circumstance charge."

Cain filed a timely amended notice of appeal.

II. STANDARDS OF REVIEW

"We review de novo the district court's denial of [Cain's] petition for a writ of habeas corpus and review its factual findings for clear error. . . ." *Smith v. Ryan*, 823 F.3d 1270, 1278 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1283 (2017)

(citation omitted). Because Cain filed his federal habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies. *See Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016) (en banc). Under the AEDPA, habeas relief is warranted if the state court's adjudication of Cain's claims "was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254. We may also grant relief if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

"An adjudication is contrary to clearly established Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Mann*, 828 F.3d at 1151 (citation, alterations, and internal quotation marks omitted). "It is an unreasonable application of clearly established Supreme Court precedent if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (citation and internal quotation marks omitted). "An *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* (citation and alteration omitted) (emphases in the original). "The federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* (citation and internal quotation marks omitted). "A state court's adjudication is unreasonable only if the federal habeas court

concludes that no fairminded jurist could conclude that the adjudication was consistent with established Supreme Court precedent. . . ." *Id.* at 1151–52 (citation omitted).

III. DISCUSSION

A. Certified Issue—Adequate Notice of the Attempted Rape Special Circumstance

Cain contends that habeas relief is warranted because he did not receive adequate notice of the attempted rape special circumstance and the prosecutor improperly relied on an attempted rape special circumstance that was not charged in the information.

The Supreme Court has clearly established that a defendant must receive adequate notice of the charges against him. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. . . ." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (citation omitted).[2]

[2] Citing *Lopez v. Smith*, 135 S. Ct. 1 (2014), the State contends that Supreme Court precedent has not clearly established the requirement of adequate notice of the specific theory under which a felony-murder special circumstance would be proved. In *Lopez*, the Supreme Court reversed our grant of habeas relief premised on failure to provide adequate notice of an aiding-and-abetting theory at trial. *See id.* at 3. The Supreme Court faulted us for granting relief because the prosecutor focused on another theory at trial, although the defendant previously received notice of potential liability on an aiding-and-abetting theory. *See id.* The Supreme Court observed that it was not disputed that the defendant "received

Relying on *Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007), Cain maintains that he was not properly informed of the attempted rape special circumstance in the second amended information. However, Cain's reliance on *Gautt* is entirely misplaced. In *Gautt*, we granted habeas relief because the information failed to inform the petitioner that he was charged with a specific sentencing enhancement that significantly increased his potential sentence. *See id.* at 998. We emphasized that "the pivotal fact" in that case was the complete omission of any mention of the specific statute in the information. *Id.* at 999. We observed that the charged and uncharged conduct were dramatically different in that the charged statute required "only that the defendant personally used a firearm," while the uncharged statute required that "the defendant personally discharged a firearm." *Id.* (emphases and internal quotation marks omitted). Moreover, the charged offense was punishable by a ten-year sentencing enhancement and the uncharged offense was governed by a "twenty-five-year-to-life . . . enhancement." *Id.*

Further compounding the error in *Gautt*, "the trial court confused the two statutes when time came to instruct the jury" and erroneously informed the jury about the additional elements unique to the uncharged offense. *Id.* The parties did not object to the trial court's instruction and the prosecution relied on the instruction in its closing argument. *See id.* at 999 n.5, 1000. Additionally, "[t]he pattern of

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adequate notice of the possibility of conviction on an aiding-and-abetting theory." *Id.* Therefore, *Lopez* is distinguishable and does not show that the requirement of adequate notice is not clearly established. However, we need not—and do not—decide whether the requirement of notice of the prosecution's theory of a felony-murder special circumstance is otherwise clearly established, as we conclude that such notice was provided here.

statutory confusion and conflation that began with the trial judge's instructions to the jury repeated itself when the jury completed its verdict form. . . ." *Id.* at 1000. Specifically, the verdict form cited the charged statute, but listed elements unique to the uncharged statute. *See id.* at 1001. Finally, the abstract of judgment "listed . . . the ten-year enhancement . . . as the basis for a sentence enhancement," but "also stated that [the petitioner's] sentence was to be enhanced twenty-five years to life-the applicable enhancement under" the uncharged statute. *Id.*

In concluding that the state appellate court unreasonably determined that the petitioner received adequate notice, we emphasized:

> This is not a situation . . . in which the numerical citation was incorrect but the verbal description of the crime corresponded to the crime of which the defendant was convicted. Nor is this a situation in which citation to one statute necessarily encompassed another lesser-included offense, thus sufficiently putting the defendant on notice of the need to defend against both statutes. . . .

Id. at 1007 (citation omitted). We criticized the state appellate court because it "never actually scrutinized the information to see if it contained any factual allegations that would have sufficiently informed [the petitioner]" of the uncharged conduct. *Id.* at 1005. The state appellate court also never explained "how exactly this triumvirate-the evidence, the jury instructions, and the closing argument-provided [the petitioner] with sufficient notice." *Id.* (footnote reference omitted). Additionally, the state appellate court

"did not acknowledge the multiple discrepancies that existed between the information, the jury instructions, the verdict form, and the ultimate sentence." *Id.* at 1006. Based on the state appellate court's "critical oversight," we opined that the petitioner's "constitutional right to be informed of the charges against him was violated by this stark discrepancy between the crime charged and the crime of conviction. . . ." *Id.* at 1008.

Although we eschewed express reliance on other sources, such as trial evidence, jury instructions, and closing arguments, to assess whether the petitioner received adequate notice of the charges, *see id.* at 1008–09, we nonetheless "assume[d]-without deciding-that such sources can be parsed for evidence of notice to the defendant." *Id.* at 1010. Nevertheless, we concluded that, even considering these sources, the petitioner received constitutionally inadequate notice. *See id.* We observed that the trial evidence did not focus on the petitioner's intent as required under the uncharged statute; the jury instructions were muddled and provided minimal indication that the uncharged offense was at issue; and the prosecution's closing argument was too flawed regarding the intent required for the uncharged offense to provide adequate notice of the uncharged offense. *See id.* at 1011–13.

Unlike in *Gautt*, the California Supreme Court in this case did not unreasonably conclude that Cain received constitutionally adequate notice of the attempted rape special circumstance. The second amended information did not explicitly charge Cain with an attempted rape special circumstance, but alleged that Cain "engaged in the commission of rape in violation of Penal Code Section 261, within the meaning of Penal Code Section 190.2(a)(17)."

The provisions of Cal. Penal Code § 190.2(a)(17) in effect at the time of Cain's trial specified that a special circumstance may be based on the defendant's attempted commission of rape:

> The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found . . . to be true: The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit . . . Rape in violation of Section 261.

Cal. Penal Code § 190.2(a)(17)(iii)(West 1987). Thus, the allegations premised on Cal. Penal Code § 190.2(a)(17) sufficiently apprised Cain that the special circumstance explicitly applied to rape and to attempted rape. *See Gautt*, 489 F.3d at 1003–04 (explaining that "the charging document need not contain a citation to the specific statute at issue; the substance of the information, however, must in some appreciable way apprise the defendant of the charges against him so that he may prepare a defense accordingly") (footnote reference omitted). Moreover, as described in *Gautt*, Cain's case is "a situation in which citation to one statute necessarily encompassed another lesser-included offense," thereby providing additional notice to Cain of the attempted rape special circumstance. *Id.* at 1007 (citation omitted); *see also People v. Atkins*, 25 Cal. 4th 76, 88 (2001) (noting that attempted rape is a lesser included offense of rape under

California law). Importantly, Cain's counsel fully acknowledged that he was not surprised by the prosecution's reliance on attempted rape as a special circumstance, and did not argue that Cain was prejudiced by the prosecution's reliance on attempted rape as a special circumstance.

The California Supreme Court reasonably concluded that Cain received adequate notice of the special circumstance. Thus, Cain is not entitled to habeas relief on his claim that he failed to receive adequate notice of the special circumstance or his claim that the prosecutor improperly presented the special circumstance to the jury. *Cf. Gautt*, 489 F.3d at 1007.[3]

B. Uncertified Claims

"To expand the certificate of appealability, [Cain] must make a substantial showing of the denial of a constitutional

[3] Any error in failing to provide Cain adequate notice of the attempted rape special circumstance was likely harmless. *See Gautt*, 489 F.3d at 1016–17 (applying harmless error review). Cain does not challenge the jury's verdict that he was death-eligible based on the multiple murder, burglary, and robbery special circumstances. Due to the weight of the aggravating circumstances and the unchallenged special circumstances, "we are not left with grave doubt about whether the jury's consideration of the [allegedly] invalid special circumstance[] had a substantial and injurious effect on the jury's verdict," particularly as "the presentation of evidence and argument during the penalty phase would not have been materially different." *Beardslee v. Brown*, 393 F.3d 1032, 1044 (9th Cir. 2004). The jury independently considered the special circumstances applicable to Mr. Galloway's murder, which did not implicate the attempted rape special circumstance. *See Brown v. Sanders*, 546 U.S. 212, 223–25 (2006) (upholding capital sentence against a constitutional challenge where a California jury considered four special circumstances findings, two of which were later invalidated).

right, accomplished by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims . . ." *Turner v. McEwen*, 819 F.3d 1171, 1178 n.2 (9th Cir. 2016) (citation and internal quotation marks omitted). Although we conclude that Cain has met that standard for the claims discussed below, we deny each of the claims on the merits.

1. Guilt-Phase Ineffective Assistance of Counsel

"Ineffective assistance of counsel claims are evaluated according to the familiar standard set forth in *Strickland*."[4] *Mann*, 828 F.3d at 1152. "To receive relief under this standard, first, the defendant must show that counsel's performance was deficient." *Id.* (citation, alteration, and internal quotation marks omitted). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* (citation omitted). "Unless a defendant 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." *Id.* (citation omitted). "Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (citation and internal quotation marks omitted).

a. Counsel's Concession of Cain's Guilt

Cain contends that he was deprived of effective assistance of counsel because his counsel conceded at trial that Cain had the specific intent to commit burglary. Cain maintains that

[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

his counsel pursued an ill-informed strategy in admitting Cain's guilt on the burglary counts because Cain never confessed to burglary.

The California Supreme Court denied this claim on direct review. *See Cain*, 892 P.2d at 1241. The Court concluded:

> Defendant also appears to argue his counsel's concessions were an incompetent tactical choice. We disagree. Defendant admitted to the police on tape he was inside the victims' residence when they were murdered and he entered the residence with the intent to steal money. His taped statement was played to the jury. Defendant's admission that he entered the residence for the purpose of stealing money proved his specific intent to commit burglary. Under the felony-murder rule, his commission of burglary, together with the killing of the victims in the commission of the burglary, made him liable for murder. Under these circumstances, we cannot conclude counsel was ineffective for candidly admitting defendant's guilt on these counts while vigorously arguing against defendant's guilt of the special circumstances.

Id. (citations omitted).

"In assessing adequacy of representation, we are required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons defense counsel may have had for proceeding as he did. . . ." *Gallegos v. Ryan*, 820 F.3d 1013, 1030 (9th Cir. 2016) (citing

Cullen v. Pinholster, 131 S. Ct. 1388, 1407 (2011) (alterations, and internal quotation marks omitted). At trial, Cain's counsel "was confronted with an exceedingly difficult task in formulating a defense" given Cain's admissions during his taped confession and the evidence against him. *Id.* at 1018. We have recognized that:

> As a strategic matter, disputing [the petitioner's] involvement in the crime would have been unpersuasive given the evidence, and [counsel's] acknowledgment of his client's guilt in the killing could reasonably have been intended to establish credibility with the jury in the face of horrendous facts. . . .

Id. at 1027 (citations omitted). In light of the evidence against Cain and his admissions of guilt, Cain "suggests no alternate theory, let alone one more likely to succeed than the one chosen" by his counsel. *Id.* at 1029. Indeed, the inability of Cain's counsel "to avoid a conviction of a predicate offense was unrelated to any allegedly deficient conduct" and convincing the jury that Cain was not guilty of felony murder "would have been an exceedingly difficult task for even the most skilled attorney." *Id.* at 1035. Rather, Cain's counsel focused on Cain's defense theory that, although involved in the crimes, he never participated in the actual killings of the Galloways and lacked the intent to kill required for the jury to find any of the alleged special circumstances to be true. Relying on this theory, Cain's counsel could have made a reasonable strategic calculation not to contest the strong evidence of Cain's guilt for felony murder, but instead, to focus on avoiding a capital sentence for Cain. *See Florida v. Nixon*, 543 U.S. 175, 190–92 (2004). Thus, "[a]bsent any

defense that could have promised a greater chance of success, we cannot conclude that [Cain's counsel] was deficient for choosing the one he did. The choice to pursue a bad strategy makes no comment on an attorney's judgment where no better choice exists." *Gallegos*, 820 F.3d at 1029 (citation and internal quotation marks omitted).

Cain also asserts that the California Supreme Court's determination that Cain admitted entering the Galloways' residence with intent to commit burglary was unreasonable. According to Cain, he never admitted that he entered the Galloways' home to steal money. However, even if the California Supreme Court was wrong that the tape recordings of Cain's police interview include an explicit admission that he went into the Galloway's home with an intent to steal on the night of the killings, there remains sufficient evidence for the court to have concluded that Cain harbored such an intent. Indeed, on the tape Cain admitted that he did want to steal from the Galloways the next morning, and testimony was offered that he did (and did intend to) steal from them the night before as well. "[Section] 2254(d)(2) requires that we accord the state trial court substantial deference." *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) "If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the [state] court's determination. . . ." *Id.* (citation, alteration, and internal quotation marks omitted). The record reflects that Cain admitted to being inside the Galloways' residence during the murders. The trial testimony also reflected that Cain suggested to Mendoza that they burglarize the Galloway residence so that he could "get thousands," and that he possessed a large sum of money after the murders. The state court's denial of this claim was not contrary to, nor did it involve an unreasonable interpretation of *Strickland*. *See*

Strickland, 466 U.S. at 690 (clarifying that counsel's tactical decisions are "virtually unchallengeable").

b. Failure To Object To Attempted Rape Special Circumstance

Cain contends that his counsel was ineffective because he did not object to the attempted rape special circumstance.

Rejecting Cain's claim on direct review, the California Supreme Court concluded:

> We doubt, moreover, whether the principal error alleged, i.e., counsel's failure to claim surprise and prejudice where there was none, could be considered constitutionally deficient performance even if prejudicial. Effective assistance does not require counsel to refrain from frankness and honesty in his or her dealings with the court. . . .

Cain, 892 P.2d at 1249 n.17 (citations and internal quotation marks omitted). The district court ruled that the state court "was not unreasonable in holding that [Cain] had adequate notice" of the attempted rape special circumstance, or in finding counsel's performance to be adequate. We agree because counsel's performance did not fall below an objective standard of reasonableness in acknowledging the portent of the state statutory provisions. *See United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984) (observing that "the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the

interests of his client by attempting a useless charade.") (citation omitted).

c. Failure To Investigate and Present Voluntary Intoxication and Mental Health Defenses

Cain describes his counsel as ineffective because he failed to investigate and present a voluntary intoxication defense during the guilt phase of the trial, premised on Cain's cocaine use and neurological deficits.

On direct review, the California Supreme Court observed:

> Defendant further contends trial counsel did not present even a minimally effective argument on the undisputed use of alcohol and drugs on the night in question. Counsel did briefly argue there was no intent to kill because defendant was obviously under the influence of alcohol and drugs. Belaboring this point would have risked appearing to concede defendant was the killer, which would have conflicted with and detracted from counsel's primary argument, that (consistent with his police statement) defendant had not killed anyone, planned to kill anyone or assisted in killing anyone in the burglary. In addition, almost no evidence was presented regarding the quantity and effects of the drugs consumed by defendant on the night of the murders or the effect consumption had on defendant. Defendant thus cannot demonstrate either deficient performance or

> prejudice in his counsel's argument relating to this subject.

Cain, 892 P.2d at 1255 (internal quotation marks omitted). The California Supreme Court summarily denied Cain's more developed ineffective assistance of counsel claim on habeas review, that was not limited to diminished capacity on the night of the murders.[5]

The district court held that the California Supreme Court's summary denial of Cain's claim was not unreasonable because "[t]he court may have reasonably concluded on habeas review that counsel reasonably relied on expert opinion in not presenting an intoxication or diminished capacity defense."

Cain's counsel was provided a psychological evaluation from Dr. Theodore Donaldson prior to trial. According to Dr. Donaldson, Cain "denied the use of illegal drugs or alcohol." Additionally, the district court referenced a report from Dr. Ronald Siegel concerning tests of Cain's hair for "the

[5] Cain maintains that the district court erred in basing its denial of habeas relief on the California Supreme Court's summary denial. Cain asserts that the California Supreme Court's decision on direct appeal is the operative decision under the AEDPA. However, the district court only referenced the summary denial for claims not addressed by the Supreme Court on direct review. We agree with the district court that the operative decision is the California Supreme Court's summary denial because its decision on direct review did not address Cain's more fully developed claim asserting ineffective assistance for failure to propose intoxication defense instructions for the special circumstance allegations. *See Cain*, 892 P.2d at 1255; *see also Ayala v. Chappell*, 829 F.3d 1081, 1094–95 (9th Cir. 2016).

presence of controlled substances." As the district court articulated:

> Dr. Siegel's report, dated May 9, 1988, states that he interviewed and examined [Cain] on April 17, 1988. Trial counsel delivered his guilt-phase closing argument on April 20, 1988. Dr. Siegel's report states, "Prior to the events of October 1986, [Cain] reported to me that he was high on beer and marijuana, but denied recent use of other substances. The analyses of hair samples indicated no detectable amounts of marijuana, cocaine, or other substances for the past 2.5 years . . ."

(internal quotation marks omitted). Thus, it appears that Cain's counsel did consult experts to investigate the efficacy of intoxication and mental health defenses. And it is not ineffective for counsel to refrain from pursuing jury instructions that have no basis in the evidence. *See Clabourne v. Lewis*, 64 F.3d 1373, 1381–82 (9th Cir. 1995). Accordingly, this claim fails on the merits. *See Strickland*, 466 U.S. at 689 (noting "the wide latitude counsel must have in making tactical decisions").

2. Penalty-Phase Ineffective Assistance of Counsel

Cain asserts that his counsel was ineffective in failing to investigate and present mitigating evidence based on Cain's substance abuse, neurological and psychological problems, and family background.

"[B]ecause the state court summarily denied [Cain's] penalty phase ineffective assistance claims, we must determine what arguments or theories could have supported the state court's decision; and then we must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court." *Gallegos*, 820 F.3d at 1037 (citation, alterations, and internal quotation marks omitted). In the context of penalty-phase ineffective assistance of counsel, we have acknowledged that "the standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Cummings v. Martel*, 796 F.3d 1135, 1148 (9th Cir. 2015) (citation and alteration omitted). "The multiple layers of deference create a standard that is difficult to meet, and even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. . . ." *Id.* (citation and internal quotation marks omitted).

"The first step in determining whether counsel's deficient performance prejudiced the defendant at the penalty phase is evaluating the totality of the available mitigation evidence. . . ." *Andrews v. Davis*, Nos. 09-99012, 09-99013, — F.3d —, 2017 WL 3255161, at *16 (9th Cir. Aug. 1, 2017) (citation and internal quotation marks omitted). After the mitigating evidence is identified, a court weighs the strength of the mitigating evidence "by assessing its likely impact on a jury. This weighing process includes evaluating whether its impact on the jury might be aggravating rather than mitigating." *Id.* at *17. Courts may "consider the fact that mitigation may be in the eye of the beholder, and juries may find that some evidence offered as mitigation cuts the other way." *Id.* (citation and internal quotation marks omitted). We have also noted the Supreme Court's observation that "on

one hand, a jury could react with sympathy over the tragic childhood of the defendant, while on the other hand, the same testimony could establish the defendant's unpredictable propensity for violence that resulted in murder." *Id.* (citation, alteration, and internal quotation marks omitted). "Similarly, evidence of mental and emotional problems might suggest an increased likelihood that a defendant would be dangerous in the future. . . ." *Id.* (citation omitted).

"The second step in determining whether counsel's deficient performance prejudiced the defendant at the penalty phase is evaluating the weight of the aggravating evidence and any rebuttal evidence that the government could have adduced had the mitigating evidence been introduced." *Id.* (citations omitted). "Aggravating evidence may include evidence relating to the circumstances of the crime. Thus in *Strickland*, the Court found the aggravating evidence to be overwhelming where the defendant had repeatedly stabbed the three murder victims during a robbery. . . ." *Id.* (citation and internal quotation marks omitted). "Rebuttal evidence may also directly undermine the value of the mitigation evidence." *Id.* at *18. "For example, the Supreme Court [has] noted . . . . that it would be of questionable mitigating value for defense counsel to introduce expert testimony diagnosing a defendant with bipolar mood disorder and seizure disorders, because such evidence would invite rebuttal by a state expert, who could reject the diagnosis of bipolar disorder and offer a different diagnosis of antisocial personality disorder." *Id.* (quoting *Pinholster*, 131 S. Ct. at 1410) (internal quotation marks omitted).

The third and final step in assessing prejudice at the penalty phase "is to reweigh the evidence in aggravation against the totality of available mitigating evidence, in order

to determine whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* (citations, alteration, and internal quotation marks omitted). "A reasonable probability is a level of probability that undermines confidence in the outcome. . . ." *Id.* (citation, alteration, and internal quotation marks omitted). "The likelihood of a different outcome must be substantial, not just conceivable." *Id.* (citation and alteration omitted). "The Court has found a reasonable probability of a different outcome when scant and weak aggravating evidence could have been presented in rebuttal to strongly mitigating evidence." *Id.* (citation omitted). "By contrast, the Court has found no prejudice when the aggravating evidence is overwhelming, even though the mitigating evidence is strong." *Id.* (citation omitted).

Prior to trial, defense counsel retained Dr. Donaldson to conduct a psychological evaluation. Dr. Donaldson observed that "there were no indications of a thought disorder." Dr. Donaldson conveyed that:

> For the most part, results of psychological testing were highly consistent among tests and with the clinical impression. There were no indications of significant psychopathology nor indications of significant ego deficits or inadequacies in reality testing. The tests are most remarkable in a general lack of indications of serious psychological problems. Testing did indicate the existence of significant situational stress . . . Mr. Cain appears as an emotionally unstable personality

> characterized by poorly controlled anger and a tendency to temper outburst.

Dr. Donaldson concluded:

> Mr. Cain displays many of the features of sociopathy, although that is too simple a diagnosis, and there are also hysteroid and narcissistic features as well. His antisocial acting out appears to have not started until he was in his late teens, but indications are that this acting out has increased in frequency and severity at a rapid rate. This suggested the possibility of central nervous system dysfunction, but none was found in this evaluation, although that part of the evaluation was somewhat limited. Nonetheless, there were certainly no indications of gross brain disorder. Mr. Cain seems predisposed to episodic and violent acting out, and there are no indications in this evaluation that such episodes are the result of dissociation or psychosis.

Based on Dr. Donaldson's evaluation, Cain's counsel may have seen limited utility in presenting a defense premised on Cain's mental state. Dr. Donaldson referred to Cain's "sociopathy" and predisposition to "episodic and violent acting out" that were not the result of any "gross brain disorder" or psychosis. It would not have been unreasonable for the California Supreme Court to determine that Cain's counsel did perform an investigation and relied on Dr. Donaldson's evaluation in deciding to emphasize Cain's positive conduct during past incarcerations and his lack of

premeditation rather than Cain's troubled background and psychological impairments.

Cain argues that his counsel also unreasonably failed to follow up on certain "red flags" raised in Dr. Donaldson's report that "suggested the possibility of central nervous dysfunction," even though "none was found in [Dr. Donaldson's] evaluation" and Dr. Donaldson concluded that there were "certainly no indications of gross brain disorder." In support, Cain submitted a declaration from Dr. Donaldson more than a decade later stating that he "recall[ed] advising [Cain's counsel] that he might want to have Mr. Cain examined by a neuropsychologist." Given Dr. Donaldson's general difficulty remembering the details of his interactions with Cain's counsel, it would be reasonable to doubt whether that recommendation was ever made. But even if Dr. Donaldson's assertion is accepted as true, the state court could reasonably conclude that not all competent attorneys would pursue additional expert testing based on Dr. Donaldson's mere suggestion that certain dysfunctions "may" or "might" exist, especially where Dr. Donaldson's own report found no evidence of such dysfunctions. *See, e.g.*, *Leavitt v. Arave*, 646 F.3d 605, 609–10 (9th Cir. 2011) (concluding that an attorney was not required to pursue "red flags" in a medical report that could only be ruled out through further testing, given the other conclusions in the report that other causes were more likely); *see also West v. Ryan*, 608 F.3d 477, 488–89 (9th Cir. 2010) (same); *Pinholster*, 131 S. Ct. at 1406–07 (acknowledging that defense counsel may reasonably determine that a particular investigation is unnecessary).

Admittedly, the social and psychological evaluations conducted after Cain's conviction indicate that Cain was not

a typical child. For example, a social history and evaluation conducted by Dr. Stanley Huey reflects the troubled criminal and psychological history of Cain's mother who died at Jonestown, the difficulties that Cain's stepmother had in taking care of the family's numerous children; the severe beatings and punishment meted out by his stepmother; Cain's untreated head injury in his childhood; and Cain's learning disabilities. Although Cain's social and psychological histories may have provided potential mitigating circumstances, the additional background information is not sufficiently compelling to warrant habeas relief. *See Cummings*, 796 F.3d at 1148–50. Additionally, Cain's social and psychological histories could have "opened the door to inflammatory and prejudicial aggravating evidence." *Id.* at 1150. Moreover, in light of the aggravating circumstances involving the brutal murders of a couple in their sixties, the thirteen blows administered to Mr. Galloway, the attempted rape of Mrs. Galloway, and Cain's prior violent acts, the state court's denial of this claim was not unreasonable. *See Andrews*, 2017 WL 3255161, at *18 (observing that "the likelihood of a different result must be substantial, not just conceivable" to establish prejudice) (citation and alteration omitted); *see also Strickland*, 466 U.S. at 687 (clarifying that to establish prejudice a defendant must show that he was deprived of a fair trial). For the same reason, Cain's intoxication and substance abuse mitigation claims lack merit.[6]

[6] Cain also contends that the district court erroneously denied his request for an evidentiary hearing because Cain demonstrated a *prima facie* case that the state court unreasonably rejected his ineffective assistance of counsel claim. However, "so long as we are reviewing a petitioner's claim under AEDPA, our review is limited to the facts before the state court and the petitioner is not entitled to an evidentiary hearing

3. *Atkins*[7] Claim

Cain asserts that the California Superior Court unreasonably denied his *Atkins* claim because Cain demonstrated that he was intellectually disabled based on an IQ of 71 when considering Cain's adaptive deficits and the Flynn effect.[8]

The California Supreme Court issued an order to show cause why Cain's death sentence should not be vacated under *Atkins*. In the subsequent Superior Court hearing on the order to show cause, two psychologists testified concerning Cain's alleged intellectual disability—Dr. Ricardo Weinstein and Dr. Efrain Beliz, Jr. Dr. Weinstein had evaluated approximately thirty-five individuals to determine if they were intellectually disabled. After administering several tests to Cain, Dr. Weinstein determined that Cain had a full scale IQ score of 71. Dr. Weinstein also relied on a prior test from another psychologist reflecting that Cain had a full scale IQ score of 75. Based on his consideration of the Flynn effect, Dr. Weinstein deducted points from Cain's IQ score and

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in federal court." *Murray v. Schriro*, 746 F.3d 418, 441 (9th Cir. 2014) (citation omitted).

[7] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[8] "The basic premise of the Flynn effect is that because average IQ scores increase over time, a person who takes an IQ test that has not recently been normed against a representative sample of the population will receive an artificially *inflated* IQ score." *Smith v. Ryan*, 813 F.3d 1175, 1184 (9th Cir. 2016), *as corrected* (citation omitted) (emphasis in the original). "This is because IQ scores are based on a normal distribution curve, and thus an individual's score is meaningful only in relation to the scores of the other people who took the same test. . . ." *Id.* (citation omitted).

determined that Cain was "mildly mentally retarded." Dr. Weinstein also relied on Cain's school records in assessing Cain's adaptive behavioral deficits. The records reflected that Cain had several learning disabilities, particularly in the areas of verbal abilities, reasoning, and mathematics. Dr. Weinstein opined that:

> from childhood through the time of his current incarceration, Mr. Cain qualified for a diagnosis of mild Mental Retardation. IQ scores fell at or below the 70 to 75 range, which meets the AAMR [American Association on Mental Retardation] definition of intellectual functioning two standard deviations or more below normal. Moreover, Mr. Cain's adaptive functioning met the AAMR standards for mental retardation.

Dr. Beliz had evaluated approximately 6,000 individuals to determine if they were intellectually disabled. Dr. Beliz observed that Cain "has never been diagnosed in the past with fetal alcohol syndrome or affect, alcohol or drug dependency, or significant brain damage." According to Dr. Beliz, in 1977, Cain was administered the Peabody Picture Vocabulary Test and received "a standard score of 85, which is the low average range"; a Culture Fair Scale II test with a score of 75; and a Wechsler Intelligence Scale for Children with a "full scale score" of 78 and a "performance IQ score of 93." Dr. Beliz opined that "the performance IQ score of 93 is significant because one could not be mentally retarded and achieve this score on this part of this test." Dr. Beliz also noted that Cain received an IQ score of 64 on one test administered in April, 1977.

Dr. Beliz observed that, in 1980, Cain received a score of 73 on the Peabody Picture Vocabulary Test and a score of 87 on the Culture Fair Scale II Test. The records indicated that there was "no evidence of organic brain problems or impairments in cerebral functioning," although Cain suffered from learning disabilities. Dr. Beliz related that Cain "was never determined to be mentally retarded" in his school testing.

Dr. Beliz determined that Cain "expresses himself well and is able to carry on adult conversation. [Cain] was able to follow instructions, listen attentively for at least 30 minutes, and carry out instructions." Cain also "speaks in full sentences, asks appropriate questions about his environment, uses regular past tense verbs, modulates his tone of voice appropriately and provides complex directions to others." During Dr. Beliz's interviews, Cain "did not become confused, frustrated, or bewildered by test demands" and Cain "was well oriented with his attention and [his] concentration [was] not significantly impaired."

Dr. Beliz administered seven psychological tests to Cain during his evaluation and he did not adjust Cain's scores for the Flynn effect. Dr. Beliz concluded:

> Mr. Cain is not mentally retarded. There is no evidence to suggest that Mr. Cain has significant cognitive and adaptive limitations. . . . While test scores on particular instruments might yield extremely low scores suggestive of mental retardation, the scores can only be considered valid if the individual evaluated is a good fit with test scores. . . . In Mr. Cain's case, the fact that he scores low on

> certain tests or that he exhibits soft neurological findings does not automatically translate into a diagnosis of mental retardation, particularly when he does not exhibit behaviors indicative of significant cognitive and adaptive limitations or neurological impairment.
>
> In conclusion, there is absolutely no evidence for mental retardation. Mr. Cain is able to survey, organize, and integrate stimuli in a meaningful manner. Mr. Cain walks, talks, problem solves, socializes, thinks, reasons and interacts with others and his environment without significant difficulty. Cognitive and adaptive skills are adequately developed and free from significant impairment. . . .

The California Superior Court determined that Dr. Weinstein's testimony "suffer[ed] from a number of infirmities." According to the court, Dr. Weinstein relied on a prior psychological evaluation to support his conclusions, without acknowledging that the prior evaluation provided that Cain's "performance score suggests that he has the potentiality of operating within the average range of intellectual abilities" or that Cain's "low test scores reflected a possible learning disability," not an intellectual disability. Dr. Weinstein also failed to mention that Cain received a score of 85 on tests administered by the same psychologist.

The California Superior Court observed that Dr. Weinstein's application of the Flynn effect was unpersuasive in Cain's case because "the observation that there is a trend in a population toward rising IQ scores, even if credible (an

assertion which was not proven in this action), does not support the practice of applying a point correction to the IQ scores of individual persons." The court also opined that Dr. Weinstein applied the AAMR "recommended correction of 5 points twice."

The California Superior Court articulated that Dr. Weinstein lacked "significant experience in making determinations of whether persons are or are not" intellectually disabled. "More importantly, [Dr. Weinstein] committed himself to the opinion that the petitioner is mentally retarded early on in his work on this case, on skimpy information. Dr. Weinstein's subsequent work has been aimed at bolstering that initial opinion instead of objectively assessing [Cain]." The court concluded that Dr. Weinstein acted as "an advocate in this case," and that "Dr. Beliz provided the only credible expert opinion in this matter."

The California Superior Court noted that Cain's interview with a news reporter after the murders was included in the record. At the time of the interview, the reporter was interviewing neighbors of the slain couple, unaware that Cain was the murderer. The court observed that Cain "understood the nature of the interview and interacted normally with the interviewer. [Cain] clearly understood that it was in his best interests to feign ignorance of the crimes and that he should minimize his contact with the victims." According to the court, there was "no deficit in [Cain's] mental functioning observable from this evidence, which was fortuitously recorded very shortly after the murders." The court observed that Cain exhibited the same behavior during his police interview.

"[T]he Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability. . . ." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (citation omitted). In order to demonstrate that a defendant is intellectually disabled "an IQ between 70 and 75 or lower is typically considered the cutoff IQ score for the intellectual function prong." *Brumfield*, 135 S. Ct. at 2278 (citation and alteration omitted). The Supreme Court has articulated that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Hall*, 134 S. Ct. at 1994 (citations omitted). The Supreme Court has furthered concluded that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. Our general assessment of Cain's *Atkins* claim leads us to conclude that Cain is not entitled to habeas relief. *See Hall*, 134 S. Ct. at 2001 (articulating the standard for determining intellectual disability).[9]

Cain's claim turns essentially on a battle of experts between Drs. Beliz and Weinstein. The state court reviewed the expert testimony for both in detail, and gave numerous

[9] Cain contends that the Supreme Court's recent decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017) suggests that he is entitled to relief on this claim. However, *Moore* is not an AEDPA case and thus does not address the difficult burden Cain bears to prove his entitlement to relief under AEDPA standards. Morever, having been decided just this spring, *Moore* itself cannot serve as "clearly established" law at the time the state court decided Cain's claim. *See Greene v. Fisher*, 565 U.S. 34, 44 (2011).

specific reasons to support its determination that Dr. Beliz was more credible. At most, Cain's arguments might show that there *could* have been reasons to credit Dr. Weinstein's findings. But this does not overcome his much more difficult burden under AEDPA to show that the state court acted *unreasonably* in concluding that Dr. Beliz's report was more credible. *See Wood v. Allen*, 558 U.S. 290, 301 (2010); *Jamerson v. Runnels*, 713 F.3d 1218, 1224 (9th Cir. 2013).

4. Cumulative Error

Cain asserts that he is entitled to habeas relief due to cumulative error based on a litany of trial errors and ineffective assistance of counsel. However, Cain is not entitled to relief on a theory of cumulative error because he was not "denied . . . a trial in accord with traditional and fundamental standards of due process." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

IV. CONCLUSION

The California Supreme Court's determination that Cain received adequate notice of the attempted rape special circumstance was not unreasonable. The amended information specifically alleged a special circumstance premised on Cal. Penal Code § 190.2(a)(17), which encompassed attempted rape. Cain's counsel also acknowledged that Cain received adequate notice of the special circumstance and that Cain was not prejudiced by the prosecution's arguments premised on attempted rape. Thus, Cain received constitutionally adequate notice of the special circumstance. In any event, Cain does not challenge the jury's verdict that he was eligible for the death penalty based on the first-degree murder of Mr. Galloway and the

associated special circumstances that were entirely unrelated to attempted rape.

After expanding the certificate of appealability to include previously uncertified claims, we conclude that, upon further consideration, these claims lack merit.

AFFIRMED.

FILED

DEC 27 2017

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRACY DEARL CAIN, Petitioner-Appellant, v. KEVIN CHAPPELL, Warden, Respondent-Appellee.	No. 13-99008 D.C. No. 2:96-cv-02584-ABC Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN, RAWLINSON, and CALLAHAN, Circuit Judges.

The panel voted to deny the Petition for Rehearing. Judges Rawlinson and Callahan voted, and Judge O'Scannlain recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

Petitioner-Appellant's Petition for Rehearing, filed on November 27, 2017, is DENIED, and the Suggestion for Rehearing En Banc is REJECTED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TRACY DEARL CAIN, Petitioner, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 96-2584 ABC **DEATH PENALTY CASE** ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT AND GRANTING UNOPPOSED APPLICATION FOR STAY OF EXECUTION

On July 2, 2013, the Court denied Petitioner's Third Amended Petition for Writ of Habeas Corpus. On July 30, 2013, Petitioner filed a Motion to Alter or Amend the Judgment Pursuant to Federal Rule of Civil Procedure 59(e) and 60(b). He filed a Notice of Appeal on July 31, 2013 along with an unopposed ex parte application for a stay of execution pending the decision on appeal. (Unopposed Ex Parte Application by State Prisoner under Sentence of Death for Stay of Execution of Death Sentence, filed July 31, 2013.)

For the reasons set forth below, the Court denies Petitioner's motion to alter or amend the judgment and grants his application for a stay of execution.

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A. Motion to Alter or Amend the Judgment

Regarding motions to alter or amend the judgment under Rule 59(e), the Ninth Circuit has held that "[s]ince specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion . . . [b]ut amending a judgment after its entry remains an extraordinary remedy which should be used sparingly." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (internal quotations omitted). The court explained that:

> [i]n general, there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

Id.

Federal Rule of Civil Procedure 60(b) provides, *inter alia*, that a court may relieve a party from a final order and judgment based upon "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2).

Petitioner asserts that alteration or amendment of the Court's judgment is called for because Petitioner was not afforded formal factual development to explore trial counsel's effectiveness, and a newly drafted declaration from trial counsel undermines the assumptions of adequate performance the Court made in reliance upon *Harrington v. Richter*, 131 S. Ct. 770 (2011). (Mot. at 3-4.)

Petitioner's counsel declares that trial counsel was unwilling to cooperate with the federal habeas investigation on Petitioner's behalf until current counsel contacted him following the Court's July 2, 2013 Order. (Decl. of Jonathan C. Aminoff, July 30, 2013, ¶¶ 2-3.) Petitioner's counsel declares that trial counsel has

since "provided some useful information," which current counsel documented in a draft declaration (attached as Exhibit 2 to the Motion) for trial counsel's upcoming review and signature. (*Id.* ¶¶ 3, 4.)

The Court's review of Petitioner's federal habeas claims under 28 U.S.C. § 2254(d) is limited to "the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The Court is precluded from considering under § 2254(d) newly developed evidence presented for the first time in federal habeas proceedings, including the newly drafted declaration from trial counsel Petitioner seeks to present. The Court, therefore, denies Petitioner's motion to alter or amend the judgment on that basis.

B. Request for Stay of Execution

Local Rule 83-17.6(c) provides that "[i]f the petition is denied and a certificate of appealability is issued, the Court may grant a stay of execution which will continue in effect until the Court of Appeals acts upon the appeal or the order of stay." L. R. 83-17.6(c).

The Court issued a certificate of appealability in its July 2, 2013 Order. Petitioner's counsel declares that Respondent does not oppose the request for a stay. (Decl. of Jonathan C. Aminoff, July 31, 2013, ¶ 3.) Accordingly, the Court grants Petitioner's request for a stay of execution.

C. Order

Petitioner's Motion to Alter or Amend the Judgment Pursuant to Federal Rule of Civil Procedure 59(e) and 60(b) is DENIED. The Motion is taken off calendar.

Pursuant to Local Rule 83-17.6(c), the execution of Petitioner's sentence of death and any and all proceedings related to the execution of that sentence, including preparation for execution and the setting of an execution date, are stayed until the final decision of the United States Court of Appeals for the Ninth Circuit in this matter, unless otherwise ordered by the Court of Appeals.

The Clerk of the Court shall serve a certified copy of this Order on Petitioner; Respondent Kevin Chappell, Warden, San Quentin State Prison; Linda Johnson, Supervising Deputy Attorney General of the State of California; the Clerk of the Superior Court; and the District Attorney of Ventura County.

IT IS SO ORDERED.

Dated: August 1, 2013.

AUDREY B. COLLINS
United States District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TRACY DEARL CAIN, Petitioner, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 96-2584 ABC **DEATH PENALTY CASE** JUDGMENT

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

The Clerk is ordered to enter this judgment.

Dated: July 2, 2013.

Audrey B. Collins

AUDREY B. COLLINS
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TRACY DEARL CAIN, Petitioner, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 96-2584 ABC **DEATH PENALTY CASE** ORDER DENYING THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner was convicted in 1988 of the burglary, robbery, and first degree murders of his neighbors, William and Modena Galloway. The jury found true special circumstance allegations of burglary murder, robbery murder, multiple murder, and attempted rape murder. Petitioner was acquitted on a charge of rape.

The jury sentenced Petitioner to death. After denying the motion for modification of the penalty verdict, the court entered judgment accordingly. The California Supreme Court affirmed Petitioner's conviction and sentence on May 4, 1995. *California v. Cain*, 10 Cal. 4th 1 (1995), *cert. denied*, 516 U.S. 1077 (1996). On July 19, 1995, the California Supreme Court denied his petition for writ of habeas corpus.

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Petitioner filed a federal petition for writ of habeas corpus on June 24, 1997. Petitioner was ordered to return to state court to exhaust certain claims. He filed a First Amended Petition containing only unexhausted claims on January 12, 1998, and the federal habeas proceedings were held in abeyance. The California Supreme Court denied relief on the state exhaustion petition on June 28, 2000.

Petitioner filed a Second Amended Petition on October 3, 2000. The court granted discovery on limited issues on March 5, 2001 and September 24, 2002.

Also on March 5, 2001, Respondent filed a motion to dismiss the Second Amended Petition. The Court denied the motion but required that Claim 10(4) be withdrawn from the Second Amended Petition because it was unexhausted. Petitioner withdrew Claim 10(4) on August 1, 2001.

Following the filing of an answer and traverse, on February 7, 2003, Respondent filed a motion for judgment on the pleadings. The next month, Petitioner filed an initial motion for evidentiary hearing. On June 12, 2003, the Court granted judgment on the pleadings in favor of Respondent on Claims 4, 5, 6, 7, and 14. (Order re: Respondent's Motion for Judgment on the Pleadings on Claims 4, 5, 6, 7 and 14, June 12, 2003 ("June 2003 Order").)

On June 19, 2003, Petitioner filed notice with the Court that he had filed a state habeas petition raising claims under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court stayed the federal proceedings and held them in abeyance pending the state court's resolution of that petition. The California Supreme Court denied the petition on April 22, 2009.

The Court lifted the stay of the instant proceedings on April 30, 2009. At that time, the Court denied without prejudice the March 2003 motion for evidentiary hearing. The Court explained that "[a]t the time the motion was filed Petitioner believed that this case was not governed by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') because it was the date that the request for counsel was filed which determined the applicability of the AEDPA.

[¶] However, since that time it has become clear that this case is governed by the AEDPA because it is the filing of the petition, not the request for appointment of counsel, which determines whether a case was pending before the AEDPA was enacted." (Minute Order, April 30, 2009, at 2 (citations omitted).)

Petitioner filed the operative Third Amended Petition on June 15, 2009 ("Petition"). He filed a Motion for Evidentiary Hearing on October 23, 2009. The Court issued an order on March 14, 2011 denying certain claims and granting a hearing on others, but later vacated those portions of the order granting a hearing in light of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). (Order Granting in Part and Denying in Part Motion for Evidentiary Hearing, Mar. 14, 2011 ("March 2011 Order"); Order re: Motion for Evidentiary Hearing and Supplemental Briefing, Apr. 11, 2011.) On February 13, 2012, the Court denied relief on those claims and ordered merits briefing on Petitioner's remaining claims. (Order Denying Evidentiary Hearing and Denying Relief on Claims 1(1), 1(2), 2(1), 2(11), 2(12), 2(17), 10(6), 10(9), 10(10), 10(11), 10(13), and 10(14), Feb. 13, 2012 ("February 2012 Order").) The parties completed the merits briefing on April 15, 2013.

For the reasons set forth below, the Third Amended Petition is DENIED.

I. Claims 1(4), 2(9), 8(1), 11(2), 19(2), and 19(3): Use of Race and Indigency as Factors in Charging Decision

A. Allegations

In Claims 19(2)[1] and 19(3), Petitioner alleges that the prosecution unconstitutionally decided to seek the death penalty against him based upon his race and indigency. Petitioner raises the allegation as a form of prosecutorial misconduct at the guilt phase of trial (Claim 1(4) (Pet. at 149-50)); ineffective assistance of counsel at the guilt phase for failing to object to the charging decision (Claim 2(9) (*id.* at 178)); an Eighth Amendment violation (Claim 8(1) (*id.* at 206));

[1] Section 1 of Claim 19 summarizes certain facts and arguments relied upon elsewhere in Claim 19. (*See* Pet. at 300-04.) Section 19(1) does not allege an independent claim for relief.

and a due process and equal protection violation (Claim 11(2)[2] (*id.* at 242)).

Petitioner alleges that of the 107 prosecutions involving Caucasian murder victims between 1976 and 1992, the Ventura County Office of the District Attorney sought the death penalty in 21 (or 19.6%) of the cases. (*Id.* at 301.) Of the 104 prosecutions involving non-Caucasian murder victims in the same period, Petitioner alleges, the Ventura County Office of the District Attorney sought the death penalty in 7 (or 6.7%) of the cases. (*Id.*) Petitioner alleges that the race of the victims was unknown in an additional 16 cases. (*Id.*)

Petitioner further alleges that of those 227 murder defendants charged in Ventura County between 1976 and 1992, 40 (or 17.6%) were represented by retained counsel, indicating that they were not indigent, and the District Attorney sought the death penalty against 2 (or 5%). (*Id.* at 301-02.) Petitioner alleges that 184 murder defendants were represented by court-appointed counsel, and the District Attorney sought the death penalty against 28 (or 15.2%). (*Id.* at 302.) Petitioner alleges that it is unclear whether the remaining defendants were represented by retained or appointed counsel. (*Id.*)

Petitioner alleges that in his case, "although multiple individuals clearly bore responsibility for this crime, only Mr. Cain, the sole African-American individual in that group, was charged capitally." (*Id.* at 303.)

B. Analysis

A prosecutorial decision:

> '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

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[2] Petitioner also alleges in Claim 11(2) that the decision to charge him capitally "was disproportionate given the treatment of other individuals involved in this crime." (Pet. at 242.) That argument is addressed and rejected in Claims 8(3)(A) and 19(4) below. (*See infra* pp. 59-60.)

> 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 those 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. 863-64 (2002) (internal quotation and alteration omitted; emphasis in original).

Here, the California Supreme Court may have reasonably determined that Petitioner failed to proffer evidence to show that he was similarly situated to non-indigent and non-white-victim defendants against whom the District Attorney's office did not seek the death penalty. Petitioner's statistics do not address the numbers of Ventura County defendants charged not only with murder, but with robbery murder, burglary murder, attempted rape murder, and multiple murder special circumstances.

Moreover, "[u]nder *Armstrong*, . . . a discriminatory effect is not enough; [a petitioner] must also show that the decisionmakers in his case acted with a discriminatory purpose." *Belmontes v. Brown*, 414 F.3d 1094, 1127-28 (9th Cir. 2005) (noting that the "Supreme Court has not determined whether statistics relating exclusively to the prosecuting authority are sufficient, standing alone, to establish a prima facie case of discriminatory intent in a capital charging case"), *reversed on other grounds by Ayers v. Belmontes*, 549 U.S. 7 (2006); *see also*

Armstrong, 517 U.S. at 465. The State may rebut a prima facie showing of intentional discrimination with sufficient evidence of a race-neutral explanation for the charging decision. *See Belmontes v. Brown*, 414 F.3d at 1128-29 (finding such rebuttal where "the evidence in the record [was] sufficient to provide a good faith basis" for the prosecutor's belief that petitioner had committed more than one murder, which the prosecutor asserted as the reason for his capital charge).

In this case, the California Supreme Court may have reasonably determined that the record supported the race- and indigency-neutral explanation offered by the State for its charging decision against Petitioner. The State asserted in its Informal Response to the California Supreme Court (and in its Response Brief to this Court) that no one "other than petitioner bore equal or near-equal culpability for the crimes . . . . [P]etitioner was the one who intentionally killed the Galloways, attempted to rape Mrs. Galloway, and burglarized the Galloway home on Saturday morning after the murders." (Informal Response, Case No. S067172, at 86 (internal quotation omitted); *see also* Respt.'s Br. at 15.)

Because the California Supreme Court reasonably concluded that Petitioner failed to establish an improper prosecutorial decision, the court's denial of Petitioner's corresponding prosecutorial misconduct, ineffective assistance of counsel, Eighth Amendment, due process, and equal protection claims was not objectively unreasonable. Claims 1(4), 2(9), 8(1), 11(2), 19(2), and 19(3) are, therefore, DENIED.

II. Claims 1(5), 2(3), and 3(6): Admission of Photographs

A. Allegations and Decision on Direct Appeal

In Claim 1(5), Petitioner alleges that the prosecutor improperly introduced into evidence and emphasized "numerous gruesome, inflammatory, redundant, and staged photographs of the victims and the crime scene [and] the staged semi-nude photographs of Mr. Cain" to appeal to the jury's emotions and inflame their passions. (Pet. at 150-51.) In Claim 2(3), Petitioner argues that counsel was

ineffective for failing to move to exclude or object to the admission of the photographs. (*Id.* at 173.) In Claim 3(6), Petitioner contends that the admission of the photographs violated his due process and equal protection rights. (*Id.* at 189.)

On direct appeal, the California Supreme Court addressed Petitioner's challenges to:

> photographs of Modena Galloway's body as discovered by the police at the crime scene, autopsy photographs of Modena Galloway's excised and inverted vagina; an autopsy photograph of Modena Galloway's face; photographs of William Galloway's body as discovered by the police at the crime scene; and autopsy photographs of William Galloway's body and face.

Cain, 1 Cal. 4th at 28. The court held that Petitioner had not demonstrated prejudice from counsel's failure to object, because:

> [a]lthough several of the photographs are highly unpleasant to observe, none of the photographs are unduly gruesome or inherently inflammatory. Moreover, each photograph was relevant to the prosecution's case. The photographs of the victims at the crime scene and the autopsy photographs of the wounds received by the victims were relevant to the prosecution contentions [sic] that defendant was the actual killer, intended to kill his victims, and did so during the commission of robbery and rape. The photographs of the excised vagina were relevant to the question of whether Modena Galloway was raped. The photographic evidence could assist the jury in evaluating the expert testimony on this subject.
>
> Assuming certain photographs were cumulative of others, there is no reasonable probability trial counsel's failure to object on this ground affected the verdicts. The overlap between photographs was not substantial. Given this fact and the strong, albeit circumstantial, evidence linking defendant to the murders and rape, confidence in either the guilt or penalty phase verdicts is not undermined by

> the admission of any redundant photographic evidence. We repeatedly have rejected the argument photographs of a murder victim should be excluded as cumulative if the photographs are offered to prove facts established by testimony.

Id. at 28-29 (citations omitted). The court held that because "the photographs in question were relevant, admissible evidence, defendant also fails to establish a violation of any other federal constitutional right by their admission into evidence." *Id.* at 29.

B. Analysis

Federal habeas review is limited "to the question whether the admission of the evidence violated [the petitioner's] federal constitutional rights." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (holding petitioner's due process rights were not violated by admission of evidence of prior injuries to victim, because prosecution was required to prove that killing was intentional, and evidence need not be linked directly to defendant). Thus, the issue for this Court is whether the admitted evidence "was so inflammatory as to prevent a fair trial," not "whether its prejudicial effect outweighed its probative value." *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *see also Hamilton v. Vasquez*, 17 F.3d 1149, 1159 (9th Cir. 1994) ("Claims of inadmissibility of evidence are cognizable in habeas corpus proceedings only when admission of the evidence violated the defendant's due process rights by rendering the proceedings fundamentally unfair"), *overruled on other grounds as recognized in Coleman v. Calderon*, 210 F.3d 1047 (9th Cir. 2000). "To show a violation of due process, [the petitioner] must demonstrate that the erroneous admission of the photographs rendered his trial fundamentally unfair." *Villafuerte v. Stewart*, 111 F.3d 616, 627 (9th Cir. 1997). Cain must also show a due process violation to establish his prosecutorial misconduct claim. *See Jones v. Ryan*, 691 F.3d 1093, 1102 (9th Cir. 2012) ("Review for prosecutorial

misconduct claims on a writ of habeas corpus is 'the narrow one of due process'" (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986))).

In *Gerlaugh v. Stewart*, the trial court entered into evidence "admittedly gruesome photos of the decedent," who had been run over with a car three times, struck in the head by the car, stabbed in the head, neck, and shoulders with a screwdriver at least thirty times, and dragged off a road into a field. 129 F.3d 1027, 1030, 1032 (9th Cir. 1997). The victim's entire body was covered with bruises and abrasions, along with puncture wounds, fractures, and internal injuries from his head to his midsection. *Id.* at 1030. The Ninth Circuit held that petitioner's habeas claim based on the admission of these photographs did not "raise[] the spectre of fundamental unfairness such as to violate federal due process of law" and was not cognizable. *Id.* at 1032.

Similarly, in *Villafuerte*, the Ninth Circuit held that photographs depicting the fatal wrapping of an asphyxiated murder victim's head, bindings on her body, and blood at the crime scene did not deprive defendant of a fair trial. 111 F.3d at 622, 627. The court held that the photographs were relevant to prove that defendant knowingly restrained the victim with the required intent and did not violate petitioner's due process rights. *Id.* at 627.

Here, as in *Villafuerte*, the photographs of the victims' bodies were relevant to demonstrate the extent of the victims' injuries and the circumstances in which the injuries were inflicted. *See Cain*, 10 Cal. 4th at 28-29. The admission of the photographs did not render Petitioner's trial fundamentally unfair so as to violate federal due process of law. *See Henry*, 513 U.S. at 366; *Gerlaugh*, 129 F.3d at 1032; *Villafuerte*, 111 F.3d at 627; *Hamilton*, 17 F.3d at 1159. Likewise, the four admitted photographs of Petitioner, from the waist up and without clothing (*see* Pet. Exs. 123-26), were relevant to demonstrate that Petitioner possessed the physical strength to apply "major," "considerable force" to Mr. Galloway's face, head, and body. (RT 5356, 5359-60); *see also Cain*, 10 Cal. 4th at 79 n.32

("Defendant's . . . use of his physical strength [was] demonstrated by the capital crimes"). The photographs were not "so inflammatory as to prevent a fair trial" in violation of Petitioner's due process rights. *Henry*, 513 U.S. at 366.

In addition, the California Supreme Court may have reasonably concluded on habeas review, as it did on direct appeal, that "the bulk of the photographs would have been properly admitted even if trial counsel had proffered the objections now urged," such that it was not reasonable that the trial court would have granted the objections, and that any successful objections would not have had a reasonable probability of altering the outcome at trial in light of the evidence presented. *Cain*, 10 Cal. 4th at 28-29; *see also Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) ("To show prejudice under *Strickland* from failure to file a motion," petitioner must show, in part, that "had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious"). Thus, the court's rejection of Petitioner's ineffective assistance of counsel claim is not objectively unreasonable.

Claims 1(5), 2(3), and 3(6) are, therefore, DENIED.

III. Claims 1(6), 2(5), 3(7), 3(11), 9(3), 11(8), 11(9), 15(7), 15(8): Attempted Rape Special Circumstance

A. Allegations

Petitioner contends that he did not receive constitutionally adequate notice of the prosecution's attempted rape special circumstance allegation. (Pet. at 152 (Claim 1(6)).) In addition to Petitioner's overarching claim that "[t]he belated charge violated Mr. Cain's right to be provided notice of the charges against him," (*id.*), Petitioner raises narrow allegations challenging the attempted rape special circumstance in: its inclusion in the prosecutor's guilt phase closing argument (*id.* at 151-52); counsel's failure to defend against the special circumstance at the guilt phase of trial (Claim 2(5) (*id.* at 175-78)); the jury's instruction on and consideration of the special circumstance (Claim 3(7) (*id.* at 189)); the jury's lack

of appropriate instructions on the elements, required findings, and availability of an intoxication defense for the special circumstance (Claim 3(11) (*id.* at 203)); and its presentation by the prosecution at the penalty phase as a basis for imposing the death penalty (Claim 9(3) (*id.* at 224), Claim 11(8) (*id.* at 243),[3] and Claim 15(7) (*id.* at 288-89)).

Similarly, in Claims 11(9) and 15(8), Petitioner contends that his constitutional rights were violated because the jury was permitted and invited to consider "all of the evidence in support of the rape charge as a 'circumstance of the crime' justifying the imposition of the death penalty, even though Mr. Cain had been acquitted of that charge" of rape. (*Id.* at 244, 290.)

B. Adequacy of Notice and Effective Assistance of Counsel

Regarding counsel's alleged ineffective assistance, the Court noted in its March 2011 Order that Petitioner failed to allege any specific facts that adequate counsel could have established at trial had Petitioner had notice of the attempted rape charge, apart from that of his intoxication at the time of the crimes. (March 2011 Order at 65-66.) Considering counsel's performance, and the adequacy of Petitioner's notice of the attempted rape special circumstance allegation more generally, the Court held:

> [F]airminded jurists could differ about whether Petitioner had adequate notice of the attempted rape special circumstance allegation. Petitioner's counsel represented to the trial court that he was aware that the prosecutor could argue attempted rape and he did not want to delve into that allegation for strategic reasons. It is true that the adequacy of counsel's performance, in claiming that he

[3] The Court observes that the text, as opposed to the title, of Claim 11(8) in the Petition concerns the Arizona car theft conviction and not the attempted rape special circumstance. (*See* Pet. at 243.) In light of Petitioner's statement in his merits brief that Claim 11(8) is briefed "in conjunction with a due process violation at Claim 3.7," regarding the attempted rape special circumstance (*see* Petr.'s Br. at 93), the Court interprets Claim 11(8) accordingly. Petitioner's corresponding allegations regarding the Arizona car theft conviction are denied below. (*See infra* pp. 80-84.)

> had notice of the attempted rape allegation and in not presenting evidence or argument on the allegation after the court's inquiry, could be questioned. The California Supreme Court found counsel's performance to be adequate, however, and even if fairminded jurists could disagree about the correctness of that decision, that does not make it unreasonable. *See* [*Richter*, 131 S. Ct.] at 785-86. Thus, in light of the deference afforded the state high court, this Court concludes that the court was not unreasonable in holding that Petitioner had adequate notice.
>
> Independently, . . . the California Supreme Court could have reasonably concluded that trial counsel reasonably relied on expert opinion in not presenting an intoxication or diminished capacity defense, or that Petitioner failed to allege facts to demonstrate any mental state evidence that competent counsel with adequate notice should have presented at trial. Thus, even if the charging document were insufficient, the California Supreme Court could have reasonably found any resulting error to be harmless beyond a reasonable doubt.

(March 2011 Order at 71-72.) The Court also denied Petitioner's claim (within Claim 10(15)) that counsel was ineffective for failing to object to prosecutorial misconduct in the inclusion of the attempted rape special circumstance finding as an aggravating factor, holding that:

> at the penalty phase of trial, the jury properly takes into account any special circumstances found to be true at the guilt phase. Cal. Penal Code § 190.3(a). The California Supreme Court could reasonably have concluded that because the jury found true the attempted rape special circumstance allegation (CT 411), counsel could not have been ineffective for failing to object to its consideration at the penalty phase.

(March 2011 Order at 115 (internal citation edited).) Petitioner's contentions that the attempted rape special circumstance should not have been included in the

prosecution's guilt phase closing argument (Claim 1(6)), was not adequately defended against by defense counsel at the guilt phase (Claim 2(5)), should not have been considered by the jury (Claim 3(7)), and should not have been presented by the prosecution at the penalty phase (Claims 9(3), 11(8), and 15(7)) are, therefore, without merit. Claims 1(6), 2(5), 3(7), 9(3), 11(8), and 15(7) are DENIED.

C. Jury Instructions

Petitioner also makes the conclusory allegation in Claim 3(11) that the jury was not appropriately instructed on the elements, required findings, and availability of an intoxication defense for the special circumstance. Petitioner fails to specify in his Petition or in his merits brief in what way the jury instructions were deficient. (*See* Pet. at 203; Petr.'s Br. at 68.) "Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); *see also Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011) ("[Petitioner's] cursory and vague claim cannot support habeas relief"); *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").

On direct appeal, the California Supreme Court rejected the challenges Petitioner made to the attempted rape special circumstance instructions. The court concluded that: (1) in context, the jury would have understood an attempted rape to be subject to the requirement that the "burglary, robbery, or rape" must not be merely incidental to the murder to find the special circumstance true; (2) the failure to provide an instruction defining "attempt" was harmless because the ordinary understanding of "attempt" includes the necessary intent, and no explanation other than rape or attempted rape was sufficient to explain the evidence; and (3) the failure to instruct that the instructions on intoxication applied as a defense to attempted rape was harmless because the jury found true all other special

circumstances (which required specific intent to kill), and "[n]o evidence was presented from which a jury rationally could have found defendant, despite his asserted intoxication, intended to kill Mr. and Mrs. Galloway, but because of that same intoxication did not form the intent to rape Mrs. Galloway." *Cain*, 1 Cal. 4th at 43-45.

The court's conclusions are not objectively unreasonable. Even an instruction "that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," but is instead subject to review for prejudice. *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (emphasis in original). To establish an instructional error meriting federal habeas relief, Petitioner must show that the given instruction violated Petitioner's constitutional rights or "'so infected the entire trial that the resulting conviction violates due process.'" *McGuire*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). "[W]here a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Neder*, 527 U.S. at 19; *see also United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008) (finding harmless error as to omitted jury instruction on defendant's requisite state of mind where defendant "scarcely" raised a state of mind defense at trial). Moreover, "the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *McGuire*, 502 U.S. at 72 (internal quotation omitted). "No prejudice results from a . . . court's failure to define a concept within the comprehension of the average juror." *United States v. Tirouda*, 394 F.3d 683, 688-89 (9th Cir. 2005) (internal quotation omitted). The California Supreme Court was not objectively unreasonable in concluding that in context, the jury would have understood that the attempted rape must not be merely incidental to the murder, and that Petitioner

must have had the specific intent to rape Mrs. Galloway, to find the special circumstance true. The court was likewise not objectively unreasonable in concluding that the jury rationally could not have found that Petitioner intended to kill the Galloways but, as a consequence of his intoxication, did not intend to rape Mrs. Galloway. Claim 3(11) is, therefore, DENIED.

D. Jury Consideration of Evidence Supporting Rape Charge

Finally, the California Supreme Court reasonably determined that the jury's consideration of "all of the evidence in support of the rape charge" at the penalty phase did not violate Petitioner's constitutional rights. (*See* Pet. at 244, 290 (Claims 11(9) and 15(8))); *Cain*, 10 Cal. 4th at 69. The jury was instructed to consider "[t]he circumstances of the crime[s] of which the defendant was convicted in the present proceeding and the existence of any special circumstance *found to be true*. . . . No other factors or circumstances may be considered in aggravation or as a reason to impose a verdict of death." (RT 6858, 6860 (emphasis added).) The court reasonably determined that the evidence offered in support of the rape charge was the same evidence supporting the jury's attempted rape special circumstance finding, and that the attempted rape special circumstance evidence was properly within the jury's consideration at the penalty phase. *See Cain*, 10 Cal. 4th at 69. Claims 11(9) and 15(8) are, therefore, DENIED.

IV. Claim 1(7): Prosecutorial Misconduct in Guilt Phase Closing Argument

A. Allegations

In Claim 1(7), Petitioner alleges that the prosecutor committed misconduct in his guilt phase closing argument by making "several false and inflammatory

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statements regarding critical elements in the case, including mischaracterizations of the evidence." (Pet. at 153.) Petitioner argues that:

> At trial, the prosecutor argued that Cain need not have

> formulated the intent to kill in order for the special circumstances to be found true. (RT 6047.) The prosecutor was subsequently forced to admit he was wrong and that intent to kill was required. (*Id.* at 6200.) The prosecutor, however, also argued that the intent to kill was 'a very low mental state.' (*Id.* at 6049.) He stated that the crime scene pictures were enough to establish Cain formed the intent to kill. (*Id.*) The prosecutor's argument that the jury could simply presume intent to kill from the crime scene was contrary to clearly established federal and state law. *See Dickey v. Lewis*, 859 F.2d 1365 (9th Cir. 1988); *Sturgis v. Goldsmith*, 796 F.2d 1103 (9th Cir. 1986). Such burden shifting arguments violate the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510 (1979). The CSC's decision that Cain failed to state a prima facie case for relief on this issue was therefore contrary to, and an unreasonable application of, clearly established federal law.

(Petr.'s Br. at 29 (internal citations edited).)

B. Statements by Counsel and the Trial Court

In his closing argument, the prosecutor argued:

> There's obviously a burglary here. There's obviously a robbery, two deaths that resulted from that. Intent to kill is not an issue. After all, look at the pictures. [¶] . . . I'm not going to stand here and wave bloody shirts and bloody pictures. You're going to see them. [¶] The purpose of seeing them is to see what happened. The purpose is not to horrify you. It's horrifying what happened. You know that. I don't have to stand here and repeat that to you. [¶] What we have here is obviously a first-degree murder and an intentional killing. [¶] If you fire a bullet – if somebody fires that bullet – after all, the gun can be aimed a number of places. It's in a second, and it's over. [¶] You look at Mr. Galloway, you look at Mrs. Galloway, and you look

at the diagrams, the body diagrams the autopsy surgeon did. That didn't take a second. That took time.

And you're going to be given an instruction about voluntary intoxication. You know, does that – in some cases that can delete or diminish the intent to kill. But think about the intent to kill. [¶] Is that a higher mental state? [¶] I remember many years ago when I took math in college. I wasn't capable of reaching the higher mental state a number of my classmates were. I didn't get as good a grade. That's a higher mental state. [¶] Higher mathematics exhibits a very thoughtful, educational process; but what about the intent to kill? [¶] A dog can intend to kill. A dog can intend to kill. [sic] [¶] Now the defendant wasn't so strung-out or so drunk or anything like that that he reached a state – a mental state lower than that of a dog. [¶] Intent to kill is a very simple mental state. Existed since man began. Isn't something that's evolved over great civilization. [¶] Intent to kill is a very low mental state, and I submit to you there's just – when you look at the pictures of Mr. and Mrs. Galloway, the person who hit them repeatedly intended to kill them. There's no doubt about that, no serious doubt about that.

. . . And there's one special circumstance that is certainly true, and that special circumstance is what's called multiple murder. [¶] And the Court will read you the following instruction. To find the special circumstance referred to in these instructions as multiple murder convictions, it must – is true, it must be proved – one thing. That the defendant has in this case been convicted of more than one murder of the first or second degree. [¶] Well, there's two murders of the first degree on the felony murder rule so. That special circumstance is true. [¶] What we're talking about is the special circumstance burglary, robbery, and rape because that special circumstance requires a special intent to burglarize, to steal, to rob, to rape and it require – they all require an intent to kill.

(RT 6047-50.)

Later, after defense counsel completed his closing argument and the prosecutor completed his rebuttal, but before the jury was given its instructions, the prosecutor told the court:

> Mr. Wiksell [defense counsel] pointed out to me that the end – at the end of my argument, when I talked about the multiple murder special circumstance, I said that two felony murders would make that. [¶] . . . I was relying on that [CALJIC 8.81.3], the instruction that we'd all agreed on . . . . [¶] Mr. Wiksell at the end of my argument said, I thought – quote: I thought you had to have an intent to kill under *Carlos*. [¶] Now, after his comment . . . I researched the matter last night. I misstated the law. [¶] . . . [On] at least one of the two murders there must be an intent to kill. [¶] . . . [M]y argument was incorrect. I believe that I argued so in good faith because the instruction, it seems to me, is pretty lousy. [¶] I have offered a modified instruction to the Court, which adds a Paragraph 2, that in at least one of the offenses of murder the defendant intended to kill or intended to aid in the killing of a human being. [¶] . . . I did not intend to mislead the jury. Last night when I researched the matter I was obviously wrong. [¶] . . . I had not read *Turner*, that I can recall, on the multiple murder matter before this statement. [¶] . . . I apologize for the error.

(RT 6199-6203.) Defense counsel stated to the trial court his belief that "[i]t was not an intentional error." (*Id.* at 6212.) The trial judge proposed "add[ing] [his] own comments" to the jury that:

> I have worked with both of these lawyers in the past, as I have with many members of the local bar on both sides of the aisle. And I would not make such a statement with regard to every member of the local bar, but with respect to both of these attorneys I am satisfied neither intentionally would mislead the jury.

> I'm satisfied that this is not now and never was a stratagem of the prosecutor to gain some special advantage, perceived or otherwise, with the jury. It is an effort to cure a mistake, and I think it's the best way to attempt – to attempt to cure that mistake.

(*Id.* at 6214.)

The prosecutor then told the jury of his error and informed them, just before the trial court read the entirety of the guilt phase instructions, that:

> [t]o find the special circumstance referred to in these instructions as multiple murder convictions is true [sic], it must be proved, number one, that the defendant has in this case been convicted of more than one offense of murder in the first or second degree; and two, that in both of the offenses of murder, the defendant intended to kill or intended to aid in the killing of a human being.

(*Id.* at 6224.) The trial court repeated the instruction when reading the jury its guilt phase instructions. (*Id.* at 6248.)

C. Analysis

Dickey and *Lewis*, upon which Petitioner relies, held that a jury instruction that "[i]ntent to kill may be presumed from use of a deadly weapon" violates a defendant's due process rights. *Dickey*, 859 F.2d at 1367; *Sturgis*, 796 F.2d at 1107 (citing *Sandstrom*, 442 U.S. 510). Here, the prosecutor in his closing argument did not tell the jury that any presumption applied. To the contrary, consistent with the requirement of *Sandstrom* that every element of the charge be proved beyond a reasonable doubt, the prosecutor argued that there was "no serious doubt" about the intent to kill. (RT 6049.) In addition, the California Supreme Court may have reasonably determined that the prosecutor's statements that intent to kill was a "very low mental state" and that the photographs showing the nature of the injuries evidenced that the killings were intentional, did not misstate the law and argued "reasonable inferences" based on the evidence. *United*

States v. Atcheson, 94 F.3d 1237, 1244 (9th Cir. 1996) ("It is not misconduct for the prosecutor to argue reasonable inferences based on the record"); *cf. United States v. Young*, 470 U.S. 1, 8 n.5 (1985) (quoting American Bar Association's "useful guideline[]" that "[t]he prosecutor may argue all reasonable inferences from [the] evidence").

In light of the record of the trial court proceedings, the California Supreme Court may have reasonably concluded that the prosecutor did not commit misconduct in his closing argument and that the jury was properly informed of the intent to kill requirement for all special circumstances. Claim 1(7) is, therefore, DENIED.

V. Claims 1(8) and 2(15): Reconvening the Jury

In Claim 1(8), Petitioner contends that "[t]he prosecutor committed misconduct in seeking to reconvene the jury and submit new verdict forms after the jury had returned a verdict that failed to specify a degree of murder." (Pet. at 153.) In Claim 2(15), Petitioner alleges that defense counsel was ineffective for failing to object to the reconvening of the jury. (Pet. at 181; *see also* Petr.'s Br. at 54-56.) In his merits brief, Petitioner argues that if the jury fails to determine the degree of a crime distinguished into degrees, then the defendant is deemed guilty of the lesser degree of the offense, citing California Penal Code § 1157. (Petr.'s Br. at 55.)

"Review for prosecutorial misconduct claims on a writ of habeas corpus is 'the narrow one of due process[.]' . . . [T]he alleged misconduct must have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Jones*, 691 F.3d at 1102 (quoting *Darden*, 477 U.S. at 181). Petitioner asserts that a due process violation based upon the improper application of § 1157 occurs where the jury does not determine the degree of a crime and as a matter of law, the defendant could have been convicted of a lesser degree of the crime. (Petr.'s Br. at 55 (citing *People v. Mendoza*, 23 Cal. 4th 896, 910 (2000)).) Petitioner argues that because "[t]he voluntary intoxication argument could negate

specific intent as to the burglary and robbery," Petitioner "would then not be guilty of first degree murder under a felony murder theory." (*Id.*)

As the California Supreme Court held on direct appeal, however:

> [p]rior to its original deliberations, the jury was instructed it should return a finding on the robbery, rape, burglary, and multiple-murder special circumstances only if it found defendant guilty of first degree murder. The jury found all of the special circumstances true. . . . The only reasonable conclusion to draw is the jury found the murders were of the first degree, but was unable to record its findings because of the inadequate verdict forms.

Cain, 1 Cal. 4th at 56 (internal citation omitted). Moreover, this Court in granting judgment on the pleadings on Claim 7 rejected Petitioner's argument based upon § 1157, holding that "Petitioner could not be found guilty of second degree felony murder because: 'as a matter of law, a conviction for a killing committed during a robbery . . . can only be a conviction for first degree murder.'" (June 2003 Order at 24 (quoting *Mendoza*, 23 Cal. 4th at 908).) The Court has found reasonable the conclusions that defense counsel reasonably relied on expert opinion in not presenting an intoxication defense and that Petitioner failed to allege facts to demonstrate any intoxication evidence that competent counsel should have presented. (March 2011 Order at 71-81.)

Because Petitioner cannot show, in light of the jury's initial verdicts and the evidence presented at trial, that he could have been convicted of second degree murder, the California Supreme Court reasonably determined that Petitioner failed to show ineffective assistance of counsel or prosecutorial misconduct in the reconvening of the jury. Claims 1(8) and 2(15) are, therefore, DENIED.

VI. Claims 1(9), 2(8), and 3(3): Petitioner's Taped Confession

A. Allegations

In Claim 1(9), Petitioner alleges that the prosecution wrongfully obtained a

false confession from him during a tape-recorded interview by Detectives Billy Tatum and John Garcia. (Pet. at 153-54.) Petitioner contends that expert analysis demonstrates that Detective Tatum lied at trial about a purported malfunction in the tape recorder causing a portion of Petitioner's interview to fail to be recorded. (*Id.* at 153-54.) Detective Tatum testified that during that portion of Petitioner's interview, Petitioner confessed to stealing money from the Galloways during the initial break-in. (*Id.* at 153.) In addition, Petitioner alleges that "it was apparent to the detectives . . . that he had used cocaine extensively prior to the interview and, as a result, was highly suggestible." (*Id.* at 154.)

In Claim 2(8), Petitioner faults counsel for failing to object to the introduction of the taped statement into evidence in spite of the fact that "numerous" unspecified "factual and legal challenges to the admission of the tape were available." (*Id.* at 178; *see also* Petr.'s Br. at 49.) Additionally, in Claim 3(3), Petitioner contends that the confession was obtained in violation of his right to remain silent and right to the assistance of counsel. (Pet. at 184.) Petitioner alleges that "[i]t is quite possible and logical" that during the break in the recording, which occurred approximately forty-five minutes into the interview (*see* Pet. Ex. 174 ¶ 4), he invoked his right to consult with an attorney or right to remain silent. (Pet. at 184.) Petitioner further alleges that any waiver of counsel he made before giving the statement was not voluntary, knowing, and intelligent because it was "not the product of a free and deliberate choice rather than intimidation, coercion, or deception" and was not made with a full awareness of the nature of the right and the consequences of abandoning it. (*Id.*) Finally, Petitioner alleges that his statement itself was the product of "duress and coercion." (*Id.*)

B. Analysis

1. Falsity of Detective Tatum's Testimony

First, regarding the alleged falsity of Detective Tatum's trial testimony, the Court held in its February 2012 Order:

As to Tatum's testimony about the substance of Petitioner's confession, there was a significant collection of other evidence presented at trial that Petitioner had stolen at least $500 from the Galloways. Mendoza testified that Petitioner asked him if he 'wanted to help him burglarize or rob that house next door to his house . . . [s]o he can get thousands.' (RT 5477.) Mendoza said that he declined, and Petitioner later went outside with Cerda. (*Id.* at 5478, 5482-83.) When Petitioner returned at least twenty or thirty minutes later, Mendoza testified, he had blood on his clothes and face and 'said he had thousands.' (*Id.* at 5489-90.) Mendoza testified that Petitioner held 'a lot of money in his left palm . . . folded in half with [a] $100 bill in the front.' (*Id.* at 5491.) According to Mendoza, Petitioner said he 'knocked somebody out' or 'blipped somebody.' (*Id.* at 5491-92.)

Richard Gifford testified that on Saturday afternoon, he saw Petitioner 'flash a big roll of bills,' a '[p]ile of money' close to $1,100 or $1,200 dollars. (*Id.* at 6023-24.) He said Petitioner gave him a one hundred dollar bill to buy beer for him. (*Id.* at 6024; *see also id.* at 6029 (testimony of 7-Eleven employee that Gifford bought beer and cigarettes Saturday afternoon with a one hundred dollar bill).) Teodorico ('Rick') Albis testified that he saw Petitioner at Petitioner's house Saturday morning, and Petitioner showed him a check and a '[w]ad' of money. (*Id.* at 5817-18.) Albis testified that on the Saturday after the murders, he saw Petitioner paying cash for a car stereo, sneakers, a hat, and some cassettes, with a large bill in at least one instance. (*Id.* at 5817-21; *see also id.* at 5650-55 (testimony of electronics store manager regarding sale of stereo system on Saturday for $214 cash).) Gifford testified that he saw Petitioner again on Sunday, after Petitioner purportedly made these purchases, still with 'some money.' (*Id.* at 6026.)

It is Petitioner's burden to demonstrate the materiality of

> any false testimony presented at trial[.] [*S*]*ee United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). . . . In light of the evidence presented at trial, the California Supreme Court may have reasonably concluded that Detective Tatum's testimony about the manner in which Petitioner's confession was not recorded or about the substance of the confession was not material . . . .

(February 2012 Order at 27-28 (internal citations edited).)

2. Invocation of Right to Remain Silent and Right to Counsel

Second, the California Supreme Court may have reasonably concluded that Petitioner's allegation that "[i]t is quite possible and logical" that he invoked his right to counsel or to silence (Pet. at 184) is purely speculative and thus without merit. *See Phillips v. Woodford*, 267 F.3d 966, 986-87 (9th Cir. 2001) (holding petitioner's *Brady* claims were "without merit" because they were "mere suppositions"); *West v. Ryan*, 608 F.3d 477, 490 n.12 (9th Cir. 2010) (holding evidence failed to establish petitioner's entitlement to a federal evidentiary hearing because it was "speculative in nature"); *Gonzalez v. Knowles*, 515 F.3d 1006, 1014 (9th Cir. 2008) (denying evidentiary hearing where petitioner's claims of ineffective assistance of counsel were "grounded in speculation").

Considering "whether [a habeas petitioner] actually invoked his right to counsel," the Ninth Circuit observed in *Sechrest v. Ignacio* that "[t]his is an objective inquiry. There must, at a minimum, be a statement from the suspect that can reasonably be construed to be an expression of a desire for the assistance of an attorney." 549 F.3d 789, 806 (9th Cir. 2008) (internal quotation omitted; citing *Davis v. United States*, 512 U.S. 452, 458-59 (1994); *Smith v. Illinois*, 469 U.S. 91, 95 (1984)). "[A]fter a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Davis*, 512 U.S. at 461. "[T]here is no principled reason to

adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*." *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010). Each invocation must be made "'unambiguously.'" *Id.* at 2259 (quoting *Davis*, 512 U.S. at 459).

The California Supreme Court may have reasonably concluded that because Petitioner's assertion that "[i]t is quite possible" that he invoked his right to counsel or to silence during the untaped interview portion is speculative, Petitioner failed to establish his entitlement to habeas relief for such a violation.

3. Police Coercion and Ineffective Assistance of Counsel

Third, regarding Petitioner's allegations that any waiver was not voluntary, knowing, and intelligent, that he was "highly suggestible," and that his statement was the product of duress, the Court held in its March 2011 Order that:

> Petitioner fails to specify in what ways police officers 'employ[ed] coercive tactics.' (*Id.*) Petitioner must establish coercive police conduct to be entitled to relief. 'The sole concern of the Fifth amendment, on which *Miranda* was based, is governmental coercion. . . . The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word.' *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (holding petitioner's 'perception of coercion flowing from the "voice of God" . . . is a matter to which the United States Constitution does not speak'); *California v. Kelly*, 51 Cal. 3d 931, 951 (1990) (applying *Connelly* on direct appeal and holding that 'defendant's low intelligence and psychiatric symptoms, standing alone, do not render his waiver of *Miranda* rights involuntary'). . . .
>
> The Ninth Circuit has held:
>
> > While it is true that a waiver of one's *Miranda* rights must be done intelligently, knowingly, and voluntarily, the Supreme Court has never said that impairments from drugs, alcohol, or other similar

> substances can negatively impact that waiver. . . . [A]n intoxicated individual can give a knowing and voluntary waiver, so long as that waiver is given by his own free will.

Matylinsky v. Budge, 577 F.3d 1083, 1095 (9th Cir. 2009) (citations and parenthetical omitted). The Circuit held in *United States v. Banks* that a suspect allegedly under the influence of narcotics and alcohol made a knowing and voluntary waiver where, among other factors, he did 'not appear to have been "incapacitated" by his use of drugs and alcohol,' selectively answered questions, was able to provide a lock combination, and requested that his girlfriend be contacted to secure his apartment. 282 F.3d 699, 706 (9th Cir. 2002), *rev'd on other grounds*, 540 U.S. 31 (2003). Likewise, the California Supreme Court 'has repeatedly rejected claims of . . . incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where . . . there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him.' *California v. Clark*, 5 Cal. 4th 950, 988 (1993), *disapproved on other grounds*, *California v. Doolin*, 45 Cal. 4th 390 (2009); *see also California v. Frye*, 18 Cal. 4th 894, 988 (1998), *disapproved on other grounds*, *Doolin*, 45 Cal. 4th 390.

The California Supreme Court could have reasonably determined that Petitioner makes no factual allegations, and there is nothing in the record to indicate, that he did not understand his rights and the questions posed to him. Petitioner merely alleges that he was 'highly suggestible,' not that he did not understand his rights, or the questioning, as a result. (Mot. at 21.) To the contrary, during the police interview, Petitioner provided detailed responses to questions, including the street names of friends' houses (Pet. Ex. 177 at 3, 9, 15, 17), a friend's car make and model (*id.* at 11), his probation officer's name (*id.* at 45), the amount of his most recent paycheck (*id.* at 12), and the times he began and finished

> work (*id.* at 19). Petitioner fabricated a story to his benefit (*see id.* at 12-20, 24) and asked the police questions about the evidence they had gathered against him (*id.* at 24, 30, 33-34). He asked whether the police were detaining other suspects (*id.* at 46; *cf.* [*id.* at] 27-31), and he reasoned about the charges he would face in light of his record and his relative age (*id.* at 42).
>
> The California Supreme Court would not have been unreasonable, therefore, in determining that the record indicated that Petitioner understood his rights and the questions asked of him, and that he gave a knowing and voluntary waiver by his own free will.

(March 2011 Order at 56-57, 102-03 (quoting Motion for Evidentiary Hearing, filed October 23, 2009, at 21).)

The Court went on to hold, regarding Petitioner's allegations of ineffective assistance, that:

> without alleging specific facts to establish police overreaching, Petitioner cannot demonstrate that counsel reasonably likely could have prevailed had he made a motion to exclude Petitioner's statement. . . . The California Supreme Court may have reasonably concluded that since a motion to exclude the statement would not reasonably likely have succeeded for the lack of police coercion, Petitioner was not prejudiced by any error of trial counsel in not investigating his mental health at the time he waived his *Miranda* rights.

(*Id.* at 57.) The Court likewise held that the California Supreme Court "could have reasonably determined that Petitioner has not demonstrated deficient performance or prejudice from trial counsel's failure to challenge the introduction of his statement on the basis of his alleged intoxication." (*Id.* at 103.) Petitioner fails to specify any other challenges to the admission of the statement that effective counsel should have raised.

Because the California Supreme Court may have reasonably determined that the prosecution did not wrongfully obtain Petitioner's confession or present material false testimony at trial, and that counsel was not ineffective for failing to object to the introduction of the taped statement, Claims 1(9), 2(8), and 3(3) are DENIED.

VII. Claim 2(4): Hair Evidence

In Claim 2(4), Petitioner alleges that counsel provided ineffective assistance by failing to object to the introduction of the hair identification testimony or to offer available "counter-expert testimony to refute the conclusions and unscientific methodology" of the prosecution's expert witness. (Pet. at 174.) Petitioner also faults counsel for failing to argue:

> flaws in the hair evidence that already existed, including the failure to compare the leg/body hairs with those of the Galloways; failure to conduct the same tests on all possible suspects; and the witness's admission that some of the hairs did not look like Mr. Cain's and could have been Mrs. Galloway's. . . . Appropriate challenges would also have established that neither Modena Galloway nor suspect Albis could have been excluded as the source of the pubic hairs found by the criminalist.

(*Id.* at 175 (citing RT 5436-37).)

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The Court held in its February 2012 Order that "the California Supreme Court may have reasonably determined on the basis of the record before it that Petitioner's allegations . . . did not show any inadequate investigation by counsel or any resulting prejudice." (February 2012 Order at 13.) The Court considered the issues of "'whether defense counsel adequately investigated and challenged Jones' [the prosecution's expert witness's] qualifications and his electrophoresis testing; and, more generally, . . . whether defense counsel adequately consulted with an independent hair analysis expert.'" (*Id.* at 12 (quoting March 2011 Order

at 37).) The Court noted that it "'must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance,'" (*id.* at 13 (quoting *Richter*, 131 S. Ct. at 787)), and held that "it was not clear from the record that counsel failed to adequately challenge Jones' qualifications or testimony." (*Id.*)

Because the California Supreme Court may have reasonably rejected Claim 2(4) on the same basis, Petitioner's claim is DENIED.

VIII. Claim 2(6): Mental Health Experts

In Claim 2(6), Petitioner alleges counsel provided ineffective assistance by failing "to ensure that Mr. Cain was evaluated by appropriate and conflict-free mental health professionals . . . . Defense counsel retained Dr. Donaldson, but Dr. Donaldson had his own conflict, and counsel failed adequately to prepare or consult with Dr. Donaldson." (Pet. at 178.) Petitioner contends that:

> [t]he trial court, at Wiksell's request, appointed Dr. Theodore Donaldson to evaluate Cain. Donaldson performed a cursory evaluation of Cain, but suggested Cain may suffer from central nervous system dysfunction and advised Wiksell to have Cain meet with a neuropsychologist. Wiksell did not inform Donaldson that Cain had been charged capitally and limited the scope of the examination to purely guilt phase mental state defenses. Despite the focus on the guilt phase, Donaldson does not address how Cain's alcohol, cocaine, and marijuana abuse on the night of the crimes might have affected him, and how possible central nervous system dysfunction may have further supported a diminished capacity defense.

(Petr.'s Br. at 47 (internal citations omitted).) Petitioner alleges that Dr. Donaldson had a conflict of interest because he previously evaluated Petitioner's co-defendant, David Cerda, who had a defense antagonistic to Petitioner's. (*See id.*)

In its March 2011 Order, the Court denied Claim 2(13), alleging that counsel failed to present evidence supporting a diminished capacity defense, and a portion

of Claim 2(14) alleging that counsel presented a guilt phase closing argument that ignored a diminished capacity defense based on Petitioner's intoxication. (*See* March 2011 Order at 72-81.) Relatedly, in its February 2012 Order, the Court denied Claim 2(1), alleging that counsel was ineffective at the guilt phase of trial for failing to obtain appropriate mental health expert assistance. (February 2012 Order at 15-18.) The Court had previously rejected Petitioner's contention in Claim 2(1) that a conflict of interest by counsel "deprived him of competent expert assistance, as the same mental health expert who had evaluated Cerda, Dr. Theodore Donaldson, was asked to examine Petitioner." (March 2011 Order at 43.)

The Court has held that the California Supreme Court may have "reasonably concluded on habeas review that counsel reasonably relied on [the] expert opinion [of Dr. Donaldson] in not presenting an intoxication or diminished capacity defense. . . . In the alternative, . . . the court may have reasonably determined that Petitioner failed to allege facts to demonstrate prejudice from any deficient performance by counsel." (*Id.* at 73-74.) The Court considered the declarations regarding Petitioner's intoxication provided by Drs. Stanley Huey, Jr., Jay Jackman, Ruth Zitner, and Donaldson and concluded that the California Supreme Court would have been reasonable "in determining that the opinions proffered by Petitioner's experts on habeas review are speculative." (*Id.* at 80.) Likewise, regarding Petitioner's alleged neurological impairment and lack of capacity to premeditate and deliberate, the Court held regarding Petitioner's penalty phase claims that the California Supreme Court may have reasonably determined that petitioner failed to demonstrate prejudice from any deficient performance by counsel. (February 2012 Order at 20-22.) The California Supreme Court may have reasonably concluded that Petitioner similarly failed to demonstrate prejudice at the guilt phase of trial from counsel's alleged ineffectiveness in obtaining mental health expert assistance in support of an intoxication or diminished capacity

defense.

Claim 2(6) is DENIED.

IX. Claim 2(10): Ineffective Assistance during Jury Selection

In Claim 2(10), Petitioner alleges that trial counsel:

> was ineffective during the jury selection by failing to: (1) object to the exclusion of potential jurors Canton and Davis; (2) be aware of, and point out to the trial court, the correct federal and state legal standards requiring removal of potential jurors Cairns, Hanson, Pamplona and Warnke; (3) exercise all of his peremptory challenges; (4) exercise peremptory challenges against three death prone and impartial [sic] jurors, Wahl, Simmons and Franz; and, (5) object to the petit jury panel as constituted.

(Pet. at 178-79.) Petitioner does not elaborate upon those allegations in his Petition or in his merits brief.

The Court considered, and rejected, Petitioner's underlying challenges to potential jurors Canton, Davis, Cairns, Hanson, Pamplona, and Warnke in granting judgment on the pleadings on Claim 14. (*See* June 2003 Order at 44-50.) Regarding Petitioner's contention that "potential jurors Darcy Canton and William Davis expressed only a generalized and equivocal opposition to capital punishment" before their excusal (June 2003 Order at 44), in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985), the Court held:

> [I]t was clear to all . . . trial participants who observed Ms. Canton's credibility and demeanor, including defense counsel, that she would be unable to fulfill her duty as a juror to consider both of the punishments for which Petitioner could be found eligible. Similarly, Mr. Davis's responses to the questions on capital punishment fairly support the trial court's determination that he could not properly perform his duty as a juror. Accordingly,

> this Court finds these two prospective jurors were properly excused for cause . . . .

(June 2003 Order at 47.) Because prospective jurors Canton and Davis were properly excused for cause, Petitioner cannot demonstrate ineffective assistance of counsel from counsel's failure to object to their excusal. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection"); *Wilson*, 185 F.3d at 990; *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991) (holding that because evidence was admissible, "the decision not to file a motion to suppress it was not prejudicial. . . . [I]t is not professionally unreasonable to decide not to file a motion so clearly lacking in merit").

Regarding potential jurors Hanson and Pamplona, the Court observed that Petitioner admits that the jurors "'were removed from the panel via peremptory challenges by the defense,'" and the defense accepted the jury with eighteen peremptory challenges remaining. (June 2003 Order at 48 (quoting Traverse, filed March 20, 2002, at 85).) Because counsel did remove jurors Hanson and Pamplona, and did not exhaust Petitioner's peremptory challenges in doing so,

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Petitioner cannot show prejudice from any shortcoming by counsel in citing the correct legal standards to the court for their excusal for cause. (*See* Pet. at 179.)

As for potential jurors Cairns and Warnke, the Court previously observed that Cairns and Warnke did not sit on the jury that convicted Petitioner. (*See* June 2003 Order at 47-48); *Cain*, 10 Cal. 4th at 61 ("Warnke and Cairns . . . did not serve on the jury or as alternates; it appears they were never seated"). Petitioner, therefore, cannot demonstrate any deficient performance or prejudice from counsel's alleged failure to argue adequately for their removal.

Finally, the California Supreme Court's denial on habeas review of Petitioner's claim regarding Jurors Wahl, Simmons, and Franz was not objectively

unreasonable. The court may have reasonably determined that counsel made a strategic decision not to challenge each of the jurors. Although Juror Wahl was not in all cases opposed to the death penalty, he stated on voir dire that he:

> would find great difficulty in invoking the death penalty or such that [he] would not be – not be – ahh – comfortable about that decision because it is a very – a very heavy – and [the trial court] said this morning a very awesome thing to consider.
>
> As a person in his upbringing has – has – you know, been taught about the value of life and the fact we don't take another life and that – ahh – you know, then makes that decision for invoking that particular penalty quite a heavy thing.

(RT 2484.) Juror Simmons stated that he thought, after counsel described the allegations to him, that he could conceive of a sentence of life without parole and he would want to know something about Petitioner himself in deciding the penalty. (*Id.* at 2552.) He stated that he was not committed to the death penalty and would vote the way that his feelings were, after weighing the mitigating and aggravating evidence. (*Id.* at 2555-56.) Similarly, after counsel described the allegations to Juror Franz, she stated that she "would have an open mind" and would "take into consideration the background of the person" in deciding his penalty. (*Id.* at 4228.) Juror Franz stated that she supposed life in prison was a worse punishment than death, "knowing that you're going to be there forever," and that society is "pretty much protected" once a person is imprisoned for life and not executed. (*Id.* at 4285, 4293.)

Particularly in light of the "strong presumption that counsel's conduct falls within the wide range of professional assistance," *Strickland*, 466 U.S. at 689, the California Supreme Court may have reasonably determined that Petitioner failed to demonstrate any deficient performance with respect to Jurors Wahl, Simmons, and Franz. Claim 2(10) is, therefore, DENIED.

X. Claim 2(14): Ineffective Assistance during Guilt Phase Closing Argument

In its March 2011 Order, the Court denied all portions of Claim 2(14) apart from counsel's alleged lack of "a coherent theory of defense." (Pet. at 180; *see* March 2011 Order at 81-82.) The Court stated that it would consider that allegation "in Petitioner's broader claim that trial counsel failed to develop and present a coherent guilt-phase theory of the case, Claim 2(17)." (March 2011 Order at 82.) The Court denied portions of Claim 2(17) in the March 2011 Order and ultimately denied relief on Claim 2(17) in its February 2012 Order. (*See* March 2011 Order at 58-81, 82-86; February 2012 Order at 29-30.) The California Supreme Court may have reasonably concluded on the same basis that counsel did not lack a coherent theory of the case at the guilt phase of trial, in closing argument or otherwise.

Claim 2(14) is, therefore, DENIED.

XI. Claim 3(2): Investigation into Exculpatory Evidence

In Claim 3(2), within a claim of due process and equal protection violations, Petitioner alleges that his "constitutional rights were violated by the failure to investigate, obtain, and provide to Mr. Cain and his counsel exculpatory evidence regarding his guilt, of the crimes involved." (Pet. at 184.) Petitioner does not elaborate on his claim in his Petition or merits brief, stating only that "[t]his claim is briefed in conjunction with a claim of prosecutorial misconduct that is explained in full at Claim 1.3." (Petr.'s Br. at 60.)

The Court considered, and denied, in its March 2011 Order Petitioner's claims that the "prosecution failed to provide to the defense (Claim 1(1)) and failed to preserve (Claim 1(3)) evidence of the personal involvement of the prosecution's primary guilt phase witness, Uly Mendoza, in violation of Petitioner's right to due process." (March 2011 Order at 9 (internal quotation omitted).) The Court held that the California Supreme Court may have reasonably concluded that:

(1) "statements by Clements [and] Lazoff . . . [were] not 'of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means[;]'" (2) "Petitioner failed to demonstrate that comparable evidence of any stolen items that may have been at Mendoza's home was unavailable to the defense by other reasonably available means[;]" and (3) "Petitioner's allegations that Mendoza received an undisclosed inducement for his testimony [were] speculative." (*Id.* at 14-15 (quoting *Trombetta*, 467 U.S. at 489).)

The California Supreme Court's determination that Petitioner failed to establish a due process or equal protection violation on the same basis would not be objectively unreasonable. *See Jones*, 691 F.3d at 1102 ("Review for prosecutorial misconduct claims on a writ of habeas corpus is the narrow one of due process" (internal quotation omitted)). Claim 3(2) is DENIED.

XII. Claims 3(4) and 15(9): Admission of Television Interview Videotape

A. Allegations

In Claims 3(4) and 15(9), Petitioner alleges that his "constitutional rights were violated when a videotaped interview with a reporter was improperly admitted into evidence at the guilt phase of his trial as a prior inconsistent statement or a false statement showing consciousness of guilt." (Pet. at 185 (internal quotations omitted).) Petitioner argues that because there was "no permissible basis" to admit the evidence, its admission constitutes a denial of due process and a violation of the Eighth Amendment. (*Id.* at 185-86.) Petitioner argues that the effects of the violation carried into the penalty phase because the prosecutor argued that the videotape demonstrated an "attitude" that constituted an aggravating factor. (*Id.* at 291.)[4] Petitioner argues that the error was exacerbated by the court's instructions to the jury on the consideration of willfully false or deliberately misleading statements and prior inconsistent statements. (*Id.* at 180.)

[4] Petitioner's claims regarding the alleged "lack of remorse" aggravating factor are addressed below. (*See infra* pp. 76-80, 88-89.)

B. Disposition on Direct Appeal

The California Supreme Court considered Petitioner's arguments at length on direct appeal. The court held:

> On October 21, 1986, the day following the discovery of the Galloways' bodies, Larry Good, a local television news reporter, briefly interviewed defendant, in his capacity as a neighbor of the victims. During the course of this interview, Good asked defendant: 'I guess there's no, no idea who would do something like this, huh?' Defendant responded: 'Uh-uh . . . not that I know of . . . I don't know nothing about that.' [¶]
>
> Defendant notes what he believes is a discrepancy between the response in the transcript . . . and the response heard on the videotape. According to defendant[] . . . , on the defense copy of the videotape defendant is heard saying: 'Uh-uh . . . not that I know of . . . oh, no, no, no.' Our review of the videotape played for the jury reveals no discrepancy. As the transcript reflects, defendant's response was: 'Uh-uh . . . not that I know of . . . I don't know nothing about that.' [¶]
>
> Over defendant's objections and following a lengthy hearing, the trial court permitted the videotape to be shown to the jury and admitted into evidence.
>
> Defendant now contends the trial court erred and the improper admission of the videotape violated his due process rights under the Fifth and Fourteenth Amendments to the federal Constitution, as well as his right to a reliable and nonarbitrary sentencing determination under the Eighth Amendment. We reject defendant's claims and conclude the trial court did not abuse its discretion in admitting the videotape.
>
> Defendant initially claims the videotaped statement should have been excluded as irrelevant. . . . [¶] The trial court concluded defendant's statement to the

reporter denying any knowledge of the crimes could be found by the jury to be a false statement inconsistent with both (1) his police interview statement proclaiming he was present during the crimes, but Albis and Cerda committed the murders, and (2) the prosecution's strong, albeit circumstantial, evidence defendant committed the murders. The trial court reasoned defendant's denial of knowledge of the crimes, taken together with his subsequent statements to the police, reasonably could be viewed as part of an evolving plan to evade responsibility and deflect blame for the crimes. Therefore, the trial court concluded defendant's videotaped statement could tend to prove consciousness of guilt and, thus, the identity of the murderer. We find no error in the trial court's reasoning.

Defendant further contends the prosecution failed to lay a foundation that defendant's statement was willfully or deliberately false. Assuming, without deciding, this objection was not waived by failure to raise it at trial, we conclude the circumstances surrounding the videotaped statement, and the patent inconsistencies between the statement and defendant's subsequent statement to the police, provided the necessary foundation.

Defendant claims the reporter's question regarding defendant's knowledge of the crimes was so ambiguous as to render defendant's response irrelevant or at least more prejudicial than probative. Again, assuming, without deciding, this objection was not waived by failure to raise it during trial, we reject defendant's contention as meritless. The question as reasonably construed called for any knowledge defendant possessed regarding the perpetrator of the crimes.

Defendant also contends that, even if the substance of his statement to the reporter was relevant and admissible, his demeanor as shown by the videotape was either irrelevant or more prejudicial than probative under Evidence Code section 352. For these reasons, defendant asserts the trial

> court erred by failing to compel the prosecution to accept defendant's proposed stipulation to introduction of the contents of the statement, without introduction of the videotape itself, or by failing to exclude the videotape altogether. Again, we find no abuse of discretion by the trial court.
>
> The trial court did not abuse its discretion in deciding defendant's demeanor was relevant. The jury was permitted to decide whether defendant's pretrial statements were false. Defendant's demeanor when making one of these statements is highly probative on this issue. Because the videotape presentation thus contained relevant information not covered by the defendant's proposed stipulation, the prosecutor was not required to accept the stipulation in lieu of showing the videotape.
>
> We also consider defendant's claim the trial court should have excluded the videotape on the basis of undue prejudice. A trial court's exercise of discretion in admitting or rejecting evidence pursuant to Evidence Code section 352 will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice. Here there was no such abuse. The trial court carefully balanced the probative value of the videotape against its potential for prejudice to defendant. On this record, we find no reason to disturb the trial court's ruling. Furthermore, because the evidence was admissible, there was no violation of defendant's federal constitutional rights.

Cain, 10 Cal. 4th at 31-33 (internal quotation and citations omitted).

C. Analysis

"[A]n inquiry" into whether "the evidence was incorrectly admitted . . . pursuant to California law . . . is no part of a federal court's habeas review of a state conviction. . . . [F]ederal habeas corpus relief does not lie for errors of state

law." *McGuire*, 502 U.S. at 67 (internal quotations omitted). As discussed above, federal habeas review is limited "to the question whether the admission of the evidence violated [petitioner's] federal constitutional rights." *Id.* at 68. The Court must consider whether the admitted evidence "was so inflammatory as to prevent a fair trial," not "whether its prejudicial effect outweighed its probative value." *Henry*, 513 U.S. at 366; *see also Hamilton*, 17 F.3d at 1159. "To show a violation of due process, [petitioner] must demonstrate that the erroneous admission of the [evidence] rendered his trial fundamentally unfair." *Villafuerte*, 111 F.3d at 627.

In *Ortiz-Sandoval v. Gomez*, for example, the Ninth Circuit considered a petitioner's argument that the introduction into evidence of a threat he made against two witnesses violated due process. 81 F.3d 891, 897-98 (9th Cir. 1996). The court emphasized the deference due to the findings of the trial court and the California Supreme Court and held that while there was "some danger of prejudice," "the record does not permit the conclusion that the trial court abused its discretion or that the introduction of the evidence rendered the trial fundamentally unfair." *Id.* at 897-98. The court observed that "[f]ederal caselaw, which controls here, is uniform in holding that threats are relevant to consciousness of guilt;" the threat was "not particularly inflammatory or macabre;" and the trial court gave limiting instructions that the threat could tend to show consciousness of guilt, but was not sufficient by itself to prove guilt. *Id.* at 897-98, 898 n.5.

Here, too, the California Supreme Court's conclusion that the content of Petitioner's interview was not particularly inflammatory or macabre was not objectively unreasonable. The California Supreme Court held, see *Cain*, 10 Cal. 4th at 32, consistent with Ninth Circuit authority, that Petitioner's "false exculpatory statements provide[d] circumstantial evidence of [his] consciousness of guilt." *United States v. Newman*, 6 F.3d 623, 628 (9th Cir. 1993) (collecting cases). Finally, the trial court instructed the jury that:

> [i]f you find that before this trial the defendant made willfully false or deliberately misleading statements concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt, but it is not sufficient of itself to prove guilt. . . .

(RT 6229.)

The California Supreme Court's determination that admission of the taped interview did not render Petitioner's trial fundamentally unfair in violation of his constitutional rights is not, therefore, an unreasonable determination of the facts or contrary to, or an unreasonable application of, federal law. Claims 3(4) and 15(9) are DENIED.

XIII. Claim 3(5): Counsel's Admissions regarding Burglary, Theft, and Felony Murder

In Claim 3(5), Petitioner alleges that his:

> constitutional rights were violated when the trial court allowed counsel to admit that Mr. Cain was guilty of the charges of burglary, robbery, and felony murder in his opening and closing statements to the jury, in spite of the fact that Mr. Cain had pled not guilty to those charges, and without any inquiry that Mr. Cain consented to those admissions of guilt.

(Pet. at 189.)

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

> Defendant equates these statements with a guilty plea on those charges. He therefore also faults the trial court for not intervening to obtain a personal, on-the-record waiver consistent with *Boykin v. Alabama*, 395 U.S. 238 (1969) and *In re Tahl*, 1 Cal. 3d 122 (1969). . . .
>
> We have held trial counsel's decision not to contest, and even expressly to concede, guilt on one or more charges at the guilt phase of a capital trial is not tantamount to a

> guilty plea requiring a *Boykin-Tahl* waiver. It is not the trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach to presenting the defense.

Cain, 10 Cal. 4th at 30 (citations omitted and edited).

Petitioner's argument to the contrary is foreclosed by *Florida v. Nixon*, 543 U.S. 175 (2004). In *Nixon*, the United States Supreme Court held that counsel's concession of guilt in a capital trial is not "the functional equivalent of a guilty plea" and does not require a defendant's "affirmative, explicit acceptance." *Id.* at 188 (internal quotations omitted). The Court observed that by pleading guilty, a defendant waives "constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. . . . [T]he plea . . . is itself a conviction, . . . [and] a defendant's tacit acquiescence in the decision to plead is insufficient to render the plea valid . . . ." *Id.* at 187-88 (internal quotation omitted). In a concession by counsel of a capital defendant's guilt, by contrast, the defendant:

> retain[s] the rights accorded a defendant in a criminal trial. *Cf. Boykin*, 395 U.S. at 242-43, 242 n.4 (a guilty plea is 'more than a confession which admits that the accused did various acts,' it is 'a stipulation that no proof by the prosecution need be advanced'). The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which [defendant] was charged. That aggressive evidence would thus be separated from the penalty phase, enabling the defense to concentrate that portion of the trial on mitigating factors. Further, the defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as [counsel] did, to exclude prejudicial evidence. In addition, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal.

Nixon, 543 U.S. at 188 (internal citations edited and omitted).

Because the California Supreme Court's rejection of Petitioner's claim was not, therefore, contrary to or an unreasonable application of federal law, Claim 3(5) is DENIED.

XIV. Claim 3(8): Instructions regarding Proof Beyond a Reasonable Doubt

A. Duty to Accept Reasonable Interpretation

Petitioner challenges the jury's instruction with CALJIC instructions 2.01, 8.83, and 8.83.1. (Pet. at 190 n.23.) Petitioner explains that the jury was instructed:

> on the meaning of 'reasonable doubt' in three interrelated instructions, two of which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence, and one of which addressed proof of specific intent, or mental state. Each of these instructions informed the jury, in essentially identical terms, that if one interpretation of the evidence 'appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.'

(*Id.* at 190-91 (quoting RT 6229, 6249, and 6250).) Petitioner contends that the instructions allowed "a finding of guilt based on a degree of proof below that required by the due process clause," and operated as a "mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence 'appears to be reasonable.'" (*Id.* at 191.)

The Ninth Circuit considered the effect of CALJIC instruction 2.01 in *Gibson v. Ortiz*, 387 F.3d 812, 822-24 (9th Cir. 2004), *overruled on other grounds by Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009). In *Gibson*, the Circuit affirmed a grant of habeas relief on the basis that the interplay of CALJIC instructions 2.50.01 and 2.50.1 allowed the jury "to infer that petitioner had committed the charged acts based upon facts found not by a reasonable doubt, but by a preponderance of the

evidence." *Id.* at 822. The Circuit noted, however, that the jury was first instructed on the reasonable doubt standard in CALJIC 2.01, *id.* at 821, 823-24, which includes the "reasonable interpretation" language Petitioner contests. The Circuit observed that "[h]ad the instructions ended" on reasonable doubt after instructions 2.01 and 2.50.01 were given, as opposed to proceeding to 2.50.1, "our inquiry would have ended with a denial of [the] petition. We would have assumed that the jury followed . . . the only standard regarding burden of proof they had received: reasonable doubt." *Id.* at 822. Similarly, in *McMillan v. Gomez*, the Ninth Circuit considered a habeas petitioner's challenge to CALJIC instruction 2.01 and held that "[t]he objection to the instruction . . . is a quibble. The instruction given was ample and exact." 19 F.3d 465, 479 (9th Cir. 1994). The court found that petitioner failed to raise a genuine federal constitutional issue regarding the instruction. *Id.*

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The California Supreme Court may have reasonably rejected Petitioner's challenge to the language in CALJIC instructions 2.01, 8.83, and 8.83.1, on the same basis.

B. Reference to "Moral Certainty"

Petitioner further asserts that the "'reasonable doubt' instruction itself was defective because it defined reasonable doubt with reference to 'moral certainty' rather than to the evidentiary certainty required by the Supreme Court," citing *Cage v. Louisiana*, 498 U.S. 39 (1990).

The Court in *Victor v. Nebraska*, 511 U.S. 1, 8 (1994), approved of the identical jury instruction given at Petitioner's trial. (*See* RT 6238.) The instruction provided:

> Reasonable doubt is defined as follows: It is *not a mere possible doubt*; because everything relating to human affairs, and *depending on moral evidence*, is open to some possible or imaginary doubt. It is that state of the

> case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.

Victor, 511 U.S. at 8 (emphasis in original; internal quotation omitted); (*see also* RT 6238). The Court held that the instruction's "reference to moral certainty, in conjunction with the abiding conviction language, impressed upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused," and the instruction "explicitly told the jurors that their conclusion had to be based on the evidence in the case." *Victor*, 511 U.S. at 15-16 (internal quotation omitted). Distinguishing *Cage*, the Court found no violation of defendant's constitutional rights in the instruction. *Id.* at 5-6, 15-17, 20-22.

The California Supreme Court may, therefore, have reasonably applied *Victor* in rejecting Petitioner's challenge to the reasonable doubt instruction.

C. Consciousness of Guilt Instruction

Petitioner next challenges the jury's instruction with CALJIC 2.03. Petitioner contends that the instruction "allow[ed] the jury to consider alleged consciousness of guilt evidence as proof of guilt . . . ." (Pet. at 192.) Petitioner argues that the instruction lacks foundational evidentiary support in the record and "allowed the jury to infer and presume the existence of a specific intent to commit the crime based on irrelevant post-offense statements." (*Id.* at 193.)

The jury was instructed:

> If you find that before this trial the defendant made willfully false or deliberately misleading statements concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt, but it is not sufficient of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination.

(RT 6229-30.)

The California Supreme Court held on direct appeal:

> The trial court concluded defendant's statement to the reporter denying any knowledge of the crimes could be found by the jury to be a false statement inconsistent with both (1) his police interview statement proclaiming he was present during the crimes, but Albis and Cerda committed the murders, and (2) the prosecution's strong, albeit circumstantial, evidence defendant committed the murders. The trial court reasoned defendant's denial of knowledge of the crimes, taken together with his subsequent statements to the police, reasonably could be viewed as part of an evolving plan to evade responsibility and deflect blame for the crimes. Therefore, the trial court concluded defendant's videotaped statement could tend to prove consciousness of guilt and, thus, the identity of the murderer. We find no error in the trial court's reasoning.
>
> Defendant further contends the prosecution failed to lay a foundation that defendant's statement was willfully or deliberately false. Assuming, without deciding, this objection was not waived by failure to raise it at trial, we conclude the circumstances surrounding the videotaped statement, and the patent inconsistencies between the statement and defendant's subsequent statement to the police, provided the necessary foundation.

Cain, 10 Cal. 4th at 32 (internal citations omitted).

Petitioner has not shown the California Supreme Court's decision to be unreasonable. The Ninth Circuit has approved of a consciousness of guilt instruction where the jury is informed, as Petitioner's jury was informed, that the pre-trial statement is not sufficient by itself to prove guilt. *See Ortiz-Sandoval*, 81 F.3d at 898 n.5. The California Supreme Court's finding that the instruction was supported by the record is not an unreasonable determination of the facts (*see, e.g.*,

RT 5841-47; Pet. Ex. 177 at 35-45), and the evidence of Petitioner's false exculpatory statements was not irrelevant. *See Newman*, 6 F.3d at 628 (collecting cases).

Claim 3(8) is, therefore, DENIED.

XV. Claim 3(9): Instructions on Implied Malice and Intoxication

A. Allegations and Decision on Direct Appeal

In Claim 3(9), Petitioner challenges the instructions given to the jury on implied malice and intoxication. (Pet. at 194-201.) Petitioner argues that "the use of the 'implied malice' instruction in connection with this felony murder case eliminated the prosecution's obligation to prove beyond a reasonable doubt that Mr. Cain had a specific intent to kill at the time he committed the crimes . . . ." (*Id.* at 196.) He adds that the implied malice instruction undermined his diminished capacity defense as to first degree murder because the intoxication instruction did not relate to implied malice. (*Id.*) Further, Petitioner contends that the use of the term "mental state" in both the implied malice and circumstantial evidence instructions "reinforced that the implied malice concept was applicable to the specific intent element of the special circumstances . . . ." (*Id.* at 198.) Finally, Petitioner challenges the instructions' failure to specify that the jury should consider intoxication in determining whether Petitioner held the specific intent required by the special circumstance allegations. (*Id.* at 198-99.)

On direct appeal, the California Supreme Court held:

> The trial court instructed the jury on implied malice in terms of CALJIC No. 8.11. As the Attorney General concedes, the trial court erred by giving this instruction. The case against defendant was tried on a felony-murder theory; therefore, malice, whether express or implied, was irrelevant.
>
> . . . First, defendant asserts the instruction injected confusion into the intent instructions properly given under the felony-murder theory. Second, defendant

asserts the implied malice instruction prevented the jury from properly understanding that intent to kill was a necessary element of the special circumstance charges. We do not believe, however, there is a reasonable likelihood the jury understood the instructions as the defendant asserts. . . .

The trial court . . . correctly instructed the jury that the intent necessary to find defendant guilty of first degree murder under the felony-murder theory was a specific intent to commit one or more of the felonies underlying the charge. The trial court also correctly instructed the jury on the elements of the underlying felonies. In light of these instructions, which clearly applied to the evidence presented and the arguments made during the trial, we do not find a reasonable likelihood the unnecessary definition of implied malice included in the instructions misled the jury about the intent necessary to convict defendant of murder under a felony-murder theory. When the instructions are viewed as a whole, it is clear the implied malice instruction related only to the general definition of murder given to the jury. The jurors would not have been misled by the inclusion of this surplus instruction.

. . . Furthermore, defendant contends the jury confusion was compounded by the references to 'mental state,' as opposed to 'intent to kill,' found in the instruction addressing the sufficiency of circumstantial evidence necessary to support a special circumstances finding. [¶] We find no reasonable likelihood the erroneously given implied malice instruction would have misled the jury in assessing defendant's culpability for the special circumstances charged. The trial court instructed the jury . . . the felony-murder special circumstances could not be found true unless the prosecution proved '[t]hat the defendant intended to kill a human being or intended to aid another in the killing of a human being.' The same information was also imparted with a modified CALJIC No. 8.80, which told the jury defendant's intent to kill, or

> intent to aid in killing, had to be proven beyond a reasonable doubt. . . .
>
> Defendant next alleges the jury was not properly informed voluntary intoxication could negate the intent to kill required for the special circumstances. . . . [¶] We do not find a reasonable likelihood the jury understood the instructions as defendant contends.
>
> First, the voluntary intoxication instruction referred to 'the crime of murder of which defendant is accused in Counts 1 and 2 of the information.' The special circumstances were alleged under the murder counts charged in counts 1 and 2 of the information. Furthermore, the jury was instructed . . . within close proximity of the voluntary intoxication instructions that intent to kill was a necessary element of the special circumstances. . . .
>
> . . . We are not persuaded there is any likelihood the standard definition of voluntary intoxication found in this instruction negatively affected the jury's deliberations. [¶] We have considered the interplay among all of the intent instructions given, including the implied malice instruction, and have found no reasonable likelihood a reasonable juror would have been misled in his or her deliberations.

Cain, 10 Cal. 4th at 35-39 (internal quotation, citations, and footnotes omitted).

B. Given Instructions

The jury was instructed:

> Defendant is charged in Counts 1 and 2 of the information with the commission of the crime of murder, a violation of section 187 of the penal code.
>
> The crime of murder is the unlawful killing of a human being with malice aforethought or the unlawful killing of a human being which occurs during the commission or attempt to commit a felony inherently dangerous to human life.
>
> In order to prove the commission of the crime of murder,

each of the following elements must be proved:

One, that a human being was killed;

Two, that the killing was unlawful;

And three, that the killing occurred during the commission or attempt to commit a felony inherently dangerous to human life.

Each of the following is a felony inherently dangerous to human life: burglary, robbery, rape.

Malice may be either express or implied. Malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life . . . [ellipsis in original] well, I guess I better read that whole sentence over.

Malice is implied when the killings results [sic] from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.

When it is shown that a killing resulted from the intentional doing of an act with implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

Aforethought does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

In each of the crimes charged in Counts 1 and 2 of the information, namely, murder, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator and unless such specific intent exists, the crime to which it relates is not committed.

The unlawful killing of a human being, whether intentional, unintentional or accidental which occurs as a result of the commission of or attempt to commit the crime of burglary, robbery or rape or where there was in the mind of the perpetrator the specific intent to commit such crime is murder of the first degree.

The specific intent to commit burglary, robbery or rape and the commission or attempt to commit such crime must be

proved beyond a reasonable doubt.

To constitute murder there must be and [sic] in addition to the death of a human being an unlawful act which was a proximate cause of that death. A proximate cause of a death is a cause which, in natural and continuous sequence, produces the death and without which the death would not have occurred.

If you find the defendant in this case guilty of murder of the first degree, you must then determine if murder was committed under one or more of the following special circumstances: Robbery, rape, burglary or multiple murder.

A special circumstance must be proved beyond a reasonable doubt. If you have a reasonable doubt as to whether a special circumstance is true, it is your duty to find that it is not true.

If the defendant, Tracy Cain, was the actual killer, *it must be proved beyond a reasonable doubt that he intended to kill.*

If defendant, Tracy Cain, was an accomplice or aider and abettor, but the [sic][5] actual killer, *it must be proved beyond a reasonable doubt that he intended to aid in the killing of a human being before you are permitted to find the alleged special circumstance of that first degree murder to be true* as to defendant, Tracy Cain.

You must decide separately as to each special circumstance charged in this case. If you cannot agree upon your finding as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

In order to find any special circumstance charged in this case to be true or untrue, you must agree unanimously. You will include in your verdict on a form that will be supplied your finding as to whether the special circumstance is or is not true.

In the crime of murder of which the defendant is accused in Count 1 and 2 of the information, a necessary element is the existence in the mind of the defendant of the specific intent to kill.

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[5] The written version of the instruction, which was provided to the jury (*see* RT 6225), includes the omitted word "not," stating, "If the defendant, Tracy Cain, was an accomplice or aider and abettor, but *not* the actual killer . . . ." (CT 360 (emphasis added).) The omitted word was also included in the trial court's second reading of the instruction to the jury. (*See* RT 6384.)

If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such specific intent.

If from all the evidence you have a reasonable doubt whether defendant formed such specific intent, you must give the defendant the benefit of that doubt and find that he did not have such specific intent.

Intoxication of a person is voluntary if it results from his willing use of any intoxicating liquor drug or other substance knowing that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect.

Voluntary intoxication includes voluntary ingestion, injecting or taking by any other means of any intoxicating liquor[,] drug or other substance.

To find that the special circumstances – well, better start that one again.

To find that the special circumstance referred to in these instructions as murder in the commission of a burglary, a robbery or a rape is true, it must be proved:

One, that the murder was committed while the defendant was engaged in or was an accomplice in the commission or attempted commission of a burglary[,] a robbery or a rape;

Two, *that the defendant intended to kill a human being or intended to aid another in the killing of a human being*;

Three, that the murder was committed in order to carry out or advance the commission of the crime of a burglary, a robbery or a rape or to facilitate the escape therefrom or to avoid detection.

In other words, the special circumstance referred to in these instructions is not established if the burglary, robbery or rape was merely incidental to the commission of the murder.

To find the special circumstance referred to in these instructions as multiple murder convictions is true, it must be proved; [sic] one, that the defendant has in this case been convicted of more than one offense of murder in the first or second degree; two, *that in both of the offenses of murder, the defendant intended to kill or intended to aid in the killing of a human being*.

(RT 6242-48 (emphasis added).)

C. Analysis

As discussed above (*see supra* p. 14), federal habeas relief for an instructional error is warranted only where the error "so infected the entire trial that the resulting conviction violates due process." *McGuire*, 502 U.S. at 72 (internal quotation omitted). "[T]he instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Id.* (internal quotation omitted).

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1. Implied Malice Instruction

a. Finding of Specific Intent

The given instructions did not so infect the trial as to render the conviction a violation of due process. The malice instruction, considered not in artificial isolation but in the context of the instructions as a whole, was extraneous but harmless. The jury was explicitly and accurately instructed that "[i]n the crime of murder of which the defendant is accused in Count 1 and 2 of the information, a necessary element is the existence in the mind of the defendant of the specific intent to kill." (RT 6246.) The definition of implied malice, in context, did not erode the trial court's charge to the jury that specific intent was required for a first degree murder conviction. *See United States v. Reese*, 2 F.3d 870, 887 (9th Cir. 1993) (holding, in prosecution of police officers for use of excessive force, that instruction to consider necessary force from the point of view of a reasonable officer at the scene did not effectively eliminate the required finding of specific intent to use more force than necessary, on which the jury was instructed).

Moreover, in light of the jury's robbery murder, attempted rape murder, burglary murder, and multiple murder special circumstance findings, any error in the specific intent instruction on first degree murder was harmless. *See Neder*, 527

U.S. at 8-9 (holding that even an instruction "that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," but is instead subject to review for prejudice (emphasis omitted)). The instructions on the special circumstance allegations stated the requirement that Petitioner must have "intended to kill or intended to aid in the killing of a human being," and made no reference to malice. (RT 6245, 6247, 6248.) The jury found those special circumstance allegations true, thereby finding that Petitioner specifically intended to kill or to aid in the killing. The jury, therefore, made the finding at issue in the

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first degree murder convictions[6] in the context of the special circumstances. *Cf. Musladin v. Lamarque*, 555 F.3d 830, 844 (9th Cir. 2009) ("[E]ven if the jury believed 'implied malice' was sufficient for first degree murder, the instructions clearly required it to find deliberation and premeditation before reaching its verdict of first degree murder. In finding deliberation and premeditation, the jury effectively found express malice"); *Lara v. Ryan*, 455 F.3d 1080, 1086-87 (9th Cir. 2006) (holding that jury's special finding that defendant attempted to murder willfully, deliberately, and with premeditation "necessitate[d] the conclusion that it found [the defendant] guilty of attempted murder with express malice," because "[t]he jury could not have found that Lara attempted murder willfully, deliberately and with premeditation *and* that he attempted murder with implied malice. The two are inconsistent" (emphasis in original)), *abrogated on other grounds by Hedgpeth v. Pulido*, 555 U.S. 57, 57 (2008).

b. Consideration of Intoxication

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[6] An intent to aid in killing satisfies the intent to kill requirement of capital felony murder. *See Carlos v. Superior Court*, 35 Cal. 3d 131, 135 (1983) ("[T]he statutory language . . . should be construed to require an intent to kill or to aid in a killing as an element of the felony murder special circumstance"); *Hughes v. Borg*, 898 F.2d 695, 704-05 (9th Cir. 1990) ("[T]he California Supreme Court construed the statutory language defining a felony murder special circumstance conviction to require an intent to kill or to aid in the killing").

The jury necessarily made a finding of intent to kill or to aid in the killing, notwithstanding the instruction that it should consider Petitioner's intoxication in determining whether he held that specific intent. (*See* RT 6246.) Petitioner's contention that "the use of the implied malice instruction eviscerated Cain's diminished capacity defense" because the intoxication instruction did not relate to implied malice is, therefore, without merit. (Pet. at 196.)

c. Circumstantial Evidence

Finally, because the jury necessarily made a finding of intent to kill or to aid in the killing, any effect of the use of the term "mental state" rather than "specific

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intent" in both the implied malice instruction and the circumstantial evidence instruction does not rise to the level of a deprivation of due process.

2. Instruction on Voluntary Intoxication

First, Petitioner alleges that the voluntary intoxication instruction "in effect invited the jury to conclude that a state of voluntary intoxication, in contrast with involuntary intoxication, could be disregarded or substantially discounted in its deliberations on the specific intent issue." (Pet. at 198-99 (internal quotations omitted).) Petitioner asserts that "[t]he only possible cure . . . was to accompany the instruction with an advisement that voluntary intoxication if it existed, could negate the specific intent required for a 'true' finding on the special circumstances allegations." (*Id.* at 199)

Although the instruction that the jury should consider intoxication in determining if Petitioner had the specific intent to kill immediately followed an instruction regarding the crime of murder charged in Counts 1 and 2, its information regarding the possible effect of intoxication on the intent to kill was not limited those counts in isolation from the felony murder special circumstance allegations. The same murders at issue in Counts 1 and 2 were at issue in the felony murder special circumstances, and Petitioner could not have committed the

murders in Counts 1 and 2 with a greater intent to kill than the felony murder special circumstances. Petitioner, therefore, shows no constitutional shortcoming in the given instructions regarding intoxication. *Cf. Lara*, 455 F.3d at 1086-87.

Second, Petitioner contends that, in violation of *Beck v. Alabama*, 447 U.S. 625 (1980), he was prejudiced by the lack of "verdict forms on necessary included offenses by which it could have given effect to a finding that Mr. Cain lacked intent to kill due to intoxication." (Pet. at 199.)

Petitioner's jury was charged with deciding his guilt or innocence of two counts of burglary, one count of robbery, and one count of rape, apart from the murder charges. *See Cain*, 10 Cal. 4th at 18. His jury was not faced with a single option of reaching first degree murder conviction(s) to avoid acquitting him altogether. As the United States Supreme Court explained in *Spaziano v. Florida*:

> The Court in *Beck* recognized that the jury's role in the criminal process is . . . not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.

468 U.S. 447, 455 (1984); *see also Hopper*, 456 U.S. at 609-10 ("Our opinion in *Beck* stressed that the jury . . . could not take a third option of finding that . . . the defendant had committed a grave crime, . . . not so grave as to warrant capital punishment. . . . In such a situation, we concluded, the jury might convict the defendant of a capital offense because it found that the defendant was guilty of a serious crime"). Petitioner's jury had the option of convicting him of the serious crimes of burglary, robbery, and rape as alternatives to "setting [him] free." *Spaziano*, 468 U.S. at 455. Petitioner has, therefore, failed to show a violation of

his federal constitutional rights under *Beck*. *See LaGrand v. Stewart*, 133 F.3d 1253, 1262-63 (9th Cir. 1998) ("[T]he instructions in the instant case do not implicate the concerns of the *Beck* doctrine because the jury was given the choice of convict[ions of] . . . aggravated assault, armed robbery, robbery and kidnapping . . . [i]n the event the jury had found itself unable to agree on a conviction of first-degree murder").

Accordingly, Claim 3(9) is DENIED.

XVI. Claim 3(10): Instruction on CALJIC 2.11.5

In Claim 3(10), Petitioner challenges the instruction of the jury with

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CALJIC 2.11.5. (Pet. at 201-03.) The jury was instructed:

> There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. You must not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted.

(RT 6230-31.) Petitioner alleges that the instruction "unconstitutionally impaired" his "right to confront the witnesses against him at his trial" by restricting the jury's consideration of Mendoza's and Albis's motivations in testifying and thus their credibility. (Pet. at 201-02.) Petitioner contends that CALJIC 2.11.5 "sabotaged the instructions regarding accomplice testimony" that were given. (*Id.* at 202.)

Petitioner's argument is foreclosed by *Allen v. Woodford*, 395 F.3d 979, 996 (9th Cir. 2004). In *Allen*, the Ninth Circuit considered a capital habeas petitioner's contention that CALJIC 2.11.5 directed the jury not to consider whether accomplices might be tried for the crimes involving petitioner "and hence precluded it from considering whether [a witness] testified to protect his wife and himself from prosecution." *Id.* The circuit court held:

> A challenged instruction violates the federal constitution

> if there is a 'reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde v. California*, 494 U.S. 370, 380 (1990). Even if the trial court was mistaken to give this instruction, any mistake was cured by the instructions read as a whole. Here, the jury was specifically instructed regarding witness bias, interest, or other motive. It was also instructed that [the witness] was an accomplice whose testimony should be viewed with distrust, examined with care and caution, and corroborated. In light of the trial court's instructions read as a whole, there is no reasonable likelihood that the jury understood CALJIC No. 2.11.5 to bar consideration of [the witness's] motives for testifying.

Allen, 395 F.3d at 996 (citations edited and omitted).

Petitioner's jury was likewise instructed that it may consider, in "determining the believability of a witness," the existence of a "bias, interest, or other motive." (RT 6231-32.) The jury was specifically directed to consider whether Mendoza and Albis were accomplices, and that:

> [t]o corroborate the testimony of an accomplice, there must be evidence of some act or fact related to the offense which, if believed by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged. . . .
>
> The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.

(*Id.* at 6239-41.)

Here, as in *Allen*, in light of the jury instructions as a whole, CALJIC No. 2.11.5 did not unconstitutionally impede the jury's consideration of the witnesses' motives for testifying. Claim 3(10) is, therefore, DENIED.

XVII. Claims 8(2) and 11(3): Unconstitutional Sentencing Scheme

In Claim 8(2), Petitioner makes the conclusory allegation that his "conviction and sentence are cruel and unusual because the statutory scheme which governs his capital charging process and the conduct of the penalty phase was unconstitutional in general, and as applied to [his] case." (Pet. at 206.) Petitioner makes an identical, conclusory allegation as a purported due process

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and equal protection violation in Claim 11(3). (*Id.* at 242.) Petitioner fails to elaborate on the claims in his merits brief. (*See* Petr.'s Br. at 69, 85.)

As noted above, "[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James*, 24 F.3d at 26; *see also Greenway*, 653 F.3d at 804 ("[Petitioner's] cursory and vague claim cannot support habeas relief"); *Jones*, 66 F.3d at 205 ("[Petitioner's] conclusory suggestions . . . fall far short of stating a valid claim of constitutional violation").

Claims 8(2) and 11(3) are DENIED.

XVIII. Claims 8(3), 11(13), 11(14), and 19(4): Constitutional Violations in Sentencing

A. Disproportionate Punishment

In Claims 8(3)(A) and 19(4), Petitioner alleges that his sentence is cruel and unusual and the charging decision was fundamentally unfair because it is "disproportionate to seek the death penalty against Mr. Cain, and Mr. Cain alone, for these crimes." (Pet. at 207, 307-08.) Petitioner alleges that although there was significant evidence indicating that other persons were responsible for the crimes, "neither Mendoza nor Albis . . . faced any charges for their roles in these crimes [and] . . . the only other individual charged in this matter, Cerda, never faced the

death penalty or even the possibility of a sentence of LWOP." (*Id.* at 207, 307.)

Similarly, in Claim 8(3)(E), Petitioner argues that the death penalty is "not constitutionally appropriate for this case" because he was under the influence of drugs and alcohol at the time the crimes were committed, and that a "rational method" of determining whether a penalty is appropriate "would be to conduct 'inter-case' proportionality reviews . . . ." (*Id.* at 209.)

Petitioner's claims lack support in clearly established federal law. The Ninth Circuit has found "no merit" in the claim, raised by a petitioner sentenced to death under the 1978 California death penalty statute (as Cain was), that the lack of inter-case proportionality review violates equal protection requirements. *See Allen*, 395 F.3d at 1018 ("[Petitioner's] due process argument is foreclosed by the Supreme Court's holding in *Pulley v. Harris*, 465 U.S. 37, 43-46 (1984), that neither the Eighth Amendment nor due process requires comparative proportionality review in imposing the death penalty" (internal citation edited)). The United States Supreme Court in *Harris* held that a capital sentencing system need not incorporate "proportionality review" comparing a defendant's sentence to that imposed on "others convicted of the same crime," or "in similar cases," to satisfy the Eighth Amendment. *Harris*, 465 U.S. at 43-44. Petitioner's claim to intra-case proportionality review, considering the punishment of Mendoza and Albis, likewise lacks support in clearly established federal law.

The California Supreme Court, though "declin[ing] to review the sentence in comparison to those in unrelated cases," considered in detail Petitioner's role in the murders and the possibility that he "may have been under the influence of alcohol or drugs, or feeling the effects of a drug dependency . . . ." *Cain*, 10 Cal. 4th at 82-83. The court concluded that Petitioner's sentence was not "grossly disproportionate to his personal culpability for these offenses." *Id.* at 82. As the California Supreme Court reasonably concluded, the evidence demonstrated that "[t]he nighttime burglary was defendant's idea, planned in advance," with the

"apparent motive . . . to get money for his personal use," and that it was Petitioner who "beat his two older neighbors to death in their own home, robbing them and sexually assaulting one as well," "form[ing] an intent to kill them, an intent he carried out with considerable brutality." *Id.* at 82-83. Thus, even if Petitioner were entitled to intra-case proportionality review, his claim fails on the merits.

Claims 8(3)(A), 8(3)(E), and 19(4) are, therefore, DENIED.

B. Presentation of Aggravating and Mitigating Factors

In Claims 8(3)(B), 11(13), and 11(14), Petitioner contends that the jury's penalty phase decision was unconstitutionally unreliable and deprived him of due process and equal protection as a result of the presentation of improper allegations in aggravation and the lack of presentation of appropriate evidence in mitigation. (Pet. at 207-08, 245.) The California Supreme Court may have reasonably rejected Petitioner's allegations regarding the presentation of evidence as follows:

- "non-violent prior felonies which were unconstitutionally obtained," for the reasons discussed in the Court's March 2011 Order at pages 88-92 and 115-17, and below in section XXIII (*see infra* pp. 80-84);
- "insignificant and unadjudicated allegations of prior acts of violence," for the reasons discussed in the Court's March 2011 Order at pages 117-20 and below in sections XXI, XXIV (*see infra* pp. 70-75, 84-88);
- "conduct for which Mr. Cain was acquitted of criminal charges," for the reasons discussed below in section XXI (*see infra* pp. 70-75);
- "the belated and uncharged attempted rape special circumstance allegation," for the reasons discussed in the Court's March 2011 Order at pages 65-72 and 115 and above in section III (*see supra* pp. 10-15);
- "unfounded and unsupported allegations regarding Mr. Cain's 'attitude' and 'life of brutality,'" for the reasons discussed in the Court's March 2011 Order at pages 122-23 and 128-31 and below in section XXII (*see supra* p. 36 n.4, *infra* pp. 76-80);

- "the offer of four years in prison to a co-perpetrator," for the reasons discussed below in section XXVII (*see infra* pp. 91-93);
- "additional evidence in support of diminished capacity and lingering doubt," for the reasons discussed in the Court's March 2011 Order at pages 61-64, 72-81, and 109-11, its February 2012 Order at pages 20-22, and above in section VIII (*see supra* pp. 29-31);
- "Mr. Cain's difficult upbringing," for the reasons discussed in the Court's March 2011 Order at pages 95-101 and February 2012 Order at pages 19-20;
- "the impact of his mother's tragic death," for the reasons discussed in the Court's March 2011 Order at pages 95-101 (noting Petitioner's separation from his mother at age three or four (citing Motion for Evidentiary Hearing, filed October 23, 2009, at 31-32 (stating that Petitioner "lost [his] mother years before she died in Jonestown"))) and its February 2012 Order at pages 19-20;
- "his untreated learning disabilities and borderline retardation," for the reasons discussed in the Court's March 2011 Order at pages 95-101, 105-06, and 109-11 and its February 2012 Order at pages 15-18 and 19-20;
- "Mr. Cain's generally good character and work ethic," for the reasons discussed in the Court's March 2011 Order at pages 95-101 and 108-09 and its February 2012 Order at pages 18-20.

(Pet. at 207-08.)

Claims 8(3)(B), 11(13), and 11(14) are, therefore, DENIED.

C. Ability to Consider All Appropriate Evidence

In Claim 8(3)(C), Petitioner contends that his sentence is cruel and unusual because the jury was not provided with "all of the appropriate evidence," including:

- "further evidence documenting that Mr. Cain never assaulted anyone with a deadly weapon during the Fontes-Ramirez incident," discussed by the Court in its March 2011 Order at pages 106-08 and 112-13;

- "further evidence that Mr. Cain was neither lazy nor idle, but was actually a good, conscientious employee who worked hard at any available jobs," discussed by the Court in its March 2011 Order at pages 95-101 and 108-09 and its February 2012 Order at pages 18-19;
- "further evidence that Mr. Cain was neither brutal nor selfish, but was in fact kind and considerate to his family and friends," discussed by the Court in its March 2011 Order at pages 95-101 (noting evidence of Petitioner's good traits and demeanor and reputation as a gentle, quiet, and reserved person (citing Motion for Evidentiary Hearing, filed October 23, 2009, at 40-41 (citing Pet. Ex. 155 ¶ 31 (declaration by Petitioner's sister that he "had the gentlest spirit of all of us kids") and Pet. Ex. 157 ¶ 13 (declaration by Petitioner's brother that Petitioner was normally a "quiet and reserved person")))) and its February 2012 Order at pages 19-20; and
- "all of the appropriate evidence regarding the mitigating circumstances applicable in this case," discussed by the Court in its March 2011 Order at pages 61-64, 95-101, and 108-11, its February 2012 Order at pages 14-22, and below in sections XXVII and XXXII (*see infra* pp. 91-93, 106-10).

(Pet. at 208.)

Because the California Supreme Court may have reasonably rejected the allegations for the reasons discussed in the passages above, Claim 8(3)(C) is DENIED.

D. Instructions to Limit Jury Discretion

In Claim 8(3)(D), Petitioner argues that his sentence is unconstitutionally unreliable because the trial court failed to instruct the jury adequately on "how to evaluate and determine whether there were any aggravating factors proven beyond a reasonable doubt; which statutory factors should be considered aggravating and which mitigating; how to weigh and evaluate any aggravating factors versus the mitigating factors; and the proper role of the exercise of mercy . . . ." (Pet. at 209.)

The California Supreme Court stated and summarily rejected each but the last of Petitioner's arguments on direct appeal. *See Cain*, 10 Cal. 4th at 80-81.

1. Aggravating Factors beyond a Reasonable Doubt

The California Supreme Court reasonably rejected Petitioner's argument that the jury must be instructed on determining whether any aggravating factors were proven beyond a reasonable doubt. The court may have reasonably determined that Petitioner has no such constitutional right.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (discussing *Apprendi*). The Court applied *Apprendi* in *Ring* to hold that a state cannot "allow[] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19; internal citation omitted). The Court distinguished California's death penalty statute from Arizona's, observing that California commits sentencing decisions to juries, while Arizona was one of only four states to "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges." *Id.* at 608 n.6.

In California, "[s]pecial circumstances . . . make a criminal defendant eligible for the death penalty [and] operate as 'the functional equivalent of an element of a greater offense.'" *Webster v. Woodford*, 369 F.3d 1062, 1068 (9th Cir. 2004) (quoting *Ring*, 536 U.S. at 609). Once the jury has found a special circumstance to be true, unanimously and beyond a reasonable doubt, death is an authorized punishment. The jury need not make any additional findings beyond a

reasonable doubt.

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

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

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

The California Supreme Court's determination that Petitioner did not have a constitutional right to an instruction or a finding by the jury that any aggravating factors were proven beyond a reasonable doubt is not objectively unreasonable.

2. Determining and Weighing Aggravating Factors

The California Supreme Court reasonably found no constitutional violation in the failure to specify further which statutory factors should be considered

aggravating and which mitigating or how aggravating and mitigating factors should be weighed and evaluated.

In *Tuilaepa v. California*, the United States Supreme Court rejected California habeas petitioners' arguments that:

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

Tuilaepa, 512 U.S. 967, 978 (1994) (considering 1978 California death penalty statute) (internal quotations omitted). In *Belmontes*, the Supreme Court observed that "California's overall balancing process" provided by the 1978 death penalty statute "requires juries to consider and balance . . . factors . . . that are labeled neither as mitigating nor as aggravating. . . . [T]he jury itself must determine the side of the balance on which each listed factor falls." 549 U.S. at 23; *see also Harris*, 465 U.S. at 51, 52 n.14 ("Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort," notwithstanding the fact that "[t]he statute does not separate aggravating and mitigating circumstances"); *Williams v.*

Calderon, 52 F.3d 1465, 1484 (9th Cir. 1995) (holding that the 1977 statute's "failure to label aggravating and mitigating factors is constitutional"). Finally, in *Babbitt v. Calderon*, the Ninth Circuit rejected a California habeas petitioner's argument that the trial court's instruction "was erroneous because the jury was not specifically told which factors it could consider as extenuating . . . ." 151 F.3d 1170, 1178 (9th Cir. 1998) (considering 1978 statute).

The California Supreme Court's decision is, therefore, in keeping with clearly established federal law and is not objectively unreasonable.

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3. Instruction on Mercy

The California Supreme Court may have reasonably concluded that Petitioner was not prejudiced by the lack of additional instruction on "the proper role of the exercise of mercy." (Pet. at 209.) Petitioner's jury was instructed that it "may reject death if the evidence arouses sympathy, mercy or compassion to the point that you feel death is not the proper penalty in this case." (RT 6860.)

The California Supreme Court may have shared the view of Justice Marshall that a "mercy verdict" may be "based on unarticulated and perhaps unarticulable reasons" and that it is "constitutionally permissible for the jury 'to dispense mercy on the basis of factors too intangible to write into a statute,'" or into a jury instruction. *Maxwell v. Pennsylvania*, 469 U.S. 971, 973 (1984) (Marshall, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring in judgment)). Similarly, the state court may have reasonably taken the view that "'mercy' is one of those words that speaks in the end for itself, and that definition may ultimately limit the generosity with which mercy is granted." *Billotti v. Legursky*, 975 F.2d 113, 118 (4th Cir. 1992) (holding that since "the Constitution permits the jury wide discretion to be lenient in a capital case, it can hardly be read to prohibit the grant of discretionary mercy in this non-capital sentencing proceeding"); *see also Adams v. Wainwright*, 764 F.2d 1356, 1368-69

(11th Cir. 1985) (holding that because the jury's sentencing instructions did not foreclose its ability "to exercise mercy and recommend a life sentence even though no mitigating factors were present," the instructions "encompass[ed] the broadest exercise of a jury's discretion in mercifully recommending a life sentence"); *Washington v. Watkins*, 655 F.2d 1346, 1376 n.57 (5th Cir. 1981) ("The exercise of mercy, of course, can never be a wholly rational, calculated, and logical process"); *cf. Tuilaepa*, 512 U.S. at 975 (holding that a sentencing factor is not impermissibly vague where it has "some common-sense core of meaning that criminal juries should be capable of understanding" (internal quotation and alteration omitted)).

Because the California Supreme Court may have reasonably rejected petitioner's contention that the trial court failed to instruct the jury adequately to limit its discretion, Claim 8(3)(D) is DENIED.

XIX. Claim 8(4): Lethal Injection

In Claim 8(4), Petitioner alleges that execution by lethal injection violates the Eighth Amendment prohibition against cruel and unusual punishment. (Pet. at 210.) In his merits brief, Petitioner acknowledges that his "lethal injection claim is currently not ripe." (Petr.'s Br. at 70 (citing *Payton v. Cullen*, 658 F.3d 890, 893 (9th Cir. 2011).) Petitioner states that he "preserves [the claim] for later review." (*Id.*) The California Supreme Court denied the claim on the merits. (*See* Petition for Writ of Habeas Corpus, Case No. S067172, Lodgment D-1 at 646 (presenting the claim as Claim U.4)); Order, *In re Cain*, Case No. S067172, June 28, 2000 (Lodgment D-5) (denying Claim U.4 on the merits).

Since the district court's 2006 ruling in *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006) that California's implementation of lethal injection violated the Eighth Amendment, "there [has been] a de facto moratorium on all executions in California." *Morales v. Cate*, 623 F.3d 828, 830 (9th Cir. 2010). California promulgated a revised lethal injection protocol effective August 29, 2010. Cal. Code Regs. tit. 15, §§ 3349-3349.4.6 (2010). The revised protocol provides, *inter*

alia:

> Inmates sentenced to death shall have the opportunity to choose to have the punishment imposed by lethal gas or lethal injection. . . . The inmate shall be notified of the opportunity for such choice and that, if the inmate does not choose either lethal gas or lethal injection within ten days after being served with the execution warrant, the penalty of death shall be imposed by lethal injection.

(*Id.*, § 3349(a)-(b).)

Following the effective date of the revised protocol, the State scheduled the execution of Albert Greenwood Brown. Brown moved to intervene in the *Morales* action. Holding that "Brown's federal claims are virtually identical to those asserted" by Morales, the court granted the motion to intervene. *Morales v. Cate*, No. CV 06-219, 2010 WL 3751757, at *1 (N.D. Cal. Sept. 24, 2010). Considering Brown's challenge to the revised protocol and his motion to stay his execution, the Northern District of California stated that it "always has understood, apparently incorrectly, that executions could not resume until it had an opportunity to review the new lethal injection protocol in the context of the evidentiary record developed during the 2006 proceedings." *Id.* The court conditionally denied a stay of execution on the basis that "there is no way that the Court can engage in a thorough analysis of the relevant factual and legal issues in the days remaining before [petitioner's] execution date." *Id.* at *5.

The Ninth Circuit remanded, directing the district court, "in light of . . . the court's findings regarding the risk of unconstitutional pain inhering in the prior three-drug protocol, . . . to determine whether, under *Baze*, [petitioner] is entitled to a stay of his execution as it would be conducted under the three-drug protocol now in effect." *Morales*, 623 F.3d at 831. Most recently, the district court explained that:

> California at this juncture lacks a lethal-injection protocol

> that is valid under state law. *Sims v. Cal. Dep't of Corr. & Rehab.*, No. CIV 1004019 (Cal. Super. Ct. Marin Cnty. Feb. 21, 2012). . . . [T]he Court has continued to defer to the parties' repeated joint requests not to proceed with this litigation until an operative protocol is in place. When the Court resumes its review of the protocol, it intends to do so deliberately and expeditiously while complying with the instruction of the Court of Appeals to 'take the time necessary to do so.'

Morales v. Cate, No. CV 06-219, 2012 WL 5878383, at *3 (N.D. Cal. Nov. 21, 2012) (quoting *Morales*, 623 F.3d at 829). On May 30, 2013, the California Court of Appeal affirmed the *Sims* decision "permanently enjoin[ing] the [California Department of Corrections and Rehabilitation] from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injection execution are promulgated . . . ." *Sims v. Cal. Dep't of Corr. & Rehab.*, __ Cal. Rptr. 3d __, 2013 WL 2359007, at *14 (Cal. Ct. App. May 30, 2013).

Although the California Supreme Court denied Petitioner's claim on the merits, the Court at this time DISMISSES WITHOUT PREJUDICE Claim 8(4). The Court will decide the merits of Petitioner's claim under 28 U.S.C. § 2254(d), if necessary, when Petitioner's execution is imminent.

XX. Claim 8(5): Competency to be Executed

In Claim 8(5), Petitioner asserts that he is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). (Pet. at 217.) Petitioner states that because no execution date is imminent, his claim is not yet ripe, and he presents it to preserve it for later review. (*Id.* (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998)).) The California Supreme Court denied the claim "as premature." Order, *In re Cain*, Case No. S067172, June 28, 2000 (Lodgment D-5).

Because Petitioner's "execution [is] not imminent and therefore his

competency to be executed [can]not be determined at th[is] time," *Martinez-Villareal*, 523 U.S. at 644-45, Claim 8(5) is DISMISSED WITHOUT PREJUDICE.

XXI. Claims 9(1), 11(6), and 15(5): Prior Felony Charge

A. Allegations

In Claim 9(1), Petitioner alleges that the prosecutor committed misconduct by presenting evidence that Petitioner "had used a deadly weapon (a rock) in the [Virginia] Fontes incident of which he was acquitted, and [of] his misdemeanor conviction in that incident . . . ." (Pet. at 218.) Petitioner raises the same allegation as a violation of due process and equal protection in Claim 11(6),[7] (*id.* at 243 (challenging the "presentation of various allegations of aggravating conduct, including non-violent prior felonies, insignificant and unadjudicated allegations of prior acts of violence, conduct for which Mr. Cain was acquitted of criminal charges")), and as a violation of the Double Jeopardy Clause, the Eighth Amendment, and due process in Claim 15(5). (*Id.* at 281-85.)

B. Decision on Direct Appeal

Considering the basis of Petitioner's claims on direct appeal, the California Supreme Court held:

> According to evidence put before the court in a hearing on defendant's objection to use of the incident, defendant and others were charged with four felonies in the attack on Fontes's husband and son. Counts 3 and 4 involved the son, Robert Ramirez. Count 3 charged assault with a deadly weapon, to wit, an iron bar. *Count 4 alleged not assault with a deadly weapon, but rather, battery causing serious bodily injury . . . . No weapon use was alleged in this count.* Defendant was completely acquitted on count

[7] Petitioner's contention in Claim 11(6) regarding his alleged "lack of remorse" is rejected for the reasons stated below as to Claim 11(7). (*See infra* pp. 76-80.) To the extent that Claim 11(6) raises an allegation regarding Petitioner's Arizona felony conviction, that allegation is rejected for the reasons stated below as to Claim 11(5). (*See infra* pp. 80-84.)

3, but on count 4 was *convicted* of a lesser included offense, the misdemeanor of simple battery.

While overruling defendant's objection to Fontes's testimony, the trial court limited the testimony to 'facts from which the reasonable inference of a misdemeanor battery could be drawn . . . .' Evidence concerning use of an iron bar was excluded, since defendant was acquitted of the assault charge alleging such use. Evidence defendant kicked Ramirez and hit him with a rock, however, was allowed, since these acts presumably formed the basis of the battery for which defendant had been convicted.

The trial court's ruling was not error. The jury heard no evidence tending to show an offense for which defendant had been acquitted. Fontes did not testify to any use of an iron bar (count 3) or that defendant inflicted any serious bodily injury on Ramirez (count 4). Defendant was not previously acquitted of assaulting Ramirez with a rock or of kicking him. Indeed, these acts constituted the circumstances of a battery for which defendant had been convicted as a lesser included offense of the felony charged in count 4.

. . . [D]efendant argues the prior acquittal was necessarily based on an acceptance of the fact that Mr. Cain used neither an iron bar nor a rock. The record does not support this claim. In the prior proceeding codefendant Mark Miller was convicted on count 3 of assault with a deadly weapon, to wit, an iron bar, and on count 4 of battery causing serious bodily injury. Thus the jurors in the previous trial may have acquitted defendant of the felonies because they believed Ramirez's injuries were caused by an attack with an iron bar for which they believed Miller, rather than defendant, was responsible. These verdicts say nothing about whether defendant hit Ramirez with a rock.

> Defendant suggests an attack with a rock of the size indicated by Fontes would necessarily cause serious injury. Although Fontes testified in the penalty phase here the rock was about eight inches wide, the record does not contain her testimony in the prior trial (references to that testimony by defense witness Clayton were stricken). Assuming the testimony was consistent, the jury in the previous trial could have found she was exaggerating the size of the rock. The jury could also have believed the prosecution had simply failed to show the rock was responsible for Ramirez's injuries in light of evidence that (as Fontes testified in the pretrial hearing here) once Ramirez got off of Miller, Miller hit him in the head with an iron bar, leaving him lying in a pool of blood.
>
> The details and circumstances of prior violent criminal conduct are properly admitted and considered under factor (b) even if the defendant was previously prosecuted for the same conduct, so long as the defendant was not acquitted of the offense. Although . . . section 190.3's bar on evidence of acquitted offenses extends to lesser included offenses, . . . [that principle does not] extend to a case, like this one, where the defendant was *convicted* of the lesser offense and the penalty phase evidence is limited to facts on which the jury could reasonably have reached the lesser verdict. . . .
>
> The use under factor (b) of a crime for which a defendant was previously convicted does not violate the constitutional and statutory bars against double jeopardy. The defendant is not being tried again, or made subject to punishment or conviction, for the same offense; instead, the evidence is admitted to assist the jury in its determination of the appropriate sentence on the current charge. . . . [T]o the extent the collateral estoppel aspect of double jeopardy applies to relitigation of facts in a penalty trial, it is inapplicable here because defendant points to no specific facts litigated in his penalty trial which were necessarily resolved in his favor in prior

criminal proceedings.

Cain, 10 Cal. 4th at 70-72 (emphasis in original; internal quotations and citations omitted).

C. Analysis

On its face, Petitioner's claim that evidence of conduct for which he was acquitted cannot be introduced in aggravation appears to lack support in clearly established federal, as opposed to state, law. The United States Supreme Court held in *United States v. Watts*, 519 U.S. 148, 156-57 (1997), considering the application of federal sentencing guidelines, that:

> an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. . . . [A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

Id. at 156-57 (internal quotation omitted). Circuit courts have applied *Watts*' holding on appeal from federal capital prosecutions as well as federal habeas proceedings from state capital convictions. *See United States v. Lujan*, 603 F.3d 850, 856 (10th Cir. 2010) (observing, in federal capital prosecution, that "even evidence tending to prove that the defendant engaged in criminal conduct for which he has already been prosecuted and *acquitted* may be introduced at sentencing in a trial charging a separate offense" (emphasis in original; citing *Watts*)); *Kokoraleis v. Gilmore*, 131 F.3d 692, 695 (7th Cir. 1997) (holding, in habeas proceedings from state capital sentence, that "even an outright acquittal [of a prior murder] would not have precluded its consideration when selecting the appropriate punishment for the [instant] murder," citing *Watts*).

However, even assuming *arguendo* such support in clearly established

federal law, Petitioner fails to show the California Supreme Court's decision to be objectively unreasonable. It is:

> impossible to know exactly why a jury found a defendant not guilty on a certain charge. An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences. Thus, . . . the jury cannot be said to have necessarily rejected any facts when it returns a general verdict of not guilty.

Watts, 519 U.S. at 155 (internal quotations and alteration omitted). An acquittal leaves the court with "no way of knowing" on what basis the jury did not find the charges where two "alternatives (and perhaps others) are rationally consistent with the jury's verdict in that case." *Santamaria v. Horsley*, 133 F.3d 1242, 1246 (9th Cir. 1998) (holding that prosecution could present evidence and argue in retrial that defendant killed the victim using a knife, where jury in first trial reached a verdict rejecting personal use of a deadly weapon, a knife).

Here, the California Supreme Court reasoned that "the jury in the previous trial could have found [Fontes] was exaggerating the size of the rock. The jury could also have believed the prosecution had simply failed to show the rock was responsible for Ramirez's injuries in light of evidence that . . . Miller hit [Ramirez] in the head with an iron bar . . . ." *Cain*, 10 Cal. 4th at 71 n.25. Because the California Supreme Court reasonably identified potential theories on which the jury may have convicted Petitioner of simple battery[8] and acquitted him of battery

[8] To the extent Petitioner contends that the introduction in aggravation of conduct underlying a misdemeanor conviction is unconstitutional, the claim lacks support. *Cf. Nichols v. United States*, 511 U.S. 738, 748-49 (1994) (holding, in considering federal sentencing guidelines, that "consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous [misdemeanor] offense," and that even "an uncounseled misdemeanor conviction . . . [is] valid

(continued...)

causing serious bodily injury and assault with a deadly weapon, consistent with Petitioner's use of a rock in the altercation, the California Supreme Court's decision is not objectively unreasonable. Claims 9(1), 11(6), and 15(5) are DENIED.

//

XXII. Claims 9(2), 11(7), and 15(6): Lack of Remorse

A. Allegations

In Claims 9(2), 11(7), and 15(6), Petitioner argues that the presentation of his alleged lack of remorse as an aggravating factor constitutes prosecutorial misconduct and a violation of due process and of the Fifth and Eighth Amendments. (Pet. at 220-24, 243, 285-88.) Petitioner argues that the prosecutor's remarks "infringed on Mr. Cain's right not to incriminate himself" under the Fifth Amendment and made an "impermissible attempt to broaden the categories of evidence" in aggravation without "sufficient factual basis." (*Id.* at 220-21.)

B. Legal Standard

Whether Petitioner's Fifth Amendment claim is supported by clearly established federal law is a matter of some debate. In *Mitchell v. United States*, 526 U.S. 314, 327-29 (1999), the United States Supreme Court applied *Griffin v. California*, 380 U.S. 609 (1965) and *Estelle v. Smith*, 451 U.S. 454 (1981) to hold that the Fifth Amendment forbids adverse inferences from a defendant's silence at his sentencing hearing. The Court expressly cautioned, however, that "[w]hether

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[8] (...continued)
when used to enhance punishment at a subsequent conviction"); *Gonzalez v. Wong*, 667 F.3d 965 (9th Cir. 2011) (holding in habeas proceedings from state capital conviction that introduction of certain mitigating evidence "would have opened the door to evidence about allegations . . . [for which petitioner] pled guilty to a charge of misdemeanor battery . . . . [I]t was not unreasonable for the California Supreme Court to conclude that Gonzalez's counsel had a valid strategic reason for not introducing the character evidence so as to avoid the details of this incident").

silence bears upon the determination of a lack of remorse . . . is a separate question. It is not before us, and we express no view on it." *Mitchell*, 526 U.S. at 330. The Fourth Circuit has observed a "deep circuit split that has developed over the matter . . . ." *United States v. Runyon*, 707 F.3d 475, 510 (4th Cir. 2013) (finding any error harmless and "leav[ing] this complicated constitutional question for another day").

In a habeas proceeding not governed by AEDPA, and therefore not limited to violations of clearly established federal law within § 2254(d)(1), the Ninth Circuit has noted that the "contention that the prosecution may not argue that the defendant has failed to show remorse by using his silence at trial as the evidence of remorselessness" is "true in the abstract." *Sims v. Brown*, 425 F.3d 560, 562, 588 (9th Cir. 2005). The circuit court held that the contention is "misplaced," however, where the prosecutor's arguments were "tethered to evidence that was part of the record in the penalty phase" and rested "upon statements that [petitioner] himself had made." *Id.* at 588-89; *see also Isaacs v. Head*, 300 F.3d 1232, 1271-72 (11th Cir. 2002) (rejecting claim based upon *Griffin* where "the most damaging evidence concerning [petitioner's] lack of remorse came from his own words to that effect freely expressed to a reporter" and the prosecutor's remarks "were related to the evidence properly before the jury").

C. Analysis

Here, Petitioner challenges the prosecutor's remarks that Petitioner's attitude was "[a]bsolutely extraordinary. No sense of decency. No shame," and that Petitioner was "given every opportunity to express sorrow, sympathy, pity, remorse. Nothing. No remorse, nothing. Just a fear that he'd be caught. Selfish. Remorseless." (RT 6790, 6791; Pet. at 221 (citing same).)

The California Supreme Court reasonably concluded that the prosecutor's statements, in context, were explicitly tied to evidence in the record of statements Petitioner made. *See Cain*, 10 Cal. 4th at 78 ("[T]he prosecutorial argument . . .

focused on overt demonstrations of remorselessness and did not include any implied comment on defendant's failure to testify or confess full responsibility for the killings"). The prosecutor argued:

> [A] tv reporter talks to him, and he denies knowing anything about it. No respect for the truth.
>
> No, you know, go talk to somebody else. No, I'm going to be on TV. I'm a big man. Absolutely extraordinary. No sense of decency. No shame.
>
> But in a way what – two things really sum up his attitude after the crime, and that's his brother Val asks him, 'Did you kill those people?' Ulie Mendoza testified he was around.
>
> Val asked him, 'Did you kill those people?' And he said the defendant, Tracy Cain, said, 'That's on them.' That's their tough luck. That's their tough luck. [sic] They're fake, they're dead, they're gone. That's their problem.
>
> And you know, you don't have to take Ulie's idea or Ulie's word for it because in the police interview, page 41 and 42 of that: Question. Did you have any – there it says 'fill,' but I believe the word is 'feel,' because you'll read it later in context. You can see it's a misprint there. It's 'feel.'
>
> 'Did you feel anything for them when you went back in there Saturday?'
>
> That's Detective Tatum's question.
>
> 'Did you feel anything for them when you went back in there Saturday?'
>
> And the defendant's answer is:
>
> 'I think somebody was going to come in and find them, but' –
>
> And then Detective Garcia says:

> 'Oh, no. I don't think you understood what he asked. I mean, you knew these people. You'd known them for at least probably a few months anyway. You mowed the grass. You talked to them. You saw them at least every other day.[']
>
> 'Didn't you feel anything when you walked in there and saw them like that?'
>
> The defendant's answer: 'I was scared.'
>
> Look out for number one. The hell with anybody else. Detective Tatum then says:
>
> 'But didn't you feel any sympathy?'
>
> The defendant's answer is:
>
> 'They laugh at shit like that, man.'
>
> Who does Tracy blame it on? Everybody else? 'Didn't you feel any sympathy' when interrogated by the police. He can't bring himself to recognize them as human beings. You ought to read that and/or listen to the tape, bottom of page 41, top of page 42.
>
> Absolutely extraordinary. He's given every opportunity to express sorrow, sympathy, pity, remorse. Nothing. No remorse, nothing. Just a fear that he'd be caught. Selfish. Remorseless.

(RT 6789-91 (capitalization as in original).)

The jury could properly consider in the penalty phase of trial the evidence it heard during the guilt phase. *See Pinholster*, 131 S. Ct. at 1408 (noting that jury was "instructed to consider all the evidence presented," and examining guilt phase evidence in reweighing aggravating and mitigating evidence); *Ybarra v. McDaniel*, 656 F.3d 984, 1000 (9th Cir. 2011) ("[Petitioner's] jury was permitted to consider guilt-phase evidence at the penalty phase"). The jury heard evidence during the guilt phase proceedings that Petitioner denied knowing anything about the murders

in his interview with a television news reporter. (*See* RT 5887-88; Pet. Ex. 176; *cf.* Pet. at 81 ("In the interview, Goode asked: 'I guess there is no idea of who would do something like this, huh?' Mr. Cain responded: 'Uh, uh . . . not that I know of . . . I don't know nothing about that'").) The jury heard evidence that when asked if he killed "those people," Petitioner told his brother, "That's on them." (RT 5498.) The jury also heard evidence that Petitioner told police in his interview that he thought about the bodies being found and felt scared when he entered the Galloways' home after the murders, and when asked if he didn't feel any sympathy, responded, "They laugh at shit like that, man." (*Id.* at 5841-50; Pet. Ex. 177 at 42.)

The California Supreme Court's conclusion that the prosecutor's arguments referred not to Petitioner's silence but only to evidence in the record of his own statements, and did not violate Petitioner's constitutional rights, was not objectively unreasonable. *See Cain*, 10 Cal. 4th at 78; *Sims*, 425 F.3d at 588-89. The state court likewise reasonably concluded that the arguments did not impermissibly broaden the scope of evidence in aggravation and had sufficient factual basis in the record. *See Cain*, 10 Cal. 4th at 77-78.

Claims 9(2), 11(7), and 15(6) are, therefore, DENIED.

XXIII. Claims 9(4), 11(4), 11(5), and 15(2): Arizona Non-Violent Felony Conviction

A. Allegations

In Claims 9(4) and 15(2), Petitioner argues that the presentation in aggravation of his conviction at age 18 for an alleged nonviolent crime of automobile theft constitutes prosecutorial misconduct and a violation of the Double Jeopardy Clause, the Eighth Amendment, and due process. (Pet. at 225, 270-75.) In Claims 11(4) and 11(5), Petitioner alleges due process and equal protection violations in the admission of the Arizona conviction because the conviction "was obtained in violation of Mr. Cain's constitutional rights" and because counsel

failed to advise him, "at the time that he waived his right to a trial on the prior conviction, that it would be used as a factor in aggravation during the penalty phase." (*Id.* at 242.) Petitioner's merits brief on each claim states without elaboration that it is "briefed in conjunction with a claim of ineffective assistance of counsel that is explained in full at Claim 10.2." (Petr.'s Br. at 71, 85, 98.) In Claim 10(2), denied in the Court's March 2011 Order, Petitioner argued that trial counsel was ineffective for failing to object to the use in aggravation of the allegedly unconstitutional prior conviction and for advising him to stipulate without informing him that the conviction could be used in aggravation. (*See* March 2011 Order at 88-92.)

B. Analysis

1. Constitutionality of Prior Conviction

The Court previously held that Petitioner had not demonstrated that competent counsel would have been reasonably likely to succeed on an objection to the use of the Arizona conviction in aggravation. (*See id.* at 91.) The Court explained:

> Contrary to Petitioner's allegations, trial counsel did object to its presentation on the ground that it was unconstitutional. Counsel based his objection on the court's review of the 'voluminous' documents concerning the conviction and did not argue it further. (RT 5899, 5911; CT 272.) The trial court held:
>
> > [W]ith respect to . . . the reservation of the defendant's right to attack the [] constitutionality or legality of the Arizona conviction, I paid particular attention to those court documents from the Arizona Superior Court of the County of Yuma. I'm satisfied that the defendant was duly arraigned. There were hearings for suppression of evidence on a number of – at least one issue, including *Miranda*. I'm

> satisfied that the defendant's constitutional rights were scrupulously protected throughout these proceedings, that he had a fair trial. I see absolutely no constitutional or legal infirmity with the jury's verdict or with the conviction or with the sentence that was imposed.

(RT 5912.)

The state high court may have reasonably concluded that counsel was not ineffective for failing to present additional evidence or argument to the trial court. When a California defendant:

> challenges the validity of a prior conviction [used in aggravation], he or she bears the burden of establishing its constitutional invalidity. To meet this burden, it is not enough for a defendant simply to make some showing that a constitutional error occurred in the prior proceedings. A prior conviction carries a *strong presumption of constitutional regularity*, and the defendant must establish a violation of his or her rights that so departed from constitutional requirements as to justify striking the prior conviction.

California v. Horton, 11 Cal. 4th 1068, 1136 (1996) (emphasis in original, internal quotation omitted). The claim of error must be based upon one of certain '*fundamental* constitutional flaws,' such as a denial of the right to appeal or a complete denial of representation at a critical stage of trial. *Id.* at 1135. Where a postconviction court of a 'sister state[]' has reviewed and denied the claim of error, a California capital defendant may challenge the constitutionality of the prior conviction where an error 'appears on the face of the judgment itself . . . .' *Id.* at 1138.

> Here, the California Supreme Court may have reasonably determined that the alleged ineffective assistance of Petitioner's Arizona counsel was not a complete denial of representation. Petitioner has not alleged any other fundamental constitutional flaw. It is reasonable that Petitioner's unsupported allegation that 'his case was not properly presented and that his Attorney represented both himself and' a guilty co-defendant (State Habeas Pet. Ex. 49 at 000879), would not meet Petitioner's burden in the California court of establishing 'a violation of his [] rights that so departed from constitutional requirements as to justify striking the prior conviction.' *Horton*, 11 Cal. 4th at 1136. Moreover, to the extent that the Arizona postconviction court reviewed and denied Petitioner's claim, the California Supreme Court could reasonably have concluded that no error appears on the face of its judgment.

(March 2011 Order at 89-91 (internal citations edited).)

The California Supreme Court may have reasonably rejected this portion of Claims 9(4), 11(4), 11(5), and 15(2) on the same basis.

2. Advisement on Use in Aggravation

The Court also held previously that the state high court may have reasonably concluded that counsel was not ineffective for advising Petitioner to stipulate to the conviction. (*Id.* at 91.) The Court explained:

> It would not be unreasonable to hold that stipulating to the conviction was strategically sound to avoid the presentation of testimony from prosecution witnesses, who may have included the victim or co-defendants. *See Dyer v. Calderon*, 122 F.3d 720, 737 (9th Cir. 1997) (holding that if counsel had not stipulated to prior conviction, the prosecution 'could have called the victim . . . to the stand to testify. Wanting to avoid this potentially damaging testimony, [counsel's] stipulation was reasonable'), *vacated on reh'g en banc on other grounds*, 151 F.3d 970 (1998); *Hooker v. Mullin*, 293

> F.3d 1232, 1246-47 (10th Cir. 2002). In *Hooker*, for example, petitioner argued that trial counsel was ineffective for stipulating to two prior violent felony convictions. 293 F.3d at 1246-47. The Tenth Circuit rejected petitioner's claim. *Id.* The circuit court agreed with the state supreme court that:
>
> > the decision to enter the stipulations was part of a calculated strategy to alleviate the potential harm that might occur if the State were allowed to put on its proof regarding the two prior violent felony convictions . . . . Moreover, we conclude the jury would have found these two aggravating circumstances regardless of the stipulation. Accordingly, counsel retained credibility with the jury by stipulating to the aggravators.
>
> *Id.* at 1246, 1246 n.15 (internal quotation and citations omitted). Here, too, the California Supreme Court may have reasonably concluded that Petitioner has failed to establish that the jury would not have found the Arizona conviction as an aggravating circumstance absent the stipulation. It was, therefore, not an unreasonable application of Supreme Court precedent to hold that, to the extent that counsel advised Petitioner to stipulate to the Arizona conviction without informing him that the conviction could be used in aggravation in support of a death penalty, counsel did not err, and Petitioner was not prejudiced.

(March 2011 Order at 91-92 (internal citations edited).)

The California Supreme Court may have reasonably rejected this portion of Claims 9(4), 11(4), 11(5), and 15(2) on the same basis.

Claims 9(4), 11(4), 11(5), and 15(2) are, therefore, DENIED.

XXIV. Claims 9(5) and 15(3): Anita Parker Assault Allegation

A. Allegations

In Claim 9(5), Petitioner alleges that the prosecutor committed misconduct

by "pressuring . . . Anita Parker to provide factually inaccurate and incomplete information" and by making "constitutionally impermissible use of the totally unreliable and uncharged allegation of assault . . . ." (Pet. at 227.) In Claim 15(3), Petitioner alleges that his Eighth Amendment rights were violated because he was deprived "of a fair trial by an impartial jury on th[e] charge," because "[a]ny jury that heard only the allegations by Parker, the statements by Mr. Cain, and the reports given to the police including Parker's admission that she had pulled a knife on Mr. Cain prior to his reaching for any tire iron," as opposed to the crimes against the Galloways and other crimes in aggravation, "would have been unlikely to have found that Mr. Cain committed any crime in this incident, particularly if that jury was also told the truth about Parker's history of assaulting Mr. Cain." (*Id.* at 275.) Petitioner further alleges he suffered Eighth Amendment violations because "[t]he penalty jury was not required to find unanimously that Mr. Cain had actually committed this assault on Parker before any one juror decided to recommend imposition of the death penalty based on a consideration of this aggravating factor," and the jury was not instructed on "the constituent elements of such crime . . . ." (*Id.* at 275-78.)

B. Analysis

1. Prosecutorial Misconduct and Fair Trial

In its March 2011 Order, the Court held that "the state high court would have been reasonable in concluding that Petitioner's allegations of prosecutorial misconduct toward Parker are unsupported . . . ." (March 2011 Order at 120.) Specifically, the Court held:

> Petitioner alleges counsel failed to object to prosecutorial misconduct in 'pressuring [] witness Anita Parker to provide factually inaccurate and incomplete information, and [making] constitutionally impermissible use of the totally unreliable and uncharged allegation of assault' by arguing it as a factor in aggravation. (Pet. at 227; *see also id.* at 113, 238.) Specifically, Petitioner alleges:

> [T]he district attorney's investigator and [Parker's] father (who hated Mr. Cain) colluded to force her testify [sic] about the alleged assault with the tire iron, and . . . she was pressured into giving this testimony. . . . [T]he prosecutor in Mr. Cain's case, and his agents, pressured Ms. Parker into presenting [the incident]. . . . Furthermore, the prosecutor did not have the witness testify truthfully about her lengthy history of assaults on boyfriends in general and Mr. Cain in particular, in spite of his knowledge of these facts, and instead presented a truncated and factually inaccurate account of this incident. Then, the prosecutor relied extremely heavily on this purported "crime" as factor [sic] in aggravation justifying imposition of the death penalty.

(Pet. at 113.) Petitioner makes no other factual allegations in support of this claim. . . .

As to Petitioner's claim that the investigator and Parker's father 'colluded' to pressure or force Parker to testify, the California Supreme Court could have reasonably determined that the allegation is not supported by her declaration or by any other evidence. Parker declares:

> I remember the day that the District Attorney's investigator came to interview me about Tracy's case. My father was present for the entire interview. My father hated Tracy and he answered all of the questions that the investigator asked of me. I didn't have [a] chance to answer the questions.
>
> The investigator wanted to know about the time that Tracy and I had a fight and Tracy hit me with a tire iron. My father told him the story and I didn't have a chance to

> answer. After my father told the story, I felt I had to stick with it because both my father and the investigator would have been really angry if I changed it.

(Pet. Ex. 178.) There is nothing in Parker's declaration to indicate any collusion between the police and her father. Parker makes no statement that the investigator and her father had any agreement or arrangement whatsoever. Any common interest between the investigator and Parker's father in aiding Petitioner's prosecution does not show prosecutorial misconduct.

Similarly, the court could have reasonably determined that Parker's statements provide no support for Petitioner's allegations that the prosecutor pressured her into testifying, falsely or otherwise. Parker says that her father, not the investigator, kept her from answering the investigator's questions. She provides no basis for her statement that the investigator 'would have been really angry' if she told a different story from her father's. (Pet. Ex. 178.) Parker's potentially unreasonable belief, absent any supporting allegations, cannot establish prosecutorial misconduct. The court was also reasonable to reject Petitioner's claim that the prosecutor presented untruthful and inaccurate testimony from Parker. Petitioner's only specific allegation in support is that 'the prosecutor did not have [Parker] testify truthfully about her lengthy history of assaults on boyfriends in general and Mr. Cain in particular,' leading to an inaccurate portrayal of the incident. (Pet. at 113.) Trial counsel had successfully moved, however, to exclude evidence regarding all incidents of violence surrounding Parker besides that involving the tire iron (*see* RT 177-78, 181-82, 6460-66), a motion Petitioner does not challenge as ineffective. Those incidents included one in which Parker stabbed Petitioner in the arm with a steak knife, because he was holding her sister on the ground. (*Id.* at 150; *see also id.* at 177-78.) Nevertheless, on cross-examination trial counsel elicited testimony from Parker

> that she once cut Petitioner on the arm with a knife. (*Id.* at 6457.) The prosecutor was barred from presenting that incident, or any others, by the trial court's ruling. Finally, the California Supreme Court could have reasonably determined both that there is no evidence in the record of any assaults by Parker on other boyfriends and that the prosecutor would have had no duty to question Parker about any such assaults.

(March 2011 Order at 117-20 (internal citations edited).)

The California Supreme Court may have reasonably rejected Petitioner's claims of prosecutorial misconduct and deprivation of a fair trial in Claims 9(5) and 15(3) on the same basis.

2. Eighth Amendment Violations

Petitioner's arguments that the jury was constitutionally required to receive instruction on the elements of assault and to find unanimously that Petitioner committed the assault before considering it at the penalty phase are addressed, and rejected, above and below. (*See supra* pp. 63-65; *infra* p. 95.)

Accordingly, Claims 9(5) and 15(3) are DENIED.

XXV. Claim 9(6): Prosecutorial Misconduct in Penalty Phase Argument

In Claim 9(6), Petitioner alleges that the prosecutor committed misconduct by "making false, inaccurate and inflammatory statements in the penalty phase argument, including arguments regarding Mr. Cain's 'attitude' and failure to express numerous vague emotions[,] . . . providing a personal interpretation of the evidence, 'testifying' regarding his own life," and making statements about Petitioner personally. (Pet. at 227.) Petitioner does not elaborate on the claim in his merits brief. (Petr.'s Br. at 71.)

In the context of an ineffective assistance of counsel claim, the Court held in its March 2011 Order that the California Supreme Court reasonably concluded that: the prosecutor's personal interpretations of the evidence did not misstate the evidence and stated reasonable inferences from the record (March 2011 Order at

124-26); the prosecutor's "testimony" about his life experiences "bore no reasonable possibility of influencing the penalty verdict" (*id.* at 127 (internal quotation omitted)); and the prosecutor's statements about Petitioner himself were reasonable inferences from the record. (*Id.* at 128-31.)

The Court also identified the prosecutor's arguments concerning Petitioner's lack of remorse in its March 2011 Order. (*Id.* at 122-23.) Regarding those arguments, the California Supreme Court held on direct appeal:

> [M]uch of the prosecutor's argument referred to what we have called 'overt remorselessness,' a proper aggravating circumstance. . . . From the evidence that defendant, still bloody from the killings, returned to his friends and boasted of what he had just done, the jury could infer his attitude during the crimes was one of callousness towards the victims. Similarly, Detective Tatum's question related to defendant's emotions during the second burglary on Saturday morning, and defendant's answer tended to show his attitude at that time. The prosecutor did not misconduct himself in arguing from this evidence.
>
> . . . To the extent the prosecutor exceeded the proper scope of argument by characterizing defendant's post-crime attitude as aggravating, the error was harmless. With or without argument, jurors can be expected to react strongly to evidence of overt callousness. . . . The prosecutor in this case also made it very clear the absence of a mitigating factor was not in itself aggravating, telling the jury that 'when a mitigating factor is not present, you don't shove it over into the aggravating factor column. It's just a zero.'
>
> . . . [T]he prosecutor's specific references to defendant's words and actions made clear the meaning of his assertion defendant lacked remorse.

Cain, 10 Cal. 4th at 77-78 (internal citations and quotation omitted).

The California Supreme Court's conclusions that the arguments were

reasonable inferences from the record, *see Atcheson*, 94 F.3d at 1244; *Young*, 470 U.S. at 8 n.5, and that any misconduct was harmless in light of the prosecutor's clarifying remarks (*see* RT 6782) and the other penalty phase evidence before the jury, were not objectively unreasonable.

Claim 9(6) is, therefore, DENIED.

XXVI. Claim 11(1): Impartial Jury

In Claim 11(1), Petitioner alleges that his constitutional rights were violated because "his penalty phase was tried before a biased and death-prone jury, from which any individual that might have voted against the death penalty based on religious belief was automatically excluded." (Pet. at 242.) Petitioner does not elaborate on the claim in his merits brief. (Petr.'s Br. at 84.)

In its June 2003 Order, the Court granted judgment on the pleadings in favor of Respondent on Petitioner's allegations that the trial court "sustain[ed] challenges for cause to those prospective jurors who, for religious reasons, would not impose the death penalty." (June 2003 Order at 35.) The Court held:

> It is the inability to apply the law that makes the juror unqualified to serve on the jury. *See, e.g., Witherspoon*, 391 U.S. at 514 n.7. The dismissals of the prospective jurors in Petitioner's case were not based upon religion per se, but rather were consistent with the United States Supreme Court's decisions in *Maxwell v. Bishop*, 398 U.S. 262 (1970), and *Boulden v. Holman*, 394 U.S. 478 (1969), because those cases involved jurors who were dismissed because they had '"conscientious" objections to, or did not "believe in," the death penalty.' *Wainwright*, 469 U.S. at 422 n.4. . . . [The potential jurors in Petitioner's case] said they would not set aside their beliefs when they deliberated on Petitioner's penalty. Thus, these jurors admitted their actions during deliberations would be affected by their beliefs, regardless of what the law required.

(June 2003 Order at 40; *see also id.* at 44 ("Petitioner's claim that his constitutional

rights were violated by the exclusion of jurors who were opposed to the death penalty is foreclosed by established law" (internal citations omitted)).)

Because the California Supreme Court may have reasonably concluded that Petitioner's jury was not unconstitutionally "biased and death-prone" at the penalty phase, Claim 11(1) is DENIED.

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XXVII. Claim 11(10): Evidence of Co-Defendant's Withdrawn Plea Agreement

A. Allegations and Decision on Direct Appeal

In Claim 11(10), Petitioner alleges that the trial court violated his constitutional rights by suppressing evidence at the penalty phase that Cerda "had been offered a deal of only four (4) years in prison for his role in the crimes, even though this evidence was a matter of public record." (Pet. at 244.) The defense sought to introduce "a change of plea form in which David Cerda agreed to plead guilty and testify against [Petitioner] in exchange for a sentence of four years in state prison. Cerda later withdrew his plea and, at the time of [Petitioner's] trial, still faced first degree murder charges without special circumstance allegations." *Cain*, 10 Cal. 4th at 62. The California Supreme Court rejected Petitioner's claim on direct appeal, holding that Petitioner was not denied his constitutional right to present relevant mitigating evidence. *Id.* at 62-64.

In his penalty phase opening argument, defense counsel told the jury:

> I've got another court record from that court file. I located a document in which on March 25th Mr. Cerda agreed to accept four years in prison if he would testify against Mr. Cain. [¶] Well, he changed his mind and this was – he was to testify truthfully, but the offer was that if

> he testified – it was March 25th, 1988 – against Mr. Cain in this case, he would receive four years in prison on a burglary charge. [¶] He signed it, his lawyer signed it, and Mr. Holmes signed it. It's part of the court file. When they went to take the plea, factually and out loud, Mr. Cerda changed his mind, but nevertheless, Mr. Cerda does not face the death penalty. Mr. Mendoza does not face anything. No one else faces anything. The only person who faces execution is Mr. Cain. [¶] And I think that that's evidence for you to consider in determining whether or not he should die in the gas chamber.

(RT 6547.)

After defense counsel's opening argument:

> [t]he prosecutor objected on grounds of section 1192.4 and Evidence Code section 1153, both of which exclude evidence of withdrawn guilty pleas. . . . The court excluded evidence of the withdrawn plea because it was not relevant in mitigation, because it was inadmissible under section 1192.4 and Evidence Code section 1153, and because trial of the collateral issues relating to the withdrawn plea would consume undue time and raise issues of attorney-client privilege. Cerda's attorney testified without objection his client was charged with murder, but was not faced with possible sentences of death or life without parole.

Cain, 10 Cal. 4th at 62-63 (internal citation omitted).

B. Analysis

In *Lockett v. Ohio*, the United States Supreme Court held that the sentencer in a capital case must:

> not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [¶] Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not

> bearing on the defendant's character, prior record, or the circumstances of his offense.

438 U.S. 586, 604, 604 n.12 (1978) (emphasis in original).

Applying *Lockett*, the Ninth Circuit has held that "[a]lthough a trial court is not necessarily precluded from allowing consideration of co-defendant sentences, a trial court does not commit constitutional error under *Lockett* by refusing to allow such evidence." *Beardslee v. Woodford*, 358 F.3d 560, 579 (9th Cir. 2003); *see also Smith v. Mahoney*, 611 F.3d 978, 996 (9th Cir. 2010) (discussing with approval the reasoning of *Beardslee*). Similarly, the Sixth Circuit in *Owens v. Guida*, 549 F.3d 399, 418-22 (6th Cir. 2008), found no violation of *Lockett* in the trial court's refusal to admit evidence at the capital penalty phase that a co-defendant was offered a joint plea agreement with the defendant, which the prosecutor withdrew upon the co-defendant's refusal to plead. The Sixth Circuit held that "[t]he failed negotiations are not related to [the defendant's] 'record' [and] . . . are not related to the 'circumstances of the offense'" within the meaning of *Lockett*. *Owens*, 549 F.3d at 420 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)). Likewise, in *Schneider v. Delo*, 85 F.3d 335, 342 (8th Cir. 1996), the Eighth Circuit found no violation of a capital habeas petitioner's constitutional right to present mitigating evidence from the trial court's exclusion of evidence that the prosecution entered into a plea agreement with his accomplice to recommend a thirty-year sentence. The circuit court rejected petitioner's argument that "under *Lockett* and *Eddings*, the plea agreement was relevant because the jury might have concluded that because [the accomplice] received a 30-year prison term, it would be unfair to sentence [petitioner] to death." *Id.* The court held that "the disposition of [the accomplice's] case had nothing to do with [petitioner's] 'character or record' or with the 'circumstances of the offense.'" *Id.* (quoting *Eddings*, 455 U.S. at 110).

By extension from *Beardslee*, the Court finds no basis to hold that a co-defendant's withdrawn plea agreement is constitutionally relevant mitigating evidence, even though a co-defendant's imposed sentence is not. Thus, in the absence of any clearly established federal law in support of Petitioner's contention, Claim 11(10) is DENIED.

XXVIII. Claim 11(12): Petitioner's Presentation to the Jury

In Claim 11(12), Petitioner alleges that his due process and equal protection rights were violated by his presentation to the jury in "jail house" attire throughout the penalty phase. (Pet. at 244.) Petitioner alleges that the trial court "should have inquired directly of Mr. Cain, both instructing him on his rights to appear in other more appropriate clothing and asking him whether he wished to appear in the jail attire; and, the court should have instructed the jury to disregard Mr. Cain's appearance in reaching a verdict." (*Id.* at 245.)

Denying Petitioner's related ineffective assistance of counsel claim, the Court held in its March 2011 Order:

> The record . . . indicates that Petitioner was educated [by the trial court and directly questioned] about wearing civilian clothes and was advised to wear them before the penalty phase of trial, and he chose to do otherwise. *Cf. California v. Bradford*, 15 Cal. 4th 1229, 1363 (1997) (holding defendant's stated preference to appear in jail clothing, after he was advised of his right to do otherwise, defeated his claim that he was compelled to do so by the trial court). The California Supreme Court may have reasonably . . . concluded, in addition, that Petitioner's state and federal constitutional rights were not implicated by his appearance in jail clothing during the penalty phase of trial. "[R]equiring a defendant to wear prison clothes during sentencing is not prejudicial and does not violate due process." *Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995); *Bradford*, 15 Cal. 4th at 1363 ("[T]he rule that a defendant may not be compelled to attend trial in jail or prison garb is premised upon the

> notion that doing so might subvert the presumption that an accused is innocent until proved guilty. . . . Because the presumption of innocence already had been rebutted and defendant had been found guilty beyond a reasonable doubt, there was no reasonable probability that the jury would base its penalty decision on the factor of defendant's attire").

(March 2011 Order at 95.)

Because the California Supreme Court may have reasonably rejected Claim 11(12) on the same basis, the claim is DENIED.

XXIX. Claim 11(15): Penalty Phase Instructions

A. Special Instruction No. 1

The Court held in its March 2011 Order that the California Supreme Court may have reasonably determined that "'Special Instruction No. 1' regarding the empaneling of an alternate juror between the guilt and penalty phases of trial . . . did not violate Petitioner's federal constitutional rights." (March 2011 Order at 131-33.) Accordingly, this portion of Claim 11(15) is DENIED.

B. Instructions on Aggravating and Mitigation Factors

1. Instructions on Elements of Crimes Introduced in Aggravation

Petitioner asserts next that the "jury was not instructed in the elements of various crimes allegedly committed by Mr. Cain which the prosecutor contended should be considered as factors in aggravation." (Pet. at 251.)

Petitioner's argument lacks support in clearly established federal law and has been rejected by the Ninth Circuit. In *Williams v. Vasquez*, petitioner argued that California Penal Code § 190.3(b), which permits the jury to consider prior criminal activity, was unconstitutionally vague because it did not require a jury instruction setting forth the elements of the criminal offenses to be considered. *See Williams v. Vasquez*, 817 F. Supp. 1443, 1470-71 (E.D. Cal. 1993), *aff'd sub nom. Williams v. Calderon*, 52 F.3d at 1480-81. The district court rejected petitioner's

arguments. The Ninth Circuit affirmed, holding that § 190.3(b) is not "void for vagueness, as [petitioner] contends," and also that any failure to instruct the jury that "it could consider any criminal activity only if proved beyond a reasonable doubt . . . is state law error, not cognizable on federal habeas." *Williams*, 52 F.3d at 1480-81. As noted above, once a California jury has found a special circumstance beyond a reasonable doubt, it need not make any further findings to make death an authorized punishment. (*See supra* pp. 63-65 (discussing *Ring*, 536 U.S. at 609).) A lack of instruction on the elements that would be required to make a further finding is not, therefore, constitutionally deficient.

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2. Instruction against Double Counting

Petitioner contends that the trial court failed to instruct the jury that it "could not double count the special circumstances found true as both a special circumstance aggravating factor and as a 'circumstance of the capital crime' aggravating factor." (Pet. at 252.) Petitioner argues that such "double counting" violates the Double Jeopardy Clause of the Fifth Amendment. (*Id.*)

The Court held in its March 2011 Order that the California Supreme Court's denial of Petitioner's related ineffective assistance of counsel claim on direct appeal was not an unreasonable application of Supreme Court precedent. (March 2011 Order at 137-38 (discussing *Brown v. Sanders*, 546 U.S. 212, 222 n.8 (2006)).) The California Supreme Court reasonably determined that Petitioner could not demonstrate prejudice because "the instruction given was not reasonably likely to have been understood as inviting the jurors to 'weigh' each special circumstance twice." *Cain*, 10 Cal. 4th at 68 n.24 (internal citation omitted). Petitioner's underlying claim of constitutional error in the jury instructions fails on the same basis.

3. Instructions against Consideration of Evidence on Rape

Petitioner alleges that the trial court "failed to instruct that no consideration

should be given to evidence of the crime of rape, of which Mr. Cain had been acquitted." (Pet. at 253.)

Rejecting Petitioner's related ineffective assistance of counsel claim, the Court held in its March 2011 Order that since:

> the evidence relating to the rape was the same evidence from which the jury found an attempted rape, the [California Supreme Court] could have reasonably determined that Petitioner suffered no prejudice from the absence of such an instruction. In the alternative, the court could have reasonably . . . held that Petitioner suffered no prejudice from the absence of the instruction because there was no reasonable probability that the jury considered any evidence relating to the rape, when it was instructed to consider the circumstances of the crime 'of which the defendant was *convicted* in the present proceeding' and any special circumstance 'found to be *true*.'

(March 2011 Order at 136 (quoting RT 6858; emphasis added).) Petitioner's underlying claim of constitutional error in the jury instructions fails on the same basis.

4. Explanation of Terms "Aggravation" and "Mitigation"

Petitioner alleges that the trial court "failed to furnish a definition or explanation of the terms 'aggravation' and 'mitigation' or a meaningful explanation of the distinction between the two . . . ." (Pet. at 253.)

The Court held above that the California Supreme Court reasonably found no constitutional violation in the failure to specify further which statutory factors should be considered aggravating and which mitigating, or how aggravating and mitigating factors should be weighed and evaluated. (*See supra* pp. 65-66.) For the same reasons that the jury instructions did not constitutionally require additional clarification on how the jury should apply the relevant sentencing considerations in aggravation or mitigation, no additional explanation of the terms

"aggravation" and "mitigation" was required.

5. Failure to Delete Inapplicable Factors

Petitioner contends that the trial court "failed to delete factors (e), (f) and (g)," "which did not apply in this action," and that as a result the jury "could not help but consider the absence of these potentially mitigating factors to count as aggravating factors." (Pet. at 255.) Petitioner argues that inclusion of the inapplicable factors minimized the significance of those mitigating factors that were presented. (*Id.*) The California Supreme Court denied Petitioner's argument on direct appeal. *See Cain*, 10 Cal. 4th at 80.

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The Ninth Circuit in *Bonin v. Calderon* rejected a petitioner's argument that the inclusion of inapplicable mitigating factors in the trial court's instructions allowed the jury "to consider the absence of numerous possible mitigating circumstances to be aggravating circumstances." 59 F.3d 815, 848 (9th Cir. 1995). The Circuit held that because the jury was instructed "to consider the listed factors only 'if applicable,'" the jury was "warned . . . that not all of the factors would be relevant and that the absence of a factor made it inapplicable rather than an aggravating factor." *Id.*; *see also Williams*, 52 F.3d at 1481 (finding no constitutional error in the trial court's instructions on "the entire list of factors the state considered relevant to the sentencing decision, even when some did not apply").

Petitioner's jury was likewise instructed that it should "consider[,] take into account and be guided by the following factors [provided to the jury], *if applicable*." (RT 6858 (emphasis added).) The California Supreme Court may have reasonably found no constitutional violation in the trial court's instructions.

6. Significance of "So Substantial" and "Appropriate" Instructions

Petitioner challenges the use of the term "so substantial" in the court's instruction to the jury that to return a judgment of death, it "'must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that the comparison warrants death instead of life without parole.'" (Pet. at 255 (quoting RT 6867).) Petitioner alleges that the "so substantial" instruction is "so vague . . . as to be relatively meaningless" and failed to guide adequately the jury's exercise of its discretion. (*Id.*) Petitioner challenges on the same basis the court's use of the term "appropriate" in its instruction to the jury that:

> [i]t is not necessary that you unanimously agree on the weight to be given any particular aggravating or mitigating factor. In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

(RT 6867; *see* Pet. at 256.) The California Supreme Court denied Petitioner's arguments on direct appeal. *See Cain*, 10 Cal. 4th at 80-81.

The California Supreme Court may have reasonably concluded that the jury instructions provided adequate guidance in the jury's exercise of its discretion. "'A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.'" *Williams*, 53 F.3d at 1482 (holding that the court's instruction to the jury that it was "not required to weigh aggravating and mitigating factors, and was not under obligation to find for life or death based upon which factors predominated . . . violates no right" of the petitioner) (quoting *Tuilaepa*, 512 U.S. at 979). The Supreme Court in *Gregg*, for example, "rejected a vagueness challenge to th[e] Georgia sentencing scheme in a case in which the 'judge . . . charged the jury that in determining what sentence *was appropriate* the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.'" *Tuilaepa*, 512 U.S. at 978 (quoting *Gregg*,

428 U.S. at 161; emphasis added); *see also Williams*, 52 F.3d at 1485 (holding that the "failure of the [California death penalty] statute to require a specific finding that death is beyond a reasonable doubt the *appropriate* penalty does not render it unconstitutional" (emphasis added)). Similarly, the Supreme Court in *Belmontes* found no reasonable likelihood that the jury applied the penalty phase instructions in petitioner's California trial to prevent the consideration of constitutionally relevant evidence, where the trial court instructed the jury that the mitigating circumstances it read were merely examples and "[a]ny one of them standing alone may support a decision that death is not the *appropriate* punishment in this case." 549 U.S. at 20 (emphasis added).

In Petitioner's case, the jury was instructed that it could consider "any . . . circumstance which lessens the gravity of 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," (RT 6860); that it was "free to assign whatever moral or sympathetic value [it] deem[ed] appropriate to each and all of the various factors [it was] permitted to consider," (*id.* at 6867); and that it "may return a verdict of life without possibility of parole based on any evidence of mitigation that [it found] sufficient to warrant such a verdict." (*Id.* at 6868.) The California Supreme Court may have reasonably concluded that the instructions to "determine . . . which penalty is . . . appropriate," (*id.* at 6867), and to return a death judgment only if persuaded that aggravating circumstances were "so substantial" compared to mitigating circumstances that death was warranted, (*id.* at 6867), did not fail to guide the jury's exercise of discretion adequately in light of the given instructions.

C. Instructions to Guide and Limit the Jury's Exercise of Discretion

Petitioner also contends that the jury was not provided with meaningful guidance in deciding whether to recommend the death penalty in Claim 11(15)(C). (Pet. at 257-58.) Petitioner contends that the instructions:

- "failed to require the jury to unanimously find that the prosecution had proved the existence of any aggravating factors beyond a reasonable doubt," as discussed by the Court above in section XVIII.D.1 (*see supra* pp. 63-65);
- "imposed a limitation on the jury's ability to consider issues relating to doubts regarding Mr. Cain's innocence of the underlying crimes," as discussed by the Court above in sections XVIII.D.1, XXIV, and XXIX.B.1 (*see supra* pp. 63-65, 84-88, 95);
- "failed to inform the jury that it could not consider evidence of crimes for which Mr. Cain had been acquitted, and actually instructed the jury to consider that evidence," as discussed by the Court above in section XXI (*see supra* pp. 70-75);
- "purported to limit mitigating factors to a single lingering doubt issue," as discussed by the Court above in section XXIX.B.4 (*see supra* p. 97; Pet. at 253-54 (alleging that because the terms "mitigating factor" and "aggravating factor" were mentioned only in the court's lingering doubt instruction and were not defined further, "[t]he plain meaning of the instruction that was given is that the *only* factor which might mitigate against imposing the death penalty would be . . . lingering doubt" (emphasis in original))); and
- "were vague and ambiguous in defining critical issues such as 'aggravating' and 'mitigating' factors, and the appropriate weight to be given to either," as discussed by the Court above in section XVIII.D.2 (*see supra* pp. 65-66).

(Pet. at 258.)

Because the California Supreme Court may have reasonably rejected the allegations for the reasons discussed above, Claim 11(15) is DENIED.

XXX. Claim 11(16): Consideration of Motion to Modify the Verdict

In Claim 11(16), Petitioner contends that his constitutional rights were violated by errors the trial judge made in deciding Petitioner's motion for modification of the verdict pursuant to California Penal Code § 190.4(e). (Pet. at 258-65.) Specifically, Petitioner alleges that the trial judge: (1) relied on

purported factors in aggravation that were irrelevant, were repetitive, or "should have been rejected as a matter of law;" (2) "treated the absence of mitigating evidence as factors in aggravation, and failed to give proper consideration to undisputed matters in mitigation;" and (3) improperly considered prejudicial matters in the probation report. (*Id.* at 259.)

In *Turner v. Calderon*, 281 F.3d 851, 871 (9th Cir. 2002), the Ninth Circuit rejected a habeas petitioner's contention that the trial court's "consider[ation] [of] non-statutory aggravating factors and fail[ure] to consider mitigating factors when reviewing [petitioner's] automatic application for modification of the death verdict" could state a federal constitutional violation. The Ninth Circuit held that because petitioner showed "no legal authority to support his constitutional claim, and because the trial court made an individualized determination of whether death was the proper punishment, we agree with the district court that at most the trial court's error would be one of state law." *Id.* (denying certificate of appealability on the claim) (internal quotation and alteration omitted).

Similarly, in *Allen v. Woodford*, the Ninth Circuit held that the trial court had "erred *as a matter of state law*" by considering presentence reports that were not before the jury when the court decided petitioner's motion for modification of the verdict. 395 F.3d 979, 1018 (9th Cir. 2004) (emphasis added). Nevertheless, the circuit court went on to consider whether petitioner was prejudiced by the trial court's consideration of the presentence reports, and held that he was not. *Id.*

Here, although Petitioner identifies a number of items in the probation report that were allegedly "prejudicial," he specifies no matter in the probation report that was discussed by the trial judge as a basis for his decision. (*See* Pet. at 260); *cf.* Cal. Penal Code § 190.4(e) ("The judge shall state on the record the reasons for his findings"). To the contrary, as the California Supreme Court found:

> before ruling the court explained its view 'the court should not take into consideration the contents of the

> probation report'; after ruling the court repeated, 'I base my ruling entirely upon the evidence that was presented in the trial.'
>
> Although the judge also stated he had, in preparation for ruling on the motion, refreshed his recollection of the evidence in part by reading the probation officer's factual summary, nothing in the record suggests he was influenced by any extraneous material. Defendant incorrectly argues the court's reference to defendant having denied using drugs must have been based on a statement to that effect in the probation report because there was no such evidence at trial. In the police interview introduced at trial defendant several times denied using 'dope' or 'coke.'

Cain, 10 Cal. 4th at 81, 81 n.34 (punctuation as in original); (*see also* RT 6921-22, 6925-29; Pet. Ex. 177 at 21-22).

Thus, to the extent Petitioner's claim states a violation of his federal constitutional rights, the California Supreme Court reasonably concluded that "[t]he Court explicitly stated that it had independently reviewed the evidence and believed death was the appropriate penalty. Nothing in the record suggests the court failed to perform its duty in this regard." *Cain*, 10 Cal. 4th at 82. The court's decision is not contrary to or an unreasonable application of clearly established federal law and is not based on an unreasonable determination of the facts. Accordingly, Claim 11(16) is DENIED.

XXXI. Claims 11(17) and 15(1): Proceeding with Capital Trial

In Claims 11(17) and 15(1), Petitioner alleges that his constitutional rights were violated by his capital prosecution after the prosecutor offered to allow him to plead guilty in exchange for a sentence of life without the possibility of parole. (Pet. at 266, 270; Petr.'s Br. at 96-98.) Petitioner makes no allegation that the trial judge had any involvement in the plea bargaining process. Petitioner also states that "[b]ecause Cain has been afforded no factual development, Cain cannot say

that the government was motivated by vindictiveness or [sic] simply relied on an unconstitutional capital charging system," but he asserts that "either way Cain is entitled to relief." (Petr.'s Br. at 97.) Petitioner argues that if the California Supreme Court "found that the government has unbridled discretion in the capital charging decision, then the CSC's decision violates clearly established federal law as expressed in *Gregg*, *Coker*, *Armstrong* and their progeny." (*Id.* at 98.)

Petitioner cites no authority to support his argument that the Eighth Amendment prohibition against punishment "'excessive' or 'disproportionate' to the offense" bars a capital prosecution following a plea offer for a lesser sentence. *Spaziano*, 468 U.S. at 477 (quoting, *inter alia*, *Gregg*, 428 U.S. at 171-73; *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977)); (*see also supra* pp. 4-6 (rejecting Petitioner's argument that his prosecution was motivated by a discriminatory purpose under *Armstrong*)). To the contrary, the Ninth Circuit held in 1988, after the decisions in *Gregg* and *Coker*, that "the imposition of a sentence of death on a defendant who would have received a prison sentence had he pled guilty" burdened "none of [defendant's] constitutional rights . . . ." *McKenzie v. Risley*, 842 F.2d 1525, 1536 (9th Cir. 1988). Although the circuit court held in *Adamson v. Lewis*, 955 F.2d 614, 620 (9th Cir. 1992) that the imposition of a death sentence following a breached plea agreement could be unconstitutionally arbitrary and perhaps prosecutorially vindictive, the Circuit has not applied its *Adamson* decision to invalidate a conviction or sentence following the passage of AEDPA. *Cf. Ricketts v. Adamson*, 483 U.S. 1, 3-4 (1987) (holding that defendant's conviction and death sentence after his breach of a plea agreement for a term sentence did not violate double jeopardy protections); *Williams v. Kemp*, 846 F.2d 1276, 1285 (11th Cir. 1988) (applying *Ricketts v. Adamson* to hold that petitioner's death sentence was not "arbitrarily imposed because the prosecution sought the death penalty after Williams voluntarily withdrew his plea agreement in which he would have received thirty years for manslaughter. . . . [T]he state was free to proceed with its

prosecution and to pursue the death sentence").

Since AEDPA's enactment, the Ninth Circuit has held that the State's offer of a plea agreement for a non-capital sentence can serve as mitigating evidence at the penalty phase of a capital trial.[9] *See Scott v. Ryan*, 686 F.3d 1130, 1135 (9th Cir. 2012); *cf. Summerlin v. Schriro*, 427 F.3d 623, 640-41 (9th Cir. 2005); *compare Wright v. Bell*, 619 F.3d 586, 598-99 (6th Cir. 2010) (holding, where prosecution offered capital defendant a life sentence in exchange for a guilty plea, that "the state court's determination that evidence of the plea negotiations did not constitute admissible evidence of mitigating circumstances was not an unreasonable application of federal law or contrary to clearly established federal law"). The plea offer does not render the ensuing capital prosecution unconstitutional. Indeed, in *Scott*, the Ninth Circuit affirmed the denial of habeas relief from petitioner's capital sentence following the defense's rejection of an offer to plead guilty to second degree murder in exchange for testimony against two co-perpetrators. *See Scott*, 686 F.3d at 1135, *on appeal from remand*, 567 F.3d 573, 584 (9th Cir. 2009). The Circuit held that:

> [e]ven considering the totality of mitigation evidence that Scott introduced at the district court . . . – evidence of his head injuries, brain shrinkage, and seizures; *evidence that the State once offered him a plea bargain* to testify against [co-perpetrators]; and evidence that the victim's

[9] It is unclear to what extent Petitioner pleads a claim of ineffective assistance of counsel for failing to introduce mitigating evidence of the plea offer. (*See* March 2011 Order at 9 n.3 (discussing Petitioner's failure to specify what lingering doubt evidence counsel allegedly failed to present and Petitioner's incorporation of evidence limited to Mendoza's credibility, the bloody footprints, Cerda's presence in the Galloways' house, and Petitioner's leadership capacity); Pet. at 131 (discussing, independent of a claim for relief, counsel's failure to present lingering doubt mitigation evidence of Petitioner's plea offer).) In any event, the California Supreme Court may have reasonably determined that counsel had a tactical basis for the omission of the evidence. *See Richter*, 131 S. Ct. at 790 ("There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect" (internal quotation omitted)). Counsel may have strategized that despite any arguments he would make that the offer evidenced the appropriateness of a life sentence, the jury would be likely to view Petitioner's rejection of the offer as "further evidence of his lack of remorse and failure to take responsibility for his crimes." *United States v. Moskovits*, 86 F.3d 1303, 1310 (3d Cir. 1996) (quoting sentiment expressed by trial judge regarding defendant's failure to accept a plea offer).

> father . . . thought the trial court should show Scott leniency – we cannot say it would have made any difference in the outcome.

Scott, 686 F.3d at 1135 (emphasis added).

Accordingly, Petitioner's contention that his capital prosecution was unconstitutional following the State's plea offer lacks support in clearly established federal law. Claims 11(17) and 15(1) are, therefore, DENIED.

XXXII. Claim 15(4): Admission of Juvenile Conduct

A. Disposition on Direct Appeal

In Claim 15(4), Petitioner raises a number of challenges to the trial court's admission of the testimony of Nicolas Perez at the penalty phase of trial.

On direct appeal, the California Supreme Court held:

> On September 28, 1979, defendant (then 16 years old) was an inmate in a Yuma County, Arizona, juvenile detention facility. Nicolas Perez, Jr., a control officer at the facility, was escorting a group of inmates from the dining room to a dormitory. As they prepared to pass through a door, defendant, the first in line, turned suddenly and hit Perez in the face with his closed fist. Other inmates in the group then tried to take Perez's keys as he and defendant fought. Perez suffered a broken nose and cheekbone and a wound requiring six stitches above his eye; he was off work for about one month. . . .
>
> Defendant's claims regarding use of the 1979 assault on Perez, . . . [are] without merit. As already discussed, use of prior violent conduct under factor (b) does not violate the bar on double jeopardy and does not generally require instruction on the elements of the offenses previously committed. The use of defendant's out-of-state conduct as evidence of a circumstance in aggravation does not raise any question of the court's jurisdiction to convict or punish him for an offense committed in another jurisdiction, because . . . the defendant in the penalty phase is not convicted of or punished for the prior

> offense.
>
> Finally, neither the passage of nine years between the incident and this penalty trial, nor the fact defendant was a juvenile when he assaulted Perez, nor the alleged destruction of Arizona juvenile detention records, made the use of this prior violent crime unfair or unreliable. *See People v. Anderson*, 52 Cal. 3d 453, 476 (1990) (remoteness goes to weight, not admissibility). As to the alleged destruction of records (a fact not shown in the record, since defendant did not object on this ground below), we are not convinced, if true, this would have unconstitutionally deprived defendant of an opportunity fairly or fully to litigate the circumstances of the 1979 assault. The conduct was proven through a percipient witness, Perez, whom the defense could, and did, cross-examine fully. Defendant was also a percipient witness to the event and could have testified to any circumstances reducing his culpability, had he so wished.

Cain, 10 Cal. 4th at 57, 74-75 (internal citations omitted and edited).

B. Allegations and Analysis

First, Petitioner alleges that he "was substantially prejudiced by the nine-year delay between this incident and murder trial and the destruction of the Arizona records relating to the incident." (Pet. at 278-79.) Petitioner contends that the alleged lack of records impinged upon his ability to present rebuttal or mitigating evidence regarding the incident, "including indications of Mr. Cain's otherwise good behavior while in this juvenile facility." (*Id.* at 279.) The California Supreme Court's determination that Petitioner could have adequately presented evidence about the incident through witness testimony, including the cross-examination of Perez, is not objectively unreasonable. As the California Supreme Court observed, the prosecution proved Petitioner's conduct "through a percipient witness, Perez," and not through use of any records to which Petitioner was denied access. *Cain*, 10 Cal. 4th at 75. Petitioner offers no authority to

support his position that his constitutional rights were violated by the presentation of Perez's testimony.

Second, Petitioner argues that "the California trial court did not have jurisdiction to adjudicate this incident." (Pet. at 279.) He contends, similarly, that "[p]ermitting the penalty jury to make a determination as to Mr. Cain's guilt of such alleged prior crime after Arizona had already adjudicated the incident violated [the] double jeopardy clause[] of the U.S. Constitution . . . ." (*Id.*)

Petitioner's arguments lack support in clearly established federal law. The jury is "entitled to consider facts about [the defendant's] background, including his other criminal acts . . . , but this does not mean that the punishment in a given case is *for* these other crimes; it is for the crime of which the defendant now stands convicted." *Kokoraleis*, 131 F.3d at 695 (emphasis in original). Thus, as the California Supreme Court reasoned, the introduction in aggravation of the Arizona incident at Petitioner's California trial "does not raise any question of the court's jurisdiction" over that offense. *Cain*, 10 Cal. 4th at 74; *see also McDowell v. Calderon*, 107 F.3d 1351, 1366 (9th Cir.) (holding that introduction at penalty phase of California trial of evidence of unadjudicated rape occurring in Florida was not unconstitutional), *opinion on reh'g*, 130 F.3d 833, 835 (9th Cir. 1997) ("leaving intact those parts [of the court's prior decision] . . . deciding other issues" beyond supplemental jury instruction), *overruled on other grounds as stated in Morris v. Woodford*, 273 F.3d 826, 839 n.4 (9th Cir. 2001).

Use of the Arizona incident in aggravation likewise does not offend Petitioner's double jeopardy protections; "[o]therwise every recidivist statute would violate the double jeopardy clause by imposing additional punishment for a crime that has already been punished." *Kokoraleis*, 131 F.3d at 695 (finding no double jeopardy violation in penalty phase presentation of prior murder conviction); *see also Watts*, 519 U.S. at 155 ("[C]onsistent with the Double Jeopardy Clause, . . . consideration of information about the defendant's character

and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted" (internal quotation omitted)); *cf. Sattazahn v. Pennsylvania*, 537 U.S. 101, 105, 116 (2003) (holding prosecution may seek death penalty based on aggravating prior felony convictions, against double-jeopardy challenge raised on other grounds).

//

Third, Petitioner faults the trial court's failure to instruct the jury on the required elements of the crime under Arizona law. (Pet. at 279.) The Court has rejected above the contention that the jury must be instructed on the elements of alleged crimes used as factors in aggravation. (*See supra* p. 95.)

Fourth, Petitioner argues that "permitting the jury to determine whether Mr. Cain had committed any crime in the alleged assault on Perez violated Mr. Cain's right to a trial by an impartial jury . . . ." (Pet. at 279.) Petitioner asserts that the jury could not be impartial after convicting him of two capital murders and being urged by the prosecutor to conclude that he committed the assault as part of a pattern of violent behavior. (*Id.*) As discussed above, Petitioner's jury was not tasked with adjudicating his conviction or sentence for the Arizona crime, and thus could not have denied him any fair trial rights in those proceedings. The California Supreme Court's conclusion that Petitioner's jury was permitted to consider the incident at the penalty phase is not objectively unreasonable.

Fifth, Petitioner argues that the use of the juvenile incident in aggravation deprived him of a fair and reliable sentencing determination, because "a fight with a guard at a juvenile detention facility nine years earlier, when Mr. Cain was only sixteen years old, is a totally unreliable indication that death is the proper penalty." (Pet. at 280-81.) Petitioner points to no clearly established federal law holding that the consideration of juvenile offenses or offenses committed years before the capital crime renders the penalty determination unreliable. *See Cox v. Ayers*, 613

F.3d 883, 889 (9th Cir. 2010) (affirming denial of capital habeas relief where the "prosecutor presented aggravating factors in the form of evidence about two robberies in which Petitioner had participated as a juvenile"); *Strouth v. Colson*, 680 F.3d 596, 605 (6th Cir. 2012) (holding that any error in consideration of juvenile record at penalty phase "was one of state evidence law" and did not introduce factors irrelevant to the sentencing process or preclude a fundamentally fair trial); *Peterson v. Murray*, 904 F.2d 882, 885-86 (4th Cir. 1990) (recognizing that Virginia law permits consideration of juvenile offenses at penalty phase and finding no basis for habeas relief, where juvenile offenses began nine years before capital crime (*see Peterson v. Commonwealth*, 225 Va. 289, 298, 300 (1983))).

Claim 15(4) is, therefore, DENIED.

XXXIII. Claim 16: Ineffective Assistance of Appellate Counsel

In Claim 16, Petitioner alleges that his appellate counsel provided ineffective assistance by failing to present the following claims "to the California Supreme Court on direct appeal or in other post-conviction proceedings:"

> a. The failure of the investigating agents and prosecutors to investigate, obtain, and provide to Mr. Cain all of the exculpatory evidence relating to the liability and attendant credibility of witness Uly Mendoza.
>
> b. The available challenges to the taped statement given by Mr. Cain to the police.
>
> c. The deprivations of constitutional rights in the charging practices under which Mr. Cain was capitally charged.
>
> d. The direct and irreconcilable conflict of for [sic] Mr. Cain, due to his status as a partner in CDA and the fact that CDA also represented Mr. Cain's codefendant, Cerda.
>
> e. The direct and irreconcilable conflict of the only mental health professional retained to of [sic] Mr. Cain's

> defense team.
>
> f. [Within] the issue [raised] of trial counsel's prejudicial admissions and characterizations, . . . not[ing] each of the admissions and characterizations readily apparent in the trial record . . . [and] counsel's characterizations of the crime during voir dire . . . .
>
> g. [Within] the issue [raised] of the improper photographs, . . . not[ing] the admission of additional such photographs, including those of the crime scene (Prosecution Exhibits 53-61, Exhibits 130-137), and perhaps even more critically, the admission of the four pictures in which Mr. Cain was forced to pose half-nude (Prosecution Exhibits 29-32, Exhibits 123-126), even though these photographs had no evidentiary value . . . [and arguing] the presentation of those photographs and the blatant appeal to the passions and emotions of the jury in the prosecution's arguments regarding the photographs [as] prosecutorial misconduct.
>
> h. . . . [T]he extensive ineffective conduct, occurring at critical stages of both the guilt and penalty phase of the trial, constitut[ing] abandonment of Mr. Cain.

(Pet. at 292-94.)

The Court has held that the California Supreme Court's determination that claims (a), (b), (c) in part, (d), (e), (f), (g), and (h) lacked merit was not objectively unreasonable. (*See* March 2011 Order at 8-15 and 17-21, February 2012 Order at 23-24 (claim (a)); March 2011 Order at 101-03 (claim (b)); *supra* pp. 3-6 (claim (c) in part); March 2011 Order at 42-44 (claims (d) and (e)); March 2011 Order at 82-86 (claim (f)); *supra* pp. 6-10 (claim (g)); *infra* pp. 121-23 (claim (h)).) Because the California Supreme Court reasonably determined that the claims lack merit, Petitioner cannot demonstrate prejudice from appellate counsel's failure to raise them. In addition, as to Petitioner's allegation in claim (f) that prior counsel "failed to note each of the admissions and characterizations readily apparent in the trial record," Petitioner likewise fails now to identify the allegedly unspecified

statements. Petitioner's conclusory allegation does not demonstrate prejudice, and the California Supreme Court reasonably denied it.

The Court held that the remaining portions of claim (c) were conclusory and lacked support in clearly established federal law. (*See supra* pp. 58-60.) Petitioner's conclusory allegation that prior counsel was ineffective fares no better than his underlying, conclusory claims. *See Greenway*, 653 F.3d at 804; *Jones*, 66 F.3d at 205; *James*, 24 F.3d at 26. As to those claims that lack support in clearly established federal law, the California Supreme Court on direct appeal denied the claims under state law, *see Cain*, 10 Cal. 4th at 82-83, and Petitioner has not shown that denial to be based on an unreasonable determination of the facts. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *McGuire*, 502 U.S. at 67-68. This Court, therefore, has no basis to find prejudice from counsel's failure to present the claims in any post-conviction proceedings.

Claim 16 is, therefore, DENIED.

XXXIV. Claim 17: Deprivations of Due Process in Appellate and Habeas Proceedings

A. Ineffective Assistance of Counsel

In Claim 17(1), Petitioner realleges his ineffective assistance of counsel argument "as set forth in the previous claim for relief." (Pet. at 295.) The Court denied Claim 16 above. Claim 17(1) is DENIED.

B. Death Penalty Review Process

In Claim 17(2), Petitioner alleges that his claims on direct appeal and on habeas review, like those of others since 1987, received "cursory treatment" that denied him "meaningful appellate review . . . ." (*Id.* at 295, 298.) Petitioner contends that "[t]he abdication by the California Supreme Court of its responsibilities renders both the death judgment in this case invalid and casts substantial suspicion over an entire category of capital affirmance by the court."

(*Id.* at 297.)

There is a "general presumption that judges are unbiased and honest." *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Nothing in Petitioner's argument regarding "the internal decision-making of the California Supreme Court" suffices to overcome that general presumption. (Pet. at 297.) Petitioner fails to allege with specificity any support in the record of his own case to demonstrate judicial bias. Further, while Petitioner notes that a 1986 retention election in which three justices of the California Supreme Court were removed from the bench "demarcates [a] dramatic shift" in capital affirmance rates (*id.* at 295), Petitioner has not demonstrated that the justices who considered his case were in any manner influenced by a fear of future challenge and removal. Finally, although Petitioner asserts that the "striking turnabout in the California Supreme Court affirmance rate is indicative of a qualitative change in the capital decision-making process" and, statistically, cannot be explained as a product of random variation (*see id.* at 296-97), he makes no specific allegation in Claim 17 of any observable impact on his own appellate or habeas proceedings.

Because Petitioner has failed to demonstrate that the California Supreme Court's rejection of his claim was objectively unreasonable, he is not entitled to habeas relief on this basis. Claim 17(2) is DENIED.

XXXV. Claim 19(5): Constitutionality of Death Penalty Statute

In Claim 19(5), Petitioner raises a variety of challenges to the constitutionality of California's 1978 death penalty statute, California Penal Code §§ 190 *et seq.* (Pet. at 308-20.)

First, Petitioner argues that the California death penalty statute is unconstitutional because it "fails to adequately narrow the class of individuals eligible for the death penalty and creates a substantial likelihood that the death penalty will be imposed in capricious and arbitrary fashion." (*Id.* at 308 (footnote

omitted).) Petitioner's claim lacks support in clearly established federal law. *Cf. Bradway v. Cate*, 588 F.3d 990, 992 (9th Cir. 2009) (rejecting petitioner's challenge to special circumstance in 1978 statute and observing that the Supreme Court has not decided any "case that could reasonably support [petitioner's] due process claim of unconstitutional vagueness based on a failure to narrow the class").

Second, Petitioner asserts that the California death penalty statute "sets forth unconstitutionally vague aggravating circumstances," including factor (a), the "circumstances of the crime." (Pet. at 312.) Petitioner acknowledges that factor (a) "has survived a facial [Eighth] Amendment challenge, *Tuilaepa v. California*, 512 U.S. 967" (Pet. at 313), but contends that it is nevertheless unconstitutionally applied because the circumstances of the crime may be aggravating "based on squarely conflicting circumstances." (*Id.* at 315.) Petitioner argues that the age of the victim, for example, may be an aggravating circumstance regardless of whether the victim is young, middle-aged, or elderly. (*Id.*)

The Supreme Court held in *Tuilaepa* that:

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

512 U.S. at 976 (internal citation omitted). The Court rejected petitioners' challenge to the "equivocal" nature of the jury's consideration of the defendant's

age at the time of the crime, holding that "[i]t is neither surprising nor remarkable that the relevance of the defendant's age can pose a dilemma for the sentencer." *Id.* at 977. The age of the victim may pose a similar dilemma for the jury, "[b]ut difficulty in application is not equivalent to vagueness." *Id.* Petitioner's arguments lack support in clearly established federal law.

Third, Petitioner argues that the California death penalty statute is unconstitutional because it "provides for a death sentence which is *de facto* unreviewable" by failing "to require the jury to make written findings or any record of the grounds for its decision to impose death . . . ." (Pet. at 317.) The California Supreme Court may have reasonably concluded, as the Ninth Circuit concluded in reviewing the 1977 statute, that its "statute ensures meaningful appellate review, and need not require written jury findings in order to be constitutional." *Williams*, 52 F.3d at 1484-85 (internal citation omitted).

Fourth, Petitioner argues that the California death penalty statute is unconstitutional because it fails to require "that all aggravating factors be proved beyond a reasonable doubt, that aggravation be proved to outweigh mitigation beyond a reasonable doubt, and that death must be found to be the appropriate penalty beyond a reasonable doubt . . . ." (Pet. at 318.) The California Supreme Court may have reasonably concluded that "the failure of the statute to require a specific finding that death is beyond a reasonable doubt the appropriate penalty does not render it unconstitutional." *Williams*, 52 F.3d at 1485; *see also supra* pp. 63-65 (holding that California Supreme Court may have reasonably concluded that Petitioner has no constitutional right to an instruction that aggravating factors must be proven beyond a reasonable doubt).

Fifth, Petitioner asserts that the California death penalty statute is unconstitutional because it "allows for the introduction of evidence of facts and circumstances underlying prior convictions to be introduced as aggravating factors . . . ." (Pet. at 318.) The California Supreme Court may have reasonably

concluded, as has the Ninth Circuit, that "the introduction, during the penalty phase, of the facts underlying [a] prior conviction . . . does not necessarily violate a federal defendant's rights under the Eighth or Fourteenth Amendments or render a death sentence unreliable." *McDowell*, 107 F.3d at 1366; *cf. Rompilla v. Beard*, 545 U.S. 374, 383-86, 386 n.5 (2005) (finding ineffective assistance where counsel failed to examine petitioner's prior conviction file despite awareness that prosecutor intended to introduce facts underlying the conviction).

Sixth, Petitioner contends that the California death penalty statute is unconstitutional because it "allows for unfettered prosecutorial discretion in its imposition." (Pet. at 319.) The argument that a "capital punishment statute is unconstitutional because it vests unbridled discretion in the prosecutor to decide when to seek the death penalty . . . has been explicitly rejected by the Supreme Court." *Campbell v. Kincheloe*, 829 F.2d 1453, 1465 (9th Cir. 1987) (citing *Gregg*, 428 U.S. at 199; *Proffitt v. Florida*, 428 U.S. 242, 254 (1976); *Jurek v. Texas*, 428 U.S. 262, 274 (1976)). Petitioner's argument lacks support in clearly established federal law.

Claim 19(5) is, therefore, DENIED.

XXXVI. Claim 20: Mental Retardation and Mental Impairments

A. Allegations and Legal Standard

In Claim 20, Petitioner contends that his execution would violate the Eighth Amendment as interpreted in *Atkins v. Virginia*, 536 U.S. 304 (2002), because of his "retardation and severe mental impairments." (Pet. at 320.)

Petitioner raised his *Atkins* claim to the California Supreme Court in a habeas petition filed June 18, 2003. (*In re Cain*, No. S116805.) Petitioner acknowledges that the California Supreme Court issued an order to show cause on his claim of mental retardation, and the Ventura County Superior Court held an evidentiary hearing from January 23 to 25, 2007. (Pet. at 31; Petr.'s Br. at 3.) The Superior Court judge issued a written opinion finding that Petitioner failed to prove

that he was mentally retarded, and the California Supreme Court summarily denied the petition. (*See* Lodged Doc. E-2, vol. 2, at 876-91; Lodged Doc. E-6 (denying habeas petition in *In re Cain*, No. S152288, challenging the Ventura County Superior Court decision); Lodged Doc. D-9.) Petitioner makes no allegations that the state procedure he was afforded was inadequate.

"Construing and applying the Eighth Amendment in light of our evolving standards of decency," the United States Supreme Court in *Atkins* concluded that "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. at 321 (internal quotation omitted). "To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* at 317. In keeping with the Court's direction in *Atkins*, states have "adopt[ed] their own measures for adjudicating claims of mental retardation." *Schriro v. Smith*, 546 U.S. 6, 7 (2005).

Thus, whether a petitioner is mentally retarded is a factual determination made pursuant to state law and entitled to deference on federal habeas review. *See Moormann v. Schriro*, 672 F.3d 644, 648-49 (9th Cir. 2012). 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." *Hibbler v. Benedetti*, 693 F.3d 1140, 1146-47 (9th Cir. 2012) (internal quotation omitted).

In California, to establish mental retardation within the scope of *Atkins*, a petitioner must prove by a preponderance of the evidence that he has "'the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.'" *In re Hawthorne*, 35 Cal. 4th 40, 47, 50 (2005) (quoting Cal. Penal Code

§ 1376(a)). "[T]he California Legislature has chosen not to include a numerical IQ score as part of the definition of mentally retarded," and the California Supreme Court has declined to "adopt an IQ of 70 as the upper limit for making a prima facie showing. . . . [S]ignificantly subaverage intellectual functioning may be established by means other than IQ testing. Experts also agree that an IQ score below 70 may be anomalous to an individual's intellectual functioning and not indicative of mental impairment." *Id.* at 48.

B. Analysis

At the evidentiary hearing before the Ventura County Superior Court, the parties presented the interview videotape (*see* Pet. Ex. 176) and testimony from news reporter Larry Good and the interview by Detectives Tatum and Garcia (*see* Pet. Ex. 177). Petitioner presented expert testimony from Ricardo Weinstein, Ph.D., and Respondent presented expert testimony from Efrain Beliz, Jr., Ph.D. The Superior Court found that "Dr. Weinstein's testimony in this matter suffers from a number of infirmities." (Lodged Doc. E-2, vol. 2, at 883.) The court found that "Dr. Beliz provided the only credible expert opinion evidence in this matter." (*Id.*, vol. 2, at 887.)

The court made factual findings, supported by the record, that Dr. Weinstein's declaration omitted significant information, including tests and conclusions by Robert Goldsworthy (*see id.*, vol. 1, at 004-11, 108-09; *id.*, vol. 2, at 686, 884); his methodology in relying upon witnesses' recollections of Petitioner's unremarkable daily behaviors from many years ago to assess Petitioner's adaptive behaviors, using the ABAS-II, was not persuasive, and was subject to the witnesses' bias from their awareness of the implications of their responses (*see id.*, vol. 2, at 585-86, 608-13, 622-24, 627, 719-20, 722, 884); his scoring of the responses in the ABAS-II was "misleadingly simplistic" for failing to account for Petitioner's lack of freedom to perform certain behaviors while housed in reform school (*see id.*, vol. 2, at 621-25, 885); he applied the five-point

subtraction from Petitioner's IQ score for the test's margin of error twice, rather than once, in testifying that Petitioner's already-corrected score of 72 was within the range of possible mental retardation (*id.*, vol. 2, at 588-90, 885); his logic in applying a correction to Petitioner's IQ scores for "the Flynn effect" was not persuasive (*id.*, vol. 2, at 544-45, 599, 671-73, 885); and he relied upon others' reports and conclusions without knowing the source of the others' information or their qualifications (*see id.*, vol. 2, at 604-06, 886).

Based on the testimony from Dr. Beliz, the court made further factual findings, supported by the record, that Petitioner's fluctuations in IQ scores do not support a conclusion that he is mentally retarded and that a mentally retarded person would not be able to achieve the higher scores Petitioner achieved (*see id.*, vol. 2, at 664-67, 670-71, 688-89, 887); Petitioner was able to engage in adult conversation during his interviews with Dr. Beliz (*see id.*, vol. 2, at 693, 696, 713, 720, 887); Petitioner did not show deficits in his ability to think, reason, and plan that would be found in someone who was mentally retarded (*see id.*, vol. 2, at 693, 887); Petitioner has average intelligence, compromised by limited formal education, an impoverished background, substance abuse, and truancy (*see id.*, vol. 2, at 887, 710); Petitioner's poor performance in school after the fourth grade may have been the product of a learning disability or a lack of motivation but the cause cannot now be determined (*see id.*, vol. 1, at 283-85; *id.*, vol. 2, at 887); Petitioner does not have special needs and does not have the deficits indicative of mental retardation (*see id.*, vol. 1, at 302; *id.*, vol. 2, at 887); Petitioner has moderately low to normal adaptive skills (*see id.*, vol. 1, at 300, 304; *id.*, vol. 2, at 887); and, as measured by Dr. Beliz's administration of the Vineland Adaptive Behavior Scales II test, there was no evidence of the impairments in communication, living, and socialization skills that must be present to support a finding that Petitioner is mentally retarded (*see id.*, vol. 2, at 710-18, 887).

Finally, the court made factual findings, supported by the record (*see* Pet.

Ex. 176), that Petitioner understood the nature of the news interview, interacted normally with the interviewer, gave responsive answers that were in his interests, and demonstrated no observable deficit in mental functioning. (*See* Lodged Doc. E-2, vol. 2, at 888.) The court also made factual findings, supported by the record (*see, e.g.*, Pet. Ex. 177 at 12-20, 24, 27-31, 33-34, 46), that during his police interview Petitioner yielded information only when it was to his advantage or when he was confronted with contradictory evidence, adapted his account to fit the facts presented to him, sought to learn what evidence the police possessed against him, and sought to cast doubt upon others' credibility. (*See* Lodged Doc. E-2, vol. 2, at 888-89.) The court concluded, based upon support in the record, that the police interview was inconsistent with the proposition that Petitioner is mentally retarded. (*See* Lodged Doc. E-2, vol. 2, at 889; Pet. Ex. 177.)

The record supports the factual findings of the Ventura County Superior Court. The California Supreme Court's denial of Petitioner's *Atkins* claim was not, therefore, an unreasonable determination of the facts. Claim 20 is DENIED.

XXXVII. Claims 1(10), 2(16), 2(18), 2(19), 9(7), 10(17), 10(18), 11(18), 12, 15(10), 15(11), and 18: Cumulative Errors

A. Cumulative Prosecutorial Misconduct

Petitioner challenges the cumulative effect of prosecutorial misconduct in the guilt phase of trial in Claim 1(10) (Pet. at 154) and at the penalty phase of trial in Claim 9(7) (*id.* at 227-28). In Claims 15(10) and 15(11), he asserts that this misconduct, and particularly the errors in the presentation of aggravating circumstances, violated his right to a reliable, non-arbitrary, and non-capricious sentence. (*Id.* at 291-92.)

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

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

The California Supreme Court may have reasonably determined that any prosecutorial misconduct in arguing to the jury, disclosing evidence, and presenting testimony, even when considered cumulatively, does not show a denial of due process or a reasonable probability of a different result absent the alleged misconduct. The court was not objectively unreasonable in concluding that any prosecutorial misconduct in, for example, arguing to the jury based upon the prosecutor's life experiences and Petitioner's alleged lack of remorse, failing to disclose Mendoza's criminal history, and presenting testimony from Bruce Woodling, M.D., Detective Stone, and Detective Tatum was harmless. Claims 1(10), 9(7), 15(10), and 15(11) are DENIED.

B. Cumulative Ineffective Assistance of Counsel and Abandonment

In Claim 2(16), Petitioner faults counsel for failing to object to "multiple instances of misconduct" by the prosecutor. (Pet. at 181.) The Court has held that any prosecutorial misconduct was harmless. Counsel's lack of objection to that potential misconduct fails to demonstrate a reasonable probability of a different result at trial. Claim 2(16) is, therefore, DENIED.

Petitioner challenges the cumulative effect of counsel's alleged ineffective assistance at the guilt phase of trial in Claim 2(18) (*id.* at 182), and at the penalty

phase of trial in Claim 10(17). (*Id.* at 240.) In Claim 2(19), Petitioner alleges that the "extensive failures of defense counsel during the entire trial go beyond ineffectiveness and rise to the level of actual abandonment by counsel." (*Id.* at 182.) Likewise, in Claim 12, Petitioner claims abandonment of counsel from counsel's alleged ineffectiveness during both phases of trial "compounded by counsel's conflict of interest." (*Id.* at 266.) In Claim 10(18), he alleges abandonment during the penalty phase alone. (*Id.* at 240.)

So long as counsel does not "'entirely fail[] to subject the prosecution's case to meaningful adversarial testing,'" counsel's performance is subject to analysis under the *Strickland* standard of error and prejudice. *Nixon*, 543 U.S. at 190 (quoting *Cronic*, 466 U.S. at 648). The United States Supreme Court concluded in *Nixon* that defense counsel who conceded defendant's guilt at the guilt phase of trial to attempt to avoid a capital sentence during penalty proceedings did not fail to function as the prosecution's adversary under *Cronic*. 543 U.S. at 187-92. The Court observed that despite counsel's concession, defendant "retained the rights accorded a defendant in a criminal trial. The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes . . . . Further, the defense reserved the right to cross-examine witnesses . . . and could endeavor, as [counsel] did, to exclude prejudicial evidence." *Id.* at 188 (internal citation omitted); *see also Bell v. Cone*, 535 U.S. 685, 696-98 (2002) (noting that "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete," and holding that counsel's alleged failure to present mitigating evidence and closing argument at capital sentencing proceeding should be considered under *Strickland*, not *Cronic*).

The California Supreme Court's determination that counsel subjected the prosecution's case to meaningful adversarial testing is not objectively unreasonable. Counsel cross-examined witnesses, *see, e.g.*, *Cain*, 10 Cal. 4th at 58,

75; (March 2011 Order at 35, 38, 60); moved to exclude allegedly prejudicial evidence, *see*, *e.g.*, *Cain*, 10 Cal. 4th at 31, 70; (March 2011 Order at 108 n.17, 112-14); emphasized in guilt phase argument that Petitioner's guilt must be proven beyond a reasonable doubt (*see* March 2011 Order at 45); presented mitigating evidence, *see*, *e.g.*, *Cain*, 10 Cal. 4th at 58-59; and asked the jury in penalty phase argument to spare Petitioner's life. (*See* March 2011 Order at 45-46.) As the Court has held, the California Supreme Court's determination that counsel did not suffer from a conflict of interest is not objectively unreasonable. (*See id.* at 42-44.) Claims 2(19), 10(18), and 12 are, therefore, DENIED.

In addition, considering the entirety of Petitioner's allegations of ineffective assistance of counsel cumulatively under *Strickland*, the Court finds that the California Supreme Court's determination that Petitioner was not prejudiced by any deficient performance was not objectively unreasonable. The California Supreme Court was not objectively unreasonable in concluding that any ineffective assistance in failing, for example, to object to photographs, to contest the hair identification testimony, to make additional argument in objection to the Arizona conviction, to challenge the attempted rape special circumstance and testimony from Dr. Woodling, to request an instruction against "double counting," and to investigate and present evidence regarding Cerda's presence, Mendoza's criminal history, Petitioner's mental state and mental health, employment and life history, lack of leadership capacity, and lack of premeditation, was harmless. Claims 2(18) and 10(17) are DENIED.

C. Cumulative Error

In Claim 11(18), Petitioner alleges within his due process and equal protection claims that "[g]iven the cumulative impact of th[e] multiplicity of errors in the presentation of penalty phase, the jury's recommendation to impose the death penalty cannot meet the special need for reliability in a capital murder conviction." (Pet. at 266.) In Claim 18, Petitioner alleges cumulative error as a

whole. (*Id.* at 298-99.)

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

Here, the California Supreme Court may have reasonably concluded that any prosecutorial misconduct and ineffective assistance, in addition to any errors, for example, in providing jury instructions on the definition of "attempt," on intoxication as a defense to attempted rape, on consideration of the prosecution of others involved in the crime, and on implied malice, considered cumulatively, were harmless. *Cf. Cain*, 10 Cal. 4th at 82 (finding no cumulative error based upon the "few isolated instances of error" found on direct appeal). Claims 11(18) and 18 are, therefore, DENIED.

ORDER

For the reasons set forth above, Petitioner is not entitled to federal habeas

relief. The Court hereby DENIES the Third Amended Petition for Writ of Habeas Corpus with prejudice. Claims 8(4) and 8(5) are DISMISSED WITHOUT PREJUDICE.

Pursuant to 28 U.S.C. § 2253(c)(2), the Court ISSUES a Certificate of Appealability as to Claims 1(6) and 3(7) regarding the constitutional adequacy of Petitioner's notice of the attempted rape special circumstance charge.

IT IS SO ORDERED.

Dated: July 2, 2013.

AUDREY B. COLLINS
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TRACY DEARL CAIN, Petitioner, v. MICHAEL MARTEL, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 96-2584 ABC **DEATH PENALTY CASE** ORDER DENYING EVIDENTIARY HEARING AND DENYING RELIEF ON CLAIMS 1(1), 1(2), 2(1), 2(11), 2(12), 2(17), 10(6), 10(9), 10(10), 10(11), 10(13), AND 10(14)

On March 14, 2011, the Court issued an order granting in part and denying in part Petitioner's motion for evidentiary hearing. (Order Granting in Part and Denying in Part Motion for Evidentiary Hearing, Mar. 14, 2011 ("Mar. 14 Order").) Shortly thereafter, on April 4, 2011, the Supreme Court issued its decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). The Supreme Court held in *Pinholster* that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398. The Court was also clear that the statutory language of § 2254(d)(2) similarly limits the federal court's review under that subsection to the state court record. *See id.* at 1400 n.7.

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On April 11, 2011, the Court vacated those portions of its March 14, 2011 Order granting an evidentiary hearing on Petitioner's claims. The Court Ordered the parties to brief Petitioner's entitlement to an evidentiary hearing in view of *Pinholster*. (Minute Order, Apr. 11, 2011.)

For the reasons set forth below, the Court denies an evidentiary hearing and relief on Claims 1(1), 1(2), 2(1), 2(11), 2(12), 2(17), 10(6), 10(9), 10(10), 10(11), 10(13), 10(14), and denies an evidentiary hearing on Claims 2(18), 8(3)(A), 10(17), 10(18), and 18.

I. Petitioner's Entitlement to an Evidentiary Hearing

Petitioner makes three central arguments to support his entitlement to an evidentiary hearing following *Pinholster*: (a) *Pinholster* does not apply to Petitioner's case, because *Pinholster* concerned § 2254(d)(1), and this Court held that Petitioner satisfied § 2254(d)(2) (Petr.'s Br. at 5-8); (b) section 2254(d)(2) is satisfied because the state court process was deficient (*id.* at 8-11); and (c) *Pinholster* applies only to decisions about whether to grant relief, not decisions about whether to grant an evidentiary hearing. (*Id.* at 2-4).

A. The Court's Reliance upon § 2254(d)(2)

Petitioner first attempts to distinguish *Pinholster* on the basis that "*Pinholster* involved an application of § 2254(d)(1). The areas this Court has identified as meriting a hearing all involve claims where the state court denial violates § 2254(d)(2). As such, *Pinholster* poses no restriction on this Court's ability to conduct an evidentiary hearing or to apply de novo review and grant relief." (Petr.'s Br. at 2.) Petitioner asserts that the Court has already held that he has satisfied § 2254(d)(2) on the basis of the state court record alone. (*Id.* at 2, 5-6.) He cites, for example, the Court's consideration of his claim that trial counsel provided ineffective assistance in investigating mitigating evidence at the penalty phase of trial. (Petr.'s Br. at 5 (citing Mar. 14 Order at 100).) As Petitioner recounts, the Court reviewed this claim and noted "areas that were not clear from

the record including 'to what extent counsel investigated Petitioner's life history and alleged mental impairments for the penalty phase of trial.' The Court then determined that '[b]ecause an evidentiary hearing is needed in order to resolve these factual questions, the California Supreme Court's decision summarily rejecting this claim was based on an unreasonable determination of the facts.'" (Petr.'s Br. at 5 (quoting Mar. 14 Order at 100 (citing *Earp v. Ornoski*, 431 F.3d 1158, 1166-67 (9th Cir. 2005))).)

The Court granted an evidentiary hearing where Petitioner's claims were heavily fact-dependent (*see, e.g.*, Mar. 14 Order at 16, 21, 37, 60, 100), and where the weight of the evidence was not apparent to this Court from the record. (*See, e.g.*, Mar. 14 Order at 16, 60, 64, 100, 105, 106, 109.)[1]

The United States Supreme Court made clear in *Harrington v. Richter*, however, that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." 131 S. Ct. 770, 786 (2011) (internal quotation omitted). "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision;" the court must not "overlook[] arguments that would otherwise justify the state court's result . . . ." *Id.* The court may not consider evidence beyond the state court record in making this determination. *See Pinholster*, 131 S. Ct. at 1398, 1400 n.7.

As discussed below, the California Supreme Court may have denied Petitioner's claims on the grounds that Petitioner failed to demonstrate the deficiency of counsel's performance, the withholding of information by the

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[1] In two instances, the Court granted an evidentiary hearing to resolve the credibility and/or weight of the evidence regarding allegedly false testimony given at trial. (*See* Mar. 14 Order at 25, 42.) As discussed below (*see infra* pp. 25-29), because the California Supreme Court may have reasonably determined that the testimony, even if falsified, was not material or prejudicial, an evidentiary hearing is not necessary to evaluate the credibility and weight of the evidence.

prosecution, the falsity of prosecution witnesses' testimony or the materiality of that testimony, or prejudice following from those sources. (*See infra* § II.) Because those "arguments or theories . . . could have supported [] the state court's decision," Petitioner has failed to satisfy § 2254(d), *Richter*, 131 S. Ct. at 786, and is not entitled to an evidentiary hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate"); *see also Pinholster*, 131 S. Ct. at 1399 ("In practical effect, . . . when the state-court record 'precludes habeas relief' under the limitations of § 2254(d), a district court is 'not required to hold an evidentiary hearing'" (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007))).

B. Deficiency of the State Court Process under § 2254(d)(2)

1. Prima Facie Case for Relief

Petitioner also argues that because each of his claims states a prima facie case for relief[2] on the basis of the state court record, the California Supreme

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[2] The California Supreme Court, upon receiving a habeas petition:

> evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC [order to show cause]. . . . Issuance of an OSC, therefore, indicates the issuing court's preliminary assessment that the petitioner would be entitled to relief if his factual allegations are proved.

California v. Duvall, 9 Cal. 4th 464, 474-75 (1995) (internal quotation, citations, and emphasis omitted); *see also Pinholster*, 131 S. Ct. at 1402 n.12 ("Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that the claims made in the petition

(continued...)

Court's denial of the claim must necessarily have involved either an unreasonable application of law or an unreasonable determination of the facts. Petitioner contends that:

> if this Court finds, as it has, that Petitioner has alleged facts that, if proven, entitle him to relief, and the state court found that Cain failed to state a prima facie case for relief while allegedly assuming those facts to be true, then the state court either: (1) unreasonably applied clearly established law in recognizing those facts, but denying relief; or (2) unreasonably determined those facts.

(Reply at 6 (footnote omitted).) Specifically, Petitioner asserts that the denial of his claims "despite Cain's presentation of facts and evidence establishing a prima facie case for relief constitutes an unreasonable determination of the facts under § 2254(d)(2)." (Petr.'s Br. at 11 n.4 (citing, *inter alia*, *Nunes v. Mueller*, 350 F.3d 1045, 1050 (9th Cir. 2003)).)

The Ninth Circuit held in *Nunes* that the state court's denial of petitioner's claim of ineffective assistance of counsel was unreasonable under both § 2254(d)(1) and § 2254(d)(2). The Circuit held that the California Supreme Court's decision was an unreasonable application of federal law under § 2254(d)(1) because "Nunes clearly made out a prima facie case of ineffective assistance of counsel . . . [w]ith Nunes' claims being taken at face value as the state court claimed it had done . . . ." *Id.* Similarly, the Circuit found an unreasonable determination of the facts under § 2254(d)(2), because the California Supreme Court's "assessment of the evidence went well beyond its self-assigned task of

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[2] (...continued)
do not state a prima facie case entitling the petitioner to relief. It appears that the court generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations, and will also review the record of the trial . . . to assess the merits of the petitioner's claims" (internal quotation and citations omitted)).

assessing Nunes' allegations for sufficiency . . . ." *Id.* at 1055. The California Supreme Court "found that materials Nunes included in the record that showed his counsel's delinquency were 'of dubious relevance' and rejected as 'simply not credible' Nunes' claim that he could not reach his attorney to clarify" the plea offer counsel inaccurately communicated to him. 350 F.3d at 1053-54. The Ninth Circuit was careful to note, however, that "there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved . . . ." *Id.*

Here, the California Supreme Court may have reasonably determined that Cain's allegations, unlike Nunes', would not justify relief even if proved. As noted above (and discussed below), it is unclear from the state court record whether counsel's performance was deficient, whether the prosecution withheld information or presented false and material testimony, and whether Petitioner suffered prejudice from any such errors. Petitioner, as a result, did not "clearly ma[k]e out a prima facie case" for relief before the state court. *Nunes*, 350 F.3d at 1054; *cf. Pinholster*, 131 S. Ct. at 1402 n.12 (observing that the California Supreme Court "generally assumes the allegations in the petition to be true, but does not accept wholly conclusory allegations, and . . . review[s] the record of the trial to assess the merits of the petitioner's claims" (internal quotations, citations, and alterations omitted)). The California Supreme Court's denial of his claims was, therefore, not an unreasonable determination of the facts under § 2254(d)(2).

2. Inadequate Fact-Finding Process

Petitioner further argues that *Pinholster* "does not apply to this case" in part because the state court record was more developed in *Pinholster* than it is here. (Petr.'s Br. at 7-11.)

The California Supreme Court in *Pinholster* issued an order to show cause why relief should not be granted, and the parties filed a return and a traverse. *See*

Docket, *In re Pinholster*, Case No. S034501. The California Supreme Court then vacated the order to show cause as improvidently issued and denied the petition. *Id.*; *see also* Brief of Respondent [Pinholster] in Opposition to the Petition for Writ of Certiorari, *Cullen v. Pinholster*, 2010 WL 4148534, May 12, 2010 ("*Pinholster* Opp. to Cert."), at *31 ("The California Supreme Court held no hearing, originally issued an OSC and then withdrew it for unknown reasons, and finally issued a post-card denial of the petition").

Petitioner asserts that while the more developed "process afforded to Pinholster might be considered adequate, the minimal process afforded to Cain is not entitled to deference under § 2254(d). The Supreme Court has previously ruled that a federal court should not defer to a fact-finding process that was not adequate for reaching 'reasonably correct results' or appeared 'seriously inadequate' for ascertaining truth. *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007)." (Petr.'s Br. at 10.) Petitioner adds in his Reply that he is entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293, 313 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992), because "the material facts were not adequately developed at the state-court hearing." *Townsend*, 372 U.S. at 313; (*see* Petr.'s Reply to Respt.'s Supp. Br. Addressing Petr.'s Entitlement to an Evid. Hr'g in View of *Cullen v. Pinholster* ("Reply") at 4-5). Petitioner argues that where "'the material facts [are] not adequately developed at the state-court hearing,' [that] result[s] in an unreasonable finding of fact under § 2254(d)(2)." (Reply at 4-5 (quoting *Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir. 2010) (quoting *Townsend*); and citing *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005)).) Petitioner contends that § 2254(d)(2) is satisfied with a showing of "the state court's 'defective fact-finding process.'" (Reply at 5 (quoting *Hurles v. Ryan*, 650 F.3d 1301, 1312-13 (9th Cir. 2011).)

The Supreme Court's holding in *Panetti*, that the state court "failed to provide petitioner with a constitutionally adequate opportunity to be heard," was

limited to "the measures a State must provide when a prisoner alleges incompetency to be executed" as identified in *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986). *Panetti*, 551 U.S. at 948, 950, 952 (noting that petitioner must make a "substantial threshold showing of insanity" (internal quotation omitted)). Petitioner cites no authority to suggest that *Panetti* should be applied more broadly. There is similarly no suggestion in *Pinholster* that a petitioner's lack of evidentiary hearing before the state court could run afoul of *Townsend*. Although Pinholster had received no hearing on his penalty-phase ineffective assistance claim, the Court held that the district court could not rely upon evidence it developed at its own evidentiary hearing when applying § 2254(d). *See Pinholster*, 131 S. Ct. at 1398, 1400 n.7. The Court noted that AEDPA's provisions (in § 2254(e)(2) in particular) should be "interpreted in a way that does not preclude a state prisoner, who was diligent in state habeas court *and who can satisfy § 2254(d)*, from receiving an evidentiary hearing." *Id.* at 1400 n.5 (emphasis added).

In *Hurles v. Ryan*, decided after *Pinholster*, the Ninth Circuit held that the state fact-finding process was fundamentally flawed where the post-conviction relief judge, who also presided over petitioner's trial, denied petitioner's claim that she was biased based upon her own memories and factual assertions. 650 F.3d 1301, 1309, 1311-13 (9th Cir. 2011). At the time of Hurles's trial proceedings, the judge denied Hurles's application for second counsel to defend his capital prosecution, and Hurles sought relief from the court of appeals in a special action. *Id.* at 1305. The trial judge appeared in the special action and filed a responsive pleading defending her ruling, which expressed her views that the state had assembled overwhelming evidence of guilt and that the case was "simple and straightforward." *Id.* at 1305-06. The court of appeals found the judge's response improper and held that her participation "violated the 'essential [principle] to impartial adjudication' that judges must have 'no personal stake – and surely no justiciable stake – in whether they are ultimately affirmed or reversed.'" *Id.* at

1306 (quoting *Hurles v. Superior Court*, 174 Ariz. 331 (Ariz. Ct. App. 1993)). The judge nevertheless proceeded to preside over Hurles's trial and post-conviction petitions. *Id.* at 1306, 1311. The Ninth Circuit held that "[t]his case presents an especially compelling example of a defective fact-finding process [under § 2254(d)(2)], where the facts 'found' by Judge Hilliard involved her own conduct and her 'findings' were based on her own untested memory and assertions." *Id.* at 1312-13.

More recently, in *Woods v. Sinclair*, the Ninth Circuit considered a petitioner's argument that the California Supreme Court "wrongfully denied him an evidentiary hearing to develop [his] claim" that the prosecution withheld exculpatory material regarding its DNA testing practices. 655 F.3d 886, 903 (9th Cir. 2011). The Circuit "construe[d] his argument as a claim that the state court's factfinding process was flawed and was therefore an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2)." *Id.* The circuit court observed that "[a] state court's factfinding process is unreasonable under § 2254(d)(2) only when we are 'satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's factfinding process was adequate,'" *id.* (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)), and concluded that:

> there was no defect in the state supreme court's factfinding process. Although it might have been prudent to provide Woods with the opportunity to develop the facts underlying this aspect of his *Brady* claim, the state court's decision to deny him a hearing . . . was not unreasonable . . . when all [petitioner] could offer was speculation that an evidentiary hearing might produce testimony or other evidence inconsistent with [the] declarations [he submitted].

Id.

In Petitioner's case, the resolution of factual issues was not critical to the

California Supreme Court's denial of his claims, because even accepting Petitioner's allegations as true, the California Supreme Court could reasonably have determined that Petitioner failed to show that counsel's performance was deficient, that the prosecution withheld information or presented false and material testimony, or that Petitioner suffered prejudice as a result of any such errors. Consequently, the California Supreme Court need not have made any determinations of material facts, as the post-conviction relief court did in *Hurles*, to deny Petitioner's claims. *Cf. Hurles*, 650 F.3d at 1312-13. The California Supreme Court's summary denial does not, therefore, constitute a flawed fact-finding process unreasonable under § 2254(d)(2).

C. *Pinholster*'s Application to Evidentiary Hearing Standards

Finally, Petitioner asserts that "*Pinholster* does not affect the evidentiary hearing standards, . . . [and] the law is entirely unchanged with respect to whether to grant an evidentiary hearing . . . ." (Petr.'s Br. at 2, 4 (capitalization edited).) Petitioner argues that:

> [n]either *Landrigan* [nor] *Pinholster*, nor any other Supreme Court decision, . . . holds that a court must decide whether a petitioner has met his burden under § 2254(d) prior to granting a hearing. In fact, in *Wellons v. Hall*, 130 S. Ct. 727, 730 (2010), the Supreme Court explained that the decision to grant an evidentiary hearing is analytically distinct from the decision to grant relief. . . . [T]he Supreme Court in *Pinholster* made no ruling as to whether Pinholster's evidentiary hearing held in the district court was improper.

(Petr.'s Br. at 3-4 (citations edited).)

Petitioner is correct that the Court in *Pinholster* noted that it "need not decide . . . whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied." 131 S. Ct. at 1411 n.20. Even if the Court might not err by conducting a hearing before finding § 2254(d) to

be satisfied, however, the Court does have the discretion to require Petitioner to demonstrate his satisfaction of § 2254(d) without first holding an evidentiary hearing. *See id.* at 1399 ("[W]hen the state-court record precludes habeas relief under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing" (internal quotation omitted)); *see also id.* (citing, as "consistent . . . with [its] holding," *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate")).

The Ninth Circuit has considered the decision in *Pinholster* to have significant implications for a petitioner's entitlement to an evidentiary hearing. The Ninth Circuit held in *Stokley v. Ryan* that *Pinholster*'s application would "foreclose[] the possibility of a federal evidentiary hearing" for a petitioner to present evidence beyond the state court record. 659 F.3d 802, 809 (9th Cir. 2011). The petitioner in *Stokley* moved for an evidentiary hearing on a claim of ineffective assistance of counsel. In support of his motion, Stokley introduced declarations from four medical experts. The district court denied his motion for evidentiary hearing and denied the claim, and Stokley appealed.

In supplemental briefing to the circuit court following the decision in *Pinholster*, the state argued "that *Pinholster* applies to preclude consideration of the declarations Stokley supplied for the first time in federal court." *Id.* at 807. Stokley took a different approach, arguing that his federal claim was "fundamentally new and different from the ineffective assistance claim presented to the state courts in his supplemental petition." *Id.* The court noted that "[i]f accepted, Stokley's argument would mean that *Pinholster* does not apply to his federal claim." *Id.*

The court held that it need not resolve whether Stokley's claim was, indeed, a new claim, because Stokley was not entitled to relief on the merits in any event.

Id. Notably, however, the court observed that "if *Pinholster* applies, it directly bars Stokley from receiving the only relief he seeks – a hearing to present new evidence in federal court." *Id.* The court emphasized that "*Pinholster*'s limitation on the consideration of Stokley's new evidence" from the medical experts "*forecloses the possibility of a federal evidentiary hearing*, the only relief Stokley currently seeks." *Id.* at 809 (emphasis added).

Here, Petitioner has made no argument that his federal claims are fundamentally different from those he presented to the state court. The Court, therefore, is not required to hold an evidentiary hearing, because Petitioner has not satisfied § 2254(d) on the basis of the state court record.

II. Petitioner's Entitlement to Relief [3]

A. Hair Comparison Evidence: Claims 1(2) and 2(11)

In its March 2011 Order, the Court held that an evidentiary hearing was:

> necessary to resolve the 'heavily fact-dependent' issues of (1) whether the prosecution presented false testimony or withheld evidence regarding [expert witness Edwin] Jones' qualifications and the electrophoresis [hair] testing he performed; (2) whether defense counsel adequately investigated and challenged Jones' qualifications and his electrophoresis testing; and, more generally, (3) whether defense counsel adequately consulted with an independent hair analysis expert.

(Mar. 14 Order at 37 (quoting *Earp*, 431 F.3d at 1173, 1176).) The Court explained that:

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[3] Petitioner requests that, if the Court does not reinstate those portions of its prior order granting a hearing on certain claims, he be permitted to file an amended motion for evidentiary hearing "addressing in further detail his entitlement to a hearing, and relief, on each claim previously raised." (Petr.'s Br. at 2; *see also id.* at 7 n.1.) In light of the "arguments or theories . . . [that] could have supported [] the state court's decision" to deny Petitioner's claims, as set forth below, the Court does not find additional briefing necessary. *Richter*, 131 S. Ct. at 786.

> while the record suggests that trial counsel retained a defense criminalist, the scope of any expert assistance counsel obtained is unclear. Whether counsel could have challenged Jones' testimony that 'root sheath material will display the same enzyme types or the same electrophoretic patterns as from the individual['s] . . . blood' remains an open question. Similarly, whether trial counsel adequately investigated Jones' qualifications, and whether the prosecution withheld any information or presented any false testimony about Jones' qualifications or test results, would be clarified by a hearing.

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

Although the questions of whether the prosecution presented false testimony or withheld evidence and whether counsel performed an adequate investigation are "heavily fact-dependent," *Earp*, 431 F.3d at 1176, the California Supreme Court may reasonably have determined on the basis of the record before it that Petitioner's allegations did not show the falsity of Jones' testimony or the withholding of evidence, and did not show any inadequate investigation by counsel or any resulting prejudice. *Cf. Pinholster*, 131 S. Ct. at 1402 n.12 (observing that the California Supreme Court's "determination that the claims made in the petition do not state a prima facie case entitling the petitioner to relief . . . review[s] the record of the trial . . . to assess the merits of the petitioner's claims" (internal quotation and citations omitted)). As this Court held, the record suggested that trial counsel retained a defense criminalist. (Mar. 14 Order at 37.) This Court "must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance," and it was not clear from the record that counsel failed to adequately challenge Jones' qualifications or testimony. *Richter*, 131 S. Ct. at 787 (internal quotation omitted); *see also id.* at 788 ("The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard"). It was likewise not established in the state court record that the prosecution withheld any information or presented any

false testimony about Jones' qualifications or test results. The California Supreme Court could have reasonably denied Petitioner's claims on those grounds. Accordingly, Claims 1(2) and 2(11) are DENIED.

B. Counsel's Retention of Mental Health Expert Assistance and Investigation and Presentation of Petitioner's Background, Employment History, Mental Impairments, and Capacity to Premeditate and Deliberate: Claims 2(1), 10(6), 10(9), 10(10), 10(11), 10(13), and 10(14)

1. Claims 10(6) and 10(9) as to Lack of Remorse

In portions of Claims 10(6) and 10(9), Petitioner argues that counsel failed to present evidence that "would have allowed the jury to more accurately evaluate whether Cain's statements actually indicated a lack of remorse by an average 'reasonable' person, or whether they were simply the statements of a mentally and emotionally impaired individual who could not comprehensibly express remorse . . . ." (Mar. 14 Order at 104 (quoting Mot. at 22, Pet. at 233 ¶ 625).) The Court noted in its March Order that of the expert witnesses Petitioner sought to present, only the declaration of Dr. Zitner provided limited support for Petitioner's claim. (*Id.* at 104-05 ("While Drs. Jackman and Bronk Froming make no statements in their declarations directly bearing upon Petitioner's alleged lack of remorse, Dr. Zitner reports that Petitioner 'was provided with no moral rudder from which to decipher right from wrong'" (quoting Pet. Ex. 171 at 64 ¶ 117)).) The Court held that an evidentiary hearing was needed to clarify the nature and weight of that expert testimony. (*Id.* at 105.) The import of Dr. Zitner's testimony

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as to Petitioner's alleged remorselessness was, therefore, not apparent on the basis of the state court record.

Based on the indistinct significance of Dr. Zitner's statement, the California Supreme Court may have reasonably determined that Petitioner failed to demonstrate prejudice from any ineffective assistance of counsel on this issue. Dr.

Zitner's opinion that Petitioner was not provided with a "moral rudder" to "decipher right from wrong" does not necessarily bear upon his alleged lack of remorse; a person who committed an act he could not decipher as wrong could still express remorse for that act upon learning of its wrongfulness. In addition, the California Supreme Court could have reasonably determined that, in light of the evidence presented at the penalty phase of Petitioner's trial, Petitioner had not demonstrated a reasonable probability of a different outcome had the evidence from Dr. Zitner been presented.

Because, on the basis of the state court record alone, the Court cannot conclude that no "fairminded jurist[]"could find the state court's decision correct, *Richter*, 131 S. Ct. at 786 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision"), Claims 10(6) and 10(9) as to Petitioner's alleged lack of remorse are DENIED.

2. Claim 10(11) and Claim 2(1) Regarding Mental Health Expert Assistance

In Claims 10(11) and 2(1), Petitioner argues that, had trial counsel obtained appropriate mental health expert assistance, he would have identified and could have presented mitigating evidence of "longstanding mental health disabilities, including organic non-psychiatric deficits, psychiatric impairment, and symptoms of the overwhelming trauma he has experienced, which affect his behavior and functioning." (Mot. at 45.)

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This Court observed in its March 2011 Order that Dr. Donaldson, the expert retained by trial counsel:

> 'declares that it appears the scope of the referral question given to him was solely the existence of any mental state defenses at the guilt phase of the trial. Donaldson Decl. at ¶ 6. Dr. Donaldson also declares: "I believe that I was

> not informed at the time, nor was I aware until meeting present counsel, that Mr. Cain had been capitally charged." Donaldson Decl. at ¶ 7.'

(Mar. 14 Order at 106 (quoting Order re Petr.'s Outstanding Disc. Reqs., Sept. 24, 2002, at 24).) The Court observed that:

> Petitioner offers testimony from Dr. Karen Bronk Froming, who interviewed and tested Petitioner and reviewed evidence of his personal history, that Petitioner's intellectual performance is in the borderline retarded range and Petitioner has moderate brain impairment. ([Mot.] at 38-39 (citing Pet. Ex. 170).) Petitioner also offers testimony from Dr. Jay Jackman regarding Petitioner's significant psychiatric and neurologic dysfunction (*id.* at 39 (citing Pet. Ex. 169)), and from Dr. Zitner regarding Petitioner's extensive neurological impairments and cognitive deficits (*id.* (citing Pet. Ex. 171)).

(Mar. 14 Order at 97.) The Court held that, without an evidentiary hearing, it could not determine "the nature and weight of the evidence regarding whether counsel obtained appropriate mental health expert assistance and whether Petitioner was prejudiced by any deficiency." (*Id.* at 106.)

As noted above, under § 2254(d), this Court "must determine what arguments or theories . . . could have supported [] the state court's decision." *Richter*, 131 S. Ct. at 786. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* Following that deferential approach, it is conceivable that the California Supreme Court may reasonably have determined that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in presenting mitigating evidence from mental health experts.

As the California Supreme Court discussed in its order on Petitioner's direct

appeal, the prosecution introduced aggravating evidence of one prior felony conviction and three incidents of criminal activity involving the use of force or violence. *California v. Cain*, 10 Cal. 4th 1, 57 (1995). Petitioner was convicted of felony auto theft in Yuma County, Arizona, and served time in prison for that offense. *Id.* Previously, when Petitioner was an inmate in a Yuma County juvenile detention facility, he hit a control officer in the face and fought with him while other inmates tried to take the officer's keys. Petitioner broke the officer's nose and cheekbone and caused a wound above the officer's eye that required six stitches. *Id.* After his felony auto theft incarceration, Petitioner was involved in a fight with several other men, in which he hit a man's head twice with a rock approximately eight inches wide. *Id.* at 58. Petitioner struck the man in the back of the head, and as the man tried to get up, he struck him again in the eye. *Id.* Approximately one year later, and just one month before the instant murders, Petitioner was involved in an incident with a woman who had previously resided with him. *Id.* Petitioner saw the woman outside of a bar in a car with her boyfriend. He pulled her from the car and knocked down her boyfriend. He approached them a short time later as they were arriving at the man's mother's house, pulled a tire iron from his pants, and hit the woman in the head with it. Petitioner told the woman to get up and run, and as she did so, he followed her and kicked her from behind. The woman eventually lost consciousness and awoke in a hospital, where she heard Petitioner telling the police that her boyfriend had hit her with a shovel. *Id.*

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The California Supreme Court may reasonably have determined, in view of this aggravating evidence, that Petitioner had not demonstrated a reasonable probability of a different outcome at trial had counsel presented mitigating mental health expert testimony like that offered from Drs. Bronk Froming, Jackman, and Zitner. Because the state court may have reasonably held that Petitioner failed to

demonstrate prejudice from counsel's performance, Claims 10(11) and 2(1) regarding counsel's retention of mental health expert assistance are DENIED.

3. Claim 10(9) Regarding Petitioner's Employment Status

The Court granted an evidentiary hearing on Claim 10(9), in which Petitioner alleges counsel was ineffective for failing to present evidence that, contrary to the prosecution's contention, Petitioner "was a good, capable and conscientious worker who was always willing to work an available job" and did not "live[] at home off of his father." (Pet. at 235-36 ¶ 632(a)-(b); *see also* Mar. 14 Order at 106, 108-09.) Petitioner faults counsel for failing to present "the testimony of Richard Clayton, a former employer of Cain's who had employed Cain until he ran out of work for him, and the records of Cain's employment with Lozano Painting, Rasmussen Construction, Inc., and other employers in 1981 and 1985." (Mot. at 25 (citing Exs. 42, 161).)

As the Court noted in its March Order, the California Supreme Court held, on a related appellate claim that the prosecutor made an impermissible argument in aggravation, that "'[t]here is no reasonable probability the jury was moved to sentence defendant to death because he lacked permanent employment and lived with his father.'" (Mar. 14 Order at 108 (quoting *Cain*, 10 Cal. 4th at 79 n.32).) The California Supreme Court may have reached a similar conclusion on the instant habeas claim, and determined that, even considering any additional evidence of employment or self-support Petitioner may have presented, Petitioner had not demonstrated a reasonable probability of a different outcome at the penalty phase. As this Court noted, defense counsel did, in fact, present testimony at the penalty phase from Clayton, a general engineering contractor, that Petitioner was working for him in 1985 at the time of the Fontes incident. (*Id.* (citing 24 RT 6552-53).) The court also noted that the jury was aware at the guilt phase that Petitioner was employed by Manpower Temporary Service in 1986 and sent to various jobs, although that employment was not presented or emphasized at the

penalty phase. (*Id.* (citing 21 RT 5661-65; Pet. Ex. 177 at 2-3; 21 RT 5850).) In addition, as the Supreme Court explained in *Richter*, "[t]here is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Richter*, 131 S. Ct. at 790 (internal quotation omitted). Thus, a fairminded jurist may also have concluded that counsel's investigation and presentation of employment evidence was not deficient.

Because there is "a[] reasonable argument that counsel satisfied *Strickland*'s deferential standard," *Richter*, 131 S. Ct. at 788, Petitioner's claim does not satisfy § 2254(d). Claim 10(9) as to Petitioner's employment status is, therefore, DENIED.

4. Claims 10(9) and 10(10) Regarding Investigation and Presentation of Background and Mental Impairments

In Claims 10(9) and 10(10), Petitioner alleges ineffective assistance of counsel in the investigation and presentation of evidence regarding his life history and mental impairments. (*See* Pet. at 236-37 ¶¶ 632(d), 634.)

The Court observed in its March Order that, based on the current record, "[i]t is unclear to what extent counsel investigated Petitioner's life history and alleged mental impairments for the penalty phase of trial." (Mar. 14 Order at 100.) In light of the "strong presumption that counsel's representation was within the wide range of reasonable professional assistance . . . [and] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect," the California Supreme Court may have reasonably determined that Petitioner failed to demonstrate deficient performance by counsel. *Richter*, 131 S. Ct. at 787, 790 (internal quotations omitted); *see also id.* at 786 ("Under § 2254(d), a habeas court must determine what arguments or theories . . . could have supported [] the state court's decision").

This Court also observed in its March Order that, on the basis of the current

record, "the Court cannot accurately assess what impact [any missing mitigation] evidence may have had on the jury's penalty decision." (Mar. 14 Order at 100.) Because the record did not show such prejudice that no fairminded jurist could deny relief, Petitioner has not shown § 2254(d) to be satisfied. *See Richter*, 131 S. Ct. at 786 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision"). Accordingly, Claims 10(9) and 10(10) regarding counsel's investigation and presentation of evidence regarding Petitioner's life history and mental impairments are DENIED.

5. Claim 10(13) Regarding Petitioner's Leadership Capacity

In Claim 10(13), Petitioner argues that counsel provided ineffective assistance by failing to present evidence regarding Petitioner's incapacity for leadership, in support of a lingering doubt argument at the penalty phase of trial. In its March Order, the Court held that "[w]ithout further development of the record, it is impossible to determine what effect, if any, counsel's presentation of expert testimony that Petitioner could not have been the leader may have had on Petitioner's penalty-phase trial." (Mar. 14 Order at 64.) On the basis of the state court record alone, therefore, Petitioner has not demonstrated prejudice such that no fairminded jurist could deny relief. *See Richter*, 131 S. Ct. at 786. Petitioner has failed to satisfy § 2254(d), and Claim 10(13) regarding Petitioner's leadership capacity is DENIED.

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6. Claim 10(14) Regarding Petitioner's Capacity to Premeditate and Deliberate

In Claim 10(14), Petitioner alleges trial counsel was ineffective for failing to argue the absence of premeditation as a factor in mitigation. (Pet. at 238 ¶ 638; Mot. at 47-48.) In its March 2011 Order, this Court observed:

> Petitioner alleges that mental health expert testimony would support his claim that counsel's performance was deficient. (Mot. at 49 (citing Pet. Exs. 169-171).) Specifically, Petitioner seeks to present evidence from Dr. Jay Jackman (Pet. Ex. 169), Dr. Karen Bronk Froming (Pet. Ex. 170), and Dr. Ruth Zitner (Pet. Ex. 171) regarding his lack of capacity to premeditate and deliberate. Dr. Bronk Froming draws no conclusions, general or specific, regarding Petitioner's capacity to premeditate and deliberate. (*See* Pet. Ex. 170.) Dr. Jackman makes only one statement potentially relevant to the claim, that 'Mr. Cain has significant psychiatric and neurologic dysfunction that affected his behavior at the time of the offense for which he has been sentenced to death.' (Pet. Ex. 169 at 26.) Similarly, Dr. Zitner states only that '[i]t is reasonable to believe that the combination of Tracy's head traumas, chronic ingestion of alcohol and drugs and in utero alcohol exposure caused brain damage that has effected [sic] his behavior and mental functioning throughout his entire life, including the time of his crime.' (Pet. Ex. 171 at 64.)

(Mar. 14 Order at 110-11.)

While the Court granted an evidentiary hearing "to determine what evidence Petitioner's counsel may have been able to present in mitigation, whether he investigated adequately, and whether he made a strategic decision not to present such evidence," the Court noted that "the expert declarations do little to address directly Petitioner's capacity to premeditate and deliberate . . . ." (*Id.* at 111.)

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In view of the scant evidence Petitioner presented in support of his claim, the California Supreme Court may have reasonably determined that Petitioner failed to demonstrate prejudice from any deficient performance by counsel. This Court may not overlook that "argument[] that would otherwise justify the state court's result . . . ." *Richter*, 131 S. Ct. at 786. Accordingly, Petitioner has failed

to satisfy § 2254(d) on the basis of the state court record. Claim 10(14) regarding counsel's presentation of mental health expert testimony on Petitioner's capacity for premeditation and deliberation is DENIED.

C. Mendoza's Alleged Attempts to Create an Alibi: Claims 2(12), 10(6), 10(9), and 10(13)

In Claims 2(12), 10(6), 10(9), and 10(13), Petitioner alleges that counsel provided ineffective assistance at both phases of trial by failing to present evidence regarding Mendoza's lack of credibility. Specifically, Petitioner submits declarations from Floyd Clements and Kathy Lazoff that Mendoza asked them to provide an alibi for him for Friday and, apparently, Saturday nights. (*See* Pet. at 179 ¶ 465, 233 ¶ 624; Pet. Ex. 162 ¶¶ 8-9; Pet. Ex. 165 ¶ 10.) Petitioner faults counsel for failing to present that evidence at trial to cast doubt upon the credibility of Mendoza's testimony against Petitioner.

The Court "must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance . . . [and] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Richter*, 131 S. Ct. at 787, 790 (internal quotations omitted). This Court cannot conclude that no fairminded jurist would find counsel's investigation strategic or reasonable. *See id.* at 786. The California Supreme Court may, therefore, have reasonably rejected Petitioner's claim on that basis. Similarly, the California Supreme Court may have reasonably determined, in light of the evidence presented at trial regarding Mendoza's credibility, that there was no reasonable probability of a different outcome had the alibi testimony been presented. (*Cf.* Mar. 14 Order at 16 (holding that an evidentiary hearing was needed to determine whether trial counsel adequately investigated and to evaluate the weight of any testimony Clements and Lazoff could have provided, and thus that deficient performance or prejudice was not conclusive on the basis of the state court record alone). Mendoza's proximity to the Galloways' house on the night of

the murders was already established at trial, *Cain*, 10 Cal. 4th at 19; (20 RT 5466), and his credibility was amply questioned. "Defense counsel pointed out in his closing argument that the testimony of five different people, Sean Sampson, Richard Willis, Floyd Clements, Trish Greene and Richard Gifford, established that Mendoza was lying. RT 6143. The prosecutor conceded that Mendoza lied about some things . . . . RT 6162." (Order re Petr.'s Outstanding Discovery Requests, Sept. 24, 2002, at 7.) Mendoza's involvement with the stolen goods was also established, *see Cain*, 10 Cal. 4th at 22; (20 RT 5499-5501; 21 RT 5628, 5747-48, 5753-54, 5774; 22 RT 5931), as was evidence of the prosecution's investigation of Mendoza. (*See* 20 RT 5501-03, 5511 (Mendoza's testimony that he lied during recorded police interview "because [he] was scared"); *id. at* 5425, 5436, 5575-76 (comparison of physical evidence to samples taken from Mendoza).)

Because "fairminded jurists could disagree on the correctness of the state court's decision," *Richter*, 131 S. Ct. at 786, the state court's decision withstands review under § 2254(d). Accordingly, Claims 2(12), 10(6), 10(9), and 10(13) as to Mendoza's alibi attempts are DENIED.

D. Mendoza's Alleged Criminal History: Claims 1(1), 2(12), 10(6), 10(9), and 10(13)

In Claims 1(1), 2(12), 10(6), 10(9), and 10(13), Petitioner alleges that the prosecution committed a *Brady* violation by failing to disclose Mendoza's "criminal activity prior to and after the crimes against the Galloways," including "drug sales, burglary of a residence, theft and assaults." (Mot. at 80; *see also* Pet. at 143 ¶ 346(d).) In support, Petitioner cites "criminal history information regarding Mendoza . . . available publicly" as well as statements by Clements and Lazoff. (Mot. at 80 (citing Pet. Ex. 196); *see also* Pet. at 143 ¶ 346(d) (citing Pet. Exs. 162, 165).) Petitioner also contends that trial counsel was ineffective for failing to investigate and present evidence of Mendoza's criminal history. (Mot. at

21-22, 24-26, 70-71.)

As noted above, there was significant evidence presented at trial calling into question Mendoza's credibility. (*See supra* p. 23.) The California Supreme Court may have reasonably determined, as to petitioner's claims of ineffective assistance and prosecutorial misconduct, that Petitioner was not prejudiced from any lack of presentation of Mendoza's criminal history in light of that evidence. The California Supreme Court would have been reasonable in reaching that conclusion even considering any prosecutorial misconduct regarding Mendoza's criminal history cumulatively with any other prosecutorial misconduct. Accordingly, the Court must conclude that Petitioner has not satisfied § 2254(d) as required to merit federal habeas relief. Claims 1(1), 2(12), 10(6), 10(9), and 10(13) as to Mendoza's alleged criminal history are DENIED.

E. Investigator Stone and Detective Tatum: Claim 1(2)

1. Investigator Stone

In Claim 1(2), Petitioner alleges that the prosecution presented false testimony from Investigator Stone to impeach Clements' testimony that Petitioner kicked the door of a bedroom where Val Cain was with two girls on Saturday, not Friday, night. The Court observed in its March Order that the record before it supported Petitioner's claim that Clements told Stone that the events happened Saturday night,[4] and granted an evidentiary hearing to help determine "if Clements' recollection of the events Friday and Saturday nights changed or was clarified before the conclusion of the interview." (Mar. 14 Order at 25.)

To be entitled to relief, it is Petitioner's burden to establish not only that the evidence presented by the prosecution is false, but that it is material. *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) ("To prevail on a claim based on

[4] The Court noted that the transcript of Clements' interview by Stone appears to be truncated, ending with a question pending from Stone. (Mar. 14 Order at 25 (citing Pet. Ex. 76 at 0025).)

Mooney-Napue, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material" (citing *Napue v. Illinois*, 360 U.S. 264, 269-71 (1959))). To establish materiality, Petitioner must show "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (internal quotation omitted); *see also Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011) (holding same).

The California Supreme Court may have reasonably determined that Stone's testimony (that Clements previously stated that the events occurred Friday night), even if false, was not material. The court may have determined that Stone's testimony could not have influenced the jury's judgment regardless of the night at issue because the act of kicking a door where women were inside was too attenuated from the nature of the crimes to be influential. In addition, the court may have determined that even if the events occurred Saturday night, after the murders were committed, they may still have evidenced Petitioner's emotional state after the murders in committing an aggressive act, like that of kicking a door, where women were involved. It would not be unreasonable, therefore, for the California Supreme Court to have concluded that the additional impact of evidence of the act occurring Friday, not Saturday, night could not in any reasonable likelihood have affected the judgment of the jury. It would also have been reasonable for the California Supreme Court to determine that any effect of Investigator Stone's testimony in impeaching Clements' testimony generally could not in any reasonable likelihood have affected the judgment of the jury. As a result, the California Supreme Court would have been reasonable in determining that any prosecutorial misconduct regarding Stone's testimony was not material,

even when considered cumulatively with any other instances of prosecutorial misconduct.[5]

2. Detective Tatum

Petitioner alleges the prosecution committed misconduct in "knowingly presenting the perjured testimony of Detective Tatum regarding Cain's alleged unrecorded 'confession.'" (Pet. at 146 ¶ 353.) During an interrogation by Tatum and another detective:

> Petitioner stated that the day after the murder he, Rick, Cerda and Mendoza, went into the Galloway house to 'wipe away the fingerprints.' Throughout the interview Petitioner maintained that he did not murder either of the victims or rape Mrs. Galloway. At trial Det. Tatum testified that during the interview Petitioner admitted stealing $500 from the Galloways during the initial break-in to the residence on Friday, October 17, 1986. While Det. Tatum noted that the interview was tape recorded, he claimed that due to a malfunction in the tape recorder, Petitioner's admission was not recorded. RT 5863-64. Det. Tatum also testified that the malfunction was not a result of the tape recorder running out of tape, but rather that 'it stopped taping on Side 1.' RT 5870. Det. Tatum stated that he learned of the malfunction shortly after it occurred. RT 5870.

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[5] "[W]e first consider the *Napue* violations collectively and ask whether there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury. If so, habeas relief must be granted. However, if the *Napue* errors are not material standing alone, we consider all of the *Napue* and *Brady* violations collectively and ask whether there is a reasonable probability that, but for [the] errors, the result of the proceeding *would* have been different. At both stages, we must ask whether the defendant received a trial resulting in a verdict worthy of confidence." *Jackson*, 513 F.3d at 1076 (internal quotations and citations omitted; emphasis in original); *see also Sivak*, 658 F.3d at 912 (quoting and applying *Jackson*).

(Order re Petr.'s Outstanding Disc. Reqs., Sept. 24, 2002, at 8-9; Mar. 14 Order at 41.)

Petitioner presented a declaration from an expert in forensic analysis of tapes that:

> based on the announced times at the ending and beginning of the interview, it would appear that there was an interval of approximately twenty minutes between the end of side A and the start of side B that was not recorded. . . . That twenty minute period, however, cannot be accounted for due to some anomalous break during the recording on either side of the interview tape.

(Pet. Ex. 174 ¶ 4.)

The Court noted in its prior orders that "because claims of prosecutorial misconduct must be analyzed cumulatively, Detective Tatum's allegedly false trial testimony could support Petitioner's claims notwithstanding Petitioner's admission that he had gone in the victim's house 'to get some money,' and Mendoza's testimony that he counted $500 in Petitioner's possession after the murders." (Mar. 14 Order at 42 (quoting Pet. Ex. 177 at 32); *see also* Order re Petr.'s Outstanding Disc. Reqs., Sept. 24, 2002, at 9-10.) The Court held that Petitioner had "alleged facts that, if proved, could demonstrate the falsity of Detective Tatum's testimony that because of a malfunction, beyond simply running out of tape, the tape recorder stopped taping on side 1," and that an evidentiary hearing was needed to "resolve the credibility and weight of the witnesses' testimony." (Mar. 14 Order at 42.)

As to Tatum's testimony about the substance of Petitioner's confession, there was a significant collection of other evidence presented at trial that Petitioner had stolen at least $500 from the Galloways. Mendoza testified that Petitioner asked him if he "wanted to help him burglarize or rob that house next door to his house . . . [s]o he can get thousands." (20 RT 5477.) Mendoza said that he

declined, and Petitioner later went outside with Cerda. (*Id.* at 5478, 5482-83.) When Petitioner returned at least twenty or thirty minutes later, Mendoza testified, he had blood on his clothes and face and "said he had thousands." (*Id.* at 5489-90.) Mendoza testified that Petitioner held "a lot of money in his left palm . . . folded in half with [a] $100 bill in the front." (*Id.* at 5491.) According to Mendoza, Petitioner said he "knocked somebody out" or "blipped somebody." (*Id.* at 5491-92.)

Richard Gifford testified that on Saturday afternoon, he saw Petitioner "flash a big roll of bills," a "[p]ile of money" close to $1,100 or $1,200 dollars. (22 RT 6023-24.) He said Petitioner gave him a one hundred dollar bill to buy beer for him. (*Id.* at 6024; *see also id.* at 6029 (testimony of 7-Eleven employee that Gifford bought beer and cigarettes Saturday afternoon with a one hundred dollar bill).) Teodorico ("Rick") Albis testified that he saw Petitioner at Petitioner's house Saturday morning, and Petitioner showed him a check and a "[w]ad" of money. (21 RT 5817-18.) Albis testified that on the Saturday after the murders, he saw Petitioner paying cash for a car stereo, sneakers, a hat, and some cassettes, with a large bill in at least one instance. (*Id.* at 5817-21; *see also id.* at 5650-55 (testimony of electronics store manager regarding sale of stereo system on Saturday for $214 cash).) Gifford testified that he saw Petitioner again on Sunday, after Petitioner purportedly made these purchases, still with "some money." (22 RT 6026.)

It is Petitioner's burden to demonstrate the materiality of any false testimony presented at trial, *see Zuno-Arce*, 339 F.3d at 889, and the materiality of prosecutorial misconduct must be considered cumulatively. *See Jackson*, 513 F.3d at 1071; *Sivak*, 658 F.3d at 912. In light of the evidence presented at trial, the California Supreme Court may have reasonably concluded that Detective Tatum's testimony about the manner in which Petitioner's confession was not recorded or about the substance of the confession was not material, even when considered

cumulatively with any other instances of prosecutorial misconduct. *Cf. Richter*, 131 S. Ct. at 786 ("Under § 2254(d), a habeas court must determine what arguments or theories . . . could have supported [] the state court's decision" and must not "overlook[] arguments that would otherwise justify the state court's result"). Because there is an argument that could justify the California Supreme Court's denial of the claim, Claim 1(2) is DENIED.

F. Tammy and Jennifer O'Neil: Claims 2(12), 2(17), and 10(13)

In Claims 2(12), 2(17), and 10(13), Petitioner alleges counsel was ineffective for failing to investigate and present evidence from Tammy and Jennifer O'Neil regarding the timing of the bloody footprints found in the Galloways' home.

The Court observed in its March Order that, even without the evidence:

> Defense counsel nevertheless succeeded at trial in casting significant doubt on the possibility that the others' footprints were made after the time of the crimes. As Petitioner acknowledges, the prosecution 'presented evidence that the murders occurred around midnight . . . [and] asserted in closing argument that these footprints were made at 9:00 a.m.,' (Pet. at 98 ¶ 208), a span of roughly nine hours. Counsel established that the window of time when the footprints could have been made was likely only six hours after the murders. (*See* 20 RT 5581, 5591.) Through counsel's cross-examination, the expert testified that if the footprints had been made six or more hours later, he would expect to see a disturbance in the pool of blood that was tracked in the footprints, and no disturbance was present. (*Id.* at 5591.) Counsel emphasized this point in closing argument. (23 RT 6144.) Indeed, the prosecutor acknowledged that the footprints in some way supported Petitioner's claim that he did not kill the Galloways, calling the footprints "ambiguous support." (22 RT 6057-59.)

(Order at 59-60.)

The California Supreme Court may have reasonably determined, based on

the evidence presented at trial, that Petitioner failed to demonstrate prejudice from any deficient performance by counsel in not presenting the O'Neils' testimony. (*Cf. id.* (holding that an evidentiary hearing was needed to determine the extent to which the O'Neils' testimony could have provided additional support for Petitioner's defense, and thus that Petitioner had not conclusively shown prejudice on the basis of the state court record alone).)

This Court also observed in its March Order that "Petitioner concedes that counsel 'possessed' the evidence" regarding the O'Neils, and it is "unclear . . . whether he made a strategic decision not to present their testimony." (*Id.*) This court must apply a "strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect," and must be doubly deferential to the state court's decisions on *Strickland* claims when deciding whether § 2254(d) is satisfied. *Richter*, 131 S. Ct. at 788, 790 (internal quotation omitted). Applying those principles, the Court holds that the California Supreme Court would have been reasonable in concluding that Petitioner failed to demonstrate deficient performance by counsel. Petitioner has, therefore, failed to satisfy § 2254(d) on the basis of the state court record. Accordingly, Claims 2(12), 2(17), and 10(13) regarding the O'Neils are DENIED.

III. Order

For the foregoing reasons, the Court hereby orders as follows:

1. Petitioner's Motion for an Evidentiary Hearing is **DENIED** as to Claims 1(1), 1(2), 2(1), 2(11), 2(12), 2(17), 2(18), 8(3)(A), 10(6), 10(9), 10(10), 10(11), 10(13), 10(14), 10(17), 10(18), and 18.

2. Claims 1(1), 1(2), 2(1), 2(11), 2(12), 2(17), 10(6), 10(9), 10(10), 10(11), 10(13), and 10(14) are **DENIED**.

3. Within sixty (60) days of the date of this Order, Petitioner shall file a brief addressing the merits of his remaining claims for relief under 28 U.S.C. § 2254(d). Respondent shall file his opposition within thirty (30) days of

Petitioner's filing. Petitioner shall file any reply within fifteen (15) days of Respondent's filing.

IT IS SO ORDERED.

Dated: February 13, 2012.

AUDREY B. COLLINS
United States District Judge

S152288

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

In re TRACY DEARL CAIN on Habeas Corpus

The petition for writ of habeas corpus filed on April 30, 2007, is denied on the merits. (*Atkins v. Virginia* (2002) 536 U.S. 304, 317-321; *In re Hawthorne* (2005) 35 Cal.4th 40, 44-51; *In re Wright* (1978) 78 Cal.App.3d 788, 801-802.)

Corrigan, J., was absent and did not participate.

GEORGE
Chief Justice

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

JUDGE: JAMES P. CLONINGER DATE: February 27, 2007 TIME: _____

CLERK: CAROL HENRY BAILIFF: _____ CASE NO: S116805

TYPE OF CASE:

In re the Matter of

TRACY DEARL CAIN, Petitioner

for Writ of Habeas Corpus

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER

This matter was transferred to the Ventura County Superior Court by the California Supreme Court for a hearing on the order to show cause issued under case number S116805. The order to show cause was issued to hear the petitioner's claim that he is mentally retarded within the meaning of Penal Code section 1376 and Atkins v. Virginia, (2002) 536 U.S. 304. Under Penal Code section 1376 "mentally retarded" means the condition of significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18. The petitioner bears the burden of proof by a preponderance of the evidence.

This court conducted the hearing on the order to show cause between January 23 and 25, 2007. The court reporter has transcribed the testimony from the hearings. The transcript will be filed with the Supreme Court concurrently with this ruling. The court finds that the petitioner has failed to prove that he is mentally retarded and that his petition is untimely. The reasons for these findings are set forth below.

Determination on the Merits of the Petitioner's Claim

Expert Opinion Testimony

Two expert witnesses testified at the hearing. They were Ricardo Weinstein, Ph.D., and Efrain Beliz, Jr., Ph.D. Both are psychologists.

Dr. Weinstein's opinions were received through his declaration of July 16, 2005, (Petitioner's Exhibit 4) and his testimony.

Dr. Weinstein has evaluated persons to determine whether they are mentally retarded about 35 times. Dr. Weinstein administered an intelligence test to the petitioner on June 24, 2005. The test used was the Stanford-Binet Intelligence Scale, Fifth Edition. Dr. Weinstein reported the petitioner's full scale IQ score at 71 on this test.

Dr. Weinstein relied on the previous intelligence test given to the petitioner by Dr. Karen Froming in February 1997. The test used was the Wechsler Adult Intelligence Scale, Revised (WAIS, R). Dr. Froming scored the petitioner's full scale IQ at 75 using this test.

Dr. Weinstein testified that he applies a correction to IQ scores for the "Flynn effect", which is a term used for the hypothesis that intelligence test scores are improving over time. This effect is postulated from studies done on normal populations, not populations of mentally retarded persons. To compensate for the Flynn effect, Dr. Weinstein deducts points from intelligence test scores obtained by individuals, as he did in this case.

Dr. Weinstein's opinion based on the testing is that the petitioner is mildly mentally retarded.

Dr. Weinstein declared that he relied on the petitioner's records from the Adobe Mountain School in Arizona for information on adaptive behavior deficits. The petitioner had been placed at the school by the courts in Arizona as a result of his youthful criminality. The portions of the petitioner's record at the Adobe Mountain School noted in Dr. Weinstein's declaration are as follows:

1. A document described by Dr. Weinstein as "A personality and social assessment" done by Robert Goldsworthy, a psychology intern, dated March 21, 1977. The declaration states that Mr. Goldsworthy reported that the petitioner was very immature for his age, fails to express attitudes and perceptions which are common for his age group.

2. A diagnostic summary prepared by Richard Flagle on April 4, 1977. This summary stated that the petitioner had very deficient verbal abilities, a limited fund of information, deficient reasoning skills, poor vocabulary, deficient verbal expression, difficulty understanding the meaning of what he hears, and severe short-term auditory memory impairment. The petitioner was 14 years old at the time of this evaluation and was found to be reading at a 4.5 grade level and doing math at a 3.5 grade level.

3. A treatment plan dated May 2, 1977, by John Del Bene, a counselor. This treatment plan stated that the petitioner had very deficient verbal abilities, reasoning skills, a poor vocabulary and deficient verbal expression.

4. A "Pre-Home Investigation Request/Progress Summary" dated July 12, 1977, prepared by Frank Esquer. Mr. Esquer stated that the petitioner lacked adequate problem-solving and coping skills.

5. A neuropsychological assessment by Richard Kapp, dated February 19, 1980, which stated that the petitioner had poor reasoning skills, a poor vocabulary, poor verbal expression, difficulty understanding the meaning of what he hears, severe short-term auditory memory impairment, and faulty social judgment. Dr. Kapp gave the petitioner the Peabody Picture Vocabulary Test and recorded his IQ score at 73.

6. An evaluation by Mickey Mast dated March 5, 1980. This evaluation showed that the petitioner was reading at a 4.8 grade level.

7. An IEP by Vicki Vance dated March 6, 1980, which stated that the petitioner's math ability was at a grade level 4.1.

8. A Specific Learning Disabilities Evaluation performed by Michael D. Fidler, Educational Psychologist, dated March 8, 1980. In this evaluation Mr. Fidler found that the petitioner had specific learning disabilities and ongoing emotional problems. Dr. Weinstein stated that Mr. Fidler diagnosed the petitioner with a severe deficit of auditory memory which prevents him from following simple oral directions. Dr. Weinstein declared that Mr. Fidler had speculated that the petitioner may have possible borderline developmental disability.

9. The declaration of Majil Fausel dated March 15, 1997.

Dr. Weinstein summarized his opinions in his declaration as follows: "from childhood through the time of his current incarceration, Mr. Cain qualified for a diagnosis of mild Mental Retardation. IQ scores fell at or below the 70 to 75 range, which meets the AAMR definition of intellectual functioning two standard deviations or more below normal. Moreover, Mr. Cain's adaptive functioning met the AAMR standards for mental retardation."

Dr. Weinstein's testimony at the hearing disclosed that he had met with the petitioner for about two and a half hours before preparing the declaration. Most of this time was consumed with the psychological testing. Dr. Weinstein performed a retrospective evaluation of the petitioner's mental functioning.

After forming his opinion and preparing his declaration, Dr. Weinstein performed additional evaluations of the petitioner in February, June and August of 2006. In this subsequent work, Dr. Weinstein further assessed the petitioner's adaptive behavior by communicating with persons who know or knew the petitioner prior to his present incarceration and by further testing of the petitioner. A scored written inventory, the ABAS-II, was used to evaluate the petitioner's adaptive behavior. The petitioner provided responses about his present functioning. Other persons provided information about his past functioning based on their memories of the petitioner.

The opinions of Dr. Beliz were received via his report (Petitioner's Exhibit 14) and his testimony.

Dr. Beliz has evaluated persons to determine whether they are mentally retarded about 6,000 times. Most of these evaluations were not made in the context of litigation, instead being performed for the purpose of making decisions about providing educational and support services for the mentally retarded. In doing these evaluations the witness would ordinarily receive information from others, including other experts, who may have disagreed with the determinations he made.

Dr. Beliz evaluated and interviewed the petitioner on four occasions: March 18, 2006, March 25, 2006, May 1, 2006 and May 2, 2006. The witness reviewed extensive records concerning the petitioner, including the prison records generated after he was incarcerated in this case. The petitioner was the primary source of information

for Dr. Beliz, who prepared a detailed report, dated June 24, 2006.

Dr. Beliz reviewed the petitioner's medical history from records and by interview. The witness noted that the petitioner has never been diagnosed in the past with fetal alcohol syndrome or affect, alcohol or drug dependency, or significant brain damage. The only suggestion of organic neurological impairment was that raised by Dr. Froming in her 1997 report. Dr. Froming was an expert hired by the defense in the petitioner's case.

Dr. Beliz considered prior intelligence and other testing of the petitioner from a variety of sources. This included the testing done by Dr. Froming in 1977. She gave the petitioner the WAIS, R and reported the petitioner's intelligence quotient as 75 on this test.

Dr. Beliz considered testing by Dr. Donaldson. Dr. Donaldson administered the Minnesota Multiphasic Personality Inventory and a Rorschach test to the petitioner in 1987. The witness opined that the fact that the petitioner could complete these tests and give the responses which he gave to Dr. Donaldson is inconsistent with a finding that the petitioner is mentally retarded.

Dr. Beliz considered testing done in March of 1977 when the petitioner was about fifteen years old and incarcerated at the Adobe Mountain School. The Peabody Picture Vocabulary Test was given by Mr. Goldsworthy. The petitioner's IQ on this test was measured at a standard score of 85, which is the low average range. The Culture Fair Scale II test was given and the petitioner scored 75. The Wechsler Intelligence Scale for Children was given and the petitioner's full scale score was 78, with a performance IQ score of 93. Dr. Beliz testified that the performance IQ score of 93 is significant because one could not be mentally retarded and achieve this score on this part of this test.

Dr. Beliz noted that the petitioner was given additional tests in April of 1977. On one of these tests his IQ was reported to be 64.

Dr. Beliz considered the report of Dr. Kapp at the Adobe Mountain School in 1980. The report noted that the petitioner was given the Peabody Picture Vocabulary Test again and scored 73. He was given the Culture Fair Scale II test again and scored an IQ of 87. Dr. Kapp found no evidence of organic brain problems or

impairments in cerebral functioning. Dr. Kapp opined that the petitioner had a learning disability.

Dr. Beliz found there to be no evidence for mental retardation from the many evaluations of the petitioner found within the records from the Adobe Mountain School. The records from that institution did suggest learning disabilities and a lack of effort in school.

Dr. Beliz gave the petitioner a total of 7 psychological tests during his evaluation, 4 of which were intelligence tests. These included the WAIS – III, the Beta III, the Test of Non-Verbal Intelligence, and the Peabody Picture Vocabulary Test III. On the WAIS – III the petitioner's full scale score was 85, after adjusting for a scoring error by the witness. The witness testified that this score is in the low average range for intelligence. On the Peabody test the petitioner achieved a standard score of 88 – within the average range of intelligence. On the Test of Non-Verbal Intelligence the petitioner scored 84 – low average range. On the Beta III the petitioner scored 88 – the low average range. One of these tests, the Bender Visual Motor Gestalt Test, could not be administered as recommended because the petitioner was shackled.

The petitioner was given the Wide Range Achievement Test, 3rd Revision. His reading score was 95, spelling was 81, and arithmetic was 65. These scores equate to high school, 7th grade and 4th grade performance, respectively. The witness opined that these scores are suggestive of someone with a learning disability or who quit trying in school.

Dr. Beliz testified that it is not possible for someone to fake intelligence, while it is easy to fake being mentally retarded. The witness testified that intelligence test scores for mentally retarded persons tend to be stable, that one does not see "spikes" in test scores for such individuals.
Dr. Beliz does not adjust test scores for the "Flynn effect." He testified that such score adjustments are not normally applied in the practice of psychology in determinations of retardation. He has only seen the Flynn effect raised as an issue in Atkins hearings.

Dr. Beliz formed his opinions about the petitioner's level of adaptive functioning by personally interviewing him, reviewing his records and personal history, and by using a scored inventory called the Vineland Adaptive Behavior Scales II. The petitioner's overall score on this measure was 91 – within the average range.

In his interviews, the petitioner reported to Dr. Beliz that he had completed the sixth or seventh grade, but after that never really tried to perform well in school. The petitioner was chronically absent from classes and was hampered by being raised in a bad home environment.

The petitioner reported to Dr. Beliz that petitioner learned to drive a car with a manual transmission by the age of 13. He reported that, at that age, his parents would send him on driving errands to the store. The petitioner reported that he obtained a drivers license at age 18.

Dr. Beliz considered the petitioner's history through his interviews with the petitioner and school and other records. The petitioner was evaluated repeatedly at the Adobe Mountain School and was never determined to be mentally retarded, though learning disabilities were suspected. The petitioner adapted well to the school environment, volunteered for extra duties, and mentored other students.

The records showed that the petitioner planned and carried out an escape while incarcerated at the Adobe Mountain School at age 16. He assaulted a correctional officer and successfully escaped. Thereafter he drove himself from Arizona to California without becoming lost or confused.

Dr. Beliz considered the petitioner's history of his sexual development and activities, and relationships. He also considered the petitioner's accounts of his athletic activities, his insights into why he preferred certain positions on a football team, depending on the strength of the offensive line, his hobbies, and his skills working with cars. None of these aspects of the petitioner's history supports a finding of retardation.

Dr. Beliz observed that the petitioner expresses himself well and is able to carry on an adult conversation. The petitioner was able to follow instructions, listen attentively for at least 30 minutes, and carry out instructions. Dr. Beliz observed that the petitioner speaks in full sentences, asks appropriate questions about his environment, uses regular past tense verbs, modulates his tone of voice appropriately and provides complex directions to others. The petitioner has writing skills at about the seventh grade level.

During the interviews and the psychological testing he performed with the petitioner, Dr. Beliz observed that the petitioner did not become confused, frustrated, or bewildered by test demands. Dr. Beliz observed that the petitioner was well oriented with his attention and concentration not significantly impaired.

The petitioner was able to relate his employment history to Dr. Beliz. When he was fired from jobs it was because of things such as poor attendance. When he left a job it was to seek better employment. Reviews of his performance by employers were generally favorable, with the petitioner being described as a hard worker, a leader, a motivator, a person who gets assignments done, and conscientious. There was no evidence that the petitioner had gotten fired from jobs because he could not do them, or get himself to work on time. There was no suggestion that he required a sheltered environment or special accommodations to maintain employment. Dr. Beliz testified that the petitioner's vocational history was inconsistent with mental retardation.

Prison records showed that the petitioner could interact with the prison administration and argue successfully for the classification he desired. The petitioner requires no special accommodations in prison and has not been victimized in prison. The witness would have expected these things if the petitioner was mentally retarded. The petitioner reported to Dr. Beliz that the petitioner sees himself as someone who has "influence over others in prison: disruptive gang members (Crips), shot callers." Prison psychological evaluations done on 3 occasions in 1990 showed no evidence that the petitioner suffered from organic brain impairment.

The petitioner maintains a schedule of physical exercise. The petitioner understands the workings of the prison in which he lives. He is careful to avoid behaviors which might result in suspicion being cast upon him with respect to prison violence. The petitioner is careful to avoid conduct with other prisoners which might cause prison guards to use deadly force. The petitioner related that he likes to play games such as dominoes, Uno and Scrabble in prison.

The petitioner was unhappy with being transported to Ventura County in connection with the present matter. The petitioner believed that one of the Sheriff's deputies who transported him was antagonistic, but the petitioner was able to maintain his composure in the face of this perceived hostility.

The court carefully considered the opinion testimony of each of the experts and the reasons they gave for their opinions.

Dr. Weinstein's testimony in this matter suffers from a number of infirmities. Some of the matters which concern the court are set forth below:

Dr. Weinstein's declaration referred to a "personality and social assessment" by Mr. Goldsworthy. What Mr. Goldsworthy actually wrote was a report titled "Psychological Evaluation." The "Personality and Social Assessment" is a portion of this report, found at pages 108 and 109 of Exhibit 13. What was not mentioned in Dr. Weinstein's declaration is that tests were administered to the petitioner by Mr. Goldsworthy in connection with his psychological evaluation. These included the MMPI, the California Personality Inventory, the Jesness Inventory, the Sacks Sentence Completion Blank, the Problem Check List, the Peabody Picture Vocabulary Test, the Culture Fair Scale II, the Wechsler Intelligence Scale for Children – Revised, the Nelson Reading Test, the Stanford Achievement Test, and the Revised Benton Visual Retention Test.

Dr. Weinstein did not set forth in his declaration the IQ scores reported by Mr. Goldsworthy. Dr. Weinstein did not report Mr. Goldsworthy's observation that "Although Tracy's full-scale IQ is in the borderline range of intelligence, his performance score suggests that he has the potentiality of operating within the average range of intellectual abilities." Dr. Weinstein did not report Mr. Goldsworthy's conclusion that it was probable that low test scores reflected a possible learning disability.

In attempting to understand this significant omission by Dr. Weinstein, the court notes that he did not think testing was unimportant. Dr. Weinstein's declaration recited Dr. Kapp's administration of the Peabody Picture Vocabulary Test. Dr. Weinstein specifically pointed out that the petitioner scored 73 on the test in 1980. Yet he made no mention that the very same test was given to the petitioner by Mr. Goldsworthy just 3 years prior, with a score of 85. This omission is even more striking in light of the stress given by the witness when he was cross examined, to improvements in intelligence test scores caused by the "practice effect."

Dr. Weinstein's assessment of the petitioner's adaptive behaviors, using the ABAS-II, is not persuasive. The method used by the witness to get the responses for the inventory was to ask the petitioner, or witnesses who know or knew the petitioner, to search their memories from many years ago and to describe what are really trivial or unremarkable daily behaviors. Thus Dr. Weinstein's methodology relies on the notion that one can get accurate historical information from the witnesses about these behaviors after the passage of so much time. Under normal circumstances this is not something which the court believes witnesses could reliably do. In this case, however, everyone involved understands that their descriptions may support the thesis that the petitioner is mentally retarded, and that he will avoid the penalty of death if the court finds him to be so. Because of this,

such retrospective assessments are even less worthwhile as evidence of the petitioner's actual level of functioning. The court finds the methodology employed by Dr. Weinstein to be unsound.

Even if the use of the ABAS-II in this way did not suffer from this defect, the scoring of it by the witness creates additional reasons to discount the results. For example, Dr. Weinstein included the responses of Majil Fausel on the ABAS-II in a misleadingly simplistic manner. Ms. Fausel's responses included zeros for such things as whether the petitioner traveled with classmates to locations more than 50 miles from the school, relied on himself to travel in the community, carried enough money to make small purchases, etc. But Ms. Fausel's contact with the petitioner was during the time he was at the Adobe Mountain School. The petitioner was unable to do these things when she knew him because he was an inmate in a reform school. These responses thus shed no light on Mr. Cain's abilities. To include them in an assessment of his mental abilities is nonsense. As a former teacher filling out a questionnaire Ms. Fausel may not have known this but, as a psychologist, Dr. Weinstein must know it. The inclusion of such things has utility only in the court's assessment of Dr. Weinstein's credibility as an examiner and witness.

On cross examination Dr. Weinstein testified about the Wechsler Intelligence Scale for Children IQ test performed by Mr. Goldsworthy in 1977. Dr. Weinstein's logic in applying the corrections that he believed to be appropriate was difficult to follow. The petitioner achieved an overall score on the test of 78 points. From this Dr. Weinstein would subtract 5 points as recommended by the AAMR, plus an additional point for the Flynn effect. This would yield a minimum score of 72 points. Then, evidently, the witness concluded that a score of 72 is within the range of possible mental retardation because the AAMR cautions that a score of 75 may be within that range. But this caution from the AAMR is designed to account for what it concluded might be a 5 point error in measurement, which the witness already took into account. In doing his arithmetic it was apparent that the witness was applying the AAMR recommended correction of 5 points twice.

Despite the recommendation from the AAMR that the Flynn effect should be considered when using IQ scores as part of a determination of mental retardation, the court is not persuaded that it is logical or appropriate to apply a correction to IQ scores, as Dr. Weinstein did in this case, to compensate for it. The data which gave rise to the observations which are collectively described as the Flynn effect were derived from populations which did not include the mentally retarded. The court has before it no evidence which supports the leap of logic that, if there is a Flynn effect for normal populations, there must be an identical one for populations consisting of the

mentally retarded. Further the observation that there is a trend in a population toward rising IQ scores, even if credible (an assertion which was not proven in this action), does not support the practice of applying a point correction to the IQ scores of individual persons.
Dr. Weinstein relied on the report from Mr. Flagle, who is identified as a psychology associate, without knowing what Mr. Flagle's qualifications were or what a psychology associate is. Similarly, Dr. Weinstein relied upon and recited in his declaration the conclusions of Mr. Esquer without knowledge as to the source of Mr. Esquer's information.

Dr. Weinstein testified on cross examination that he was referring to page 216 of Exhibit 13 when, in his declaration, he attributed a statement to Mr. Fidler that the petitioner may be borderline developmentally disabled. When shown the records the witness acknowledged that the page actually reads "possible borderline D.D." The witness acknowledged that the handwriting on this page looked different than Mr. Fidler's handwriting. The witness did not know who made the note, and admitted that it may have been an error to attribute it to Fidler. The court has examined the records. Neither the placement of this document within the records nor the handwriting suggests that it is part of the report of Mr. Fidler. There was no testimony on the point, but the court will assume that "D.D." would always mean "developmental disability" in the context of these records.

Dr. Weinstein lacks significant experience in making determinations of whether persons are or are not mentally retarded. More importantly, he committed himself to the opinion that the petitioner is mentally retarded early on in his work on this case, on skimpy information. Dr. Weinstein's subsequent work has been aimed at bolstering that initial opinion instead of objectively assessing the petitioner.

Dr. Weinstein, at the beginning of his testimony, stated that psychology "is the science that studies human behavior." Whether psychology is or is not a science is a question far from settled and one which will not be resolved by this court. The court observes, however, that what Dr. Weinstein did in this case was not scientific. Science involves the objective collection and neutral analysis of data to discern the truth. The scientific method has nothing to do with having a preconceived result, picking through a pile of data to find bits here and there that support that conclusion, ignoring other evidence, manipulating the data, and then presenting the conclusion as though it was the product of objective analysis. Dr. Weinstein was an advocate in this case.

The court finds Dr. Weinstein's testimony about the petitioner's mental functioning not to be credible.

Dr. Beliz, on the other hand, has had a great deal of experience in assessing whether individuals are, or are not, mentally retarded. The court finds that the opinion testimony of Dr. Beliz is credible and that it is based on direct interaction with the petitioner, objectively verifiable facts about the petitioner, his behavior and abilities, and reasonable conclusions based on the petitioner's history.

Dr. Beliz testified that the petitioner's IQ scores display fluctuations up and down which do not support the premise that he suffers from mental retardation. Dr. Beliz testified that one can fake mental retardation, but not intelligence, and that a mentally retarded individual would not have been able to achieve the higher scores which the petitioner did. The lower scores are more likely an artifact of lack of effort and schooling than intelligence.

Overall, Dr. Beliz testified that it was his opinion that the petitioner was able to engage in adult conversation during their interviews. The petitioner would have been able to understand everything discussed in the hearing on his application for the writ of habeas corpus, except the statistics. Dr. Beliz testified that the petitioner did not show the deficits in his ability to think, reason and plan that would be found in someone who was mentally retarded. Dr. Beliz testified that it is his opinion that the petitioner has average intelligence, compromised by limited formal education, an impoverished background, substance abuse and truancy. The petitioner does not have special needs and does not have the deficits indicative of mental retardation. Dr. Beliz opined that the petitioner has moderately low to normal adaptive skills. There is no evidence of the impairments in communication, survival or socialization skills which must be present to support a finding that the petitioner is mentally retarded. There is no question but that the petitioner did not do well in school after about the fourth grade. Whether that is because of a learning disability or lack of interest and effort on the petitioner's part cannot be determined now.

Dr. Beliz provided the only credible expert opinion evidence in this matter. This evidence shows that the petitioner is not now, and has never been, mentally retarded.

Evidence of Statements by the Petitioner about the Murders

The evidence at the hearing included the trial testimony of television news reporter Larry Good (Respondent's Exhibit 2), the video of the interview of the petitioner by Good on October 21, 1986 (Respondent's Exhibit 12), and the transcript of this interview (Respondent's Exhibit 3). On that date Mr. Good was covering the Galloway murders in the course of his job. The bodies of the victims had been discovered the day before the interview. Mr. Good was at the scene to talk to neighbors of the victims as background for a story about the murders. He interviewed the petitioner, unaware that the petitioner was the killer.

The court has carefully examined this evidence. The petitioner understood the nature of the interview and interacted normally with the interviewer. The petitioner understood when the interviewer sought information as to what the victims were like as neighbors. The petitioner gave responsive answers. The petitioner clearly understood that it was in his best interests to feign ignorance of the crimes and that he should minimize his contact with the victims. The petitioner played the role of a concerned neighbor/bystander well. There is no deficit in the petitioner's mental functioning observable from this evidence, which was fortuitously recorded very shortly after the murders.

The interview of the petitioner by Oxnard Police Department detectives Tatum and Garcia (Respondent's Exhibit 4) was also admitted as evidence. This interview was conducted on October 22, 1986, the day after the petitioner's interview with Mr. Good. The court has carefully examined this evidence. As he did with Mr. Good the day before, the petitioner began by feigning ignorance of the crimes. He put forward an alibi, describing activities for the weekend to account for his time and whereabouts. When confronted with conflicting information and pressed hard by the detectives, the petitioner adapted his story to fit with the facts as they were disclosed to him. For example, when the petitioner discerned that the detectives could prove that he bought some shoes, he corrected his story to account for this. Accused of lying about this point, he denied lying and asserted that he had not realized that it was important. When confronted with witness statements tending to show circumstantially that he had committed the murders, the petitioner demanded to know if the investigators had evidence, such as a weapon, which would show that he was guilty. Later, after admitting that he had entered the Galloway home, the petitioner maintained that he was just one of four men, including his friends Tony, Rick and David, that had entered the house. The petitioner blamed the attack on the victims on the alleged other perpetrators. To make his story about the culpability of the others more believable, the petitioner

asserted that these other men would blame him because of his bad record and because he was the oldest of the group. He tried to undermine the credibility of what the others may have told the police by alleging that some of them were on probation. The petitioner pointed out that he was suspicious of a call he received from Tony in which Tony had told the petitioner that the police wanted to talk with Tony about property which had been stolen from the Galloways. The petitioner told the detectives that he was suspicious that the police were listening in on the call that Tony had placed to him.

The petitioner fenced with the detectives, yielding points only when confronted with evidence. He fished for information about what it was, exactly, that the police had by way of evidence against him. He understood what the issues were. He understood that it might help him to cast blame on others and to say things about them to make them appear to be culpable and unworthy of belief. The petitioner was aware that he might have been the target in a surreptitiously recorded phone call placed to him by a friend at the direction of the police for the purpose of drawing him into making incriminating statements. This interview is entirely inconsistent with the notion that the petitioner is mentally retarded.

Based on all the evidence presented in the hearing the court finds that the petitioner has failed to establish by a preponderance of the evidence that he is mentally retarded. The court finds the opposite to be true: the respondent has proven by at least a preponderance of the evidence that the petitioner is not mentally retarded.

Timeliness

The respondent has asked the court to deny the petition as untimely. The petitioner asserts that the California Supreme Court has implicitly found the petition to be timely by issuing the order to show cause. The petitioner further argues that his petition is timely and that, even if not, he should be excused from the timeliness requirement because the imposition of the death penalty upon him would be a miscarriage of justice, due to his alleged mental retardation.

The court does not find the issuance of the order to show cause to be a determination by the Supreme Court on the timeliness of the petition. This court finds that the case was sent to the court for a determination on this issue, along with the merits of the petition.

The petitioner's writ is governed by the policies of the California Supreme Court. Without reciting the details of the policies, this court finds that the petition was due within 180 days of the time when the petitioner or his counsel knew or should have known of the facts supporting the claim, or its legal basis.

The petitioner argues that his counsel filed the petition in a timely manner after becoming aware of the factual or legal basis for the petition. In the petition, counsel alleges that an earlier petition was filed in 1998 alleging that the petitioner was mentally retarded. Thus, the petitioner knew of the facts which he alleged as the basis for his claim at that time. Factually then, the claim raised in this petition, being filed on June 18, 2003, was about 5 years late.

In considering whether the petitioner was aware of the legal basis for his claim, he has a somewhat better argument. The United States Supreme Court decided Atkins on June 20, 2002. The petitioner cannot have known that the United States Supreme Court would make evidence of mental retardation critical in determining whether the States would be allowed, under its decisional law, impose the death penalty. Even though evidence of a defendant's mental condition has been relevant and admissible in penalty phase litigation in California since 1977, and may well have been admitted in the petitioner's trial, the petitioner is not chargeable with knowledge that he could assert mental retardation as a bar to the death penalty before the decision in Atkins. The reason for this is that Atkins v. Virginia was unprecedented, at least in the sense of there being no precedent which would have allowed one to predict its holding. In fact, just 13 years prior, in Penry v. Lynaugh (1989) 492 U.S. 302, the Court held that the Eighth Amendment did not categorically bar the execution of mentally retarded persons – the opposite of its holding in Atkins. No individual appellant or habeas petitioner could have forecast the radical change in law brought about by the Atkins decision. Given that the Supreme Court used the Eighth Amendment in Atkins as a vehicle for announcing an unprecedented new rule for capital litigation, it would be manifestly unreasonable to say that someone in the petitioner's situation could know to assert the claim under the rule before the rule was announced by the Court. The court finds that the petitioner did not have notice of his legal grounds until the decision in Atkins was issued.

Nonetheless the petitioner waited just 2 days short of a full year after the Atkins decision was handed down to file the present petition for the writ. The petitioner had filed an earlier petition and had habeas counsel. The petitioner had experts, well before Atkins was decided, who were prepared to support his claim to being mentally retarded.

The petition asserts that it is timely because it was brought less than a year after Atkins, but this is incorrect. The petitioner has not shown good cause for the additional delay in filing the present petition after the first six months following the Atkins decision. It is untimely pursuant to California Supreme Court rules.

The petitioner's only remaining basis for being excused from the timely filing requirement is that constitutional error would ensue if he were to be executed. This argument depends on the premise that he is mentally retarded. He is not. This claim therefore fails.

The petition for the writ of habeas corpus is denied for the reason that it is untimely, in addition to its being denied on the merits.

Dated: February 27, 2007

JAMES P. CLONINGER
Judge of the Superior Court

MICHAEL D. PLANET, Superior Court Executive Officer and Clerk.

By: _____
Deputy Clerk

MINUTES

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

CASE NO.: S116805 In re the Matter of TRACY DEARL CAINE, Petitioner

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, CA 93009. On February 27, 2007, I served the following document described as:

RULING ON SUBMITTED MATTER RE WRIT OF HABEAS CORPUS

by placing a true copy thereof for collection and mailing so as to cause it to be mailed on the above date, following standard court practices, in sealed envelopes addressed as follows:

Office of the Federal Public Defender
Katherine A. Froyen
Gerald Salseda
321 E. 2nd Street
Los Angeles, CA 90012

Linda C. Johnson
Supervising Deputy Attorney General
300 S. Spring Street, Suite 5000
Los Angeles, CA 90013

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Office of the District Attorney
Mike Schwartz
Brown Mail #2730

I am "readily familiar" with the County's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service and/or interoffice mail on that same day with postage thereon fully prepaid at Ventura, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated and executed at Ventura, California on February 27, 2007

MICHAEL D. PLANET, Superior Court
Executive Officer and Clerk

By: _____
Deputy Clerk

DECLARATION OF MAILING

S067172

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE TRACY DEARL CAIN ON HABEAS CORPUS

The following claims are denied as substantially delayed without good cause under *In re Robbins* (1998) 18 Cal.4th 770 and *In re Clark* (1993) 5 Cal.4th 750: claims A, C (except subclaim 5), D, E, F, G, H, I, J, K (except subclaims 3, 4 and 11), L, M, N, O (except subclaim 7), P (except subclaim 3), Q, T, and U (except subclaims 2, 4 and 5).

In addition, except insofar as they incorporate allegations of ineffective assistance of trial counsel, the following claims are denied under *In re Dixon* (1953) 41 Cal.2d 756, 759, because they could have been, but were not, raised on appeal: claims E.2 (insofar as the claim alleges violation of the right to free exercise of religion), G (insofar as the claim concerns photographs of petitioner), H.2, J.4, J.5 (insofar as the claim concerns hair match evidence), J.11, and M.6 (insofar as the claim alleges trial court error).

In addition, except insofar as they incorporate allegations of ineffective assistance of trial counsel, the following claims are denied under *In re Waltreus* (1965) 62 Cal.2d 218, 225, because they were previously raised and rejected on appeal: claims E.2 (except insofar as the claim alleges violation of the right to free exercise of religion), F.4, G (insofar as the claim concerns photographs of the victims and crime scene), I, J.10, K.16, L.9, L.16, L.17, L.18, L.19, L.22, L.24, L.25, M.5, M.6 (insofar as the claim concerns prosecutorial misconduct), M.8, N.2, O.11, P.9, P.17, and P.18.

In addition, claim U.5 is denied as premature.

In addition, all claims except claim U.5 are denied on the merits. (See *Harris* v. *Reed* (1989) 489 U.S. 255, 264, fn. 10.)

Mosk, J., is of the opinion an order to show cause should issue.

Brown, J., would deny all claims solely on the merits.

/Kennard

Acting Chief Justice

B-15

Johnson

SUPREME COURT
FILED

JUL 19 1995

Robert Wandruff Clerk

DEPUTY

S006544

IN THE SUPREME COURT OF CALIFORNIA

DOCKET
CR. LA.
No. 88XS0010
Entered by
Date 7/21/95

THE PEOPLE, Respondent

v.

TRACY DEARL CAIN, Appellant

Petition for rehearing DENIED.

Chief Justice

B-13

COPY

SUPREME COURT
FILED

MAY 4 1995

Robert Wandruff Clerk

IN THE SUPREME COURT OF CALIFORNIA

DOCKET
CR. LA.
No. 96
Entered by
Date

THE PEOPLE,

Plaintiff and Respondent,

v.

TRACY DEARL CAIN,

Defendant and Appellant.

S006544

Super. Ct. No. Cr. 22297

Defendant Tracy Dearl Cain was convicted following a jury trial of the first degree murders of William and Modena Galloway (Pen. Code, § 187, subd. (a), 189).[1] The jury found true robbery-murder, burglary-murder, attempted-rape-murder and multiple-murder special-circumstance allegations. (§ 190.02, subds. (a) (3) & (17).) Defendant was also convicted of two counts of burglary (§ 459) and one count of robbery (§ 211), but was acquitted on a charge of rape (§ 261). The jury fixed the penalty for each murder at death. After denying the motion for modification of the penalty verdict, the court entered judgment accordingly. The present appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

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

SEE CONCURRING OPINION

GUILT PHASE FACTS

Prosecution's Case

1. The Victims

Prior to the weekend of October 17, 1986, Modena Shores Galloway and William Jefferson Galloway lived in Oxnard. Their next door neighbor was Persey Cain, the father of defendant. Mr. Galloway, 63 years of age, had injured his back and was in poor health. Since Mr. Galloway was unable to work on his own car, his son, William, and Persey Cain had sometimes repaired the car in the Galloway driveway with the garage door open. Defendant observed some of these repairs.

Mr. Galloway had a habit of keeping large amounts of cash in his house. When he received his monthly disability check, which ranged from $1,500-$2,000 per month, he placed $200-$300 in a savings account and retained the remainder in cash. He paid all of his bills in cash and did not have a checking account. Mr. Galloway had shown his son-in-law, Kenneth Mehaffie, a brown wallet containing approximately $1,000, which he kept in the desk next to the bed. He also kept a black wallet containing less cash on his person.

Mrs. Galloway stored her jewelry in a small wooden box with a sliding top. The Galloways also owned a Sanyo beta video casette recorder (VCR), which was kept in Mr. Galloway's room. The Galloways kept a child-sized rocker in the living room of their home for their grandchild. Their home was equipped with several night lights that turned on automatically and remained on when the Galloways retired. These night lights provided sufficient light by which to recognize someone they knew.

On Monday, October 20, 1986, the Galloways' son, William, found them dead in their home. William entered the house through the garage. The door

between the garage and the kitchen was broken off its hinges. William found his father's body lying in the hallway to the living room. Dried blood was on the wall. William found his mother's body in her bedroom. Again, dried blood was splattered on the wall.

2. Chronology from Witness Testimony

Defendant lived with his father, Persey Cain, next door to the Galloways. On Tuesday, October 14, 1986, Persey Cain went on a week-long trip, leaving defendant and defendant's younger brother Val in charge of the house, with food in the refrigerator and approximately $50. Prior to his departure, Persey Cain took parts from defendant's Pinto to Barber Auto Parts for a valve job. On Sunday, October 12, 1986, defendant had received a pay check in the amount of $111.75 from Manpower Temporary Services.

a. Friday, October 17, 1986

The auto parts store records show $57.18 was paid in cash for defendant's valve job on October 17. Beginning in the late afternoon on that day, defendant and Val held a party at their house. Acquaintances attending the party included David Cerda, Floyd Clements, Rick Albis, Kevin Walker, Ulysses Anthony Mendoza, and two unidentified girls. At the party, everyone consumed beer and everyone, except Albis, consumed marijuana. Later in the evening, defendant "rock[ed] up" some cocaine and smoked it out of a pipe.[2]

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[2] Baking soda is used to "rock up" cocaine, i.e., transform it into a smokable form. Around 7:30 that evening defendant told Val to go next door to the Galloways' to borrow baking soda. Val enlisted Mendoza to do the errand. Mendoza went to the Galloway residence and obtained baking soda from Mrs. Galloway.

Around 8:30 p.m., defendant complained he was missing $10. He threatened "to beat all of their asses" if someone did not find the money. Mendoza told defendant his money was in his top dresser drawer, where defendant had placed it after returning from purchasing beer. Defendant found the money.

According to Mendoza, defendant remained angry, because his brother Val and Walker were in the bedroom with the two girls. Defendant complained Val should have included him instead of Walker. Defendant was so angry he kicked the door and put a hole in it. A few minutes later, Walker and the girls left and did not return. Clements testified this incident occurred on Saturday night, not Friday night, while Albis testified it occurred on Friday but he, not Walker, was in the bedroom with Val and the girls.[3]

Mendoza testified that around 11 p.m. he and defendant walked to a nearby 7-Eleven to buy more beer. On the way to the store defendant asked Mendoza to help burglarize the Galloways' house so "he could get thousands." Mendoza declined, saying he didn't have the nerve.

At the 7-Eleven, Mendoza and defendant encountered Richard Willis and Sean Sampson. Defendant told them he wanted to buy drugs. According to Mendoza, he and defendant climbed in the backseat of Sampson's car and drove off to obtain drugs. While they were in the car, defendant tapped Mendoza on his knee and made a strangling gesture with his hands. Mendoza told Sampson and Willis that, if they were smart, they would turn around and drop him off or something foolish would happen. They complied and Mendoza returned to the

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3 Albis was in custody at the California Youth Authority at the time of trial. He was granted immunity for his testimony. He was not charged with any crime relating to the present case.

party. About 20-30 minutes later, defendant returned home and called Mendoza a "pussy," because he would not help him.

Willis's account of his encounter with defendant differed somewhat. Willis testified that, as he was leaving the 7-Eleven store at approximately 6:30 or 7 p.m., he met defendant, who asked if Willis knew where he could get some marijuana. They drove to defendant's house, because defendant said he needed to get some money, then to Willis's house. When Willis asked to see the money, defendant claimed he forgot to bring it, so they returned to defendant's house. When defendant returned to the car, he brought Mendoza with him. They returned to Willis's house, but when Willis again asked to see the money defendant still didn't have any. They returned to the car. As they started to drive, defendant asked if Willis knew where he could sell a home entertainment system so he could purchase the marijuana. Willis directed him to Aleric Street. Mendoza then said, "If you know what is good for you, you'll take me back." Willis "got the hint" and dropped them back at the Cain house. Sampson testified he did not see either Mendoza or defendant on Friday night.

Mark Pina lived across the street from the Cain residence. At approximately 12:30 a.m., on Saturday, October 18, defendant and Mendoza visited Pina. Defendant asked Pina if he owned a freebase pipe and offered him $10 for it. Pina gave the pipe to defendant and declined payment. During the brief visit, Pina thought defendant looked "sprung," as though he had already used cocaine; he talked fast, repeated things, and did not seem to hear when Pina spoke to him.

Mendoza testified that, sometime after he returned from his ride with Willis and Sampson, he was seated on the couch. (The record is not clear whether he and defendant had yet visited Pina.) Mendoza heard defendant call to Cerda. Cerda walked outside the front door and talked with defendant. He came back inside,

grabbed his jacket, and left again. Cerda returned three or four minutes later without defendant. A bit later, Val asked Cerda to go check where defendant was. Cerda left and returned again in a couple minutes without defendant.

Rick Albis, who had left the party with Floyd Clements sometime between 10 and 11 p.m., returned less than one hour later. He stayed for 10-20 minutes. Cerda, Mendoza and Val were present, but Albis did not see or hear defendant.

Approximately 20-30 minutes after Albis left for the second time, defendant returned. Mendoza, Val and Cerda were present. According to Mendoza, defendant had blood on the inner part of the bill of his hat, on his right cheekbone, on his right foot, on his right leg by his pocket, and on his chest area. Defendant said he had gotten "thousands." Mendoza saw defendant holding a lot of money in his left palm. The money was folded in half with a $100 bill on top. Defendant said he had "knocked them smooth out" or he had "blipped somebody." Val had defendant remove his clothes to be washed. Mendoza and Cerda spent the remainder of the night at the Cain residence.

b. Saturday, October 18, 1986

On Saturday defendant was scheduled to work at a temporary job, but did not report to work. When Mendoza awoke, he went into the living room. Defendant was asleep in a recliner. Mendoza picked up a wad of bills lying next to defendant and counted the money. The wad contained $500. Defendant woke up, grabbed the money and exclaimed: "Give me my fucking money." Albis also testified defendant showed him a check and a wad of money when he returned to the Cain house on Saturday morning.

During the encounter, Mendoza noticed what appeared to be fresh cut wounds on defendant's right hand. Later on Saturday afternoon, Clements saw defendant hold his right hand in a fist in the palm of his left hand. He heard defendant ask Mendoza to get him a Band-Aid. That morning Mendoza heard Val

ask defendant what he did with the people the previous night. Defendant responded: "That's on them."

Sometime that day, defendant, Mendoza, Albis and Cerda went shopping. Defendant bought a pair of black leather hightop basketball shoes, a black Raiders hat, some cassettes and a car stereo. The stereo cost over $200. Defendant paid cash for all the items.

Clements testified Mendoza came to his house around 5 or 6 p.m. to ask if he knew anyone who would buy a VCR for $25 or $30. Clements saw the VCR in the back of Mendoza's truck. Clements noticed Mendoza was wearing a new jacket and cap. Mendoza testified he did not purchase any new clothes when he accompanied defendant on his shopping spree.

Clements further testified Mendoza told him about seeing the Galloways' bodies. Mendoza told Clements the lady was lying on the bed with a pillow over her face and there was blood everywhere. The old man was lying on the floor, all bloody with holes in his head. Mendoza, however, testified he never entered the Galloway home.

Sometime between 11 p.m. and midnight, Willis and Sampson again encountered defendant and Mendoza at the 7-Eleven. Mendoza tried to sell Sampson a VCR, which he said was at the defendant's house. Mendoza also had with him a wooden box containing jewelry he was trying to sell. Sampson and Willis gave Mendoza and defendant a ride back to defendant's house. As he left the car, defendant warned Sampson and Willis to keep their mouths shut about the VCR. Mendoza testified these events did not occur.

c. Sunday, October 19, 1986

Defendant and Val held a barbecue on Sunday afternoon. Just as the sun was going down, defendant asked Mendoza to take him to the store in Mendoza's truck. Mendoza refused. According to Mendoza, defendant stated Mendoza

would either take him or he would knock Mendoza out and take the truck himself. When Mendoza got to the truck, he saw a box containing cables, wires, rags and sticks in the back of the truck. Defendant directed him to drive to Perkins Road where defendant disposed of the box. While defendant was disposing of the box, Mendoza saw that it also contained a VCR.

Kathy Lazoff, Mendoza's girlfriend at the time, was also at the barbecue. Lazoff overheard a conversation between Mendoza and defendant. Defendant said: "Take it. I'll give you a couple bucks for gas." Mendoza responded: "Man, you're crazy." Defendant then replied: "You have no choice because I'll kick your ass and take your truck." Defendant appeared angry and upset during the conversation.

3. The Investigation

The investigation of the Galloway murders began around 2:40 p.m. on October 20, 1986. The crime scene was photographed. Bloody footprints were found on the asphalt tile in Mr. Galloway's bedroom between the bed and the television. Some prints appeared to have been made by a stocking-clad foot and at least one print appeared to have been made by some type of shoe. Some of the prints differed in size. The tiles were photographed. A broken child's rocking chair, splattered with blood and missing a rocker and an armrest support, was found next to Mr. Galloway's body in the hallway. The house was dusted for fingerprints and some latent prints were found. The results of comparisons of these prints were not part of the trial testimony. Despite the use of sophisticated tests to recover fingerprints from the rocking chair, no prints were found.

Dr. Ronald O'Halloran, the Assistant Medical Examiner for Ventura County arrived at the Galloways' house around 5 p.m. He found Mr. Galloway's body in the hallway. Based upon the state of decomposition of the bodies,

Dr. O'Halloran estimated the Galloways had been murdered two to three days before he examined them.

Dr. O'Halloran found Mrs. Galloway's body on a bed. She was lying on her back with her feet and legs extending over the side of the bed. Her legs were spread apart exposing her genitals. The body was nude from the waist down, except for two bootie socks. Her top was pulled up almost to her breasts. A pillow covered her head and blood was splattered on the wall. The police found Mrs. Galloway's panties on the floor just inside her bedroom door and her pajama bottoms near her husband's body.

A VCR, a jewelry box containing jewelry, and the brown wallet in which Mr. Galloway habitually kept large amounts of cash were missing from the house. A black wallet containing $170 was found in Mr. Galloway's bedroom and a small pouch containing $34 was found pinned in Mr. Galloway's pajama bottoms.

Between October 20 and 24, Detective Billy Tatum interviewed Rick Albis, Mendoza, Clements and Val. None had injuries on their hands. Cerda was arrested on October 22; the little finger of his right hand was injured. Defendant was also arrested October 22. He had cuts on his fingers and knuckles and a bruise on his shoulder.

In a tape-recorded interview with detectives, defendant first gave an entirely exculpatory version of events. Defendant claimed he learned of the Galloway murders from some of his neighbors when he returned home from work on Monday afternoon and saw all of the police cars near the Galloways' home. Except for trips to the store to buy beer, defendant was home all night on Friday. He stayed home all day Saturday watching television and videotapes. On Sunday morning, he visited his ex-girlfriend. Later that afternoon, he held a barbecue for friends and family.

After being confronted by the detectives with some obvious lies in his initial story, defendant modified his story. He maintained he did not kill anyone. He admitted, however, going to the Galloway home on Friday night. On Saturday, he returned to the Galloway house with Rick Albis and Mendoza to wipe away fingerprints.

Finally, defendant stated that he, Mendoza, Albis and Cerda went to the Galloway house on Friday night. Defendant continued to deny that he killed anyone. Defendant was looking for money and Rick Albis was looking for a gun. Rick Albis took his shoes off so he would not leave shoe prints. At some point, Mrs. Galloway came out of the bedroom. Rick Albis hit her; knocked her down; and continued hitting her. Defendant could not say who moved Mrs. Galloway back to her room or who raped her. Cerda placed the pillow over her face and hit and shook her. Cerda also killed Mr. Galloway. Mendoza hit Mr. Galloway with his hand and a rocking chair. Defendant stated that he moved the broken rocking chair. Defendant, Mendoza and Rick Albis returned to the Galloway house on Saturday morning to wipe away fingerprints. Defendant used a face towel from his house for this purpose. He then wrapped two broken sticks from the rocking chair in the towel. Later that day, Mendoza threw the sticks and the VCR into the water.

4. Physical Evidence

Dr. Frederick Lovell, Chief Medical Examiner for Ventura County, performed the autopsy on the body of William Galloway on October 22. He estimated Mr. Galloway died two to three days before his body was placed in the morgue refrigerator. The cause of Mr. Galloway's death was trauma to the brain. Mr. Galloway sustained a minimum of 13 blows, which produced injuries to Mr. Galloway's upper chest, right shoulder and head. One of the blows to the head was probably the lethal blow. The object used to administer the blows was

hard and had an edge, but not a sharp cutting edge. Considerable force would have been necessary to produce the bruising found on the body. Evidence of defensive wounds was also found.

Also on October 22, Dr. O'Halloran performed the autopsy of Mrs. Galloway's body. Dr. O'Halloran opined the cause of Mrs. Galloway's death was also traumatic head injury. He found evidence of eight external and five internal injuries. At a minimum, Mrs. Galloway received two to three blows. If an object was used to administer the blows, it was blunt.

Because the crime scene suggested a sexual assault, Dr. O'Halloran examined the body's vaginal area. Dr. O'Halloran prepared vaginal swabs and pubic and scalp hair samples. He surgically removed Mrs. Galloway's vagina and attempted to invert it. During his examination of the vagina, he found an approximately one-half inch tear just inside the lower part of the vaginal opening. Dr. O'Halloran did not notice the tear when he first examined the body or when he removed the vagina. Since there was no hemorrhage related to the tear, Dr. O'Halloran believed he produced the tear when he attempted to turn the vagina inside out.

Sometime after the autopsy, Dr. O'Halloran tested the vaginal swabs for the presence of sperm and seminal fluid. None was detected. In his opinion, these findings did not rule out a rape, but he was unable to opine Mrs. Galloway definitely had been raped. The prosecution also called Dr. Bruce Woodling, a medical doctor and expert in sexual assault examinations. In Dr. Woodling's opinion, the tear in the vagina occurred as the result of penetration by a penis-like object and not Dr. O'Halloran's attempts to invert the vagina.

Criminalist Edwin Jones, Jr., compared foreign hairs found on Mrs. Galloway's clothing to hair samples from defendant and other possible donors. Defendant's pubic hair exhibited a "very unusual" cuticle structure, which

was also found in the foreign hairs. Based upon microscopic and electrophoreses examination, Mr. Jones concluded all of the foreign hairs could have been deposited by defendant, and the characteristics exhibited in the foreign pubic hairs would be found in only a very few people in the general population.

Three foreign hairs were found in Mrs. Galloways panties. One foreign hair was a long pubic hair, the other two were leg hairs. Mrs. Galloway, Mendoza, Cerda, and Clements were eliminated as the source of these hairs by microscopic examination. Electrophoresis testing in the PGM (phosphoglucomutase) subgroup on the pubic hair further eliminated Mr. Galloway and Albis as the source of the hair. Thus, of the people defendant's statement placed in the Galloway house, only defendant's hair possessed the same PGM subgrouping and microscopic characteristics as the foreign hairs found in the panties.

According to Mr. Jones, all of the other foreign hairs found on Mrs. Galloway's clothing also could have been deposited by defendant. A dark hair found in Mrs. Galloway's pajama bottoms, hairs found in Mrs. Galloway's pajama top, and three hairs found in Mrs. Galloway's socks were all microscopically similar to defendant's samples.

In photographs of the crime scene, Jones observed blood splatters on the walls next to where the bodies were located. The multiple blood splatters in the vicinity of Mr. Galloway's head suggested Mr. Galloway's head was very close to or on the floor when most of the blood was released. Most of the blood splatters near Mrs. Galloway's body were on the wall directly above the pillow that covered her face, from which Jones opined the blows took place while Mrs. Galloway was lying on the bed.

Jones was also given a blue jacket soaked in blood that was found at the crime scene. The jacket was a size small and would not have fit defendant.

On Wednesday, October 22, 1986, Officer Charles Hookstra recovered the Galloways' VCR from a drainage ditch off Perkins Road. He was unable to find the missing rocking chair pieces among the driftwood and trash in the ditch.

Defense Case

Consistent with his final statement to the police, defendant contended he entered the Galloway home to steal money, was present when the Galloways were murdered, but did not kill them.

Criminalist Gregory Laskowski, an expert in footprint examination, compared the photographs of the crime scene footprints to controlled samples of footprints made by defendant and Mendoza. Mr. Laskowski eliminated Mendoza as the source of the prints. According to Mr. Laskowski, defendant did not make the whole-foot impressions found at the crime scene. Mr. Laskowski was not able to eliminate defendant as the possible source of two heel prints, because the prints did not possess sufficient individual identifying characteristics. Laskowski also opined it was unlikely the footprints were deposited six to ten hours after the murder, a time consistent with when defendant, Albis and Mendoza wiped away the fingerprints on Saturday.

Dr. Werner Spitz is the Medical Examiner for Wayne County, Michigan. Dr. Spitz agreed with Dr. O'Halloran that the absence of bleeding associated with Mrs. Galloway's vaginal tear indicated the tear occurred after death. Furthermore, Dr. Spitz testified that, in the vast majority of sexual assault cases he has investigated, semen and/or seminal fluid were found. Dr. Spitz opined, in the absence of evidence of trauma to the genitals, or semen or seminal fluid, no evidence substantiated a sexual assault. The presence of pubic hair would not be sufficient to alter his conclusion. On cross-examination, Dr. Spitz conceded a rape can occur without leaving evidence of vaginal injury.

Defendant called Trisha Greene and Richard Gifford to provide testimony inconsistent with Mendoza's testimony. Greene testified she had known Mendoza since grade school, approximately seven years. On Sunday morning, the day before the Galloways' bodies were discovered, Mendoza spoke with her, Cerda and Bill Miller at her home. At that time Mendoza was wearing a new jacket, shirt and hat, which he said his father bought. Mendoza described going to the Galloway house with "Tracy" on Saturday after the Galloways were dead. He described Mrs. Galloway lying on the bed with her head covered by a pillow. Mendoza also said he took a VCR, which he dumped in the reservoir.

Richard Gifford testified that in October of 1986, Mendoza tried to sell him jewelry from an antique wooden box with carvings on its sides. Mendoza told Gifford he had stolen the box from a house in the neighborhood. Mendoza also tried to sell Gifford a VCR, which resembled a picture he was shown of the Galloways' VCR. During this time, defendant was down the street talking loudly with Cerda. Defendant kept glancing in the direction of Mendoza and Gifford.

On cross-examination, Gifford testified he saw defendant on Saturday afternoon at the 7-Eleven with a large roll of bills. Gifford thought defendant must have had over $1000. Defendant gave Gifford a $100 bill to buy some beer for him. Gifford went into the store and gave the bill to the cashier, Dean Geer. Later on Sunday afternoon, Gifford observed defendant still flashing money.

Prosecution Rebuttal

Dean Geer testified that on Saturday, October 18, he was employed at the 7-Eleven on Channel Islands Boulevard. In the late afternoon, Richard Gifford purchased some beer and cigarettes with a $100 bill. Dean knew Gifford, because he often helped Dean close the store in the evenings. Dean remembered the transaction, because it was unusual to receive such a large bill.

Arturo Mendoza is Mendoza's father. In October of 1986, Mr. Mendoza bought Anthony a new jacket and a baseball hat. Anthony also owned another jacket of a similar style that he was buying for himself at that time through Amway.

GUILT PHASE ISSUES

I. Admission of Photographs into Evidence

Defendant contends he was prejudiced during both the guilt and penalty phases by the admission into evidence during the guilt phase of 29 photographs: photographs of Modena Galloway's body as discovered by the police at the crime scene, autopsy photographs of Modena Galloway's excised and inverted vagina; an autopsy photograph of Modena Galloway's face; photographs of William Galloway's body as discovered by the police at the crime scene; and autopsy photographs of William Galloway's body and face. Defendant claims these photographs were cumulative, gruesome, inflammatory and irrelevant. He contends the admission of these photographs into evidence violated his Fifth and Fourteenth Amendment rights to due process, his Eighth Amendment right to a reliable verdict in a capital case and his Sixth Amendment right to a fair jury trial. He also claims his trial counsel rendered ineffective assistance by failing to object to the admission of these photographs.

Because trial counsel did not object to the admission of any of these photographs, defendant's objections are waived. (E.g., *People* v. *Turner* (1990) 50 Cal.3d 668, 706.) Contrary to defendant's contention, no special exception to this rule of waiver exists for capital cases. (*Ibid.; People* v. *Pinholster* (1992) 1 Cal.4th 865, 935.)

Defendant further contends the trial court had a sua sponte duty to conduct an independent review of the photographs pursuant to Evidence Code section 352.

As we have previously recognized, "[w]hile a court may exercise such authority under Evidence Code, section 352 [citations], the failure to so act cannot be urged on appeal as error." (*People* v. *Visciotti* (1992) 2 Cal.4th 1, 53, fn. 19.)

Defendant also contends trial counsel's failure to object to the admission of these photographs constituted ineffective assistance of counsel. In order to prevail on this claim defendant must prove (1) his attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) his attorney's deficient representation subjected him to prejudice. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687; *In re Wilson* (1992) 3 Cal.4th 945, 950.) Prejudice for purposes of this analysis is demonstrated by showing a reasonable probability that, but for trial counsel's failings, the result would have been more favorable for the defendant. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*) Defendant's claim fails, because he is unable to demonstrate prejudice from counsel's failure to object.

Contrary to defendant's contentions, we conclude the bulk of the photographs would have been properly admitted even if trial counsel had proffered the objections now urged. Our conclusion is based upon our independent review of the photographs in question.

Although several of the photographs are highly unpleasant to observe, none of the photographs are unduly gruesome or inherently inflammatory. Moreover, each photograph was relevant to the prosecution's case. The photographs of the victims at the crime scene and the autopsy photographs of the wounds received by the victims were relevant to the prosecution contentions that defendant was the actual killer, intended to kill his victims, and did so during the commission of robbery and rape. (*E.g.*, *People* v. *Wash* (1993) 6 Cal.4th 215, 245-246; *People* v. *Pride* (1992) 3 Cal.4th 195, 243.) The photographs of the excised vagina were

relevant to the question of whether Modena Galloway was raped. The photographic evidence could assist the jury in evaluating the expert testimony on this subject. (Cf. *People* v. *Price* (1991) 1 Cal.4th 324, 441.)

Assuming certain photographs were cumulative of others, there is no reasonable probability trial counsel's failure to object on this ground affected the verdicts. The overlap between photographs was not substantial. Given this fact and the strong, albeit circumstantial, evidence linking defendant to the murders and rape, confidence in either the guilt or penalty phase verdicts is not undermined by the admission of any redundant photographic evidence. We repeatedly have rejected the argument photographs of a murder victim should be excluded as cumulative if the photographs are offered to prove facts established by testimony. (E.g., *People* v. *Price*, *supra*, 1 Cal.4th at p. 441.) Defendant presents no persuasive reason for us to depart from our prior rulings.

Defendant fails to establish ineffective assistance of counsel. Moreover, since the photographs in question were relevant, admissible evidence, defendant also fails to establish a violation of any other federal constitutional right by their admission into evidence.

II. Partial Concession of Guilt

Defendant next asserts his constitutional rights were violated by certain admissions made in defense counsel's opening and closing guilt phase arguments. In particular, defendant argues defense counsel was ineffective, because he told the jury defendant was guilty of burglary and multiple felony murder.[4] Defendant

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[4] The content of defense counsel's statements can be judged from the following excerpts from his closing guilt phase argument:

"First of all burglary.

"Did Mr. Cain go in the Galloway home to steal?

(footnote continued on next page)

equates these statements with a guilty plea on those charges. He therefore also faults the trial court for not intervening to obtain a personal, on-the-record waiver consistent with *Boykin* v. *Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122.

We have held trial counsel's decision not to contest, and even expressly to concede, guilt on one or more charges at the guilt phase of a capital trial is not tantamount to a guilty plea requiring a *Boykin-Tahl* waiver. (*People* v. *Griffin* (1988) 46 Cal.3d 1011, 1029; *People* v. *Hendricks* (1987) 43 Cal.3d 584, 592-

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(footnote continued from previous page)

"Yeah, he did. I said so in my opening statement, but that wasn't evidence. The evidence was from his own lips to the police. He stole."

"....

"What about murder? Is the defendant guilty of murder?

"Well, this may surprise you; but in my understanding of the law, yes, he is. He is guilty of murder.

"You may think: Wow, defense lawyer up there and he's giving away the store. He's not doing his job. He's not representing Mr. Cain.

"Well, I disagree with that. I think I am representing him, but I'm also not going to dispute facts that are not in dispute. Mr. Holmes [the prosecutor] is correct. If he's engaged in a felony inherently dangerous to human life and somebody dies, each participant is guilty of murder."

"....

"I'm not saying and I won't say that the evidence is Tracy Cain killed anybody. My goodness. That's a big difference, and I tend [*sic*: intend] to stress that this afternoon.

"I submit the evidence is not Tracy Cain personally killed anybody; but I also submit ladies and gentlemen, that you don't even get to that part when you're talking about the murder. That's the special circumstance, but the murder--

"Is he guilty of murder?

"The law is clear. He did something wrong, and that's burglary. That's a given. And somebody died during that. So it's a given. He's guilty. And he's guilty of murder."

594.) It is not the trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach to presenting the defense. (See *People* v. *Freeman* (1994) 8 Cal.4th 450, 497; *People* v. *Griffin, supra,* 46 Cal.3d at p. 1029; *People* v. *Hendricks, supra,* 43 Cal.3d at 593-594.)

Next we turn to defendant's claim his counsel's concessions constituted ineffective assistance of counsel. As we previously have recognized, "[t]o the extent defendant is arguing that it is necessarily incompetence for an attorney to concede his or her client's guilt of murder [or burglary and murder as in this case], the law is otherwise." (*People* v. *Mayfield* (1993) 5 Cal.4th 142, 177.) Furthermore, as pointed out above, the record does not demonstrate counsel ignored "any express wish on defendant's part to present an active defense" with regard to either the felony-murder or burglary counts. (*Ibid.*)

Defendant also appears to argue his counsel's concessions were an incompetent tactical choice. We disagree. Defendant admitted to the police on tape he was inside the victims' residence when they were murdered and he entered the residence with the intent to steal money. His taped statement was played to the jury. Defendant's admission that he entered the residence for the purpose of stealing money proved his specific intent to commit burglary. (Pen. Code, §§ 459, 460; 2 Witkin, Cal. Criminal Law (2d ed. 1988) § 656, pp. 736-737.) Under the felony-murder rule, his commission of burglary, together with the killing of the victims in the commission of the burglary, made him liable for murder. (1 Witkin, Cal. Criminal Law (2d ed. 1988) § 470, pp. 528-529.) Under these circumstances, we cannot conclude counsel was ineffective for candidly admitting defendant's guilt on these counts (*People* v. *Freeman, supra,* 8 Cal.4th at p. 498; *People* v. *Mayfield, supra,* 5 Cal.4th at p. 177; *People* v. *Jackson* (1980) 28 Cal.3d 264, 292-

293), while vigorously arguing against defendant's guilt of the special circumstances.

III. Admission of Videotaped Statement into Evidence

On October 21, 1986, the day following the discovery of the Galloways' bodies, Larry Good, a local television news reporter, briefly interviewed defendant, in his capacity as a neighbor of the victims. During the course of this interview, Good asked defendant: "I guess there's no, no idea who would do something like this, huh?" Defendant responded: "Uh-uh . . . not that I know of . . . I don't know nothing about that."[5] Over defendant's objections and following a lengthy hearing, the trial court permitted the videotape to be shown to the jury and admitted into evidence.

Defendant now contends the trial court erred and the improper admission of the videotape violated his due process rights under the Fifth and Fourteenth Amendments to the federal Constitution, as well as his right to a reliable and non-arbitrary sentencing determination under the Eighth Amendment. We reject defendant's claims and conclude the trial court did not abuse its discretion in admitting the videotape.

Defendant initially claims the videotaped statement should have been excluded as irrelevant. "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency

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5 Defendant notes what he believes is a discrepancy between the response in the transcript, Court's Special Exhibit No. 17, and the response heard on the videotape. According to defendant's reply brief, on the defense copy of the videotape defendant is heard saying: "Uh-uh . . . not that I know of . . . oh, no, no, no." Our review of the videotape played for the jury (People's exhibit No. 102) reveals no discrepancy. As the transcript reflects, defendant's response was: "Uh-uh . . . not that I know of . . . I don't know nothing about that."

in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) As we have repeatedly observed, the trial court is "vested with wide discretion in determining relevance under this standard." (E.g., *People* v. *Kelly* (1992) 1 Cal.4th 495, 523.)

The trial court concluded defendant's statement to the reporter denying any knowledge of the crimes could be found by the jury to be a false statement inconsistent with both (1) his police interview statement proclaiming he was present during the crimes, but Albis and Cerda committed the murders, and (2) the prosecution's strong, albeit circumstantial, evidence defendant committed the murders. The trial court reasoned defendant's denial of knowledge of the crimes, taken together with his subsequent statements to the police, reasonably could be viewed as part of an evolving plan to evade responsibility and deflect blame for the crimes. Therefore, the trial court concluded defendant's videotaped statement could tend to prove consciousness of guilt and, thus, the identity of the murderer. (E.g., *People* v. *Green* (1980) 27 Cal.3d 1, 41.) We find no error in the trial court's reasoning.

Defendant further contends the prosecution failed to lay a foundation that defendant's statement was wilfully or deliberately false. (See *People* v. *Albertson* (1944) 23 Cal.2d 550, 581-582 (conc. opn. of Traynor, J.); *People* v. *Mickey* (1991) 54 Cal.3d 612, 671-672.) Assuming, without deciding, this objection was not waived by failure to raise it at trial, we conclude the circumstances surrounding the videotaped statement, and the patent inconsistencies between the statement and defendant's subsequent statement to the police, provided the necessary foundation.

Defendant claims the reporter's question regarding defendant's knowledge of the crimes was so ambiguous as to render defendant's response irrelevant or at least more prejudicial than probative. Again, assuming, without deciding, this

objection was not waived by failure to raise it during trial, we reject defendant's contention as meritless. The question as reasonably construed called for any knowledge defendant possessed regarding the perpetrator of the crimes.

Defendant also contends that, even if the substance of his statement to the reporter was relevant and admissible, his demeanor as shown by the videotape was either irrelevant or more prejudicial than probative under Evidence Code section 352. For these reasons, defendant asserts the trial court erred by failing to compel the prosecution to accept defendant's proposed stipulation to introduction of the contents of the statement, without introduction of the videotape itself, or by failing to exclude the videotape altogether. Again, we find no abuse of discretion by the trial court.

The trial court did not abuse its discretion in deciding defendant's demeanor was relevant. The jury was permitted to decide whether defendant's pretrial statements were false. Defendant's demeanor when making one of these statements is highly probative on this issue. Because the videotape presentation thus contained relevant information not covered by the defendant's proposed stipulation, the prosecutor was not required to accept the stipulation in lieu of showing the videotape. (*People* v. *Edelbacher* (1989) 47 Cal.3d 983, 1007; see also *People* v. *Karis* (1988) 46 Cal.3d 612, 640.)

We also consider defendant's claim the trial court should have excluded the videotape on the basis of undue prejudice. A trial court's exercise of discretion in admitting or rejecting evidence pursuant to Evidence Code section 352 "will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice." (*People* v. *Milner* (1988) 45 Cal.3d 227, 239.) Here there was no such abuse. The trial court carefully balanced the probative value of the videotape against its potential for prejudice to defendant. On this record, we find no reason to disturb the trial court's ruling. Furthermore, because the

evidence was admissible, there was no violation of defendant's federal constitutional rights.

IV. Instructional Error

A. CALJIC No. 2.03

Defendant contends the trial court erred in instructing the jury on the subject of consciousness of guilt with CALJIC No. 2.03.[6] Specifically, defendant argues this instruction improperly permitted the jury to infer "since [defendant] made false statements . . . at the time of the event he had a specific intent to steal and a specific intent to kill."

Defendant's argument is belied by the text of the instruction itself. The instruction on its face did not address the specific intent issues, which were governed by other instructions. CALJIC No. 2.03 instructed the jury only to consider defendant's false statement as a circumstance tending to prove consciousness of guilt; the instruction cautioned the jury the statement standing alone is "not sufficient by itself to prove guilt." (See *People* v. *Kelly, supra*, 1 Cal.4th at p. 531.) We presume the jury followed the instruction as given. (E.g., *People* v. *Frank* (1990) 51 Cal.3d 718, 728.) Under these circumstances, the jury could not have been misled by CALJIC No. 2.03 into improper inferences regarding defendant's specific intent at the time the crimes were committed.

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6 The jury was instructed as follows: "If you find that before this trial the defendant made willfully false or deliberately misleading statements concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient of itself to prove guilt. The weight to be given to such circumstance and its significance, if any, are matters for your determination."

Accordingly, defendant fails to demonstrate instructing the jury with CALJIC No. 2.03 violated his constitutional rights.[7]

B. CALJIC No. 2.11.5

Defendant next contends the trial court erred by instructing the jury with an unmodified version of CALJIC No. 2.11.5, which told the jury to disregard, for purposes of determining defendant's guilt, the nonprosecution of other persons allegedly involved in the crimes.[8] Defendant contends this instruction undermined other instructions regarding accomplice testimony, thereby unfairly restricting the jury's evaluation of the testimony of Mendoza and Albis.[9] In particular, defendant contends this instruction barred the jury from considering any bias in these witnesses' testimony resulting from grants of immunity.

We previously rejected this specific claim under substantially similar circumstances. (*People* v. *Price, supra*, 1 Cal.4th at pp. 445-446.) In so doing, we explained: "The purpose of the challenged instruction is to discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly

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7 Because we conclude the videotaped statement was properly admitted into evidence as tending to prove consciousness of guilt, defendant's related objection to instructing the jury in terms of CALJIC No. 2.03 on the ground there was no evidentiary support for the instruction is meritless. (*People* v. *Kimble* (1988) 44 Cal.3d 480, 498, fn. 14.)

8 The jury was instructed: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. You must not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted."

9 Cerda did not testify at defendant's trial. Defendant correctly concedes the instruction would have been proper if its application had been expressly limited to Cerda. (E.g., *People* v. *Cox* (1991) 53 Cal.3d 618, 667, fn. 13.)

prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators. (*People* v. *Cox* (1991) 53 Cal.3d 618, 668.) When the instruction is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses. (*People* v. *Sully* [1991] 53 Cal.3d 1195, 1219.) Although the instruction should have been clarified or omitted (see *People* v. *Cox*, *supra*, [53 Cal.3d] at p. 667; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1313), we cannot agree that giving it amounted to error in this case." (*People* v. *Price*, *supra*, 1 Cal.4th at p. 446.) Here, as in *Price*, standard instructions on accomplice testimony were given; the *Price* analysis is thus dispositive of defendant's claim.

C. CALJIC No. 8.11

The trial court instructed the jury on implied malice in terms of CALJIC No. 8.11 (1983 rev.).[10] As the Attorney General concedes, the trial court erred by

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[10] The instruction as given reads in relevant part:

"'Malice' may be either express or implied . . . . [¶] Malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.

"When it is shown that a killing resulted from the intentional doing of an act with implied malice, no other mental state need be shown to establish the mental state of malice aforethought. . . ."

giving this instruction. The case against defendant was tried on a felony-murder theory; therefore, malice, whether express or implied, was irrelevant. (See *People* v. *Dillon* (1983) 34 Cal.3d 441, 475.)

Defendant contends the implied malice instruction misled the jury in two respects. First, defendant asserts the instruction injected confusion into the intent instructions properly given under the felony-murder theory. Second, defendant asserts the implied malice instruction prevented the jury from properly understanding that intent to kill was a necessary element of the special circumstance charges.[11] We do not believe, however, there is "a reasonable likelihood" the jury understood the instructions as the defendant asserts. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385].) In making this determination, we have considered the specific language challenged, the instructions as a whole and the jury's findings. (*People* v. *Mincey* (1992) 2 Cal.4th 408, 451; *People* v. *Kelly*, *supra*, 1 Cal.4th at pp. 525-526.)

The trial court, using modified versions of CALJIC Nos. 3.31 (1980 rev.) and 8.21, correctly instructed the jury that the intent necessary to find defendant guilty of first degree murder under the felony-murder theory was a specific intent to commit one or more of the felonies underlying the charge. The trial court also correctly instructed the jury on the elements of the underlying felonies. (See CALJIC Nos. 14.50 (1981 rev.), 9.10 (1982 rev.).) In light of these instructions,

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[11] Because the murders in this case occurred after our decision in *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 and prior to our decision in *People* v. *Anderson* (1987) 43 Cal.3d 1104, defendant was tried by agreement under the rule set forth by this court in *Carlos*. Therefore, the trial court instructed the jury, with a modified version of CALJIC No. 8.80 (1984 rev.), that, in order to find any of the special circumstances true, it must first find defendant, whether acting as a principal or an aider or abettor, intended to kill.

which clearly applied to the evidence presented and the arguments made during the trial, we do not find a reasonable likelihood the unnecessary definition of implied malice included in the instructions misled the jury about the intent necessary to convict defendant of murder under a felony-murder theory. When the instructions are viewed as a whole, it is clear the implied malice instruction related *only* to the general definition of murder given to the jury. The jurors would not have been misled by the inclusion of this surplus instruction. (See *People* v. *Williams* (1988) 45 Cal.3d 1268, 1310-1311; *People* v. *Duncan* (1991) 53 Cal.3d 955, 972-973 [inclusion of malice in definition of murder, where case tried on felony murder theory, not prejudicial].)

Next, defendant asserts there is a reasonable likelihood the jury was misled by the implied malice instruction when assessing the intent necessary to find him guilty of the special circumstances charged, because no instruction was given specifically differentiating the intent to kill required for the special circumstances findings from the mental state required for implied malice murder. Furthermore, defendant contends the jury confusion was compounded by the references to "mental state," as opposed to "intent to kill," found in the instruction addressing the sufficiency of circumstantial evidence necessary to support a special circumstances finding.

We find no reasonable likelihood the erroneously given implied malice instruction would have misled the jury in assessing defendant's culpability for the special circumstances charged. The trial court instructed the jury with a modified version of CALJIC No. 8.81.17 (1984 rev.), which specified the felony-murder special circumstances could not be found true unless the prosecution proved "[t]hat the defendant intended to kill a human being or intended to aid another in

the killing of a human being."[12] The same information was also imparted with a modified CALJIC No. 8.80 (1984 rev.), which told the jury defendant's intent to kill, or intent to aid in killing, had to be proven beyond a reasonable doubt.

In light of these specific and clear instructions, we find no reasonable likelihood the surplus implied malice instruction would have misled a reasonable jury in reaching verdicts on the special circumstances.[13] Our finding is buttressed by the prosecutor's express acknowledgment, in his summation, that the special circumstances required intent to kill. (See *People* v. *Kelly*, *supra*, 1 Cal.4th at p. 526 [closing arguments correctly explaining relevant law considered in evaluating prejudice from erroneous jury instruction]; *People* v. *Moore* (1988) 47

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12 With respect to the multiple murder special circumstance, the trial judge instructed the jury with a modified version of CALJIC No. 8.81.3, which read as follows:

"To find the special circumstance, referred to in these instructions as multiple murder convictions, is true, it must be proved:

"1. That the defendant has in this case been convicted of more than one offense of murder in the first or second degree.

"2. That in both of these offenses of murder the defendant intended to kill or intended to aid in the killing of a human being."

13 Defendant may be understood to claim the failure to define the terms "intent to kill" or "specific intent to kill" rendered the jury instructions unconstitutional, because the jury was not provided with a basis for separating capital crimes from other murders. Defendant's contention lacks merit. First, we have concluded that no confusion arose from the instructions given relating to intent. Second, the terms are readily understandable. No prejudice could have resulted from the failure to instruct the jury on the meaning of intent in the language that defendant now suggests. Since the jury was properly instructed to find intent to kill, defendant's constitutional claim is meritless. (See *People* v. *Anderson*, *supra*, 43 Cal.3d at pp. 1138-1148; *Carlos* v. *Superior Court*, *supra*, 35 Cal. 3d 131.)

Cal.3d 63, 87-89 [closing arguments demonstrate adequacy of instruction on issue of corroboration required for accomplice testimony].)

D. CALJIC Nos. 4.21 and 4.22

Defendant next alleges the jury was not properly informed voluntary intoxication could negate the intent to kill required for the special circumstances. He faults the trial court for giving the version of CALJIC No. 4.21 (1981 rev.) requested by defense counsel and for giving CALJIC No. 4.22 (1981 rev.), which defines voluntary intoxication.

Defendant's jury was instructed on the interplay between intent and voluntary intoxication as follows: "[¶] In the crime of murder of which defendant is accused in Counts 1 and 2 of the information, a necessary element is the existence in the mind of the defendant of the specific intent to kill. [¶] If the evidence shows that defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such specific intent. [¶] If from all the evidence you have a reasonable doubt whether defendant formed such specific intent, you must give the defendant the benefit of the doubt and find that he did not have such specific intent." The standard definition of voluntary intoxication followed. Instructions on the special circumstances allegations preceded and followed the voluntary intoxication instructions.

Defendant first contends that under these instructions the jury would not have understood voluntary intoxication could negate the intent required for the special circumstances. Rather, the jury, he asserts, would have incorrectly construed CALJIC No. 4.21 as adding an intent element to felony murder. We do

not find a reasonable likelihood the jury understood the instructions as defendant contends.[14]

First, the voluntary intoxication instruction referred to "the crime of murder of which defendant is accused in Counts 1 and 2 of the information." The special circumstances were alleged under the murder counts charged in counts 1 and 2 of the information. Furthermore, the jury was instructed, through versions of CALJIC Nos. 8.80, 8.81.3 and 8.81.7, within close proximity of the voluntary intoxication instructions that intent to kill was a necessary element of the special circumstances. The jury was not instructed that intent to kill was an element of felony murder, and was indeed told an "unintentional or accidental" killing could be murder under that doctrine. (See CALJIC No. 8.21.) Finally, both attorneys discussed the intent to kill requirement of the special circumstances in their summations. Under these circumstances, we believe the instructions taken as a whole were understood as allowing voluntary intoxication to be considered in relation to the intent to kill requirement of the special circumstances.

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[14] Defendant's trial counsel made an informed tactical choice to limit the voluntary intoxication instruction to the special circumstance allegations and not to include in the charge the specific intent crimes of attempted rape, robbery and burglary. The instruction given, of which defendant now complains, is the one drafted and requested by his attorney. Although counsel neglected to expressly include reference to the special circumstances, the record shows counsel "made a conscious, deliberate tactical choice between having the instruction and not having it." (*People* v. *Cooper* (1991) 53 Cal.3d 771, 831.) Defendant's claim of reversible error is therefore also barred by the invited error doctrine. (*Ibid.*; *People* v. *Marshall* (1990) 50 Cal.3d 907, 931; see also *People* v. *Kelly*, *supra*, 1 Cal.4th at p. 535 [court not required sua sponte to rewrite standard instruction that correctly states the law].)

We also find no error in the court's instructing the jury with CALJIC No. 4.22. We are not persuaded there is *any* likelihood the standard definition of voluntary intoxication found in this instruction negatively affected the jury's deliberations.[15]

Defendant also complains of the court's giving the standard pattern instructions on circumstantial evidence (CALJIC No. 2.01 (1979 rev.)), and circumstantial evidence relating to special circumstances (CALJIC Nos. 8.83 and 8.83.1). His claims of error in these instructions have been repeatedly rejected by this court. (*People* v. *Freeman*, *supra*, 8 Cal.4th at pp. 505-506; *People* v. *Jennings* (1991) 53 Cal.3d 334, 386.) Defendant advances no persuasive reason for us to reconsider our prior decisions.

V. Insufficiency of Evidence of Intent to Kill

Defendant next contends the jury's implied findings of intent to kill in connection with the special circumstances are not supported by sufficient evidence. We disagree.

The standard of review is well established. "'In reviewing the sufficiency of evidence for a special circumstance' - as for a conviction - 'the question we ask is whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (*People* v. *Rowland* (1992) 4 Cal.4th 238, 271, quoting *People* v. *Mickey*, *supra*, 54 Cal.3d at p. 678, italics in original.)[16] "In a

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[15] We have considered the interplay among all of the intent instructions given, including the implied malice instruction, and have found no reasonable likelihood a reasonable juror would have been misled in his or her deliberations.

[16] As in prior decisions, "[w]e need not, and do not, reach the question whether the sufficiency-of-evidence review specified in the text is required under the due process clause of the Fourteenth Amendment to the United States

(footnote continued on next page)

case, such as the present one, [where the finding is] based upon circumstantial evidence, we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not warrant reversal of the judgment. [Citation.]" (*People* v. *Proctor* (1992) 4 Cal.4th 499, 528-529.)

Our review of the record reveals substantial evidence from which a rational jury could find beyond a reasonable doubt defendant possessed the requisite intent to kill the Galloways. First, sufficient evidence was present from which a rational jury could find defendant personally killed the Galloways. Defendant admitted he entered the Galloway house, albeit with others, on the evening of the murders in order to steal money. Defendant's hand was injured the night of the murders. Expert testimony linked leg and pubic hair found on Mrs. Galloway's clothes to defendant. Mendoza testified he observed defendant with blood on his clothing. Mendoza also testified defendant told his party guests he had "knocked them smooth out" or that he had "blipped somebody."

Second, sufficient evidence was presented from which a rational jury could conclude beyond a reasonable doubt the assailant, defendant, possessed the specific intent to kill the Galloways. While not determinative, the nature of the Galloways' wounds, multiple blows to the head and body, supports an inference their assailant intended to kill them. (Cf. *People* v. *Mincey*, *supra*, 2 Cal.4th at pp. 433-434 [nature of wounds probative of intent to torture]; *People* v. *Proctor*,

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(footnote continued from previous page)

Constitution and/or the due process clause of article I, section 15 of the California Constitution." (*People* v. *Rowland*, *supra*, 4 Cal.4th at p. 271, fn. 11.)

supra, 4 Cal.4th at pp. 529-530 [nature of killing probative of premeditation and deliberation].) Moreover, the prosecutor presented evidence that the victims knew defendant, and that lighting conditions in the victims' home would have enabled them to identify defendant. Finally, the crime scene evidence, and defendant's statement, suggested missing pieces of the child's rocking chair had been used in one or both of the killings; the assailant, the jury could infer, had deliberately taken the chair from the living room to the hallway and torn it apart for use as a weapon, again indicating an intent to kill or seriously injure. In light of this evidence, a rational jury could conclude beyond a reasonable doubt defendant intended to kill the victims in order to prevent them from identifying him.

Finally, a rational jury could conclude beyond a reasonable doubt defendant's intoxication on the night of the murders did not negate his intent to kill. Little evidence was presented from which the jury could judge the effects of the defendant's voluntary intoxication. Defendant smoked an unspecified quantity of cocaine and *may* have consumed an unspecified quantity of beer and marijuana. The only testimony relating to the effect of whatever substances defendant consumed the night of the murders was the testimony of defendant's neighbor Mark Pina. Pina testified defendant looked "sprung" and exhibited the following symptoms of cocaine usage: "talks fast, repeats things, and you try and tell them something and it doesn't -- they don't seem to hear it." Contrary to defendant's contention, this sparse evidence does not compel us to find that the only rational conclusion a jury could have reached was defendant was incapable of forming a specific intent to kill due to his voluntary intoxication. (Cf. *People* v. *Williams*, *supra*, 45 Cal.3d at pp. 1311-1312 [witness's testimony defendant acted like he consumed LSD insufficient to support instruction on voluntary intoxication]; *People* v. *Carr* (1972) 8 Cal.3d 287, 294-295 [evidence defendant consumed

unspecified quantity of alcohol or drugs insufficient to support instruction on diminished capacity].)

On this record, a rational jury could have concluded beyond a reasonable doubt defendant intentionally killed the Galloways.

VI. Contentions Relating to Attempted Rape

Defendant raises several objections relating to the attempted rape special circumstance. We address defendant's contentions in turn.

A. Inadequate Notice

Defendant asserts he received inadequate notice the prosecution was relying upon attempted rape as an alternate basis to support the rape special circumstance. Defendant claims the failure specifically to charge *attempted* rape as a basis of the rape special circumstance violated his statutory rights under sections 190.1, 190.2 and 190.4 and his constitutional rights of due process, equal protection and notice of the charges against him.

The original information, the first amended information and the second amended information charged defendant with rape and alleged a special circumstance of murder while engaged in the commission of rape. The second amended information pleaded the rape special circumstance as follows: "It is further alleged the murder of Modena Shores Galloway was committed by defendant, TRACY CAIN, while the defendant was engaged in the commission of rape in violation of Penal Code Section 261, within the meaning of section 190.2(a)(17)." Section 190.2, subdivision (a)(17) states in relevant part: "The murder was committed while defendant was engaged in or was an accomplice in the commission of, *attempted commission of*, or the immediate flight after committing or attempting to commit the following felonies: [¶] . . . [¶] (iii) Rape in violation of Section 261." (Italics added.)

Following the prosecutor's rebuttal argument in which the prosecutor stressed a finding of attempted rape was sufficient to find defendant guilty of the rape special circumstance, the trial court raised the issue of whether the information had provided defendant with sufficient notice of the attempted rape basis of the special circumstance. The court stated its inquiry was triggered by the fact the information specifically enumerated attempted robbery in the robbery special circumstance allegation, but did not specifically enumerate attempted rape in the rape special circumstance allegation. Under these circumstances, the court wished to ascertain whether defense counsel believed he had been misled. The prosecutor reminded the court he had argued attempted rape in his opening statement and attempted rape was included in the agreed jury instruction for the special circumstances. Defense counsel stated he was aware of the differences in the language used in the information, but he also was familiar with section 190.2. He was not surprised by the prosecutor's argument, believed the prosecutor had the right to make the argument, and believed his client was not prejudiced by the prosecutor's reliance upon attempted rape as a basis for the rape special circumstance.

We find no statutory error in the language used to allege the rape special circumstance. Although consistency in the form of charging special circumstances is preferable, the rape special circumstance as alleged satisfactorily "charged" defendant and was not misleading. (§§ 190.1, subds. (a) & (c); 190.4, subd. (a).) Under the statute, the rape special circumstance specifically includes that the crime was committed during the "attempted commission of a rape." (§ 190.2, subd. (a)(17).) The information specifically referred to the statute defining the special circumstance. Under these circumstances, the rape special-circumstance allegation provided the express notice of the charges against defendant required under state law in a capital case. (See *People* v. *Morris* (1988) 46 Cal.3d 1, 17,

disapproved on other grounds, *In re Sassounian* 9 Cal.4th 535, 543-544, fn. 5 [purpose of charging requirement of section 190.4 in capital cases is to provide defendant with express notice of felony underlying special circumstance or felony-murder theory].)

Furthermore, since the information was sufficient to provide the required notice, and defendant's counsel stated defendant was neither surprised nor prejudiced by the argument and instructions relating to attempted rape as the basis of the rape special circumstance, defendant's constitutional right to notice of the charges against him was not compromised. (Cf. *People* v. *Crawford* (1990) 224 Cal.App.3d 1, 7-9 [defendant's rights not compromised where circumstances of trial provided notice that prosecution was proceeding under felony-murder theory]; *People* v. *Scott* (1991) 229 Cal.App.3d 707, 712-718 [same].)[17]

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17 Because we conclude the rape special circumstance as alleged was both statutorily and constitutionally adequate, we do not further consider defendant's claim that permitting the jury to base its special circumstance finding on attempted rape resulted in a "constructive amendment" of the information. Furthermore, because we find neither error nor prejudice, defendant's ineffective assistance of counsel claim must be rejected also. We doubt, moreover, whether the principal "error" alleged, i.e., counsel's failure to claim surprise and prejudice where there was none, could be considered constitutionally deficient performance even if prejudicial. Effective assistance does not require counsel to refrain from frankness and honesty in his or her dealings with the court. (Cf. *Nix* v. *Whiteside* (1985) 475 U.S. 157, 171-176 [counsel's successful effort to prevent defendant from perjuring himself is not ineffective assistance]; cf. *Lockhart* v. *Fretwell* (1993) 506 U.S. ___, 122 L.Ed.2d 180, 188-190 [counsel's failure to raise objection was not ineffective assistance where objection would have been based on decision that was later overruled; test of prejudice is not outcome determination alone, but impact on fairness of the adversary proceedings].) To the extent defendant perfunctorily asserts other constitutional claims without adequate development, these claims are not properly made and therefore are rejected.

B. Instructing with Modified Version of CALJIC No. 8.81.17

Defendant contends the version of CALJIC No. 8.81.17 given to the jury was misleading. The jury was instructed:

"To find the special circumstance referred to in these instructions as murder in the commission of a burglary, a robbery or a rape, is true, it must be proved:

"1. That the murder was committed while the defendant was engaged in or was an accomplice in *the commission or attempted commission* of a burglary, a robbery, or a *rape*.

"2. That the defendant intended to kill a human being or intended to aid another in the killing of a human being.

"3. That the murder was committed in order to carry out or advance the commission of the crime of a burglary, a robbery, or a rape or to facilitate the escape therefrom or to avoid detection. In other words, *the special circumstances referred to in these instructions* is [*sic*] not established if the burglary, robbery or *rape* was merely incidental to the commission of the murder." (Emphasis added.)

Defendant contends the failure in the third paragraph of the instruction to refer explicitly to attempted rape permitted the jury to ignore the question whether the acts constituting *attempted* rape "were merely collateral to and occurred subsequent to the commission of the murder." We find no reasonable likelihood the jury interpreted the instruction as defendant suggests. (*Estelle* v. *McGuire*, *supra*, 502 U.S. at p. 72 [116 L.Ed.2d 385, 400].) Rather, it is obvious from the challenged instruction, the special verdict forms, and other instructions given (e.g., CALJIC No. 8.80), the court used "burglary, robbery or rape" as generic terms for the special circumstances, which also included the attempted commission of these crimes. Therefore, the failure specifically to include the word "attempt" in the third paragraph of the instruction could not have misled the jury.

C. Failure to Instruct on Elements of Attempt

The trial court instructed defendant's jury on the elements of an attempted rape special circumstance in terms of CALJIC No. 8.81.17 and on the elements of rape in terms of CALJIC No. 10.00. Neither party requested and the trial court did not instruct the jury on the elements of attempt as set forth in CALJIC No. 6.00. The jury found defendant not guilty of the separate rape count, but specifically found defendant guilty of the attempted rape special circumstance. The Attorney General concedes the failure to instruct the jury on the elements of an attempt was error.

Defendant argues the failure to instruct is reversible per se. Defendant is wrong. The omission of instruction on the elements of a special circumstance is subject to harmless error analysis. (*People* v. *Odle* (1988) 45 Cal.3d 386, 410-416 [failure to instruct on elements of peace-officer-murder special circumstance].) In this case, we are convinced the omission of the instruction defining attempt was harmless beyond a reasonable doubt and did not affect the jury's verdict.

CALJIC No. 6.00 (5th ed. 1988 bound vol.) states: "[¶] An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." As the Attorney General persuasively argues, insofar as relevant here this instruction merely restates the common meaning of "attempt." To attempt an act is to "try" or "endeavor to do or perform" the act. (Webster's New Internat. Dict. (2d ed. 1958) p. 177.) Defendant could not "try" to rape Modena Galloway without intending to do so and doing an act toward the rape's commission. In finding defendant attempted or tried to rape Modena Galloway, the jury thus necessarily considered and found to be true the elements set forth in CALJIC No. 6.00. As the prosecutor argued to the jury in his closing statement, no explanation other than rape or attempted rape was sufficient to explain the position of Modena Galloway's body

and the presence of the pubic and body hairs in her clothes. Under these circumstances, we conclude omission of the attempt instruction did not contribute to the verdict obtained; the jury necessarily made the requisite findings necessary to hold defendant liable for this special circumstance. Our conclusion precludes finding prejudice, whether under the federal constitutional standard (*Chapman* v. *California* (1967) 386 U.S. 18, 24; *Yates* v. *Evatt* (1991) 500 U.S. 391) or that for state law error (*People* v. *Watson* (1956) 46 Cal.2d 818, 836). For the same reason, defendant's related claim of ineffective assistance of counsel in failing to request a definitional instruction is also unavailing.

D. Failure to Instruct Intoxication Can Negate Specific Intent to Rape

The trial court instructed the jury on the effect of intoxication, but, at the request of defense counsel, limited the application of the instruction to the intent to kill element of the special circumstances. Defendant contends he was prejudiced by the failure of the court to instruct the jury intoxication also can be considered in determining the existence of specific intent to rape.

As already noted, defense counsel's request for the instruction bars this contention under the doctrine of invited error. (*People* v. *Cooper*, *supra*, 53 Cal.3d at p. 831; *People* v. *Marshall*, *supra*, 50 Cal.3d at pp. 931-932.) Any error, moreover, was clearly harmless. Because the jury found all of the special circumstances to be true, we know the jury rejected defendant's claim that voluntary intoxication negated the specific intent to kill elements of the special circumstances. No evidence was presented from which a jury rationally could have found defendant, despite his asserted intoxication, intended to kill Mr. and Mrs. Galloway, but because of that same intoxication did not form the intent to rape Mrs. Galloway. By finding defendant attempted to rape Mrs. Galloway, the jury necessarily found the requisite intent. Any error was thus harmless under

either federal or state standards. Again, the related claim of ineffective assistance of counsel fails for the same reason.

E. Sufficiency of Evidence

Defendant next contends the record lacks substantial evidence to support the jury's findings (1) he specifically intended to rape; (2) he committed attempted rape; and (3) Modena Galloway's murder occurred during the commission of attempted rape. Applying the standard of review set forth, *ante*, at page __ [typed maj. opn. at pp. 31-32], we reject defendant's claims.

Defendant contends the record is devoid of evidence of specific intent to rape. A rational jury, however, clearly could have concluded otherwise. Modena Galloway's body was found in a position and state of dress suggestive of rape or some type of sexual assault. Body and pubic hairs similar to defendant's, and unlike those of others possibly involved in the crimes, were found in Modena Galloway's panties, pajama top, and socks. The jury rationally could conclude defendant partially unclothed himself and the victim for the purpose of sexual intercourse.

Defendant next contends the evidence is insufficient to support a finding he was the rapist. He specifically attacks what he believes is the inconclusiveness of the hair identification testimony. However, this testimony, if believed and construed favorably to the People, eliminated as the source of the hairs found on Mrs. Galloway's clothing all persons defendant claimed were present at the murders with the exception of defendant. It thus provided substantial evidence from which a rational jury could conclude defendant was the person who attempted to rape Modena Galloway. This evidence was further buttressed by the substantial evidence defendant committed the other crimes against the Galloways alone.

The felony-murder special circumstance (§ 190.2, subd. (a)(17)) requires that the murder was committed "while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit" certain enumerated felonies, including rape. Defendant contends the attempted rape in this case was merely incidental to the murder. Defendant also contends the evidence is insufficient to support a finding the attempted rape was commenced prior to the victim's death. We again reject defendant's claims.

First, a rational jury could have concluded from the evidence that defendant intended to rape Modena Galloway in addition to stealing from the Galloways. The theory presented at trial and supported by substantial evidence was the murders were committed to advance the other felonies and to conceal defendant's identity as the perpetrator. No evidence supports the contrary conclusion, that the attempted rape was somehow committed in order to facilitate or further the murders.

Second, defendant attempts to undermine the jury's finding by claiming the evidence does not prove the attempted rape began prior to death. No evidence, however, was presented to support the opposite conclusion, and we have previously held that "in the absence of any evidence suggesting that the victim's assailant intended to have sexual conduct with a corpse [citation], we believe that the jury could reasonably have inferred from the evidence that the assailant engaged in sexual conduct with the victim while she was still alive . . . ." (*People* v. *Ramirez* (1990) 50 Cal.3d 1158, 1176.) We specifically note the lack of evidence from the pathologist or the criminalist that the victim's body was moved or disturbed after death. In addition, the presence of foreign hairs, including a pubic hair fragment, in Modena Galloway's socks supports a rational inference the victim resisted the attempted rape by kicking.

VII. Sufficiency of Evidence of Count 6, Burglary

Counts 3 and 6 of the second amended information charged defendant with separate counts of burglary. Count 3 addressed the burglary occurring at the time the Galloways were murdered. Count 6 addressed the burglary occurring on Saturday morning when the fingerprints were erased. During deliberations, the jury requested an explanation of the difference between the burglaries charged in the two counts. In response, the trial court read the counts as charged in the second amended information. The trial court also told the jury: "So in simple language it is alleged that there was [*sic*] two separate and distinct acts of burglary. The jury returned guilty verdicts on both counts in the first degree.

Consistent with his taped statement to the police, defendant admits he entered the Galloways' house a second time. He contends, however, the only purpose of this entry was to wipe away fingerprints. Defendant argues there is no evidence he entered the second time with the intent to take property belonging to the Galloways or took any property during this entry. While the evidence of defendant's guilt on this count is not overwhelming, we find sufficient evidence to support the jury's verdict.

"'Although the People must show that a defendant charged with burglary entered the premises with felonious intent, such intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal. [Citations.]'" (*People* v. *Price*, *supra*, 1 Cal.4th at p. 462, quoting *People* v. *Matson* (1974) 13 Cal.3d 35, 41.) The evidence presented at trial demonstrated defendant returned from the Galloways' home with blood on his clothes and a roll of cash. No other property known to have been taken from the Galloways' home, such as the VCR and jewelry box, was seen until later on Saturday after the defendant entered the

home a second time. The jury therefore could reasonably conclude the items in question were taken during the second entry to the Galloways' home.

Furthermore, a reasonable jury could conclude defendant possessed some proprietary interest in the items once they were removed from the Galloway home. Defendant was present when Mendoza attempted to sell the VCR and jewelry to Sean Sampson and Richard Willis. Mendoza told Sampson the VCR was stored at defendant's house. Defendant warned Sampson and Willis not to tell anyone about the attempted sale. Moreover, Mendoza testified defendant coerced him into driving the goods to a drainage canal where defendant threw them into the water. The VCR was later found at this location. Mendoza's testimony was corroborated on this point by the testimony of Kathy Lazoff, who overheard Mendoza and defendant arguing about the use of Mendoza's truck. Albis also overheard an argument between Mendoza and defendant at the relevant time.

From this evidence a jury could rationally infer defendant was involved in the taking of the VCR and the jewelry box and therefore defendant entered the Galloway home with the intent to take additional property. In addition, defendant admitted that while in the Galloway house on Saturday morning, he wrapped up and took away pieces of the broken rocking chair, pieces which may have been the weapon used in one or both of the killings. The jury could reasonably infer he entered with intent to commit that act of larceny.

VIII. Prosecutorial Misconduct

Defendant contends several statements included by the prosecutor in his closing argument constituted misconduct. We reject defendant's claims.

First, defendant waived his right to appellate review of each of the prosecutorial comments he now challenges, because he failed to object and request curative admonitions in the trial court. (*People* v. *Benson* (1990) 52 Cal.3d 754, 794.) The "close case" exception relied upon by defendant to avoid the waiver bar

is no longer recognized. (*People* v. *Carrera* (1989) 49 Cal.3d 291, 321.) "[T]hat a case is close does not in and of itself excuse the failure to object or impose a duty on the trial court to intervene in the absence of objection. [Citation.]" (*Ibid.*)

In the alternative, defendant contends failure to object to the prosecutor's statements constituted ineffective assistance of counsel. Therefore, we next address defendant's claims of misconduct on the merits. In so doing, we inquire as to whether there is a reasonable likelihood the jury misconstrued the prosecutor's words in the manner suggested by defendant. (*People* v. *Clair* (1992) 2 Cal.4th 629, 663.) Applying this standard, we find no misconduct. Therefore, defendant's ineffective assistance of counsel claim is groundless.

1. Intent to Kill

Defendant claims the prosecutor committed misconduct by including the following statements in his discussion of the intent to kill requirement for the special circumstances: (1) "[i]ntent to kill is not an issue"; (2) intent to kill is a "very low mental state"; (3) "[a] dog can intend to kill"; and (4) "the defendant wasn't so strung-out or so drunk or anything like that he reached a state -- a mental state lower than that of a dog."

The prosecutor's first statement when viewed in context did not advise the jury that intent to kill was not an issue in the case. Rather, the jury would have understood the prosecutor to argue intent to kill was obviously proven given the evidence presented during the trial, especially the photographs of the Galloways' bodies.[18]

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[18] The context was as follows: "Now, there are a lot of matters in the instructions that aren't going to be in dispute . . . . [¶] There's obviously a burglary here. There's obviously a robbery, two deaths that resulted from that. *Intent to kill is not an issue.* After all, look at the pictures. . . . [¶] The purpose of seeing them is to see what happened. The purpose is not to horrify you. . . . [¶]

(footnote continued on next page)

The prosecutor's remaining comments, understood in context, did not amount to misconduct. The prosecutor used these expressions in an attempt to contrast intent to kill, which may be formed quickly and irrationally, with more deliberative intellectual activities ("[h]igher mathematics," in his example). We believe the jury likely would have understood the prosecutor's comments in this unobjectionable way.

2. Rape and Attempted Rape

Defendant contends four prosecutorial misrepresentations "relating to the rape charge undoubtedly convinced the jury that it must reach some finding favorable to the [p]rosecution relating to rape, even if it were not convinced by the actual testimony in the record."

Defendant first claims misconduct arising from a discrepancy between the prosecutor's characterization of a portion of Dr. O'Halloran's testimony and the actual testimony. Defendant claims the prosecutor went beyond the evidence in his argument (see *People* v. *Benson*, *supra*, 52 Cal.3d at pp. 794-795) by stating Dr. O'Halloran testified about blood "coming out of the vaginal area -- a stream of dried blood," when the doctor's testimony explained the stream was "postmortem decomposition fluid rather than blood from an injury."

In his argument, the prosecutor urged the jury to look at the pictures of Mrs. Galloway, because the pictures showed a rape scene. He then stated: "A

(footnote continued from previous page)

What we have here is obviously a first-degree murder and an intentional killing. . . . [¶] You look at Mr. Galloway, and you look at Mrs. Galloway, and you look at the diagrams, the body diagrams the autopsy surgeon did. That didn't take a second. That took time." The prosecutor then discussed intoxication as it affects intent to kill.

number of them are very, very explicit and bloody, and look at them, not from the point of view of horrifying yourself, but [from] the point of view of what happened there. [¶] And you can see there's the blood Dr. O'Halloran talked about coming out of the vaginal area, and its not at all a pleasant site [*sic*]. You see it for example on this People's No. 7. Obviously, a stream of dried blood that he referred to."

The prosecutor did not mischaracterize Dr. O'Halloran's testimony. The doctor testified there was "a streak of brownish-red material that appeared to be blood coming from or coming from close to her vaginal area." Dr. O'Halloran also testified that the photograph in question "show[ed] the streak of bloody fluid coming from the vaginal area." Dr. O'Halloran's subsequent testimony attributing the source of the blood to postmortem fluid draining out of the body rather than an injury did not change the fact the photograph showed a dried, bloody fluid coming out of the vagina. The prosecutor properly used this one photograph to illustrate the point that, while viewing the photographs was unpleasant, it was important for the jury to do so.

Defendant next characterizes the following statement by the prosecutor as "inflammatory rhetoric:" "[W]hat in the hell is the defendant's pubic hair doing on Mrs. Galloway's panties if he didn't rape her or attempt to rape her?" We do not view this statement in the same light as defendant. Rather, we believe the statement was simply fair commentary on the evidence introduced at trial. (See *People* v. *Kaurish* (1990) 52 Cal.3d 648, 683.)

Defendant next claims the prosecutor impermissibly went beyond the record in attributing the hairs found on Mrs. Galloway's clothing to defendant, when the criminalist's testimony was more equivocal, e.g., the hairs "could have come from defendant" and defendant's hair was "similar in all respects that I could measure."

The prosecutor's argument was proper. As to the key pubic hair found on the victim's panties, the criminalist eliminated microscopically or by electrophoresis testing all the people, except defendant, who defendant claimed were present when the Galloways were murdered. Furthermore, the criminalist testified all of the hairs retrieved from Mrs. Galloway's clothing were microscopically similar to defendant's hair and defendant's pubic hair possessed distinctive characteristics. Under such circumstances, it was proper for the prosecutor to draw the inference the hair on Mrs. Galloway's clothes was defendant's hair. (See *People* v. *Kaurish, supra*, 52 Cal.3d at p. 683.)

Finally, having concluded the attempted rape special circumstance was properly put before the jury, we also reject defendant's claim the prosecutor should not have been permitted to refer to attempted rape in his summation.

IX. Ineffective Assistance of Counsel in Closing Argument

In addition to the claims of ineffective assistance of counsel addressed previously herein, defendant also contends his counsel rendered ineffective assistance in delivering his guilt phase closing argument. Specifically, defendant asserts the argument was deficient in the following ways: (1) inclusion of factual errors regarding money stolen from the Galloway home; (2) inclusion of legal error in explaining the necessity of finding intent to kill; (3) failure effectively to present a voluntary intoxication defense; and (4) failure to address the attempted rape basis of the rape-murder special circumstance. We address each claim in turn.

Defendant objects to five purported factual misstatements by trial counsel relating to the money taken from the Galloway home: "we know a wallet was taken"; "[t]he property that was taken was money;" "he stole this money"; defendant "admitted he got $500"; and "there's a probability" defendant was "guilty of robbery." Defendant claims these admissions were not supported by the

evidence presented at trial and no rational explanation exists for inclusion of these statements in trial counsel's argument. We disagree.

Each of these statements embodies an inference consistent with (if not actually drawn from) defendant's statement to the police. In that statement, defendant made certain admissions relating to his entry of and taking property from the Galloway home, but consistently maintained he did not personally kill or assist in the killing of either victim. In light of the evidence presented at trial and defendant's audiotaped confession, trial counsel could reasonably conclude that his client would be found guilty of felony murder and that his efforts were best concentrated on defending against the special circumstances. Therefore, defense counsel's argument, which was consistent with defendant's statement to the police and stressed defendant's unwavering claim that he did not personally kill or intend to kill the victims, does not provide support for a claim of ineffective assistance of counsel.

Defendant also objects to the italicized sentence in the following passage from defense counsel's closing statement: "Somebody killed them. And it was a senseless, terrible crime, but did Tracy Cain do it? I submit to you that beyond a reasonable doubt there's a suspicion, yeah, but not beyond a reasonable doubt. . . . [¶] This crime is horrible to any reasonable person. [¶] But you can't convict him because it's a bad crime or the pictures look bad. *It has to be on evidence and the special circumstance that he -- either was the actual killer or he intended to kill.* If he didn't kill, it simply has not been proven. It's a good maybe, but that's not enough." The italicized sentence was, under the law governing this case, incorrect, since the special circumstance allegations required proof of intent to kill even if defendant was the actual killer. Contrary to defendant's assertion, however, we find no reasonable likelihood the jury construed defense counsel's statement to his detriment. In context, counsel's point was that the prosecution

had failed in its burden of proving beyond a reasonable doubt defendant was the actual killer. As counsel stated immediately after the challenged remark, "If he didn't kill, it simply has not been proven." The jury would have understood the argument as focused on whether defendant was the actual killer, as the prosecution contended, not on the question of intent. Furthermore, the jury was properly instructed the special circumstances required proof of intent to kill, and the same point was made by the prosecutor. We presume the jury followed the instruction. (*People* v. *Frank*, *supra*, 51 Cal.3d at p. 728.) There is no reasonable probability the jury understood the particular sentence now challenged as stating otherwise. Thus, defendant's ineffective assistance of counsel claim fails for lack of prejudice, and we need not address whether the inclusion of this sentence in the argument constituted inadequate representation. (See, e.g., *People* v. *Fauber* (1992) 2 Cal.4th 792, 831.)

Defendant further contends trial counsel did not present "even a minimally effective argument on the undisputed use of alcohol and drugs on the night in question." Counsel did briefly argue there was no intent to kill because defendant "was obviously under the influence of alcohol and drugs." Belaboring this point would have risked appearing to concede defendant was the killer, which would have conflicted with and detracted from counsel's primary argument, that (consistent with his police statement) defendant had not killed anyone, planned to kill anyone or assisted in killing anyone in the burglary. In addition, almost no evidence was presented regarding the quantity and effects of the drugs consumed by defendant on the night of the murders or the effect consumption had on defendant. Defendant thus cannot demonstrate either deficient performance or prejudice in his counsel's argument relating to this subject.

Finally, defendant contends his counsel's argument was ineffective for failing to address the prosecutor's assertion that evidence of attempted rape in this

case was sufficient to support a finding of true for the rape-murder special circumstance. The record specifically reflects that trial counsel made a tactical choice not to discuss the possibility of an attempted rape in his closing argument. Trial counsel stated in a bench conference that he believed defendant's strong defense to the rape allegation would have been undermined by addressing what defense counsel believed was a speculative possibility of attempted rape. We cannot find that trial counsel's decision in this regard fell below reasonable professional norms.

X. Reconvening the Jury

After returning its guilt phase verdicts, the jury was reconvened in order to determine the degree of the murders of which it found defendant guilty. Defendant argues (1) the trial court lacked jurisdiction to reconvene the jury; (2) the trial court's instructions to the reconvened jury invaded the province of the jury; and (3) the trial court's failure to require the jury to redeliberate the special circumstances impermissibly disturbed the statutory order of deliberations.

A. Procedural Background

During the morning of April 26, 1988, the jury advised the court it had reached verdicts on the guilt phase issues. Because defendant's trial counsel, Willard Wiskell, was in Arizona preparing for the possible penalty phase, defendant agreed attorney Joel Steinfeld could appear for the purpose of receiving the verdicts. The jury presented its verdicts and the clerk read them. The jury found defendant guilty of the murders of both Mr. and Mrs. Galloway. The court told the jurors a penalty phase would be necessary, and instructed them to return on May 11.

After the jury departed, counsel stipulated the robbery verdict should be recorded as second degree robbery, since no degree was set forth on the verdict form. Apparently, no one noticed a similar flaw in the murder verdicts. Later that

day, however, the prosecutor notified the court the verdicts failed to specify the degree of the murders. The prosecutor requested the jury be immediately reconvened to correct the error. The court instructed the bailiff to contact the jurors and order them to return the next day.

The next day, the trial court granted a defense-requested continuance until May 2, when Wiskell could be present. The court further ordered the clerk not to record the verdicts until requested by the court. The court advised the jurors of a "legal problem" relating to the verdict forms and the possibility they might be reconvened with new forms. The court again admonished the jurors not to discuss the case or obtain information about the case from outside sources, and instructed them to return on May 2.

On May 2, outside the presence of the jury, the court considered the motion to reconvene. During this hearing, Wiskell admitted the only theory of the case was felony murder and therefore the verdicts returned by the jury could only be first degree murder. He stated that, for strategic reasons, he had not sought instructions regarding any possible lesser offenses. Wiskell also acknowledged the court retained jurisdiction over the jury for purposes of correcting the verdicts, but argued the jury should be instructed it must unanimously agree on the degree of murder -- first degree or nothing. Wiskell argued such an instruction would give the defendant the benefit of the jurors deliberating anew on the issue of degree.

The trial court granted the motion. The court explained to the jury the omission in the verdict forms for counts 1 and 2. The court told the jury it was being reconvened to deliberate the issue of the degree of the murders. The court then read two instructions pertaining to the issue of degree: CALJIC No. 8.21 (modified) on first degree murder and CALJIC No. 8.80 (modified) on special circumstances. Pursuant to counsel's stipulation, all other instruction previously

given and the exhibits were sent into the jury room. As neither counsel objected, the old verdict forms were also sent into the jury room for comparison with the new forms. The court told the jury: "[Y]ou're charged then only with the duty or obligation or responsibility of reconvening and deliberating on your verdicts as to Counts 1 and 2 in order that you may returned [*sic*] a correct and complete verdict as to each of those counts, if its possible for you to do so." After deliberating, the jury returned verdicts finding both murder to be of the first degree.

B. Jurisdiction

Defendant first protests reconvening the jury under the circumstances set forth above violated sections 1157 and 1164 and therefore was beyond the trial court's jurisdiction. Section 1157 provides that, in the event a jury fails to determine the degree of a defendant's crime, the degree "shall be deemed to be of the lesser degree." Section 1164, subdivision (a) directs the clerk to record in the minutes verdicts "receivable by the Court." Defendant's claim lacks merit.

In *People* v. *Bonillas* (1989) 48 Cal.3d 757 (hereafter *Bonillas*), we considered under what circumstances a trial court can reconvene a jury to correct an incomplete or otherwise irregular verdict. In that capital case, we held the trial court retains jurisdiction for this purpose until the jury has left the court's control, i.e., until the jury has been discharged. (*Id.* at pp. 770-773; accord *People* v. *Turner, supra,* 50 Cal.3d at p. 701.) Without a doubt, defendant's jury remained under the trial court's control at the time it was reconvened, since the penalty phase was still to be tried by the same jury. As the Attorney General correctly argues, our decision in *Bonillas* is dispositive of defendant's jurisdictional claim.

Defendant's attempt factually to distinguish *Bonillas* is unpersuasive. Whether the verdict in the present case was "incomplete" in light of the instructions given, or whether it should have been immediately recorded, are distinctions without relevance. *Bonillas* stands for the proposition *any* error in the

verdict may be corrected by reconvening the jury, as long as the jurors have not lost their character as jurors by, for example, discharge or receiving information inadmissible in the relevant phase of the proceeding. (*Bonillas*, *supra*, 48 Cal.3d at pp. 770-773.)[19]

C. Intrusion into Province of Jury

Defendant next insists the remarks and instructions of the trial court to the reconvened jury in effect directed the jury to return a verdict of first degree murder. He also urges the trial court committed error under *Caldwell* v. *Mississippi* (1985) 472 U.S. 320 by referring to possible appellate review of the jury's decision.

As the Attorney General observes, defendant failed to object to any of the comments by the trial court about which he now complains. Defendant therefore has waived these claims of error on appeal. (E.g., *People* v. *Anderson* (1990) 52 Cal.3d 453, 468.)[20]

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19 Defendant cursorily protests the reconvening of the jury violated his rights to due process and equal protection. Because we find no statutory violation, the authority cited by defendant in support of his due process claim is inapposite and the claim fails.

To the extent defendant explains his equal protection claim, he appears to argue the *Bonillas* rule violates equal protection because it applies only to capital cases. Defendant is wrong. Other bifurcated procedures are found outside the realm of capital cases. For example, the truth of allegations a defendant suffered prior convictions may be bifurcated from a jury trial of currently charged offenses. (See *People* v. *Calderon* (1994) 9 Cal.4th 69, 72.) Under the proper circumstances, the *Bonillas* rule could apply in such a case.

20 We have held claims of *Caldwell* error fall within an exception to this rule of waiver. (*People* v. *Bittaker* (1989) 48 Cal.3d 1046, 1104.) The reason for this exception is not articulated in *Bittaker*, but it could be argued that when the court itself has referred to impermissible and prejudicial considerations an objection is likely to be futile, and in many cases may tend to aggravate the error's effect.

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Even if we disregard waiver, defendant's claims fail on the merits. We have reviewed the court's remarks and reject defendant's contention the jury would have understood the comments to direct a finding of first degree murder. The court did not state or imply the jury should find the murder was in the first degree. Rather, the court gave the jury new verdict forms which allowed it to find, or not to find, the murder was in the first degree, and told the jury to make a finding, if it could, "as to whether the murder was first degree." To the extent the defendant complains the trial court should have explicitly instructed the jury to begin deliberations "anew," we have previously rejected this argument under similar circumstances. (*People* v. *Turner, supra*, 50 Cal.3d at p. 702.)

Finally, the trial court did not commit *Caldwell* error. This error consists of leading the sentencer in a death penalty case to believe "the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Caldwell* v. *Mississippi, supra*, 472 U.S. at p. 329.) We have explained: "Arguably the mere mention of appeal is improper, since it rarely serves any constructive purpose and may lead the jury on its own to infer that their responsibility for penalty determination is diluted. But when the context does not suggest appellate correction of an erroneous death verdict, the danger that a jury will feel a lesser sense of responsibility for its verdict is minimal." (*People* v. *Bittaker, supra*, 48 Cal.3d at p. 1106.) Here, the context of the court's reference to

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Because of the potential difficulty of determining whether the waiver doctrine should apply in this case, we assume defendant has preserved this particular point, and treat it on the merits. (*People* v. *Champion* (1995) 9 Cal.4th 879, 908, fn. 6; see, e.g., *People* v. *Fudge* (1994) 7 Cal.4th 1075, 1106-1107; *People* v. *Pinholster, supra*, 1 Cal.4th 865, 912.)

appeal was to explain why the court requested the jury not to mark on the "old" verdict forms sent into the jury room for comparison purposes.[21] The trial court's comments in no way conveyed the suggestion prohibited by the high court in *Caldwell* v. *Mississippi*, *supra*, 472 U.S. at page 333.

D. Order of Deliberation

Defendant next contends his federal constitutional rights were violated by the jury's failure to adhere to the order of deliberations set forth in section 190.1, subdivision (a). This statute states in pertinent part: "If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged. . . ." Defendant's arguments are unpersuasive.

First, the only reasonable inference in this case is the jury deliberated in the correct order. Prior to its original deliberations, the jury was instructed it should return a finding on the robbery, rape, burglary, and multiple-murder special circumstances only if it found defendant guilty of first degree murder. (CALJIC No. 8.80 (1984 rev.), modified.) The jury found all of the special circumstances true. Felony murder was the only theory advanced at trial. Defense counsel candidly admitted his pursuit of an all-or-nothing verdict. The only reasonable conclusion to draw is the jury found the murders were of the first degree, but was unable to record its findings because of the inadequate verdict forms. After determining degree, the jury then considered the special circumstances. Reconvening the jury did not materially affect the order of deliberation and was

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21 The trial court's challenged comments were as follows: "Do not mark up the old verdict forms. I have to save those if any reviewing court wants to see what we were doing and why I sent you back, to re-deliberate. I've got to keep the old forms to explain what we left out."

necessary only to satisfy the statutory mandate the degree of the offense must be express no matter how plain the implied finding. (§ 1157; *Bonillas*, *supra*, 48 Cal.3d at 769, fn. 4.)

Moreover, defendant's argument ignores section 1404, which provides: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Assuming the procedure followed by the trial court to reconvene the jury resulted in the jury deliberating in the wrong order, defendant has not explained and we do not see how he was prejudiced by this error, especially in light of the fact the same 12 jurors participated in all of the deliberations and reached unanimous verdicts on all of the charges. Under these circumstances, the trial court was not required to have the jury begin its deliberations anew from the point of the defect in the verdict form. (Cf. *People* v. *Turner*, *supra*, 50 Cal.3d at pp. 701-702 [trial court need not instruct jury to begin robbery deliberations anew].) We therefore find the error, if any, was harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra*, 386 U.S. at p. 24.)

PENALTY PHASE FACTS

Prosecution Evidence

The prosecution introduced evidence of one prior felony conviction (§ 190.3, subd. (c)) and three incidents of criminal activity involving the use of force or violence (§ 190.3, subd. (b)). The former evidence consisted of a stipulation that on October 18, 1982, defendant was sentenced in Yuma County, Arizona, to the Arizona state prison for the felony of auto theft, and served time in prison for that offense.

1. 1979 Perez Incident.

On September 28, 1979, defendant (then 16 years old) was an inmate in a Yuma County, Arizona, juvenile detention facility. Nicolas Perez, Jr., a control officer at the facility, was escorting a group of inmates from the dining room to a dormitory. As they prepared to pass through a door, defendant, the first in line, turned suddenly and hit Perez in the face with his closed fist. Other inmates in the group then tried to take Perez's keys as he and defendant fought. Perez suffered a broken nose and cheekbone and a wound requiring six stitches above his eye; he was off work for about one month.

2. 1985 Fight Outside Fontes Trailer.

Virginia Fontes, who had testified at a pretrial hearing in this case, was found unavailable as a witness; her prior testimony was read to the jury. Fontes testified that on November 4, 1985, a truck pulled up to her family's trailer, which was parked on the Rincon. A fight ensued between men from the truck, including defendant, and Fontes's husband and son. Fontes's son Robert Ramirez was fighting with a man named Mark Miller. Ramirez had the best of the fight and was on top of Miller, when defendant approached and hit Ramirez on the back of the head with a rock (about eight inches wide) he took from the nearby seawall. As Ramirez tried to get up, defendant hit him again, this time in the eye.

3. 1986 Parker / Brown Incident.

Anita Parker testified she met defendant in April 1985 and lived with him for a time in Los Angeles. On September 14, 1986, she was living in Ventura and had a new boyfriend, Greg Brown. Parker and Brown encountered defendant outside a bar in Ventura. Defendant pulled Parker from a car and, as Brown approached, knocked him down. Shortly afterward, when Parker and Brown

arrived at Brown's mother's house, defendant again approached them. This time he pulled a tire iron from his pants and hit Parker in the head with it. Defendant told Parker to get up and run. As she did so he followed her, kicking her from behind. Parker eventually lost consciousness and woke up in the hospital, where she heard defendant telling the police Brown had hit her with a shovel.

On cross-examination Parker admitted she drinks four or five bottles of wine a day. In 1985 she normally carried a small knife with her for self-defense, and on one occasion she cut defendant on the arm with it. She also testified she forgave defendant and did not want him to be executed.

Defense Evidence

1. Fontes Incident.

Richard Clayton, who was involved in the 1985 fight outside the Fontes trailer, testified he, Mark Miller and defendant went to the trailer to talk to Debbie Miller, Mark Miller's estranged wife and Clayton's former secretary. The altercation began when Debbie Miller swung at Clayton; he pushed her back and she fell down. A group of people then came out of the trailer and jumped on Clayton. Mark Miller joined the fray, but defendant at first stayed in the truck. Eventually defendant came to the aid of Clayton and Miller, but he never hit anybody with a rock. On cross-examination Clayton conceded he was too busy defending himself to have watched defendant during the whole fight.

2. Conduct in Arizona State Prison

Two Arizona state prison work crew supervisors testified, from prison records, to defendant's good conduct on prisoner work crews in 1983 and 1984. Inmates who were discipline problems or escape risks were not allowed on fence-building crews such as the one on which defendant worked. Defendant received

the highest possible score (15) on one of his evaluations on the fence crew, with comments he was doing a very good job and showing up for work every day. On another crew he was evaluated monthly for effort, responsibility and cooperation; he earned scores of 14 twice and 15 once.

3. Other Defense Evidence.

Defendant was born December 29, 1962. His mother died in Jonestown, Guyana, in 1978. Persey Cain, defendant's father, testified defendant was the fourth of his twelve children. Defendant was not a bad or wild kid, but rather a "good kid[,] . . . [a] typical, you know, boy." The murder of his neighbors shocked Percy Cain and did not sound like his son, who had never been in trouble except for the auto theft. He asked the jury for mercy.

Defendant's stepmother, Wilma Cain, raised him from the age of 4 until he left home at 18 or 19. She too was shocked when she heard of defendant's conviction or these murders, because it did not sound like him. He was a "typical" child, not "incorrigible in any way." She too asked the jury to have sympathy and show mercy for defendant.

The attorney representing David Cerda testified his client was charged with two counts of murder, as well as other offenses, in the Galloway killings. He did not face a sentence of death or life without the possibility of parole if convicted.

John Irwin, a professor of sociology at San Francisco State University, testified on the conditions of life in prison and the behavior of life prisoners. Irwin described the deprivations prisoners experience in privacy, breadth of activity and personal relationships. Life prisoners tend to cause less trouble than other prisoners. Because they know the prison will be their home for a long time they tend to "settle in" and plan for the long term. Many people serving life sentences go through a process of contrition, expiation and redemption. This may

include efforts at benefiting society through "lifers clubs" that perform good works, such as recording texts for the blind and attempting to steer juveniles away from a life of crime.

PENALTY PHASE ISSUES

I. Jury Selection: Rulings on Challenges for Cause

Defendant contends the court erred in granting the prosecution's challenge to two prospective jurors because of their bias against capital punishment and in denying defense challenges to four jurors despite their asserted bias in favor of the death penalty.

A challenge to a prospective juror should be sustained when the juror's views on capital punishment would "prevent or substantially impair" the performance of his or her duties as a juror in accordance with the instructions and oath. (*Wainright* v. *Witt* (1985) 469 U.S. 412, 424; *People* v. *Ghent* (1987) 43 Cal.3d 739, 767; *People* v. *Mincey*, *supra*, 2 Cal.4th 408, 456.)

Although we review the record to decide if the trial court's ruling is supported by substantial evidence (*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1262; see also *People* v. *Miranda* (1987) 44 Cal.3d 57, 94 [whether decision is "'fairly supported by the record'"]), we pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times when "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." (*Wainright* v. *Witt*, *supra*, 469 U.S. at p. 426; *People* v. *Ghent*, *supra*, 43 Cal.3d at p. 767.) Thus, if the juror's responses are conflicting or equivocal, the

trial court's determination as to bias is binding on the reviewing court. (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 456; *People* v. *Price*, *supra*, 1 Cal.4th at p. 402.)

A. Jurors Excused for Opposition to Capital Punishment

When initially asked whether she would always vote for a life sentence and would refuse to consider the death penalty regardless of the evidence, prospective juror Darcy Canton answered, "I don't know what I'd do, to be honest with you. . . . I would tend to think I wouldn't be able to do it, but I don't know." On further questioning she explained she leaned against the death penalty, but was not "totally" against it, and could not say "that no matter what I would never do it." Under examination from defense counsel she added, "I'd like to say I have an open mind and I would be able to go in there with an open mind. But actually being there and doing that is another thing; and . . . I don't know how my insides would respond when it came down to that, if I had to come all the way down to that point and decide." Defense counsel stated he did not think Canton met the *Witt* standard and he would not oppose a challenge for cause. The prosecutor agreed Canton was biased and challenged her; the challenge for cause was granted. The trial judge, in the process of excusing Canton, expressed his opinion she was very likely to conclude on further reflection "that for all practical purposes you personally could not impose the death penalty on anybody." She agreed, "Probably right."

Prospective juror William Davis answered "yes" when asked if he would refuse to consider the death penalty no matter what the evidence. On further questioning, he explained he could not conceive of a case where he would vote for the death penalty and could not conceive of himself "being part of a jury that sentences a man to death."

The trial court did not err in excusing these prospective jurors for cause. Davis unambiguously indicated he would vote against death regardless of the

evidence. Canton's responses were equivocal and could have been understood to mean merely that she was unable to predict what her emotions would be were she in a position to vote for a sentence of death. They also, however, offer substantial support for the contrary conclusion that, despite her desire to have an open mind, her emotional leaning against death was so strong she probably could not vote for that penalty even if she thought the evidence justified it. We defer to the trial court's resolution of this factual ambiguity. (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 456.) Our conclusion is further supported by the fact not only the trial judge, but all of the other three participants -- the prosecutor, defense counsel and Canton herself -- agreed with this assessment of her mental state.[22]

B. Denial of Defense Challenges for Cause

Defendant claims error in the court's denial of four defense challenges, those to prospective jurors Patricia Cairns, Clifford Hanson, Forrest Warnke and Rudolfo Pamplona.

The defense excused two of these panel members, Pamplona and Hanson, by peremptory challenge. Warnke and Cairns also did not serve on the jury or as alternates; it appears they were never seated. After excusing Hanson, defendant had used only eight of the twenty-six peremptory challenges to which he was entitled. (Former § 1070.) At his next peremptory, after the prosecution had passed on its challenge, he also passed and accepted the jury.

Defendant did not exhaust his peremptories and had sufficient challenges remaining to eliminate the remaining panel members to whom he objected. Moreover, none of the prospective jurors as to whom defendant now claims error

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22 Because we find no error on the merits we need not decide whether, as the People argue, defense counsel's nonopposition to the challenge waived the claim or, if it did, whether nonopposition constituted ineffective assistance of counsel.

served as jurors or alternates. Defendant accepted the jury as constituted and makes no attempt to show its members were actually biased. No prejudice could have arisen from the court's denial of the defense challenges for cause, and therefore no reversible error occurred. (*People* v. *Raley* (1992) 2 Cal.4th 870, 904-905; *People* v. *Price*, *supra*, 1 Cal.4th at p. 401; *People* v. *Coleman* (1988) 46 Cal.3d 749, 770-771.)

Recognizing he cannot show reversible error in the court's rulings, defendant further asserts his attorney's failure to exhaust the available peremptory challenges constituted ineffective assistance of counsel. However, this claim too fails, as defendant demonstrates neither that counsel performed deficiently, nor that his choice prejudiced defendant. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-217.) The record shows counsel had a reasonable tactical purpose in accepting the jury. The prosecutor had passed on his peremptory, then, after a recess, sought to withdraw the pass, remarking he realized a juror to whom he had given a low rating was still seated. The court denied that request, giving the defense an opportunity to accept the jury while it contained a juror the prosecutor viewed as undesirable. Counsel, after consultation with defendant, took advantage of that opportunity. Even were this to be regarded as an incompetent choice, no prejudice appears for the reasons already noted: none of the prospective jurors whom defendant now attacks as partial actually served, and there is no showing the jury as actually constituted was anything but impartial.

II. Exclusion of Evidence of David Cerda's Plea Offer.

Defendant contends the court erred in excluding evidence David Cerda was offered and initially agreed to accept a sentence of four years in prison for his role in the killings. We conclude the court did not err in excluding the evidence as irrelevant and because its probative value, if any, was greatly outweighed by the

confusion and consumption of time involved in litigating questions surrounding the making of the plea offer. (Evid. Code, § 352.)

The defense sought to introduce a change of plea form in which David Cerda agreed to plead guilty and testify against defendant in exchange for a sentence of four years in state prison. Cerda later withdrew his plea and, at the time of defendant's trial, still faced first degree murder charges without special circumstance allegations.

Defense counsel argued the withdrawn plea was admissible to show "the prosecutor wanted Tracy Cain so bad that they were willing to offer somebody who was legally guilty of first degree murder four years in prison." The prosecutor objected on grounds of section 1192.4 and Evidence Code section 1153, both of which exclude evidence of withdrawn guilty pleas. The prosecutor, who was also prosecuting Cerda, further noted the evidence would open up the issue of *why* he had made the offer to Cerda. If it were admitted, the prosecutor intended to testify to his personal belief David Cerda had participated in the crime only by holding up the garage door for defendant and later going back to check on him.

The court excluded evidence of the withdrawn plea because it was not relevant in mitigation, because it was inadmissible under section 1192.4 and Evidence Code section 1153, and because trial of the collateral issues relating to the withdrawn plea would consume undue time (Evid. Code, § 352) and raise issues of attorney-client privilege. Cerda's attorney testified without objection his client was charged with murder, but was not faced with possible sentences of death or life without parole.

Defendant argues the court's ruling deprived him of his right to present all available nonstatutory mitigating evidence. He relies on *Parker* v. *Dugger* (1991) 498 U.S. 308, 112 L.Ed.2d 812 (hereafter *Parker).* As we have previously

explained, however, *Parker* did not hold evidence of an accomplice's sentence must be introduced in mitigation at the penalty phase, or that a comparison between sentences given codefendants is required. (See *People* v. *Mincey*, *supra*, 2 Cal.4th at p. 480.) The *Parker* court merely concluded a Florida trial judge, in sentencing the defendant to death, had in fact considered the nonstatutory mitigating evidence of the accomplice's sentence, as under Florida law he was entitled to do. (*Parker*, *supra*, 498 U.S. at pp. 314-315.) *Parker* does not state or imply the Florida rule is constitutionally required, and California law is to the contrary; we have held such evidence irrelevant because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition. (*People* v. *Mincey*, *supra*, 2 Cal.4th at pp. 479-480; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 810-813; *People* v. *Dyer* (1988) 45 Cal.3d 26, 69-71.) .

In the present case defendant did introduce evidence of his accomplice's lesser sentence; he was precluded merely from showing the prosecution had previously offered *an even shorter sentence* in exchange for the accomplice's proposed testimony. Where the plea based on that offer was subsequently withdrawn, and the accomplice did not testify at defendant's trial, we fail to see how the prosecution's offer bears on the circumstances of the crime or on defendant's character or background. Although defendant insists "the prosecutor's view" of Cerda's culpability is a "critical circumstance relating to the crime," he offers neither authority nor reasoning supporting this position. The prosecutor's *opinion* about the various coparticipants' relative culpability is not relevant to any issue at trial.

To the extent the prosecutor's view of defendant and Cerda's relative culpability, and his reasons for making the four-year offer to Cerda, *were* relevant as mitigation, any conceivable probative value was outweighed by the confusion

of issues and consumption of time potentially involved in trying these questions. Determining the prosecutor's view of Cerda's relative culpability and the reasons for that view would involve, as the trial court noted, "a monumental trial within a trial."

We conclude the trial court did not err in finding the proposed evidence of a withdrawn plea irrelevant or in excluding it under Evidence Code section 352. "While it is true, as defendant contends, a capital defendant must be allowed to present all relevant mitigating evidence to the jury [citations], the trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (*People* v. *Fauber*, *supra*, 2 Cal.4th at p. 856 [no error in excluding evidence defendant declined a plea offer requiring him to testify against accomplices].)

III. Instruction on Deliberations With Alternate Substituted at Beginning of Penalty Phase.

At the commencement of the penalty trial one juror was discharged and an alternate substituted. Defendant does not complain of the discharge or substitution, but claims error in the special instruction the court gave the penalty phase jury on how its deliberations should be affected by the prior verdicts and the substitution. Consideration of the point requires examining the special instruction in full:

"After the guilt phase of this trial was concluded and the jury returned its verdicts one of your number was excused for legal cause and replaced with an alternate juror for the penalty phase of the trial. The alternate juror has been present during all evidence and the reading of all instructions on the law in both phases of the trial. However, the alternate juror did not participate in the jury

deliberations and voting which resulted in the verdicts returned as to the guilt and innocence of the defendant of the charges set forth in the information, and as to the truthfulness of the special circumstance allegations set out in the information.

"For the purposes of this penalty phase of the trial the alternate juror must accept the verdicts and findings rendered by the jury in the guilt phase of the trial. That is, the alternate juror must accept that the defendant has been proved guilty beyond a reasonable doubt of the charges of murder in the first degree, burglary in the first degree, and robbery, as set forth in the information. The alternate juror must accept that the special circumstance allegations have been proved to be true beyond a reasonable doubt; namely that two murders were committed by defendant and that murder was committed while the defendant was engaged in the commission of burglary and robbery and attempted rape, as set forth in the information. The alternate juror must accept the verdict that the defendant is not guilty of rape as charged in the information.

"If you have any lingering doubt concerning the guilt of the defendant as to any of those charges of which he was found guilty, or if you have any lingering doubt concerning the truthfulness of any of the special circumstance allegations which were found to be true, you may consider that lingering doubt as a mitigating factor or circumstance.

"A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the jurors a reasonable doubt.

"The People and the defendant have the right to a verdict on the matter of penalty which is reached only after a full participation of the 12 jurors who ultimately return the verdict. This right may be assured in this phase of the trial only if the alternate juror participates fully in the deliberations, including such review as may be necessary of the evidence presented in the guilt phase of the trial.

"Therefore, the reasonable doubt of guilt and truthfulness of the charges and special circumstances as to which verdicts have been returned shall not be reexamined by the jury. However, for the purpose of determining if there is a lingering doubt concerning the guilt of the defendant on any charge as to which he has been found guilty, or a lingering doubt as to the truthfulness of any special allegation which has been found to be true, the jury shall begin its deliberations from the beginning with respect to the evidence presented in the guilt phase of this trial. You are instructed to set aside and disregard all past deliberations, if any, concerning whether there is any lingering doubt as to the guilt of the defendant or the truthfulness of any special allegation and begin deliberating anew. This means that each remaining original juror must set aside and disregard any earlier deliberations concerning a possible lingering doubt as if they had not taken place."

Defendant contends the court erred by instructing the alternate to accept that defendant's guilt of murder, burglary and robbery, and the truth of the special circumstance allegations, had been proven beyond a reasonable doubt. He further maintains the jury as a whole should not have been instructed not to reexamine the question of reasonable doubt as to the verdicts already returned. These portions of the instruction, he argues, violated the principle that the jury must reach its verdict through common, shared deliberations. (*People* v. *Collins* (1976) 17 Cal.3d 687, 693.) Instead of the instruction given, defendant contends, the jury should have been told to disregard all past deliberations and, with the substituted alternate juror, "review every aspect of the evidence in the guilt phase that had any possible bearing on the penalty to be imposed."

We perceive no constitutional defect in the special instruction. As defendant concedes, excusal of a juror for good cause and substitution of an alternate at the penalty phase does not require a retrial of the guilt phase. (*People* v. *Fields* (1983) 35 Cal.3d 329, 351, fn. 9.) If the guilt phase is not retried, the

penalty phase jury, including the new juror, must perforce "accept" the guilt phase verdicts and findings, as they were instructed to do in this case. Those findings determined guilt and truth of the special circumstances beyond a reasonable doubt. It follows that reasonable doubt is not at issue in the penalty phase: the new juror must accept the previous findings were made beyond a reasonable doubt, and the jury as a whole has no cause to deliberate further on whether any of them harbor reasonable doubt as to guilt or truth of the special circumstances. (See *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1238 [at penalty phase the defendant's guilt is conclusively presumed].) The challenged portions of the special instruction did no more than inform the jury of these limitations on its penalty phase duties.

The special instruction did not purport to limit the guilt phase *evidence* that could be considered by the jury, whether in assessing the circumstances of the crime (§ 190.3, subd. (a)) or in considering the existence of lingering doubt.[23] Nor did it suggest the substituted juror should play less than an equal role in assessing the evidence from the guilt phase for either of these purposes. To the contrary, the instruction stated the alternate juror was to "participate[] fully in the deliberations, *including such review as may be necessary of the evidence presented in the guilt phase of the trial.*"

As to lingering doubt, the original jurors were instructed to "set aside and disregard" any earlier deliberations and to begin their deliberations anew, with the substituted juror, "*with respect to the evidence presented in the guilt phase of the trial.*" An instruction that allows the jurors to vote against the death penalty if

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[23] In addition to the special instruction quoted above, the jury was instructed on lingering doubt as a mitigating circumstance in another instruction. That instruction also told the jury to consider the circumstances of the crime in its penalty decision.

they have residual doubt as to guilt or truth of the special circumstances is sufficient even though it requires the jurors to accept the guilt phase verdicts. (See *People* v. *Kaurish, supra*, 52 Cal.3d 648, 708 [alternate substituted during penalty deliberations]; *People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1234-1236 [retrial of penalty phase to new jury].) Here the instructions made clear not only that lingering doubts as to guilt could be considered in mitigation, but also that the penalty phase jury was to deliberate on this question as an integrated whole, to set aside any previous discussion on the question, and to review in its common deliberations any relevant guilt phase evidence.

We recognize, as defendant emphasizes, the penalty phase "has no separate formal existence but is merely a stage in a unitary capital trial." (*People* v. *Hamilton* (1988) 45 Cal.3d 351, 369.) The overlap of relevant evidence between the two phases may be substantial. Substitution of a juror for the penalty phase presents the potential problem of the new juror "joining a group which has already discussed and evaluated the circumstances of the crime, the capacity of the defendant, and other issues which bear both on guilt and on penalty." (*People* v. *Fields, supra*, 35 Cal.3d at p. 351.) For that reason we declined in *Fields* to adopt a procedure that would result in routine substitution of jurors at the penalty phase, while recognizing substitution might nonetheless be required when a guilt phase juror, due to "unforeseen circumstances," is unable to complete the trial. (*Id.* at p. 351, fn. 9.) The special instruction given here addressed the potential problem described in *Fields* by commanding the jury in clear and certain terms to set aside any previous discussion of guilt phase evidence relevant to lingering doubt, and in general to deliberate on their penalty verdict as an integrated group, *including any review they conducted of the guilt phase evidence*. We believe this instruction was adequate to safeguard defendant's right to unitary jury deliberations.

The non-capital decisions cited by defendant are not to the contrary. (*People* v. *Thomas* (1990) 218 Cal.App.3d 1477; *People* v. *Aiken* (1988) 207 Cal.App.3d 209.) In both cases the appellate court *approved* the trial court's excusal of a juror and substitution of an alternate after the jury had reached verdicts on some but not all of the charges. (*Thomas*, *supra*, 218 Cal.App.3d at pp. 1485-1488; *Aiken*, *supra*, 207 Cal.App.3d at pp. 211-214.) Neither decision holds the reconstituted jury must reconsider the verdicts already returned or deliberate on factual conclusions irrelevant to the counts yet to be decided. As already discussed, the jury here was correctly instructed to begin its deliberations anew as to guilt phase evidence to the extent it reviewed that evidence in its penalty phase deliberations.

IV. Claims of Error Relating to Section 190.3, Subdivision (a).

The jury was instructed to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstance found to be true." (See CALJIC No. 8.84.1 (1986 rev.) mod. by court.) Defendant raises several claims of error regarding this instruction and section 190.3, subdivision (a) (hereafter factor (a)), from which it was drawn.

Defendant's broadest attack, made in a supplemental brief, is that factor (a) is so vague or imprecise that it fails to guide the sentencer's discretion, in violation of Eighth Amendment. (See *Stringer* v. *Black* (1992) 503 U.S. 222.) This court and the United States Supreme Court have both rejected this contention, holding directions to consider the circumstances of the crime are not unconstitutionally vague. (*Tuilaepa* v. *California* (1994) 512 U.S. __ [129 L.Ed.2d 750]; *People* v. *Sims* (1993) 5 Cal.4th 405, 465-466; *People* v. *Noguera* (1992) 4 Cal.4th 599, 648-649.)

Defendant also contends the court was obliged, on its own motion, to instruct the jury not to "double count" the same facts as circumstances of the crime

and as special circumstances. (See *People* v. *Melton* (1988) 44 Cal.3d 713, 768 [noting "theoretical" problem of double counting but finding "possibility of actual prejudice . . . remote"].) We have repeatedly rejected claims of reversible error in this regard where the defense did not request an instruction against double counting, and there was no misleading argument by the prosecutor suggesting the same facts should be weighed twice, once under each rubric. (*People* v. *Proctor*, *supra*, 4 Cal.4th at p. 550; *People* v. *Fauber*, *supra*, 2 Cal.4th at p. 858; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 997.) Here there was neither a defense request nor any misleading prosecutorial argument on the point.[24]

Nor do we agree the instruction's reference to special circumstances unfairly "weighted" the jury's decision in favor of death. The facts underlying the special circumstance findings are among the circumstances the jury may consider. An instruction not to consider the special circumstances "would defeat the manifest purpose of factor (a) to inform jurors that they should consider, as one factor, the totality of the circumstances involved in the criminal episode that is on trial." (*People* v. *Morris*, *supra*, 53 Cal.3d at p. 224.)

Defendant's remaining two claims regarding the instruction on factor (a) are also without merit. We have already considered and rejected defendant's claims of legal error and factual insufficiency in the finding of attempted rape as a special circumstance; we therefore also reject his further contention the penalty verdict must be reversed because the factor (a) instruction allowed the jury to consider

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24 Contrary to defendant's claim, counsel did not render ineffective assistance by failing to request such an instruction. Since the instruction given was not reasonably likely to have been understood as inviting the jurors to "weigh" each special circumstance twice (*People* v. *Fauber*, *supra*, 2 Cal.4th at p. 858), it was neither deficient performance on counsel's part, nor prejudicial to defendant's case, to forego a special instruction.

attempted rape among the special circumstances found true, as well as his related claim his attorney rendered ineffective assistance by failing to move the special circumstances be stricken or otherwise excluded from consideration by the penalty jury.

Nor can we discern any reversible error in the court's failure to instruct the jury, sua sponte, not to consider in its penalty decision any evidence relating exclusively to the charge of rape, on which defendant had been acquitted. As defendant concedes, the evidence relevant to the rape charge was the same evidence from which the jury had found Mrs. Galloway's murder was committed during an attempted rape. (Cf. *People* v. *Jennings*, *supra*, 53 Cal.3d at pp. 389-390 [penalty phase instruction should have been tailored to direct jury not to consider evidence of assault against one victim, where defendant was acquitted of the charges relating to that victim].) The jury was properly instructed to consider the attempted rape under factor (a). Moreover, since the jury was instructed under factor (a) to consider only the circumstances of crimes "of which the defendant was *convicted* in the present proceeding" (emphasis added), there is no reasonable likelihood (*People* v. *Kelly*, *supra*, 1 Cal.4th at pp. 525-526) they were misled to believe they should ignore their own not guilty verdict on the rape charge.

V. Claims of Error Relating to Section 190.3, Subdivision (b).

As with factor (a), defendant challenges as unconstitutionally vague section 190.3, subdivision (b) (factor (b)), under which the jury may consider prior violent criminal activity on the question of penalty. Again, this general objection has been rejected by the United States Supreme Court as well as this court. (*Tuilaepa* v. *California*, *supra*, 512 U.S. at p. __, 129 L.Ed.2d at p. 762; *People* v. *Sims*, *supra*, 5 Cal.4th at pp. 465-466.) Nor does defendant provide any compelling reason to reexamine our holdings that introduction in the penalty phase of prior unadjudicated crimes does not violate due process, equal protection or the right to

a reliable sentencing procedure (*People* v. *Medina* (1990) 51 Cal.3d 870, 906-907; *People* v. *Balderas* (1985) 41 Cal.3d 144, 204-205), and that the jurors need not unanimously agree as to defendant's guilt of the prior offenses (*People* v. *Hardy* (1992) 2 Cal.4th 86, 207; *People* v. *Miranda, supra*, 44 Cal.3d 57, 99).

Turning to more specific claims, defendant contends evidence of the 1985 fight outside the Fontes trailer (the Fontes-Ramirez assaults) should have been excluded because he was previously acquitted of certain charges arising from that incident. Allowing the jury to hear and consider evidence of the fight, he claims, subjected him to double jeopardy as well as violating section 190.3, which excludes from the penalty phase evidence of "an offense for which the defendant was prosecuted and acquitted."

According to evidence put before the court in a hearing on defendant's objection to use of the incident, defendant and others were charged with four felonies in the attack on Fontes's husband and son. Counts 3 and 4 involved the son, Robert Ramirez. Count 3 charged assault with a deadly weapon (§ 245, subd. (a)(1)), to wit, an iron bar. *Count 4 alleged not assault with a deadly weapon, but rather, battery causing serious bodily injury, in violation of section 243, subdivision (d). No weapon use was alleged in this count.* Defendant was completely acquitted on count 3, but on count 4 was *convicted* of a lesser included offense, the misdemeanor of simple battery (§ 242).

While overruling defendant's objection to Fontes's testimony, the trial court limited the testimony to "facts from which the reasonable inference of a misdemeanor battery could be drawn . . . ." Evidence concerning use of an iron bar was excluded, since defendant was acquitted of the assault charge alleging such use. Evidence defendant kicked Ramirez and hit him with a rock, however, was allowed, since these acts presumably formed the basis of the battery for which defendant had been convicted.

The trial court's ruling was not error. The jury heard no evidence tending to show an offense for which defendant had been acquitted. Fontes did not testify to any use of an iron bar (count 3) or that defendant inflicted any serious bodily injury on Ramirez (count 4). Defendant was not previously acquitted of assaulting Ramirez with a rock or of kicking him. Indeed, these acts constituted the circumstances of a battery for which defendant had been convicted as a lesser included offense of the felony charged in count 4.[25]

The details and circumstances of prior violent criminal conduct are properly admitted and considered under factor (b) even if the defendant was previously prosecuted for the same conduct, so long as the defendant was not acquitted of the offense. (*People* v. *Fierro* (1991) 1 Cal.4th 173, 231; *People* v. *Melton* (1988) 44 Cal.3d 713, 754.) Although we held in *People* v. *Sheldon* (1989) 48 Cal.3d 935,

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25 In his reply brief defendant argues the prior acquittal was "necessarily based on an acceptance of the fact that Mr. Cain used neither an iron bar nor a rock . . . ." The record does not support this claim. In the prior proceeding codefendant Mark Miller was convicted on count 3 of assault with a deadly weapon, to wit, an iron bar, and on count 4 of battery causing serious bodily injury. Thus the jurors in the previous trial may have acquitted defendant of the felonies because they believed Ramirez's injuries were caused by an attack with an iron bar for which they believed Miller, rather than defendant, was responsible. These verdicts say nothing about whether defendant hit Ramirez with a rock.

Defendant suggests an attack with a rock of the size indicated by Fontes would necessarily cause serious injury. Although Fontes testified in the penalty phase here the rock was about eight inches wide, the record does not contain her testimony in the prior trial (references to that testimony by defense witness Clayton were stricken). Assuming the testimony was consistent, the jury in the previous trial could have found she was exaggerating the size of the rock. The jury could also have believed the prosecution had simply failed to show the rock was responsible for Ramirez's injuries in light of evidence that (as Fontes testified in the pretrial hearing here) once Ramirez got off of Miller, Miller hit him in the head with an iron bar, leaving him lying in a pool of blood.

951, that section 190.3's bar on evidence of acquitted offenses extends to lesser included offenses, neither that holding nor the reasoning supporting it extend to a case, like this one, where the defendant was *convicted* of the lesser offense and the penalty phase evidence is limited to facts on which the jury could reasonably have reached the lesser verdict. Here, unlike *Sheldon*, the People did not "circumvent[]" section 190.3 by using a possible lesser offense to "admit evidence surrounding the acquitted offense . . . ." (48 Cal.3d at p. 951.)

The use under factor (b) of a crime for which a defendant was previously convicted does not violate the constitutional and statutory bars against double jeopardy. The defendant is not being tried again, or made subject to punishment or conviction, for the same offense; instead, the evidence is admitted to assist the jury in its determination of the appropriate sentence on the current charge. (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 71; *People* v. *Fierro*, *supra*, 1 Cal.4th at pp. 231-232; *People* v. *Melton*, *supra*, 44 Cal.3d at p. 756, fn. 17.) For this reason the "same conduct" test of double jeopardy established in *Grady* v. *Corbin* (1990) 495 U.S. 109, would not apply, even if that case had not recently been overruled. (*United States* v. *Dixon* (1993) ___ U.S. ___, ___; 125 L.Ed.2d 556, 577-578.) "As defendant was not prosecuted in the penalty phase for the conduct on which his prior conviction was predicated (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 71), *Corbin* has no application to this case." (*People* v. *Johnson* (1992) 3 Cal.4th 1183, 1242.) Finally, to the extent the collateral estoppel aspect of double jeopardy applies to relitigation of facts in a penalty trial (see *People* v. *Melton*, *supra*, 44 Cal.3d at p. 756, fn. 17), it is inapplicable here because defendant "points to no specific facts litigated in his penalty trial which were necessarily resolved in his favor in prior criminal proceedings." (*Ibid.*)

Defendant also claims error in the court's failure to instruct, sua sponte, on the elements of assault and on defense of others as a legal defense to assault. As

he acknowledges, we have repeatedly held there is no duty, absent a request, to instruct on elements of crimes proven under factor (b). (*People* v. *Tuilaepa* (1992) 4 Cal.4th at 569, 591-592; *People* v. *Hardy*, *supra*, 2 Cal.4th at pp. 205-207; *People* v. *Davenport* (1985) 41 Cal.3d 247, 281.) That rule is based in part on a recognition that, as tactical matter, the defendant "may not want the penalty phase instructions overloaded with a series of lengthy instructions on the elements of alleged other crimes because he may fear that such instructions could lead the jury to place undue emphasis on the crimes rather than on the central question of whether he should live or die." (*People* v. *Davenport*, *supra*, 41 Cal.3d at p. 281; see also *People* v. *Anderson*, *supra*, 52 Cal.3d 453, 483 [on appeal, defendant claims "'sheer bulk'" of instructions on prior criminal activity overemphasized prior crimes and distracted jury from its primary duty].) We have also noted a trial court is not *prohibited* from giving such instructions on its own motion when they are "vital to a proper consideration of the evidence." (*People* v. *Davenport*, *supra*, 41 Cal.3d at p. 282.)

Defendant urges reexamination of these precedents, insisting the court does have a sua sponte obligation when the existence of the prior offense's elements, or a legal defense to the crime, is open to serious question based on the evidence. He argues instructions on assault and defense of third parties were essential to the jury's proper consideration of the evidence in this case, as the jury could have found defendant committed no crime when he came to the aid of Miller in the latter's fight with Ramirez.

We need not decide whether under some circumstances the trial court would have a sua sponte obligation to instruct on elements or defenses. Here the instructions were not so vital to the jury's evaluation of defendant's prior actions as to require they be given without a request. The defense here was able to present evidence and argue, even without these instructions, that defendant's involvement

was restricted to rescuing his friend who was getting beaten in a fight. Fontes herself testified her son was on top of Miller and hitting him. The defense called Clayton, who testified defendant did not instigate the fight and remained uninvolved until he came to Miller's assistance; even then, Clayton testified, defendant did not use a rock. Based on this evidence, defense counsel argued defendant "had nothing to do" with the reasons for the fight and acted only to "assist afterwards one of his friends."

Standard instructions on assault (the label by which the court identified the offense against Ramirez) or battery (of which defendant was convicted) would have informed the jury these crimes were not committed if the defendant acted in lawful defense of another person. (CALJIC Nos. 9.00, 9.12 (5th ed. 1988 bound vol.).) A standard instruction on defense of others (CALJIC No. 5.32 (5th ed. 1988 bound vol.)) explains it is lawful to apply reasonable force necessary to prevent the imminent infliction of bodily injury on another. As just seen, however, even without these instructions the jury had before it evidence and argument from which it could rationally assess the degree of culpability defendant bore in the prior incident. The proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character, rather than on the labels to be assigned the past crimes (see *People* v. *Clair, supra*, 2 Cal.4th at pp. 680-681) or the existence of technical defenses to prior bad acts (see *People* v. *Tuilaepa, supra*, 4 Cal.4th at p. 592). Here the evidence and argument properly focused the jury's attention on the moral assessment of defendant's actions in the Fontes incident; the instructions now suggested were not essential to the jury's consideration of this issue.

Moreover, the tactical considerations we have previously identified were potentially present here, and instruction on the court's own motion could have interfered with those tactics. In argument, the prosecutor devoted little time to the

Fontes incident, conceding it was a relatively minor episode: "I'm not asking you to say that it's the strongest aggravating factor. It's kind of a -- it's a minor deal, but it shows a continuing pattern of violence." Defense counsel, although he had called Clayton to present a version of the events more favorable to defendant than Fontes's, also deemphasized the incident in his summation. Like the prosecutor, he discussed it very briefly, pointing out defendant had not been involved in instigating the fight and had acted only to assist Miller. He also noted a previous jury had assessed only misdemeanor liability on defendant and argued the incident was so minor, it should not "have any bearing at all on whether or not Mr. Cain ought to die." The record thus supports an inference counsel adopted the reasonable tactic of treating the Fontes incident as so minor the jury should not consider it at all in their decision. Detailed instructions on the possible crimes committed and legal defenses thereto could have frustrated this defense approach. Under these circumstances the trial court was not obliged, sua sponte, to give such instructions. (*People* v. *Tuilaepa*, *supra*, 4 Cal.4th at pp. 591-592; *People* v. *Hardy*, *supra*, 2 Cal.4th at pp. 205-207; *People* v. *Davenport*, *supra*, 41 Cal.3d at p. 281.)

Finally, defendant argues all evidence regarding the Fontes incident should have been stricken because it established, as a matter of law, that defendant had acted in lawful defense of Miller. We disagree. The evidence was such as allowed a rational juror to find beyond a reasonable doubt defendant engaged in violent criminal activity. (*People* v. *Clair*, *supra*, 2 Cal.4th at pp. 672-673.) The jurors could rationally have believed, for example, that Miller was not in imminent danger of bodily injury, or that defendant used more force than reasonably necessary to defend Miller.

Defendant's claims regarding use of the 1979 assault on Perez, the Arizona juvenile control officer, are also without merit. As already discussed, use of prior

violent conduct under factor (b) does not violate the bar on double jeopardy and does not generally require instruction on the elements of the offenses previously committed. The use of defendant's out-of-state conduct as evidence of a circumstance in aggravation does not raise any question of the court's jurisdiction to convict or punish him for an offense committed in another jurisdiction, because, as already noted, the defendant in the penalty phase is not convicted of or punished for the prior offense. (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 71; *People* v. *Fierro*, *supra*, 1 Cal.4th at pp. 231-232; see also *People* v. *Pensinger* (1991) 52 Cal.3d 1210, 1260-1261 [violent criminal conduct in another state admissible under factor (b) even if it does not constitute California crime].)

Finally, neither the passage of nine years between the incident and this penalty trial, nor the fact defendant was a juvenile when he assaulted Perez, nor the alleged destruction of Arizona juvenile detention records, made the use of this prior violent crime unfair or unreliable. (See *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 134 [passage of nine years, lack of trial transcript and unwillingness of witnesses to meet with defense counsel did not preclude use of prior criminal conduct under factor (b)]; *People* v. *Anderson*, *supra*, 52 Cal.3d at p. 476 [remoteness goes to weight, not admissibility]; *People* v. *Cox*, *supra*, 53 Cal.3d 618, 688-689 [violent criminal conduct as 15-year-old admissible under factor (b)].) As to the alleged destruction of records (a fact not shown in the record, since defendant did not object on this ground below), we are not convinced, if true, this would have unconstitutionally deprived defendant of an opportunity fairly or fully to litigate the circumstances of the 1979 assault. The conduct was proven through a percipient witness, Perez, whom the defense could, and did, cross-examine fully. Defendant was also a percipient witness to the event and could have testified to any circumstances reducing his culpability, had he so wished. (See *People* v. *Cox*, *supra*, 53 Cal.3d at p. 689 [juvenile conduct proven

through victims and other percipient witnesses, whom defense had full opportunity to cross-examine].)

VI. Claims of Error Relating to Section 190.3, Subdivision (c).

Defendant contends the use of non-violent felony convictions under section 190.3, subdivision (c) (hereafter factor (c)) violates the rights to a fair penalty trial and reliable determination on the death penalty. He attacks the statute on its face, and as applied here to his single prior felony conviction for auto theft, suffered in 1982 when defendant was 19 years old.[26]

In his facial challenge, defendant asserts the existence of prior nonviolent felony convictions does not rationally assist the jury in deciding which capital defendants are worthy of the death penalty. We have held that prior felony convictions not involving force or violence are relevant "'to demonstrate that the capital offense was undeterred by prior successful felony prosecutions.'" (*People* v. *Bacigalupo*, *supra*, 1 Cal.4th at p. 140 quoting *People* v. *Balderas*, *supra*, 41 Cal.3d at p. 202, italics omitted.) Prior convictions tend to show "the capital offense was the culmination of habitual criminality -- that it was undeterred by the community's previous criminal sanctions." (*People* v. *Balderas*, *supra*, 41 Cal.3d at p. 202, italics and fn. omitted.) Defendant offers no authority for his view that consideration of such convictions renders the penalty decision unfair or unreliable.

In support of his facial attack, defendant cites us to death penalty statutes of a large number of states that, he asserts, restrict the use of prior convictions to crimes involving force or violence. California, he maintains, is alone in allowing the use of nonviolent prior convictions as a factor in the penalty decision, and thus

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26 Defendant points out the offense was committed in 1981, when he was 18 years old.

has fallen below "contemporary standards regarding the infliction of punishment." (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 288.)

In addition to resting on the incorrect assumption the Eighth Amendment requires the states to adopt some type of uniform capital sentencing scheme (see *Tuilepa* v. *California, supra,* 512 U.S. at p. __ [129 L.Ed.2d at p. 762] [states have considerable latitude in how to guide sentencer's discretion at selection phase]), defendant's showing as to the law of other states is not convincing. At least one of the state laws he cites expressly allows specified nonviolent offenses to be used as aggravating circumstances in a penalty trial.[27] In another case he has confused death-selection factors with death-eligibility factors (see *id.* at pp. __ [129 L.Ed.2d at pp. 759-760]); a statute limiting the use of prior convictions in the *eligibility* decision does not necessarily place the same restriction on the evidence admissible in the *selection* phase.[28] Moreover, even when nonviolent prior felony convictions are not designated aggravating factors for either eligibility or selection, the presence or absence of such convictions may be relevant to prove or disprove the existence of a factor in mitigation.[29] Thus, defendant has not

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27 Section 13-703 of the Arizona Revised Statutes, as amended in 1993, mandates consideration of any prior conviction for a "serious" offense, including in that category certain nonviolent offenses such as first degree burglary. (Ariz. Rev. Stat., § 13-703, subsections F.2, H.9.)

28 Oregon defines "aggravated murder" as including murder by a defendant who has previously been convicted of murder or manslaughter. (Ore. Rev. Stat., § 163.095(1)(c).) In the proceeding to determine the sentence for an aggravated murder, however, "evidence may be presented as to any matter that the court deems relevant to sentence." (Ore. Rev. Stat., § 163.150(1)(a).)

29 See, e.g., West's Annotated Indiana Code, section 35-50-2-9(c)(1): mitigating circumstances used in selection include that "[t]he defendant has no

(footnote continued on next page)

demonstrated either that California is unique in allowing consideration of nonviolent felonies in the penalty decision, or that uniqueness would indicate constitutional defectiveness.

As to the specific use of defendant's auto theft conviction, defendant argues his conviction for "teen-age participation in a car theft" was irrelevant or unreliable as a factor in the penalty decision. Taken alone, of course, a prior auto theft, by a teenager or anyone else, would not be a reason for choosing a death sentence. The conviction here, however, was not taken alone; it was but one fact in defendant's background the jury could consider in assessing his character and culpability. Together with the evidence of later violent conduct introduced under factor (b), as well as the capital crimes, it tended to show a pattern of criminal behavior undeterred by penal sanctions.

VII. Asserted Prosecutorial Misconduct in Jury Argument.

Over defense objection, the prosecutor was permitted to argue defendant's words and actions demonstrated a lack of remorse for his role in the killings of Mr. and Mrs. Galloway. The prosecutor told the jury defendant's attitude toward the crimes was demonstrated by his statement on the night of the killings that he had "knocked" the victims "smooth out" and gotten "thousands," by his

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(footnote continued from previous page)

significant history of prior criminal conduct." The Model Penal Code provision cited by defendant employs a similar mitigating circumstance: "The defendant has no significant history of prior criminal activity." (Model Pen. Code, § 210.6.) The comment to this section notes: "The word 'significant' was inserted into the tentative-draft formulation lest a trivial and remote conviction be construed to bar consideration of an otherwise law-abiding life as a mitigating factor." (Model Pen. Code and Commentaries, com. (b) to § 210.6, pp. 137-138.)

appearance on the television news, by his answer the morning after the killings to Val's inquiry about the victims ("That's on them"), and by his response to Detective Tatum's question as to whether he felt sympathy for the victims when he saw them dead ("They laugh at shit like that, man").[30] In summary, the prosecutor argued defendant had been given "every opportunity to express sorrow, sympathy, pity, remorse. Nothing. No remorse, nothing. Just a fear that he'd be caught. Selfish. Remorseless. [¶] You know, in a sense it's not the defendant's size that frightens you. It's his attitude. It's his attitude toward other human beings. He's a big man, but it's his attitude that's frightening. [¶] And I submit to you that that is a very strong aggravating factor, his attitude toward the crime afterward."

Defendant contends the prosecutor's argument improperly treated the absence of a possible mitigating factor as aggravating and employed a non-statutory aggravating factor. (*People* v. *Davenport*, *supra*, 41 Cal.3d at pp. 288-290; *People* v. *Boyd* (1985) 38 Cal.3d 762, 771-776.) We reject this claim for two reasons.

First, much of the prosecutor's argument referred to what we have called "overt remorselessness," a proper aggravating circumstance. (*People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232.) A murderer's attitude toward his actions and

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30 As the context demonstrates, the prosecutor could reasonably argue defendant admitted he felt, during the Saturday entry, no sympathy for the victims, but only fear for his own fate: "[Police detective]: [D]idn't you feel anything when you walked in there and saw them like that? [¶] [Defendant]: I was scared, man. [¶] [Detective]: But didn't you feel any sympathy -- [¶] [Defendant]: They laugh at shit like that, man. [¶] [Detective]: Who do? [¶] [Defendant]: Tony, man, Tony and Rick, man, and Dave, they laughed at shit like that, man. [¶] [Detective]: Well, gotta be sick. [¶] [Defendant]: And I know that shit going, I know, cause I'm the oldest . . . and I've been in prison before . . . and they gonna make, they gonna put me, make me look like I did all this shit, man . . . ."

the victims at the time of the offense is a "circumstance[] of the crime" (§ 190.3, subd. (a)) that may be either aggravating or mitigating.[31] (*Ibid.*; see also *People* v. *Edwards* (1991) 54 Cal.3d 787, 833 [circumstances of crime include its moral context].) From the evidence that defendant, still bloody from the killings, returned to his friends and boasted of what he had just done, the jury could infer his attitude during the crimes was one of callousness towards the victims. Similarly, Detective Tatum's question related to defendant's emotions *during* the second burglary on Saturday morning, and defendant's answer tended to show his attitude at that time. The prosecutor did not misconduct himself in arguing from this evidence. "The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed." (*People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1232.)

Second, we have repeatedly held the prosecutor can properly direct the jury's attention to evidence showing the defendant's lack of remorse. (See, e.g., *People* v. *Hardy*, *supra*, 2 Cal.4th at pp. 209-210; *People* v. *Breaux* (1991) 1 Cal.4th 281, 313; *People* v. *Odle*, *supra*, 45 Cal.3d 386, 422.) To the extent the prosecutor exceeded the proper scope of argument by characterizing defendant's post-crime attitude as aggravating, the error was harmless. "With or without argument, jurors can be expected to react strongly to evidence of overt callousness. [Citation.] Their response is unlikely to be influenced by whether the prosecutor brands such evidence as 'aggravating' or merely 'nonmitigating.'"

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[31] In contrast, the defendant's "mere failure to confess guilt or express remorse" at a later time is not a circumstance of the crime, does not fit within any other statutory sentencing factor, and thus should not be urged as aggravating. (*Ibid.*)

(*People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1232.) The prosecutor in this case also made it very clear the absence of a mitigating factor was not in itself aggravating, telling the jury that "when a mitigating factor is not present, you don't shove it over into the aggravating factor column. It's just a zero."

Contrary to defendant's claim, evidence of his callous attitude was not irrelevant to the penalty determination. (*People* v. *Gonzalez*, *supra*, 51 Cal.3d at p. 1232.) Nor did the prosecutor's reference to remorselessness as a circumstance in aggravation subject defendant to use of a vague factor in violation of the Eighth Amendment: the prosecutor's specific references to defendant's words and actions made clear the meaning of his assertion defendant lacked remorse. Nor, finally, did the prosecutorial argument violate defendant's privilege against self-incrimination. It focused on overt demonstrations of remorselessness and did not include any implied comment on defendant's failure to testify or confess full responsibility for the killings. (*People* v. *Cummings* (1993) 4 Cal.4th 1233, 1329; *People* v. *Breaux*, *supra*, 1 Cal.4th at p. 313.)

Defendant's remaining claims of prosecutorial misconduct are barred on appeal by his failure to object and request an admonition. In no instance was the assertedly erroneous prosecutorial argument so inflammatory that a timely admonition would have been ineffective. (*People* v. *Price*, *supra*, 1 Cal.4th at p. 440.) In any event, no reversible error has been shown. The prosecutor did not misconduct himself in giving his interpretations of two statements made by defendant ("That's on them" and "They laugh at shit like that, man"); although the meaning of these phrases was less than absolutely clear, the prosecutor's interpretations were reasonable. Nor did he go beyond the evidence in arguing defendant had led a selfish and brutal life, had used his physical strength to

intimidate and frighten others and had lived in his father's home while working only sporadically.[32] Finally, the prosecutor's passing reference to the death of his own maternal grandparents when his mother was only 13 years old bore no reasonable possibility of influencing the penalty verdict. (*People* v. *Douglas* (1990) 50 Cal.3d 468, 538; *People* v. *Brown* (1988) 46 Cal.3d 432, 456.) Since all these asserted instances of unobjected-to misconduct were either proper or clearly harmless, we also reject defendant's claim counsel's failure to object constituted ineffective assistance.

VIII. Ineffective Assistance of Counsel in Defense Penalty Argument.

Defendant contends his attorney incompetently and prejudicially neglected to argue his lack of premeditation was a mitigating circumstance of the offense. The record belies this claim. The lack of premeditation and deliberation was counsel's primary argument as to the circumstances of the capital crimes. He

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[32] Defendant's brutality and use of his physical strength were demonstrated by the capital crimes as well as by the Perez, Fontes and Parker incidents, and were relevant under factor (b). The fact defendant worked only sporadically and was hence in need of money was relevant to motive, a circumstance of the crimes. Defendant's failure to support himself or to use his physical strength for good ends was also employed to demonstrate he had squandered his family advantages (a middle-class upbringing) and failed to profit from the good example of his father, a hard-working man of good character. The prosecutor suggested defendant's personal history was relevant not in aggravation, but to rebut any suggestion of mitigation in the defense evidence of background: "Now he's thrown his life away, and that's no crime, and after all, we don't just because people throw away their lives, we don't vote to give them the death penalty, but on the other hand, he's thrown away his life, I submit to you, and that's no reason to save him." To the extent the prosecutor inadvertently strayed from this permissible argument into suggesting laziness and selfishness were aggravating factors, any error was harmless. There is no reasonable possibility the jury was moved to sentence defendant to death because he lacked permanent employment and lived with his father.

argued: "[T]here was no preplanning for killing. There was no talking about killing. There was no arming yourselves with a weapon. There was no deliberate killing." He then described several capital cases with which he was familiar that involved preplanning and deliberation. He concluded: "To compare this with this was a spontaneous act. There was no preplanning whatsoever. The lack of premeditation. . . . That makes this case not excusable, *but certainly not as bad as some of these others*." (Emphasis added.) Counsel then tied the lack of premeditation to the defense theory defendant was impaired by drug use and was desperate for money with which to obtain more drugs: "*Mitigation*, ladies and gentlemen -- another part of *mitigation* is intoxication. . . . [¶] We know he was intoxicated. . . . He was using crack. [¶] The compunction, ladies and gentlemen, to use cocaine was certainly there. [¶] I submit, ladies and gentlemen, that he could no more control that urge for cocaine than probably you and I can control being right-handed. . . . [¶] That's a far cry from a person who is sober, who looks around, who creeps in, who tapes somebody up and kills them with an axe. It's a far cry from the kind of person who arms themselves with a gun and deliberately shoots and kills." (Emphasis added.)

Counsel's line of argument, while ultimately unsuccessful, was reasonable and clear. The jurors could not have failed to understand he was arguing lack of premeditation and deliberation was a mitigating circumstance of the crimes.

Defendant also complains of a single sentence in counsel's argument on premeditation that defendant interprets as a concession he was the actual killer.[33]

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33 After describing a premeditated execution-style killing, counsel argued: "That's a far cry from a person who is so drug-impaired, he goes in there, stumbles around trying to get some money, and he acts in a rage reaction because that's what happened."

In context, and in light of counsel's express reminder defendant has "denied that [he was the killer] all the way through," and counsel's urging that the evidence left room for lingering doubt, the remark is more reasonably understood as urging the jury to consider the mitigating circumstances of the killings even if they believed defendant committed them. Such an argument was proper, indeed unavoidable, in light of the guilt phase verdicts, which strongly indicated the jurors accepted the prosecution theory defendant was the actual killer.

IX. Assessment of Aggravating and Mitigating Factors.

Defendant raises a number of objections to the court's instructions on assessment of aggravating and mitigating circumstances. We have previously rejected these contentions and decline to reconsider our decisions. The court was not constitutionally required to define aggravation and mitigation (*People* v. *Malone* (1988) 47 Cal.3d 1, 54-55), to label various factors as exclusively aggravating or mitigating (*People* v. *Montiel* (1993) 5 Cal.4th 877, 943; *People* v. *Livaditis* (1992) 2 Cal.4th 759, 784) or to delete inapplicable factors (*People* v. *Montiel, supra,* 5 Cal.4th at p. 937, fn. 31; *People* v. *Miranda, supra,* 44 Cal.3d at pp. 104-105). The instruction to determine if the aggravating circumstances were "so substantial" in relation to the mitigating circumstances adequately informed the jury the former had to outweigh the latter. (*People* v. *Duncan, supra,* 53 Cal.3d at p. 978.) There was no error in failing to instruct the jury it must find beyond a reasonable doubt that each aggravating factor relied on was true, that the aggravating factors outweighed the mitigating, and that death was the appropriate penalty. (*People* v. *Clark* (1992) 3 Cal.4th 41, 170; *People* v. *Livaditis, supra,* 2 Cal.4th at p. 786.) In the absence of any indication of a jury deadlock, the court was not obliged to inform jurors they could render no verdict at all by failing to agree unanimously on either death or life without parole. (*People* v. *Miranda, supra,* 44 Cal.3d at p. 105.)

X. Application to Modify Penalty.

Defendant makes several claims of error relating to the trial court's denial of his automatic application to modify the penalty verdict (§ 190.4, subd. (e)). First, he contends the court improperly read, considered and was influenced by the probation officer's report in denying the application. As the People concede, the court did apparently read the report, which had to be prepared because defendant was also to be sentenced on noncapital crimes, before ruling on the modification motion. The better procedure, as we have previously stated, is to defer reading the report until after ruling on the modification motion, which is to be made on the basis of the evidence that was before the jury. (*People* v. *Lewis* (1990) 50 Cal.3d 262, 287.) In similar cases, however, we have assumed, absent evidence in the record to the contrary, that the court was not improperly influenced by material in the probation report. (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1106; *People* v. *Fauber*, *supra*, 2 Cal.4th at p. 866.) Here that conclusion is amply supported by the record: before ruling the court explained its view "the court should not take into consideration the contents of the probation report"; after ruling the court repeated, "I base my ruling entirely upon the evidence that was presented in the trial."[34]

Turning to the trial court's statement of its reasons for denial, the record does not support defendant's claim the court improperly treated the absence of

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34 Although the judge also stated he had, in preparation for ruling on the motion, refreshed his recollection of the evidence in part by reading the probation officer's factual summary, nothing in the record suggests he was influenced by any extraneous material. Defendant incorrectly argues the court's reference to defendant having denied using drugs must have been based on a statement to that effect in the probation report because there was no such evidence at trial. In the police interview introduced at trial defendant several times denied using "dope" or "coke."

certain mitigating factors as aggravating. The court's recital of absent mitigating factors follows, and was apparently intended to illustrate, its conclusion there were no mitigating circumstances of sufficient substance to outweigh the circumstances in aggravation.

We also reject defendant's claim the court's mention of his prior felony conviction and his attempt to rape Mrs. Galloway was improper. As explained above, the attempted rape special circumstance was not legally invalid, and the prior conviction, even though for a nonviolent crime, was an appropriate consideration on the question of penalty.

To the extent the court erred in relying on evidence defendant was, in general, "a brutal person," any error would be harmless. The court regarded *the brutality of the capital crimes* as "certainly the most aggravating circumstance of all," one that "far outweighs any mitigating circumstance that might be present." It is clear from the court's statement there is no reasonable possibility reliance on indications of brutality other than defendant's acts of violence affected its decision. (*People* v. *Fauber*, *supra*, 2 Cal.4th at p. 867.) Finally, the court's failure expressly to refer to evidence defendant regards as mitigating does not demonstrate the court ignored or overlooked such evidence. (*People* v. *Berryman*, *supra*, 6 Cal.4th at p. 1107.) The court explicitly stated it had independently reviewed the evidence and believed death was the appropriate penalty. Nothing in the record suggests the court failed to perform its duty in this regard.

XI. Cumulative Effect of Errors.

Although we have found a few isolated instances of error in defendant's trial, we do not believe they affected its fairness either individually or taken together. Defendant was entitled to a fair trial, not a perfect one. (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 454.) This record does not establish any significant error in the trial of guilt or penalty.

XII. Disproportionate Punishment

Finally, we do not find defendant's death sentence grossly disproportionate to his personal culpability for these offenses; as on previous occasions, we decline to review the sentence in comparison to those in unrelated cases. (*People* v. *Mincey*, *supra*, 2 Cal.4th at p. 476; *People* v. *Kaurish*, *supra*, 52 Cal.3d at p. 716.) Defendant beat his two older neighbors to death in their own home, robbing them and sexually assaulting one as well. His apparent motive was to get money for his personal use. The nighttime burglary was defendant's idea, planned in advance. Although defendant may have been under the influence of alcohol or drugs, or feeling the effects of a drug dependency, the jury found on sufficient evidence that when he actually encountered the Galloways he formed an intent to kill them, an intent he carried out with considerable brutality. Even without consideration of defendant's past acts of violence, it is apparent death is not a constitutionally inappropriate punishment for these crimes.

DISPOSITION

The judgment of the superior court is affirmed in its entirety.

WERDEGAR, J.

WE CONCUR:

LUCAS, C.J.
KENNARD, J.
ARABIAN, J.
BAXTER, J.
GEORGE, J.

COPY

PEOPLE v. CAIN

S006544

CONCURRING OPINION BY MOSK, J.

I concur in the judgment. After review, I have found no reason to do otherwise.

I also concur generally in Justice Werdegar's opinion for the court. It fully addresses, and soundly rejects, all of defendant's claims.

I write separately to express my view that the time has come to revisit the question what mental state is required for first degree felony murder.

Since "[i]n California all crimes are statutory and there are no common law crimes" (*In re Brown* (1973) 9 Cal.3d 612, 624; see Pen. Code, § 6), first degree felony murder is purely a creature of statute. The defining provision is Penal Code section 189: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate," certain enumerated felonies "is murder of the first degree." As for mental state, there is no requirement of intent to kill, deliberation, or premeditation (see Pen. Code, § 189) or even of malice aforethought (*People* v. *Hansen* (1994) 9 Cal.4th 300, 319 (conc. & dis. opn. of Mosk, J.); see generally *People* v. *Dillon* (1983) 34 Cal.3d 441, 472-476 (plur. opn. by Mosk, J.); accord, *id.* at p. 490 (conc. opn. of Kaus, J.)). All that is demanded in this regard is the state of mind belonging to the underlying felony. To the extent that such decisions as *People* v. *Sears* (1965) 62 Cal.2d 737, 745, overruled on another point, *People* v. *Cahill*

(1993) 5 Cal.4th 478, 509-510, footnote 17, and its progeny hold or state otherwise, they are unsound. Moreover, to the extent that they use the terms "specific intent" and "general intent," which evolved as labels to identify particular crimes as, respectively, admitting or not admitting the defense of voluntary intoxication (*People* v. *Hood* (1969) 1 Cal.3d 444, 455-456; see *People* v. *Whitfield* (1994) 7 Cal.4th 437, 463 (conc. & dis. opn. of Mosk, J.)), and which are in themselves "notoriously difficult . . . to define and apply" (*People* v. *Hood*, *supra*, 1 Cal.3d at p. 456), they have proved to be mischievous. They should no longer be followed.

MOSK, J.

PEOPLE v. TRACY DEARL CAIN

S006544

Counsel Who Argued For The Parties

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TRIAL COURT: Ventura County Superior Court

TRIAL COURT #: CR 22297

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent,	)	
vs.	)	No. _____
TRACY D. CAIN, Defendant-Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE BRUCE A. THOMPSON, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 47 HON. BRUCE A. THOMPSON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. TRACY D. CAIN, Defendant.	No. CR 22297

REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

Monday, May 2, 1988

APPEARANCES:

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know what that was about?

"ANSWER: No. Nobody understood it."

That's the end of the take, your Honor.

THE COURT: All right. Thank you.

THE COURT: Mr. Holmes?

MR. HOLMES: The People rest.

THE COURT: All right. Mr. Wiksell, do you want to make or reserve opening statement --

MR. WIKSELL: Yes.

THE COURT: -- address the jury now?

MR. WIKSELL: Thank you, your Honor.

Your Honor, ladies and gentlemen, counsel.

This proceeding means that now you are sentencing judges. You know everything about the crime for which you have convicted Mr. Cain. That's the Galloway crime. You've heard all the evidence about that now.

And as it sits right now, you also know all the bad and terrible things he's done in his life. What I'm about to do, and through the witnesses that I have, is I'm going to show you something about the person so that you'll have a complete picture when you decide what to do with Mr. Cain.

As to this incident that we just heard about through testimony of Virginia Fontes, what happened in this case is that three people -- you heard names, Clayton, Miller and Mr. Cain -- went to their -- went to their trailer.

We have a witness who's going to give you another version of what happened. What happened was that Clayton, Miller and Mr. Cain went to that trailer to see a girl by the name of Debbie Miller and a fight broke out.

Mr. Cain stayed in the truck. Mr. Cain did get out of the truck and he got in an altercation with these people. Mr. Cain did not hit anybody with a rock. Mr. Cain was arrested. Mr. Cain was charged with a number of felonies, assaults, assaults with deadly weapons, things of that nature.

I've got the court records. The court records will show he went to trial, had a jury trial along with Mr. Clayton and Mr. Miller. He was charged in an information with a number of assaults with -- by means of force likely to produce great bodily injury.

He was charged in another -- well, he was charged with four counts, which were felonies, and he was found not guilty by a jury. Three of those felonies and the last felony he was found to be lesser included, plain misdemeanor battery, for which he received a 90-day sentence.

We're going to have Mr. Clayton come in and tell you what happened on that fight and the fact that Mr. Cain went to assist someone who was getting beat up -- didn't hit him with a rock, contrary to what Mrs. Fontes says -- testified to through a transcript.

And then I'm going to show you something

about Mr. Cain's person. I will have some relatives testify. His father and his stepmother. They will tell you about his family life. You will learn that his real mother died in Jonestown with -- down in South American -- Mr. Jim Jones. And what effect, if any, that had on Mr. Cain.

Not in any way -- I'm not offering any of this evidence -- I'm not standing up here to excuse what you've convicted him of. I couldn't. Evidence doesn't exist for that. What it is is to give you a picture of a person that you are going to sentence.

The family, the family members, will tell you how they care about Mr. Cain. If he's lucky enough to spend the rest of his life in prison, they will support him, they will visit them and they still care about him, about his life.

I will show you when he was 19 years old -- you heard that he was in the youth authority over in Arizona. When he was 19 -- 18 years, as a matter of fact -- he was convicted of a stealing a car at age 18. He was sentenced to the Arizona Department of Corrections.

This is the prior Mr. Holmes and I stipulated to that he did -- he went to prison for a term of approximately five years, I believe, was his prison term. I'm not exactly sure on that, but he went to the Arizona state prison at the age 18.

While he was in prison, he was fortunate

enough to get some work details. Menial jobs. I don't know what they paid -- 20 cents an hour, something like that, but we located some prison guards who wrote reports on them because -- and then work detail is a privilege in prison.

And Mr. Cain did his time. He wasn't an escape risk in Arizona. He didn't assault people in Arizona. When he worked -- when he worked in these work facilities chopping weeds, mending fences, things of that nature. They wrote reports about him, and we have those reports.

You'll see he wasn't -- again, he wasn't the kind of a threat that you might think that he was. He did his time and he got paroled, and he was a good worker. And they will come and they will testify as to how he worked and they -- they scored him and they do keep records. If he would have done any of these things, he would have washed out of the program, but he didn't.

You know what death is. I mean, that's self-explanatory. I'm not going to present evidence about the death and about the gas chamber. I'm not going to do that. You know what that is. I don't want to shock you or do anything like that. I think that's ridiculous to do that to you people.

But I want to show you through testimony, evidence, what the other punishment is, the other punishment is life without possibility of parole. It's one thing to stand up and talk about it.

But I have a witness who's going to come in and testify. His name is John Irwin, and this man is a sociologist. More than that, he was -- when he was a youth, he went to prison. He went to prison for about five years and he got out of prison and he became a professor and he teaches college and he's in his fifties now.

And we got hold of him because he's written a lot of books about prison life and he does a lot of things with inmates. He'll tell you exactly what the deprivation is in prison because it's a tool. If you don't know what life without possibility of is in comparison with death, I don't believe you can make an accurate choice between the two. That is the purpose of this testimony.

He hasn't examined Mr. Cain. He's not a psychiatrist. He's going to tell you what it's like to be in prison, spend the rest of your life in prison knowing you're going to die there. He'll tell it from a factual basis because he's been there.

He's still involved in lifers. He's still involved and he teaches this aspect. He'll tell you quite a bit of information that I suspect that you were not aware of, but I'll let him tell you from the stand rather than me from this podium.

And because I suspect that you would like to see justice done in this case, I want to show you through testimony and evidence that the co-defendant, Mr. Cerda,

faces charges in this case. You've heard the name David Cerda, but he doesn't face the death penalty and he's coming to trial and he doesn't even face life without parole.

What he faces, if he's found guilty, the maximum is 25 years to life in prison, which means he can get out. There's no one else that's being charged in this case, and the only one that's been set off for the death penalty is Mr. Cain.

And I've got another court record from that court file. I located a document in which on March 25th Mr. Cerda agreed to accept four years in prison if he would testify against Mr. Cain.

Well, he changed his mind and this was -- he was to testify truthfully, but the offer was that if he testified -- it was March 25th, 1988 -- against Mr. Cain in this case, he would receive four years in prison on a burglary charge.

He signed it, his lawyer signed it, and Mr. Holmes signed it. It's part of the court file. When they went to take the plea, factually and out loud, Mr. Cerda changed his mind, but nevertheless, Mr. Cerda does not face the death penalty. Mr. Mendoza does not face anything. No one else faces anything. The only person who faces execution is Mr. Cain.

And I think that that's evidence for you to consider in determining whether or not he should die in the gas chamber. And at the conclusion of my case, I

will ask you to make a reasoned choice, but I will also ask you a merciful choice because you're allowed to do that, and I will ask you to sentence Mr. Cain to spend the rest of his life in jail, knowing that he'll never ever get out of jail.

Thank you, your Honor.

THE COURT: All right folks. We'll take a brief break. I'm aware you've been in that jury room back there for well over -- you've been inside well over an hour now, and we'll take a break for you to get ready to hear the evidence.

Please return in ten minutes. Don't talk about the case. Don't make up your minds about anything yet.

(The following proceedings were held out of the presence and hearing of the jury:)

THE COURT: Jurors are gone. Anything further, counsel?

MR. HOLMES: Yes, I do want to put one thing on the record. I will have a motion after Mr. Irwin testifies about my cross-examination because I don't want to get in the areas that the Court may not want me to get into.

So I'm just warning counsel that after he finishes, I will be asking for a hearing outside the presence of the jury.

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, TERI T. CAIN, CSR 4062, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 1-36, 66-92, 121-131, 170-187, 214-241, 286-322, 361-374, 402-439, 476-491, 492-519, 556-564, 597-637, 685-729, 770-789, 790-818, 855-874, 900-906, 936-962, 976-1007, 1045-1079, 1119-1155, 1202-1228, 1269-1300, 1336-1371, 1410-1443, 1476-1489, 1490-1521, 1558-1590, 1631-1667, 1707-1736, 1793-1828, 1866-1975, 1976-2006, 2045-2077, 2120-2158, 2233-2272, 2312-2348, 2375-2403, 2404-2436, 2474-2509, 2546-2580, 2652-2693, 2737-2774, 2775-2808, 2849-2886, 2929-2965, 3024-3061, 3100-3135, 3172-3212, 3257-3263, 3264-3309, 3351-3384, 3418-3459, 3509-3538, 3560-3580, 3596-3607, 3644-3683, 3721-3753, 3787-3801, 3802-3840, 3876-3908, 3949-3984, 4035-4066, 4105-4143, 4177-4213, 4236-4241, 4242-4272, 4315-4350, 4384-4425, 4519-4576, 4614-4649, 4666-4696, 4734-4769, 4805-4833, 4879-4894, 4895-4931, 4972-5013, 5060-5079, 5119-5144,

5145-5176, 5213-5258, 5302-5330, 5384-5423, 5465-5511, 5580-5613, 5649-5671, 5702-5731, 5862-5892, 5922-5946, 5977-6000, 6001-6035, 6070-6102, 6137-6169, 6220-6254, 6274-6293, 6294-6319, 6350-6405, 6436-6469, 6492-6512, 6513-6550, 6593-6622, 6655-6683, 6705-6757, 6790-6820, 6851-6880, 6881-6896, 6897-6938, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20, 26, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 14, 19, 20, 21, 22, and 26, 1988; May 2, 11, 12, 13, 18, and 20, 1988; July 12, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Teri T. Cain

TERI T. CAIN, CSR 4062
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

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5424-5464, 5512-5544, 5545-5579, 5614-5648, 5672-5701, 5732-5776, 5834-5861, 5893-5921, 5947-5976, 6036-6069, 6103-6136, 6170-6190, 6191-6219, 6255-6273, 6320-6349, 6406-6435, 6470-6491, 6551-6592, 6623-6654, 6684-6704, 6758-6789, 6821-6850, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 26, 27, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 13, 14, 19, 20, 21, and 27, 1988; May 11, 12, and 18, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Christie Montgomery

CHRISTIE MONTGOMERY, CSR 4921
Official Reporter

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) ss.
COUNTY OF VENTURA)

I, DAVID O'GRADY, CSR 3146, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 37-65, 93-120, 5777-5833, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20 and 26, 1988; April 13, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

DAVID O'GRADY, CSR 3146
Official Reporter

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent,	)	
vs.	)	No. _____
TRACY D. CAIN, Defendant-Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE BRUCE A. THOMPSON, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 47 HON. BRUCE A. THOMPSON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	
vs.	No. CR 22297
TRACY D. CAIN, Defendant.	

REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

Thursday, May 12, 1988

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THE COURT: Exhibit KK is received.

And Mr. Duran -- excuse me just a minute.

Mr. Holmes, after reviewing the exhibit, do you have any further questions of Mr. Duran?

MR. HOLMES: No, I don't.

THE COURT: All right. Mr. Duran, you can step down.

And you're excused from further attendance at this trial.

THE WITNESS: Thank you.

WILMA CAIN,

called as a witness by and on behalf of the Defense, was examined and testified as follows:

THE CLERK: If you'll raise your right hand, please.

You do solemnly swear that the testimony you are about to give in the matter now pending before this court shall be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Thank you.

Please be seated at the witness stand.

Please state and spell your name for the record.

THE WITNESS: My name is Wilma Cain.

You want the spelling of the last name?

C-a-i-n.

First name W-i-l-m-a.

DIRECT EXAMINATION

BY MR. WIKSELL:

Q. Ma'am, do you know Tracy Cain?

A. Yes, I do.

Q. Do you see him in court?

A. Yes, I do.

Q. Okay. What is your relationship to Tracy Cain?

A. Well, I'm Tracy's step-mother. The only mother he's really ever known.

Q. And why do you say that you're the only --

A. Because I've been raised -- I raised him from the time he was four years old.

Q. You were married for a time to Percy Cain?

A. For 18 years.

Q. And you raised quite a few children; is that correct?

A. That's right.

Q. About how many?

A. Altogether, 11.

Q. Now did you know Mr. Cain's - I'm talking about Tracy Cain's - real mother?

A. Yes, I did.

Q. Is she still living?

A. No, she's not.
Q. Do you know where she died?
A. She dies up in Jonestown in 1978.
Q. Now, you know, because I've told you, my investigators told you, that Mr. Cain has been convicted by this jury of very terrible crimes.
You're aware of that, correct?
A. Yes, I am.
Q. And I told you that he has -- this jury has only two choices. Mr. Cain could spend the rest of his life in jail, or he'll be executed.
You're aware of that?
A. Right.
Q. As a boy growing up, would you say that Tracy was a normal boy? Would you say that he was average, worse than average -- or what was he like?
A. I would say he was like a typical boy.
Q. When you heard that he was convicted by this jury --
And you live in Arizona; is that correct?
A. That's right.
Q. You haven't followed the details of this case, correct?
A. No, I haven't.
Q. But when you heard that he was convicted, you were very surprised, weren't you?
A. That he was convicted, yes. I was very shocked.

Q. Because it didn't sound like Tracy, did it?
A. No, it did not.
Q. Well, it's hard to talk about character traits. They're hard to define.
But why -- why was that so surprising in the sense that it didn't sound like Tracy?
You know Tracy. You raised him.
A. Yeah.
Q. Okay. Can you tell the jury some of the good qualities that Mr. Cain had that you saw?
A. Well, what I seen in Tracy, raising him as a child -- like I say, he was typical. I mean he would -- you know, he got along with everybody. He didn't give me any problems. Not what I considered incorrigible in any way. So to hear about something like that, it doesn't sound like Tracy. I still don't believe it was Tracy.
Q. Knowing you still -- you still have some strong feelings for Tracy, don't you?
A. Yes, I do.
Q. You still love him?
A. Yes.
Q. Mr. Cain has a bleak future, to put it mildly, if he's fortunate enough to receive a sentence of life in prison forever.
Would you still help him and support him in any way that you could?
A. Oh, of course. I intend to do that.
Q. You would still stand by him?

A. Yes.

Q. And I take it that you are in your own way here from Arizona --

A. Uh-huh.

Q. -- asking this jury for mercy and sympathy for Mr. Cain?

A. Yes. Yes.

MR. WIKSELL: Mrs. Cain, I don't have any further questions to ask you.

THE WITNESS: Okay.

CROSS-EXAMINATION

BY MR. HOLMES:

Q. I'm sorry. I didn't get the years that you raised him.

From what age to what age were you married to Mr. Cain?

What age was Tracy Cain?

A. Tracy was four. And Mr. Cain and I had just gotten together in '66. And he had -- just turning four, I believe, December 29th. So I raised him all the way through school.

Q. Well, that would be, in effect, 22 -- until he was 22, roughly?

A. Twenty-two -- he was already out at 22. So 18, 19.

Q. But you raised him until he left home as an

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5145-5176, 5213-5258, 5302-5330, 5384-5423, 5465-5511, 5580-5613, 5649-5671, 5702-5731, 5862-5892, 5922-5946, 5977-6000, 6001-6035, 6070-6102, 6137-6169, 6220-6254, 6274-6293, 6294-6319, 6350-6405, 6436-6469, 6492-6512, 6513-6550, 6593-6622, 6655-6683, 6705-6757, 6790-6820, 6851-6880, 6881-6896, 6897-6938, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20, 26, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 14, 19, 20, 21, 22, and 26, 1988; May 2, 11, 12, 13, 18, and 20, 1988; July 12, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

TERI T. CAIN, CSR 4062
Official Reporter

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STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, CHRISTIE MONTGOMERY, CSR 4921, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 132-169, 188-213, 242-285, 323-360, 375-401, 440-475, 520-555, 565-596, 638-684, 730-769, 819-854, 875-899, 907-935, 963-975, 1008-1044, 1080-1118, 1156-1201, 1229-1231, 1232-1268, 1301-1335, 1372-1409, 1444-1475, 1522-1557, 1591-1630, 1668-1706, 1737-1755, 1756-1792, 1829-1865, 2007-2044, 2078-2119, 2159-2195, 2196-2232, 2273-2311, 2349-2374, 2437-2473, 2510-2545, 2581-2617, 2618-2651, 2694-2736, 2809-2848, 2887-2928, 2966-2990, 2991-3023, 3062-3099, 3136-3171, 3213-3256, 3310-3350, 3385-3417, 3460-3474, 3475-3508, 3539-3559, 3581-3595, 3608-3610, 3611-3643, 3684-3720, 3754-3786, 3841-3875, 3909-3948, 3985-4002, 4003-4034, 4067-4104, 4144-4176, 4214-4235, 4273-4314, 4351-4383, 4426-4450, 4451-4518, 4577-4613, 4650-4665, 4697-4733, 4770-4804, 4834-4855, 4856-4878, 4932-4971, 5014-5059, 5080-5091, 5092-5118, 5177-5212, 5259-5301, 5331-5344, 5345-5383,

5424-5464, 5512-5544, 5545-5579, 5614-5648, 5672-5701, 5732-5776, 5834-5861, 5893-5921, 5947-5976, 6036-6069, 6103-6136, 6170-6190, 6191-6219, 6255-6273, 6320-6349, 6406-6435, 6470-6491, 6551-6592, 6623-6654, 6684-6704, 6758-6789, 6821-6850, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 26, 27, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 13, 14, 19, 20, 21, and 27, 1988; May 11, 12, and 18, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Christie Montgomery

CHRISTIE MONTGOMERY, CSR 4921
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, DAVID O'GRADY, CSR 3146, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 37-65, 93-120, 5777-5833, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20 and 26, 1988; April 13, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

DAVID O'GRADY, CSR 3146
Official Reporter

6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent,	)	
vs.	)	No. _____
TRACY D. CAIN, Defendant-Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE BRUCE A. THOMPSON, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff-Respondent: JOHN VAN DE KAMP
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For the Defendant-Appellant: In Propria Persona

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 47 HON. BRUCE A. THOMPSON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	
vs.	No. CR 22297
TRACY D. CAIN, Defendant.	

REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

Friday, May 13, 1988

APPEARANCES:

For the People:

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BY: RICHARD E. HOLMES
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For the Defendant:

CONFLICT DEFENSE ASSOCIATES
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800 South Victoria Avenue
Ventura, California 93009

VENTURA, CALIFORNIA; FRIDAY, MAY 13, 1988

9:15 A.M.

-oo0oo-

(The following proceedings were held in the presence and hearing of the jury:)

THE COURT: People against Cain. Defendant, both counsel and all the jurors are present, and we're ready to hear from the next witness.

Mr. Wiksell?

MR. WIKSELL: Thank you, your Honor. Persey Cain.

PERSEY CAIN,

called as a witness on behalf of the Defense, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please raise your right hand.

You do solemnly swear that the testimony you are about to give in the matter now pending before this Court shall be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated at the witness stand.

Please state and spell your name for the

record.

THE WITNESS: First name, Persey, P-e-r-s-e-y. Last name, Cain, C-a-i-n.

DIRECT EXAMINATION

BY MR. WIKSELL:

Q. Mr. Cain, you're the father of Tracy Cain; is that correct?

A. That's correct.

Q. And how old are you?

A. Forty -- 49.

Q. All right. Tracy is not your only child, I take it?

A. No. I have a total of 12.

Q. I wonder if you could tell the -- go from the oldest to the youngest and tell the jury their names and ages, if you can recall?

A. Names, but I can't quite remember all the ages. I'll give you all the names.

Ahh -- Larry Dunnell Cain, first child. Brenda Lee Cain, second. Janice Renee, third. Tracy Cain, fourth. Ahh -- Persey Cain, III, the fifth.

Ahh -- Candy Nichole Cain, sixth. Cantana Yvette, seventh.

I believe I left out Val Cain. Which was -- should have been the fourth. Val Cain should have been the . . . well, let's see.

Val Cain was my fourth child. And back to the youngest -- ahh -- Durez Cain. And Tiffany Nadell. Jason Lamarr. And my baby -- ahh -- excuse me.

My baby . . . excuse me. My baby, Gabriel.

Q. Now, you were married to a woman by the name of Ruth for awhile. That was Tracy's mother; is that correct?

A. That's correct.

Q. And she's now deceased?

A. That's right.

Q. She died in Guyana at Jonestown; is that correct?

A. That's correct.

Q. Do you remember approximately what year that was?

A. I believe '75 or '76, I believe.

Q. About '78 perhaps?

A. Yeah.

Q. Now, you're not originally -- are you originally from California?

A. Mississippi.

Q. For while you lived in Yuma, Arizona; is that correct?

A. That's correct.

Q. And you had your children with you?

A. That's correct.

Q. Mr. Tracy Cain, your son, lived with you in Yuma, Arizona; is that correct?

A. That's correct.

Q. And he got into a little scrape with the law and went to the youth authority for stealing a car; is that right?

A. That's right.

Q. Did he ever graduate from high school?

A. Ahh -- no.

Q. Is Tracy Cain married?

A. No, he's not.

Q. To your knowledge, has he ever been married?

A. No.

Q. Does he have any children of his own?

A. Not that I know of.

Q. In raising Tracy Cain, how would you describe him among your kids and kids you know? Was he a bad kid, a wild kid?

A. No. He was a good kid. You know, typical, you know, boy.

Q. Do you know he was arrested and you know he was charged with this offense that involved your neighbors. And he's been in jail for a long time.

You've kept in contact with him while he's been in jail, I take it?

A. That's correct.

Q. You've gone over to visit him; is that correct?

A. That's correct.

Q. Have you gone to visit -- how frequently

would you say you seem him? Once a month?

A. About twice a month.

Q. About twice a month, and when you talked to him, you talk through -- there is a glass in between? You talk to him on a phone; isn't that correct?

A. That's right.

Q. With the exception of maybe once in court, you haven't had any physical contact? You haven't shook his hand or touched him?

A. No.

Q. Have you touched him since he's been arrested?

A. No, I haven't.

Q. Not even a pat on the back.

A. (Shakes head side to side.)

Q. This crime to your neighbors was something that is shocking to you, was it not?

A. Yes, it was.

Q. But it didn't sound like Tracy Cain, did it?

A. No, it didn't.

(Pause.)

THE COURT: Mr. Cain, we'll take a break any time you feel you want to. Let me know.

THE WITNESS: I'm okay.

BY MR. WIKSELL:

Q. You love your boy?

A. Yes, I do.

Q. And that's obvious. You know at the very

best he's going to go to jail, and he's going to spend the rest of his life in jail if he's lucky. You know that, don't you?

A. Yes.

Q. If he's sent to prison, if the jury exercises mercy, will you still help him and support him any way you could?

A. All I know how.

Q. You've been a working man all your life, haven't you?

A. Sure have.

Q. You've never run afoul of the law yourself?

A. Other than traffic tickets.

Q. Tried your best to be a good father?

A. Sure did.

Q. And you love your kids?

A. Yes.

Q. All of them?

A. All of them.

Q. You don't want your boy to die?

A. No, I don't.

Q. Well, why didn't this horrible crime -- why didn't this sound like Tracy?

I take it, as you sit there now, you refuse to believe Tracy would do something this horrible; isn't that correct?

A. Yes, I did. Tracy never been in any kind of problem other than the car theft.

Q. As you sit there now, Mr. Cain, in your own way are you asking this jury for mercy for your son?

A. Yes.

MR. WIKSELL: Your Honor, I don't have any further questions.

THE COURT: Mr. Holmes?

CROSS-EXAMINATION

BY MR. HOLMES:

Q. As a matter of fact, Mr. Cain, you've worked since you were age 12, haven't you?

A. That's right.

Q. And incidentally, you worked at one point -- you worked most of your life in construction, haven't you?

A. That's correct.

Q. And you always supported your family?

A. Yes.

Q. As a matter of fact, you lived in Yuma, Arizona, for number of years own a home there and that's where Tracy was essentially raised?

A. That's right.

MR. HOLMES: Nothing further.

MR. WIKSELL: No further questions, your Honor.

THE COURT: All right. Thank you, Mr. Cain. You can step down.

THE WITNESS: Thank you.

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, TERI T. CAIN, CSR 4062, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 1-36, 66-92, 121-131, 170-187, 214-241, 286-322, 361-374, 402-439, 476-491, 492-519, 556-564, 597-637, 685-729, 770-789, 790-818, 855-874, 900-906, 936-962, 976-1007, 1045-1079, 1119-1155, 1202-1228, 1269-1300, 1336-1371, 1410-1443, 1476-1489, 1490-1521, 1558-1590, 1631-1667, 1707-1736, 1793-1828, 1866-1975, 1976-2006, 2045-2077, 2120-2158, 2233-2272, 2312-2348, 2375-2403, 2404-2436, 2474-2509, 2546-2580, 2652-2693, 2737-2774, 2775-2808, 2849-2886, 2929-2965, 3024-3061, 3100-3135, 3172-3212, 3257-3263, 3264-3309, 3351-3384, 3418-3459, 3509-3538, 3560-3580, 3596-3607, 3644-3683, 3721-3753, 3787-3801, 3802-3840, 3876-3908, 3949-3984, 4035-4066, 4105-4143, 4177-4213, 4236-4241, 4242-4272, 4315-4350, 4384-4425, 4519-4576, 4614-4649, 4666-4696, 4734-4769, 4805-4833, 4879-4894, 4895-4931, 4972-5013, 5060-5079, 5119-5144,

5145-5176, 5213-5258, 5302-5330, 5384-5423, 5465-5511, 5580-5613, 5649-5671, 5702-5731, 5862-5892, 5922-5946, 5977-6000, 6001-6035, 6070-6102, 6137-6169, 6220-6254, 6274-6293, 6294-6319, 6350-6405, 6436-6469, 6492-6512, 6513-6550, 6593-6622, 6655-6683, 6705-6757, 6790-6820, 6851-6880, 6881-6896, 6897-6938, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20, 26, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 14, 19, 20, 21, 22, and 26, 1988; May 2, 11, 12, 13, 18, and 20, 1988; July 12, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

TERI T. CAIN, CSR 4062
Official Reporter

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COUNTY OF VENTURA)

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5424-5464, 5512-5544, 5545-5579, 5614-5648, 5672-5701, 5732-5776, 5834-5861, 5893-5921, 5947-5976, 6036-6069, 6103-6136, 6170-6190, 6191-6219, 6255-6273, 6320-6349, 6406-6435, 6470-6491, 6551-6592, 6623-6654, 6684-6704, 6758-6789, 6821-6850, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 26, 27, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 13, 14, 19, 20, 21, and 27, 1988; May 11, 12, and 18, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Christie Montgomery

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Official Reporter

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DAVID O'GRADY, CSR 3146
Official Reporter

6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent,	)	
vs.	)	No. _____
TRACY D. CAIN, Defendant-Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE BRUCE A. THOMPSON, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff-Respondent: JOHN VAN DE KAMP
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For the Defendant-Appellant: In Propria Persona

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 47 HON. BRUCE A. THOMPSON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	
vs.	No. CR 22297
TRACY D. CAIN, Defendant.	

REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

Wednesday, May 18, 1988

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and return home -- jog my memory. I'll let you know one of the reasons for this morning's delay. It has nothing to do with the merits of this case at all, but I think you'll find it interesting.

Having said all of those things, we are now at that stage of the proceeding where the attorneys are permitted to address you in summation or argument.

By agreement between the attorneys we're going to take a little bit different form this morning. Mr. Holmes will lead off with his argument. Mr. Wiksell will make his argument. And that will then be all the argument you will hear.

We are shooting for 12:00 because there will not be the usual rebuttal or rejoinder by the plaintiff's counsel.

I will try to finish up before we break for lunch. Whether this can -- that might mean we'll go into -- 12:10, 1215, maybe even as late as 12:30. When we return, then we'll -- I'll give you the instructions and you'll start to deliberate.

A lot will depend on how long the remarks of the attorneys are and whether we need a break in between, but we perhaps can finish the argument before you break for lunch.

All right. Mr. Holmes.

MR. HOLMES: Thank you.

Your Honor, defense counsel, and ladies and gentlemen of the jury:

This will be my one opportunity to address you in the penalty phase. And I have a bit of a sore throat today. So I'm not going to be shouting, which may be a relief. But I hope you'll excuse my changed voice.

When you consider it, a democracy demands a great deal of its citizens. And we live in a democracy that does demand a lot of its citizens, and it's important that its citizens participate.

Consider, the decision on the life or death of the defendant is not going to be made by some governmental bureaucracy, as it would be in another country. It will be made by a jury of his peers and people who have no interest in the case.

If you knew the victims, you couldn't sit here. If you knew the defendant, you couldn't sit here. Because we ask for impartiality. Because we want fairness. We want justice.

And when you think about it, Lincoln's phrase that this government is of, for, and by the people is very true.

And it's easy to avoid your duty as a citizen. After all, any one of you could clearly see this has been a hardship to everybody sitting on this jury.

And a lot of people were excused for hardship. I mean, nobody's life goes on with absolutely nothing in there that this wouldn't interrupt.

But you have chosen to do your duty as

citizens. You could have taken the easy way out. You could have said, well, this is going to interrupt. You could have claimed an exaggerated opinion. You could have claimed you couldn't sit in judgment. All kinds of claims you could have made.

But you took the right way. You took the hard way. And now you have one last hard choice to make.

You can go the easy way. You can say: Let somebody else do it. Let somebody else -- because it's a terrible responsibility. Let somebody else be on a jury that gives the death penalty.

But you haven't taken the easy way out, and I urge you not to take the easy way out now. You're sworn to render a just verdict.

Now let's look at the factors because the Court will give you a list of factors on this. And not all the factors may necessarily apply, but this is a potential list.

Now for the ones that do apply, you don't simply add them up. You say: Well, there's three aggravating and one mitigating. Therefore the death penalty. That isn't how you do it.

It's not a mechanical adding process. You don't take a calculator in there. You decide how important is that factor. I mean, if the factor is trivial -- like one of the factors in mitigation is the defendant's age. If that makes no difference to you, it's a zero.

But an agg -- a mitigating factor is never an aggravating factor. And I want you to be absolutely clear on that. In the sense when a mitigating factor is not present, you don't shove it over into the aggravating factor column. It's just a zero. It doesn't mitigate. It doesn't -- on the other hand, it doesn't then turn around and aggravate. It's just a zero.

Now when you look at the factors - and there are a number of them that we will give you - you should also keep this in mind.

And the Court will instruct you that it is not necessary that you unanimously agree on the weight to be given any particular mitigating or aggravating factor.

In weighing the various circumstances, you simply determine, under the relevant evidence, which penalty is justified. Each of you in your own mind weighs up the aggravating versus the mitigating. You don't have to agree on each individual thought.

It's the -- in your mind, the entire weight and the importance of the aggravating versus the entire weight and the importance of the mitigating that you weigh.

You discuss it among yourselves, but you don't -- it's not like a count where you all have to agree that this happened. You don't all have to agree that this weight should be given to this factor.

But I submit to you that in your discussions with each other some things that other people say you

will adopt and say: That makes sense. That is right. And you will use those as factors and use that weight. But you need not unanimously agree.

Now these factors -- let's look at them and see. It seems to me quite clear that the aggravating factors outweigh the mitigating factors.

Now the crime itself.

I have listed under "the crime itself" various things that could potentially be. This is not the Court's list. This one through seven here, that's not the Court's list; but I submit to you it's a list of things that can happen in murder cases. And you're to give them the weight to which you think they're entitled or to simply disregard them.

What the instruction says is you look at the circumstances of the homicide. It doesn't define what circumstances, but let's look at those circumstances for a minute. And I think what I've given you is a -- is a list of things that ought to be considered.

The planning.

Was this a planned homicide? Did he have something against the Galloways? Planned, plotted, and picked the perfect day?

The answer to that is no. This isn't a long-planned homicide. He planned the burglary, but there's no evidence that he planned to kill them for any great length of time.

When he went in there and saw Mr. Galloway,

I submit to you that's when he decided he was going to kill Mr. Galloway.

But in complete fairness to the defendant -- because, after all, isn't it worse when somebody plans and plots and schemes and picks the perfect time and sort of lying in wait for the individual that they intend to kill? The perfect time when they have the best chance of getting away with it? They have an alibi all set up and everything?

Is that worse, in that sense, than a homicide like this case?

I submit to you that it is worse.

But he planned -- so I submit here that really isn't an aggravating factor because he didn't long plan this.

He planned the burglary. No question about that. After all, he talked to Ulie as he was walking along there. Then he goes out and pulled David Cerda out and he talks to David Cerda about this and then goes next door. It was a planned burglary, but not a planned murder.

Now let's look at the motive.

What's the motive in this case?

The motive in this case is money. He wanted money. The defendant wanted money.

He could have worked for it. He's a strong, healthy, young man. Could have worked for it. But he lives at home off his father. Doesn't have a regular

job. And he -- he wanted money. That's all.

And what was the motive for the murder?

The motive, I submit to you, was Mr. Galloway -- was if he left Mr. Galloway there after confronting Mr. Galloway, the defendant would go off to prison again. And so a few years of his life in prison, he weighed that versus Mr. Galloway's life. And Mr. Galloway's life came out short.

So was -- was there a terrible motive for this?

I submit to you that there was, a very low motive. It wasn't in combat. This wasn't a him or me in Vietnam. This was: I want some money. And, oh, boy, if he -- if he lives, I go to prison on a burglary. I don't want that.

But he doesn't -- the defendant doesn't value the life of others, and he doesn't value their possessions. He's out for himself.

Now what type of victim do we have?

Let's face it. A number of cases could have a victim who was a strong, healthy, young man; and these things happened during a fight.

What do we have here?

We have an old man with a bad back who's retired on disability, and we have an older woman.

I submit to you that is a strong aggravating factor, the type of victim here.

The number of victims.

Do we have just one person killed here and that's it? He kills one person, he's horrified by it, and he says: Oh, I've got to leave?

No. We have two victims. I submit to you that that is a strong aggravating factor.

And the manner of killing.

Doesn't that tell you a lot about a person? The manner they do something?

After all, there's a million ways to do things. But look at the manner in which this is done. And it also tells you a lot about the thought process.

If I stand here and Mr. Stone shoots me, how long does he have to hate me? How long does he have to want to kill me?

A second, and that bullet is out of the gun. And you can't bring it back.

But look at the way he killed both of these people. This was a matter of minutes -- a number of minutes, not a matter of seconds. This was in the matter of a number of minutes. This wasn't something --

After all, if you're bringing that club down on Mr. Galloway or Mrs. Galloway, you can stop at any time during that.

And you can stop and look at the number of blows. Thirteen blows, I believe it was, according to the doctor, on Mr. Galloway and at least three or four blows on Mrs. Galloway.

This wasn't one shot that happened to hit

right in the heart. This took time. This took real time.

And they're killed in their own home. It's not like they were somewhere where, you know, why were you there. It's not like you went into a place that was dangerous. They were in their own home. I submit to you people have a right to be safe in their own home.

So the manner of killing, I submit to you, is a very strong aggravating factor.

And other crimes during the killing.

We have a number of other crimes here. We have a burglary. You found a robbery. You found that this happened during the attempted commission of a rape.

Does -- I mean, does the killing of Mr. Galloway -- does that stop him and make him think: This is horrible. I'm going to quit?

No. He goes on to try and rape Mrs. Galloway. Absolutely unnecessary. Absolutely gratis.

I mean, just for -- There's no sense of decency here. Her last moments she spent kicking at the defendant. Last moments in terror because -- remember the broken pubic hairs in her socks.

And both of them were beaten to a pulp. I mean, they weren't just knocked out and unconscious. They were beaten to a pulp.

And those are pictures -- that's a picture of two people who were beaten to a pulp. They were beaten so that they would never regain consciousness.

And that tells you a lot about the killer.

And then remember he didn't just go in there and kill them and say: I'm getting out of here. He kept his object in mind. His object was money, and he got money.

Was he so out of his mind on dope that, you know, it drove him to forgetfulness?

No. He kept his object in mind. His object was money and he was going to get that money and he was going to run over anybody in the process.

So I submit to you that these other crimes during the killing are a strong aggravating factor.

And remember the next day he goes in and he wipes up the fingerprints.

What's his attitude toward this crime?

I'd submit to you that that's also very important.

What is his attitude after the crime is committed?

Well, that night he goes back to his house and he brags about it. "I knocked them smooth out." Like this was some heavy-weight championship fight.

With Mrs. Galloway? With Mr. Galloway? Are they any challenge to him?

"I knocked them smooth out."

He brags about such things.

And he says, "I got thousands." And he's flashing this money around.

He doesn't sit and ponder about, you know: What does death really mean? What have I done? He goes on a shopping spree the next day.

That's pretty cold.

And then he goes the next morning and he covers up for himself. He wipes off the fingerprints. He goes back into a house with the bodies of two people that he's beaten to death, in a bloody scene.

And that doesn't horrify him. That doesn't make him feel: Oh, what have I done?

No. He goes out after that, goes on a spending spree. They're dead. That's -- that's it.

What does he do?

Among other things, after that he buys a newspaper. They don't take the Star-Free Press at his house, and there's the paper. He reads about his exploits.

Cold-hearted.

And a tv reporter talks to him, and he denies knowing anything about it. No respect for the truth.

--cm--

No, you know, go talk to somebody else. No, I'm going to be on TV. I'm a big man. Absolutely extraordinary. No sense of decency. No shame.

But in a way what -- two things really sum up his attitude after the crime, and that's his brother Val asks him, "Did you kill those people?" Ulie Mendoza testified he was around.

Val asked him, "Did you kill those people?" And he said the defendant, Tracy Cain, said, "That's on them." That's their tough luck. That's their tough luck. They're fake, they're dead, they're gone. That's their problem.

And you know, you don't have to take Ulie's idea or Ulie's word for it because in the police interview, page 41 and 42 of that: Question. Did you have any -- there it says "fill," but I believe the word is "feel," because you'll read it later in context. You can see it's a misprint there. It's "feel."

"Did you feel anything for them when you went back in there Saturday?"

That's Detective Tatum's question.

"Did you feel anything for them when you went back in there Saturday?"

And the defendant's answer is:

"I think somebody was going to come in and find them, but" --

And then Detective Garcia says:

"Oh, no. I don't think you understood what

he asked. I mean, you knew these people. You'd known them for at least probably a few months anyway. You mowed the grass. You talked to them. You saw them at least every other day.

"Didn't you feel anything when you walked in there and saw them like that?"

The defendant's answer: "I was scared."

Look out for number one. The hell with anybody else. Detective Tatum then says:

"But didn't you feel any sympathy?"

The defendant's answer is:

"They laugh at shit like that, man."

Who does Tracy blame it on? Everybody else? "Didn't you feel any sympathy" when interrogated by the police. He can't bring himself to recognize them as human beings. You ought to read that and/or listen to the tape, bottom of page 41, top of page 42.

Absolutely extraordinary. He's given every opportunity to express sorrow, sympathy, pity, remorse. Nothing. No remorse, nothing. Just a fear that he'd be caught. Selfish. Remorseless.

You know, in a sense it's not the defendant's size that frightens you. It's his attitude. It's his attitude toward other human beings. He's a big man, but it's his attitude that's frightening.

And I submit to you that that is a very strong aggravating factor, his attitude toward the crime afterward.

Then we have the potential mitigating factors. Let's balance against that extraordinary combination of aggravating factors. Let's balance that and look at the other side of it.

Is there any mental illness here? There's absolutely no evidence of mental illness or mental disturbance. Zero. Again, remember, that doesn't bring it over onto this side. It -- simply, it's not a mitigating. It's a zero, okay?

The victims. Are they participants in any way? There's a factor E, because the Court will give you instructions. As I said, these are factors that I have listed that I think are relevant as circumstances of the offense and these are the actual factors, the number, and I've summarized them by using just a phrase or a word to summarize them.

Are the victims participants? But, you know, if he had strangled Willis, the drug dealer, Willis, that would be a mitigating circumstance in that type of circumstance, if he strangled Willis, grabbed the money and ran. What are they here to do? They were there to do a dope deal, but these aren't in any way. So that's no mitigation. That's a zero.

How about moral justification, a popular topic nowadays. After all, the IRA or the Palestinians both feel that they've been terribly wronged. You can debate their history until you're as blue as the sky.

I suppose part of it depends whether you

have any sympathy for the Arabs or any sympathy for the Israelis or any sympathy for the British or any sympathy for the Irish, but some people feel an emotional justification for what they do.

Is that at all present here? I submit to you that it isn't. There's no -- this is no combat situation. He doesn't feel he's a soldier in a foreign land or there's a war going on. There's no moral justification here. That's a zero.

And G, factor G, basically, is the defendant a follower or is he the leader? Paraphrasing again the Court's -- well I argued to you previously that he is a leader, and it seems to me that the evidence at this penalty phase has reenforced that, and let me refer you to Exhibit double K. Look on this exhibit.

The first line under comments this is one regarding -- I can't remember which -- I remember it's a younger guy. Mr. Cain is a leader, motivator. Okay. If you look -- that's comment number one in that exhibit.

And then comment number three. Mr. Cain is a leader. I thought that's what I said at the -- when I argued in the guilt phase, and certainly turns out to be right. So that is he just sort of a cork on the ocean, one of the guys that run along, like he said in the interview? The answer is no, he's always been a leader.

After all, we all have traits. We all have something, and what has he used these traits, this strength and this leadership ability for? Is it for good

that he's used it? No.

Then the J, did the defendant play a minor part? No, you have found by your verdicts that he is the killer. So that's not true. That's a zero.

And incidentally, on the minor participant, defense counsel made a big deal out of David Cerda's -- David Cerda, he's a big participant in this, and you notice on the charge, 25 to life on David Cerda. You look at the information on David Cerda.

It says that he conspired -- Mr. Farley talked about a conspiracy. This is what he's talking about. Conspired to commit a crime together with Tracy Cain, burglary.

It says on or about October 18, 1986, Ventura County, California, the said defendant, David Cerda, Jr., did pull up the garage door of the residence at 2421 Tulare Place, in order to allow Tracy D. Cain to enter the garage of said residence.

Overt act number two. He did enter the garage -- Tracy D. Cain did enter the garage of the residence.

Is he a minor participant? The answer is no. That ranks up as a zero.

Now, David Cerda was on trial in such an instance, you'd say, Yeah, that's a mitigating factor. You put minor up there. That's a zero. The defendant isn't a minor participant you found in your verdicts.

Now, the matter of the drugs. I submit to

you that drugs did not have a great effect on the defendant in this case. After all, remember, let's look at -- let's look at what he did before the drugs where he went around and he said, I am going to kick everybody's ass unless I get my ten bucks -- five or ten bucks.

There's always been sort of an uncertainty about that. It was five or ten bucks. So did the drugs make him aggressive? Did they make -- send him wild? The answer is no. He was that way before.

Then you have to ask yourself, Well, what about his pounding on the door and kicking a hole in the door and door in the parents' house? That was before any cocaine. What about the strangling motion to rip off the drug dealer? What about "Let's go rip off that house" to Ulie Mendoza?

And what -- he goes back in the next day. There's no drugs then. He goes back in the next day and wipes up the fingerprints. I submit to you that drugs had very little effect, if any, on the defendant in this case.

At least, after all, there's no evidence of drugs at the time he hit Perez or Ramirez. Drugs don't change him. There's no evidence that they do to any great extent. Maybe they make him feel good or feel high. They don't modify his behavior.

So I submit to you that, really, drugs here are no great factor. You may say, Well, so it's either -- really, it is either a minus fact or a zero

after all of these pluses, but again, you don't add them up mathematically. You decide on the importance of them.

I submit to you that drugs were not an important factor in this case and their effect on the defendant's behavior.

And the age of the defendant. I believe he was almost 23 at the time of this, these two murders. He wasn't some callow youth. He'd been around. After all, he'd been to the joint. He'd been to prison. He knew what the score was.

When you add those up about this portion, that is, the crime itself and things that deal with the crime itself, the mitigating factor on that line are small or nonexistent, and there are a great many aggravating factors. The circumstances of this crime.

The Court will also instruct you that if you have a lingering doubt, that can be a mitigating factor, but I submit to you that the hairs in this case take away any lingering doubt you might have had. If there were no evidence of hairs in the case, those are the defendant's hairs, and there is no lingering doubt in this case. Not by now.

There's no other possible explanation. No other possible explanation then the defendant is the killer for all of the evidence in this case. There's no other possible explanation.

Now, we get into prior history. On the prior history, remember, we have the 1979 violence

against Nick Perez. The defendant is in a juvenile detention facility in Arizona, and he belts the guard.

And it was even brought out, you know, hey didn't your glasses have a lot to do with your injury? Well, is that a mitigating factor, if you slug a guy and he has glasses or doesn't have glasses when you're as big as the defendant is, you're going to produce an injury, now it may be a little bit worse? Did Tracy Cain take that into account, I better not slug that guy, he had glasses?

Apparently not, because he slugged him. And he kept pounding him, and remember, there was a group, and Nick Perez had taken them, and they were lined up there at the door to go on in. And who was the only one in that group who was assaulted Nick Perez? The defendant.

The defendant was yelling, "Get his keys, get his keys," and they were trying to get his keys, but they weren't assaulting -- other people were trying to take advantage of what the defendant did, just like in this case, but who was the only assaulter? The defendant.

Then the defendant went to Arizona state prison. I mean, an auto theft isn't a terrible horrendous crime in that sense, but the defendant was sent to state prison.

He didn't take that opportunity to rehabilitate himself, and remember on these, the

extraordinary -- one of the extraordinary things about these is that what do they show you?

They show you the prison guards notes. When he wants to work, he can. He's a strong, healthy young man, and when he wants to work, he wants to make his way in life, he can do so.

It's not like he has some physical disability. When he wants to work, he can get out there and work, but it's all up to him. What kind of life he has. It's up to him.

Then Miss Fontes. You know, if the defendant had never had anything in his record, but Fontes, it isn't -- it isn't a huge thing. I'm not asking you to say that it's the strongest aggravating factor. It's kind of a -- it's a minor deal, but it shows a continuing pattern of violence.

He's just out of prison -- what -- do five years, number of years, '83 and '84, I believe the notes were, and in '85, he's out. And he hits Robert Ramirez. Well, did this actually happen? I submit to you it did, and there's one note of caution here.

He was only convicted of a misdemeanor. You can use several things as aggravating factors. You can use felony convictions of any type. Felony convictions. And the incident against Robert Ramirez was not a felony conviction. Or you can use incidents of violence.

This is an incident of violence, but it doesn't fit in both categories. It only fits in

incidents of violence as an aggravating factor. It doesn't fits there. Don't try and make it cross over and fit into prior felonies.

It wasn't a prior felony, but it is an aggravating factor and we certainly have the violence against Nick Perez and the violence again Robert Ramirez as an aggravating factor.

And I've just done these historically, but in a separate way, the Arizona state prison prior for auto theft, and we also have violence against Anita Parker is another and that's a 1986. That's about a month before this happened.

And if you recall the evidence, let's think about that evidence for minute that was offered on that evidence. How similar it is. The defendant's reading from the same script. He's at the bar. He first fights with Greg Brown, a male. He then carries on into another area and fights with a female and uses a tire iron.

Well, I submit to you, using a tire iron on your girlfriend isn't ordinary behavior, and it does constitute an act of violence, but what a pattern. There's first a male assaulted, then a female and with a weapon. And all of these times, he's given all of this chance to rehabilitate himself. Nothing works. Going state prison doesn't work. The jail doesn't work. Nothing works. He keeps on the same pattern.

And then, in a sense, if you caught the end of Anita Parker's statement. What does she say? She's

lying there in the hospital, just regaining consciousness. There's the police are there and Tracy Cain is there saying Greg Brown did it. I mean, is he following the same script or is he following the same script?

It's -- it's absolutely extraordinary, but let's face it. We all have patterns in life and we've seen the defendant's. That's the path he's chosen.

Then we look at factor K. Any other evidence, any other factor is the way the Court says it, sympathy, pity, mercy, anything like that. Any other factor that is mitigating, that you feel is mitigating. Isn't that present here? Let's think about that.

The defense put on a case that lasted awhile. It was extraordinary to me. Who was the witness who testified the longest? Who was the witness who testified the longest in the entire penalty phase? It was the witness who knew absolutely nothing about this case. This was the witness who knew absolutely nothing about Tracy Cain.

The professor. He didn't know anything about this case or anything about Tracy Cain. And now we know -- I think when you listen to his explanations and his answers to the question, now you know why a -- long ago one of my uncles told me a definition of sociology.

It's the tedious explanation of the obvious. And that's what that was -- went on and on -- and when you're in prison, do you lose your freedom? Yeah. You

do. Thanks. Thanks for great insight. The tedious explanation of the obvious. And that's what we got.

He rambled on about night air. Well, I found that kind of ironic in the sense that Mr. Galloway's last breath was of night air. It was precious to him. Mrs. Galloway's last breath was of night air. It was precious to her.

And then he talked about -- went on and on about terrible punishment, you know, hey, but these people who went to prison, they committed a crime. I thought, What about the handicapped? Did they do anything to deserve their lack of freedom?

How about balancing things, Professor? How about balancing it? The defendant was strong and healthy and free, and what use did he make of his freedom?

Now, sympathy. That's one of the factors. Sympathy. You know, besides the victims and the victims' family. I say to you, there is one person that deserves -- person in this case that deserves sympathy and that's Persey Cain.

Now, I think we all feel extraordinarily sorry for him. He did his absolute best always. He raised his kids. Always supported all of his kids. Loved all his kids. He worked since he was age 12. I mean, in these days that's pretty darn extraordinary.

Maybe I guess back when he was young, it wasn't as extraordinary. A lot of people dropped out of high school so they could work and support and help bring

money into the family and so on, but what a fine example he was.

You know, there's an old phrase. There is no teaching; there's only example. And what did the defendant take from that example? From the example of a man who works since he was age 12? What did Tracy Cain take from that? He works sporadically when he damn well felt like it.

From the example of a man who always supported his family, Tracy Cain barely didn't even support himself. You add up all the money he was making at Manpower, and it's a pittance. Half of it went to repair the car.

Then you look at example of a father who never was in trouble with the law -- said I have some traffic tickets. Well, who hasn't? I have one. I'm sure we've all had one. I mean, it's not an extraordinary matter. I mean, so what?

And that's his extent of, you know, having to go to court. And he's an honest man. He didn't come in and lie in the guilt phase. He came in and told -- painful though that is, told the truth. And what did Tracy Cain take of that. Tracy Cain lies and he has this kind of a record. What kind of use did he make of that example?

Persey and Wilma Cain did the very best parents can do, but you can't make your kids live -- you can't live it for them. It's too bad he didn't because

he obviously led a very fine life himself in contrast to Tracy Cain.

In a sense, when you look at it, to me, one of the more shocking things was we were never told of an incident where the defendant was kind to someone, where he gave -- he was charitable or he was thoughtful. Not one incident.

They said he was a typical kid. Well, the typical kid doesn't end up going to prison and the typical kid doesn't end up killing two people, but he was a typical kid. But when he grew out of that, what did he -- what path did he choose? Of his own free will?

Not one act were we told of where the defendant made the world a better place. Not one. And this is from a young man who had a lot of advantages.

You know, when I was a kid, I lived overseas, and one time my parents took me to Hong Kong. We were coming back from the United States. We went to Hong Kong. And my father looked out on the harbor in Kowloon in Hong Kong and said, Get on your knees and be damn grateful that you weren't borne out there.

And for one of the few times in my life, I was damn grateful. They live on a small, confined boat and do everything on that boat. Never leave the small territory during their entire life.

And what advantages did the defendant have? He was born an American. I submit to you that is one hell of an advantage. He was born in the American West.

He was born in the latter half of the 20th century -- didn't have to eke out a meager existence among putting rocks aside and trying to plant something in sandy soil.

And he was born into a middle class family. Persey Cain owned his own house in Arizona. His father was a good example. The defendant had good health. No physical problems. No mental problems. He wasn't born with -- he was born with every advantage.

Let's face it. In life, even in these days, it's not an advantage in America to be a black man. It is not an advantage, but when you look at things, this -- the defendant's race has nothing to do with this case.

He didn't kill Mrs. Galloway and Mr. Galloway because they were white. Race has no part in this case. They weren't members of Ku Klux Klan that he hated or anything. Race just has no part of this case. It's not a reason for the offense. It's not an excuse.

After all, hey, when you look at this list, remember, the defendant, if anything, is an equal opportunity assaulter. Men or women. Black, Anglo, Hispanic. It doesn't matter to him. Nick Perez is obviously a Hispanic young man. He assaulted him.

Robert Ramirez. With that name, it certainly seems Hispanic. Anita Parker, a young black woman. Mrs. Galloway, an Anglo woman. Mr. Galloway, Anglo male. It doesn't matter to him. I mean, he doesn't -- you know, race is just not a factor in this case. He doesn't discriminate among his victims.

Many years ago when Martin Luther King gave that famous speech at the Lincoln Memorial, he mentioned -- he said he hoped to see the day when a person would not be treated according to the color of their skin, but would be treated according to the quality of their values.

And I submit that's the way you ought to treat the defendant, according to the quality of his values. His values are dishonesty, violence against others, disregard for the rights and lives of others.

And he's had -- again, I can't get over -- when you think about the advantages he's had in life. We've all had bumps along the road. His mother died in Jonestown. What effect did that have on him? He was 16 or something like that at the time.

We don't know what effect that had on him, if any. And after all, she was out of his life for something like 12 years. If I were recall correctly, Wilma Cain married and -- when he was age four married Persey Cain and raised him. So what effect does his natural mother dying in Jonestown have?

We all had bumps along the road. We all have -- my mother's parents were both dead by the time she was 13. You know, we could all think of examples of things that have gone wrong. Is life perfect? The answer is no. Do people die -- and how well did he know his mother? She was gone for a dozen years. I suppose that was thrown in for a sympathy factor, but I just

can't -- I can't see that any effect has been shown to the defendant.

You know, when you consider all of the advantages he has and being born in the American West in a middle class family and in the latter half of the twentieth century.

In the early 1900's, 1905, Winston Churchill went to a Welsh mining town, was walking down one of the streets. Those houses are slammed up against each other, and there is coal dust in the air because everybody burned coal in those days. It's dirty and it's filthy and there's no electricity. There is no running water. There was an open sewer there.

And he said, Can you imagine -- to a friend of his -- living a life like this? Because, of course, he was brought up in absolutely luxury. He was rich kid, in effect, the Marlborough family, but he said, Can you imagine never seeing anything beautiful? Never tasting anything savory? What a life these people must live.

And these were people in the English and in the British Isles at the time that the British Empire was at its height and that was true then, but that's not true of Americans.

Did the defendant -- did he ever have to go into the army -- did he want to go in the army and go into combat? That's no day at the park. He never had something crushing, any weight like that or anything thrown into his life of that nature. He's had -- he's do

the easy and what has he made with it?

There's no excuse for what he did. Not at all. You know, the one improvement he's made in life. He didn't improve himself as vis-a-vis schooling. He didn't improve himself by saying, I'm going to best welder, I'm going to best plumber or I'm going to be an architect.

What did he do? He did that he built himself up for, extraordinary strength. What was the reason for it? Did he get into body building championships because he wanted to show people, Hey, stay off drugs, live healthy, be happy? Did he do that? No.

He did this. So he could frighten and what he's used this for is to frighten and intimidate people, not to give them a message to lead a healthy life and stay in good shape because what a great opportunity we have as Americans in the latter half of 20th century, what extraordinary advantages we have. Why not live and get all these advantages as long as you can?

That's what he used that for is to frighten and intimidate. You know, we're all given gifts in life, all given different abilities, and it's how you use them that counts, and he used them to kill, and he used them totally to the detriment of others.

Now he's thrown his life away, and that's no crime, and after all, we don't -- just because people throw away their lives, we don't vote to give them the death penalty, but on the other hand, he's thrown away

his life, I submit to you, and that's no reason to save him. When he takes the life of two other people in their home and in their golden years, that's a crime, and the only just punishment for that is death.

There comes a time in life when you have to make a decision. You're going to go the easy way or are you going to go the right way? It's easy to say, I don't want to sit on this jury. Let somebody -- let Jack do it is the British phrase. Let somebody else do it, but I submit to you that it's time for the hard decision.

And you've made hard decisions in this case. We all contribute to making this a more just world when we think and when we make the hard decisions. If we just casually toss it away or let somebody else do it, we don't contribute to a more just world.

Look at the factors. Think of how they apply or how they don't apply. Weigh the importance of each factor and do your duty. Make the tough decision in this case. You know as Americans we want to believe the best about somebody. We don't want to believe the worst. We want to be charitable. We want to give people a second chance.

We don't want to face facts, but there comes a time when we have to face the facts and face the decision, and for you, this is it. The defendant has killed -- after terrorizing two people, has killed them. He has shown no pity, no remorse.

When given every chance by the police, he

tried to lie his way out of it instead of facing it, and he's led a life of brutality and selfishness. That culminated in this trial. It's time that this pattern was ended.

The defendant, in effect, has forced you by the way he has led his life to render a verdict of death. It's not something that anyone of you look forward to. It's not something that any one of you would choose to do and it's no pleasant duty, but it is your duty.

You swore to God that you would render a just verdict, and I'm asking you to render a just verdict, death on Count 1, and death on Count 2. That's not a pleasant duty, but it is your duty and you had sworn to do it. Thank you.

THE COURT: All right. We'll take a stretch break, folks. Walk around a little bit. Make it about ten minutes. Don't talk about the matter and don't come to any conclusions yet.

(The following proceedings were held out of the presence and hearing of the jury:)

THE COURT: The jury is gone. Anything further, counsel?

MR. WIKSELL: No.

MR. HOLMES: No.

THE COURT: We're in recess.

(Recess taken.)

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, TERI T. CAIN, CSR 4062, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 1-36, 66-92, 121-131, 170-187, 214-241, 286-322, 361-374, 402-439, 476-491, 492-519, 556-564, 597-637, 685-729, 770-789, 790-818, 855-874, 900-906, 936-962, 976-1007, 1045-1079, 1119-1155, 1202-1228, 1269-1300, 1336-1371, 1410-1443, 1476-1489, 1490-1521, 1558-1590, 1631-1667, 1707-1736, 1793-1828, 1866-1975, 1976-2006, 2045-2077, 2120-2158, 2233-2272, 2312-2348, 2375-2403, 2404-2436, 2474-2509, 2546-2580, 2652-2693, 2737-2774, 2775-2808, 2849-2886, 2929-2965, 3024-3061, 3100-3135, 3172-3212, 3257-3263, 3264-3309, 3351-3384, 3418-3459, 3509-3538, 3560-3580, 3596-3607, 3644-3683, 3721-3753, 3787-3801, 3802-3840, 3876-3908, 3949-3984, 4035-4066, 4105-4143, 4177-4213, 4236-4241, 4242-4272, 4315-4350, 4384-4425, 4519-4576, 4614-4649, 4666-4696, 4734-4769, 4805-4833, 4879-4894, 4895-4931, 4972-5013, 5060-5079, 5119-5144,

5145-5176, 5213-5258, 5302-5330, 5384-5423, 5465-5511, 5580-5613, 5649-5671, 5702-5731, 5862-5892, 5922-5946, 5977-6000, 6001-6035, 6070-6102, 6137-6169, 6220-6254, 6274-6293, 6294-6319, 6350-6405, 6436-6469, 6492-6512, 6513-6550, 6593-6622, 6655-6683, 6705-6757, 6790-6820, 6851-6880, 6881-6896, 6897-6938, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20, 26, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 14, 19, 20, 21, 22, and 26, 1988; May 2, 11, 12, 13, 18, and 20, 1988; July 12, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Teri T. Cain

TERI T. CAIN, CSR 4062
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, CHRISTIE MONTGOMERY, CSR 4921, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 132-169, 188-213, 242-285, 323-360, 375-401, 440-475, 520-555, 565-596, 638-684, 730-769, 819-854, 875-899, 907-935, 963-975, 1008-1044, 1080-1118, 1156-1201, 1229-1231, 1232-1268, 1301-1335, 1372-1409, 1444-1475, 1522-1557, 1591-1630, 1668-1706, 1737-1755, 1756-1792, 1829-1865, 2007-2044, 2078-2119, 2159-2195, 2196-2232, 2273-2311, 2349-2374, 2437-2473, 2510-2545, 2581-2617, 2618-2651, 2694-2736, 2809-2848, 2887-2928, 2966-2990, 2991-3023, 3062-3099, 3136-3171, 3213-3256, 3310-3350, 3385-3417, 3460-3474, 3475-3508, 3539-3559, 3581-3595, 3608-3610, 3611-3643, 3684-3720, 3754-3786, 3841-3875, 3909-3948, 3985-4002, 4003-4034, 4067-4104, 4144-4176, 4214-4235, 4273-4314, 4351-4383, 4426-4450, 4451-4518, 4577-4613, 4650-4665, 4697-4733, 4770-4804, 4834-4855, 4856-4878, 4932-4971, 5014-5059, 5080-5091, 5092-5118, 5177-5212, 5259-5301, 5331-5344, 5345-5383,

5424-5464, 5512-5544, 5545-5579, 5614-5648, 5672-5701, 5732-5776, 5834-5861, 5893-5921, 5947-5976, 6036-6069, 6103-6136, 6170-6190, 6191-6219, 6255-6273, 6320-6349, 6406-6435, 6470-6491, 6551-6592, 6623-6654, 6684-6704, 6758-6789, 6821-6850, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 26, 27, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 13, 14, 19, 20, 21, and 27, 1988; May 11, 12, and 18, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Christie Montgomery

CHRISTIE MONTGOMERY, CSR 4921
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, DAVID O'GRADY, CSR 3146, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 37-65, 93-120, 5777-5833, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20 and 26, 1988; April 13, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

DAVID O'GRADY, CSR 3146
Official Reporter

6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent,	)	
vs.	)	No. _____
TRACY D. CAIN, Defendant-Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE BRUCE A. THOMPSON, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

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For the Defendant-Appellant: In Propria Persona

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 47 HON. BRUCE A. THOMPSON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	
vs.	No. CR 22297
TRACY D. CAIN, Defendant.	

REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

Wednesday, May 18, 1988

APPEARANCES:

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In any event, I rolled my sweater up under my head, took a nap for 40 minutes -- had to throw the switches everyplace, replace a fuse, whatever it was. Don't panic. It's fairly comfortable in there.

The only thing that happened today to get it started a little bit later, I got to the elevator as usual, but I used that freight elevator back there that we're all accustomed to at this end of building. It went down to the basement, for some reason unknown to me. There was nobody there waiting.

Then it finally wended its way slowly back upstairs to pick me up where I had pushed the up button. Anyhow, so I had a longer ride than usual in the elevator, and I was going to think to myself, I can't afford 40 minutes today.

However, it's all turned out -- I was only three or four minutes late instead of the possible 40.

All right. We're ready to go, Mr. Wiksell.

MR. WIKSELL: Your Honor, counsel, ladies and gentlemen of the jury.

My remarks will probably take us past 12 o'clock a little bit. We think that it's best that I conclude my argument. I don't think it's going to go much more than 12:30. I would be surprised if it went that long -- my remarks.

Once I'm finished, we'll break for lunch and you'll be instructed. The instructions are quite a bit less than what you received at the end of the first phase

of the trial.

But when it does get to be noon and your eyes start looking at the clock, I want you to keep in mind that this is the final chance for me to talk to you about this case.

It wasn't so long ago that I stood up here and I gave you my remarks about how I view the evidence. And it's a bit awkward for me now, as it must be for you, and I look at you when I consider that I asked and I submitted to you that the evidence showed that my client was not guilty of the special circumstance. Well, you rejected that opinion, obviously, and those urgings of mine.

I'm not here to quibble with you and I'm not here to tell you that you're right or wrong because you have your job and I respect your job. And it's not an easy job that you have and I respect your decision. Because I don't think that it's a decision that you arrived at lightly.

I think that you weighed all of the evidence, and I submit that it was a decision that you arrived at after careful deliberation of all the evidence. This is a phase that you're going to decide each for yourselves and by yourselves in discussions with others, but ultimately by yourself, and that is whether or not that young man over there is going to die or is he going to spend the rest of his life in jail.

Now, Mr. Holmes never once mentioned the

other punishment. Never once mentioned life without possibility of parole. You see, right now Tracy Cain has a death sentence. Right now. Because he's going to die in jail one way or the other. You set the time. And that's really what it is. He'll never get out of jail.

I want to go over with you the reasons why I believe he should not be executed. I'm not going to stand up here and ask for sympathy and mercy solely. I'm certainly going to do that, but I'm not going to dwell on those kinds of things because I want to give you reasons, logical reasons why this case is unique and why this case should be decided with a life and without possibility of parole verdict.

But before I get into those reasons, I want to tell -- you know, I live in this county and these kinds of crimes are terrible and what happened to the Galloways is inexcusable. When I stood here in my opening statement months ago and I said that I'm not going to excuse inexcusable conduct, I'm not, and I'm not going to say I -- you know, excuse me or excuse Mr. Cain because that doesn't cut it, not in our value system.

You can't excuse inexcusable conduct. He should be punished for what he did, yes. Yes, he should, and that's the decision that you have to make is what is the appropriate proper punishment. Not as an excuse. Because, you know, I could never, ever with an unlimited budget and years of research, I could never come up with an excuse for a deliberate killing.

That doesn't exist. What you have to do is determine whether or not this killing is the type of killing and this person is the type of person that should be executed or should he spend the rest of his life in jail. That's the decision.

Now, if you decide, ladies and gentlemen, that this crime is such that he should go to the gas chamber, I want to draw your attention back to when we talked to you one at a time.

Because when you came in here one at a time and I asked you, I said, assume Mr. Cain is guilty. Assume you found him guilty of breaking into a house, of beating a 58-year-old Caucasian man to death and of raping a woman and of beating her the death, would you automatically vote for the death penalty?

Not one of you said you will automatically vote for the death penalty. Not one of you. You said it depends on the circumstances. Not 100 percent of the time. You were open.

Well, now, if you just say, Okay, now that I've heard the crime, now that I've found him guilty, what has changed since then? If you're sitting there saying this crime is really bad -- and it is bad. I mean, I'm not going to sugarcoat it.

That's not me, but I asked you to look at -- I sat over there just by myself. I gave you that example. The only thing I didn't do was how you a picture. I don't think I had to show you the picture. I

had to paint a picture with words. None of you said that that crime automatically equals the gas chamber.

Well, the law allows you to compare homicides, to compare people, because that's what aggravation is. All murder is bad. There's never an excuse for a murder. There is sometimes excuse for killing. For example, self-defense. Then that's an excuse, but murder, there's never an excuse.

First degree murder is two things -- can be two things. One is the felony murder rule. That's what you decided. The other first degree murder which you didn't decide, a willful, deliberate and premeditated murder. So there's never an excuse for a murder.

I could never -- I don't think I could sit in the same room and have some guy justify to me a deliberate, intentional killing. That's absurd on its face. So you'll have to compare aggravation and mitigation and see if this murder in comparison with other murders and that person in comparison with other persons, then you determine the appropriate penalty.

That's your function. That's why this is difficult. That's why we spent so much time in talking to you one at a time and determining whether or not this is the type of case you can sit on.

You know, aggravation Mr. Holmes talked about, that is limited. It's limited by law. It's limited to the crime itself. It's limited to the special circumstances. It's limited to any other felony and any

other criminal activity. That's it. Those the only things you can consider. You can't consider anything else as aggravation.

Everything else may be, if applicable, mitigation, but you can only consider those specific things as aggravation. So I want to talk about those. One is, of course, the felony car theft that he suffered, things of that nature.

Now, you know all about the crime. That's what we had a trial about. I'm going to mention various aspects of it from time to time, but I won't dwell on the crime. I would like you to note, however, that in this particular crime, there was no preplanning for killing. There was no talking about killing. There was no arming yourselves with a weapon. There was no deliberate killing.

Deliberation is a unique thing in the law. Deliberation means -- premeditation means you think about beforehand. That's pretty obvious, but deliberation means to weigh the consequences of your act, then go ahead and do it anyway. That's what deliberation means. To know the consequences of your act and then to do it.

So you didn't have to decide that because this fell under the felony murder rule, but a first degree murder that is a willfully deliberate, premeditated, all those elements have to be proven.

We have no weapon taken into a house. We have a reaction, and we know Mr. Cain's mind is impaired.

Now, I know that you can say that he voluntarily took drugs. Sure he did. Nobody made him take drugs, but the fact of the matter is he did take drugs, and the fact of the matter is he was impaired.

Mr. Holmes paraded witness after witness up on the stand and they talked about his impairment, but I want to talk about this homicide and compare it to others. As bad as this one is, I read in the paper just recently some people down in Los Angeles were buying some dope, so they had a hostage, a girlfriend of one of the people who sold flowers and raped her. If this wasn't bad enough, they armed themselves with guns and went out to kill, deliberately to kill.

They got high-powered weapons. They were going to kill the sister and the girlfriend of the dope dealers. The only problem, they got the wrong kids. They shot a 19-year-old and 13-year-old and killed them. They weren't drug-impaired. They thought about it. They knew what they were going to do and they had a hostage. They went ahead, did it anyway.

I'll tell you about another case. These are real cases. I can make up cases. These are real cases. Talk about a burglary. Two guys decided to burglarize a house. This happened in our county here. So they went to the house and they watched the house. Couple days.

Then they armed themselves, they got masks, they armed themselves with guns, they broke into the house after they determined the one occupant was asleep.

Then they taped him up, they put him face down on the bed and they killed him with an axe as they were holding a gun on him.

That's a far cry from a person who is so drug-impaired, he goes in there, stumbles around trying to get some money, and he acts in a rage reaction because that's what happened. If the murder weapon was the rocking chair, and it probably was, it was there. It wasn't a preplanned killing.

This one I just described about the killing with the axe, that person had a prior murder. I'll tell you one more because I could go on all day on that. I'll tell one more that happened.

This was a guy who was married, had some children. He got tired of being married for some reason. Nobody really knows why. So he got to talking to this other guy, and he told him that he'd fix his car if the other guy would kill his wife. The other guy happened to have been in prison for murder before, and the other guy said, Okay, that's fine.

So they lured her out on a road just in back of Target over here in Ventura. And this guy beat her to death with a hammer. And he took four hours to kill her because he hit her a little while, then had to think about it, hit her a little while, and he tied her up.

You see, these are murders during special circumstances that are so abhorrent -- and the person who has prior homicides -- these are real cases, ladies and

gentlemen.

To compare this with this was a spontaneous act. There was no preplanning whatsoever. The lack of premeditation. Now, the lack of deliberation of knowing what's wrong and doing it anyway because you're so impaired, you're so urging to have your fix. That makes this case not excusable, but certainly not as bad as some of these others.

Now, this other crime evidence, this other criminal activity must be proved beyond a reasonable doubt. Let's just jump right into it. The misdemeanor where Mr. Cain excused of hitting somebody with a rock.

We didn't have the witness testify so you can't judge that witness's demeanor, perceptions of what she actually saw in terms of distances. We had her testimony read to you.

Well, Mr. Clayton, we brought him in and he testified and talked about Mr. Cain's involvement here. He had nothing to do with these people. He was working and a car pulled into the Rincon so one of the guys can talk to his wife. What happened next was these guys got out in a fight incident.

Now, Mr. Cain got out of the car to assist afterwards one of his friends. Now, the idea -- perhaps Mr. Clayton didn't see Mr. Cain, a rock or something else. This went to a trial.

A jury, probably not different than you -- I wasn't the trial lawyer -- but probably not different

than you concluded, faced with all the evidence -- and certainly they would have found him guilty of using a weapon, that was the allegation in those four felonies, but they found him guilty of a misdemeanor.

So I don't think, ladies and gentlemen, on a complete analysis of that evidence that it would have any bearing at all on whether or not Mr. Cain ought to die.

The other is Anita Parker. Now, at first it sounded as if Mr. Cain just walked up and bopped her up on the head with a tire iron and that's -- it's inconceivable. But once you, you know, take the -- take the evidence and listen to it. You find that she has a serious problem with alcohol.

She drinks wine quite a bit. Night Train. I'm not sure. I didn't know what it was before until I asked her what it was. She normally carries a knife.

--tc--

She cut Mr. Cain before. Mr. Cain was -- went up to her. There was an altercation. She pulled out a knife, as she told the police. She's fuzzy on this. Mr. Cain hit her with a tire iron. May or may not have been in self-defense.

What's interesting on this -- you know, the police were called. Mr. Cain never went to trial on that. Mr. Cain was never convicted of anything in regard to that.

Are you going to use this type of evidence to -- which we all have a presumption of innocence, if that means anything. If it's not just a slogan.

Are we going to use that to enhance a punishment and execute him?

I think that that incident should not have any bearing whatsoever in your determination.

Now, Nick Perez, the Youth Authority individual, was watching Mr. Cain when he was 16 years old. He was in the Youth Authority for a car theft.

Mr. Cain hit him. Again, I'm not going to make excuses where excuses won't fly. He shouldn't have done it. Absolutely shouldn't have done it. No way around it.

And Mr. Holmes is correct. The fact that glasses had a major part of the injuries. They were -- they were a consequence of being hit. Whether or not they were foreseen, he shouldn't have been hit; but it was the glasses that caused the severe injury.

If you look at that incident and say, well, he got injured. Mr. Cain injured him. It was the glasses. I can't -- I'm in an awkward position because I don't excuse inexcusable conduct, and I don't wish to even attempt to do so. It's wrong to hit Nick Perez.

When I follow it up, but he didn't hurt him, is kind of illogical because he did hurt him. His intent was not to hurt him. His intent during that time. He didn't knock him down. He didn't kick him.

As a matter of fact, Mr. Perez -- when he went into -- what did he use his legs for? He was using his legs to stop me from kicking him.

It was a fight. It was a 16-year-old boy who did something that was inexcusable. That's what it was.

What he did at age 16 you might think about. I'm not going to tell you that you shouldn't. But what I'm going to say is that sums up the aggravation. That sums up his criminal history. There's no robberies. There's no -- there's no murders. There's no manslaughters.

A kid who -- who went to prison at age 18 on a car theft, but his criminal history that Mr. Holmes can bring into you is that. He got into a fight on the Rincon with his boss, he hit his girlfriend in self-defense, and he did something when he was 16.

All of it was wrong. All of it, I submit to you, he's -- he's been punished for.

And I don't think that those are the kind of factors that, when you compare people with prior acts of serious violence, using a gun, shooting people, shooting into an inhabited dwelling, these kinds of crimes, it pales in comparison.

So what is mitigation?

Mitigation is not an excuse. Again, I've gone over that. All murders are inexcusable.

But I propose to you, ladies and gentlemen, that you analyze intellectually this case.

What is the purpose of punishment?

You ought to have a reason. You can't have it -- "I'm going to kill Tracy Cain because it feels good. Makes me feel better." So I whipped up a little chart. Little visual aid.

And for your consideration I've got four topics because sometimes when you talk about the death penalty it's seems as if there's a death penalty or he gets off the hook -- or there's a death penalty or he gets out of jail in 25 years or 30 years.

No. He's got two deadends.

Which is the right one?

I submit to you, ladies and gentlemen, those four categories.

What -- and the punishments, the death penalty or life without parole. What does it accomplish?

We'll go through them one by one.

Protecting of society is of absolute

paramount importance. You're a citizen. I'm a citizen. Your relatives are citizens. We need to be protected, absolutely, from anything from a bicycle stolen out of our garage to -- to assaultive conduct. We need to be protected. That's a must.

Does the death penalty protect society in this case?

Certainly. Absolutely. He's gone. He's history.

Well, so does life without parole. And life without parole means life without parole, and I told every one of you that it does.

And I ask you: Do you believe life without parole means life without parole?

And if you had any question about it, you can ask Judge Thompson, Mr. Holmes, myself. It does mean life without parole.

I've read of cases in Texas where persons -- they give people hundreds of years. A guy got 1200 years. He got out in 17, 18 years.

There is no getting out for Mr. Cain. He's done. He's over.

So does that protect society?

Sure it does. Society is protected. Logically, society is protected by locking him up for the rest of his life.

How about serves justice?

Let's go on to No. 2.

When you compare the crime and the person, not everyone gets the gas chamber. A person who commits a first-degree murder that is, willful, deliberate, and premeditated - an intentional, deliberate killing without a special circumstance - gets 25 to life. If he used a gun, he gets two more. He gets 27 to life. That carries with it parole.

So a person can commit a willful, deliberate, premeditated murder and he doesn't even become eligible for the gas chamber.

Mr. Holmes stood up here and he said if Mr. Stone wanted to shoot me, if he was mad at me and shot me, if Mr. -- if that happened --

Let's say Mr. Stone, to pick on him a little bit -- let's say he armed himself and something about me he just didn't care for so he got his gun and he made sure it was clean and it was loaded with a high-power bullet and he shot and killed me. He wouldn't get the death penalty. He wouldn't be eligible for the death penalty.

So let's talk about the person, now that -- now that we know that not all people are eligible for the death penalty. Mr. Cain.

What do we know about Mr. Cain?

He came from a large family. His mother died when he was young. The fact that she died in Jonestown is relevant only for the point that you should know about Mr. Cain if you're going to punish him.

Where a person dies or what surroundings doesn't give one a license to go commit crimes. It wasn't thrown in for any other reason than you're the trier of fact and you should know everything. You decide.

You know, it had to affect him. A death in any way is going to affect us. When my father died, it affected me. When your loved one died, it affected you.

To die in that particular situation is a question mark for Mr. Cain. It certainly is. It's a big question mark.

Now, you know, he never finished school.

All these advantages that Mr. Holmes talks about. I guess if we're born in America, maybe we just got a head start on a lot of things. I don't know. I kind of scoff at that when I hear that. But we know he never finished school.

I wonder what it was like. You know, it's one thing to have your dad take you to Hong Kong. I think it would be another to be born black and grow up in Yuma, Arizona.

We know he stole a car and he went to the Youth Authority. At age 16 society gave up on him and threw him in prison. Maybe he deserved to go to prison, but that's where he went. 18 years old he went to prison for a car theft. That's where he wound up.

How many kids have you heard about who steal a car get five years?

But he had some good in him. He didn't roll over, just lie in his cell and mope about.

The purpose of these prison records, ladies and gentlemen, is to show you from the time he was 16, when he did something in the Youth Authority that was inexcusable, he grew up a little bit in prison. And he took the hard way out. He didn't take the easy way out.

What he did is he worked, programmed. He didn't do it, as Mr. Holmes wanted to find out from these prison guards, to get some time off his sentence. No. He did it because that's what he was going to do. And he took the hard jobs, building the fences around there.

Now he got top grades. He worked hard.

If you remember Mr. Duran and what he said -- and he talked about Mr. -- just to read what he said.

He said, answer: In the system we have two types. We have the convicts, and we have the inmate. The inmate is the person that wants to buck the system, to not get along with anybody, to not program at all.

Now the convict, on the other side of the coin, gets along with staff, realizes that they've broken laws of society, and all they want to do is just do their time. And yet they get along in prison well. They don't give anybody any problems whatsoever.

And I ask him: How did you rate him?

And he said: In order to get this, he was a convict.

And I said: You don't give 15's and excellents to people routinely, do you?

No, sir. They've got to be able to program. If they're not programmable, they don't get them.

Then I asked him a question.

I said: All right. Which means if he's a wise guy or if he had a bad attitude, he had a bad day --

And he interrupted me.

He said: I don't care if he had a bad day. If he came to work, gave us a rough time to cause a work stoppage, I got rid of him.

Mr. Duran was a hard-nosed person. So was Dave Wheat. They didn't score Tracy high and give him excellents because they liked him. It's because he did his work and kept his nose clean.

That's how it was. That's how he was in prison. We know, ladies and gentlemen, that he got along in prison for five years.

And I think from that you can assume that if you -- if he's lucky enough, if you can give him -- give him a break and if you can give him life without parole, you know he's going to do that well. He's going to do his time.

And that's what he's done the only time you've heard about, one incident when he was 16 years old. Since then he's done his time.

So does it serve justice, ladies and gentlemen that when he's 23 years old, who never planned

the consequences of an act, who went into that house to steal but certainly not to kill -- as Mr. Holmes concedes, not to kill, 23 years old, is that justice to execute him?

Mitigation, ladies and gentlemen -- another part of mitigation is intoxication. And the judge will read you this as mitigation.

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

We know he was intoxicated. Witness after witness came in and testified. Mr. Holmes called them. He wanted a pipe. He was getting baking soda. He was using crack.

The compunction, ladies and gentlemen, to use cocaine was certainly there.

I submit, ladies and gentlemen, that he could no more control that urge for cocaine than probably you and I can control being right-handed.

The fact that he did it voluntarily to get started we're not excusing. We're not saying it's okay. We're not saying: Okay, go home.

Now we're going to punish you, Mr. Cain.

But I think you can take that into consideration. That's a far cry from a person who is

sober, who looks around, who creeps in, who tapes somebody up and kills them with an axe. It's a far cry from the kind of person who arms themselves with a gun and deliberately shoots and kills.

This man -- whatever you want to say, the truth is he was impaired. Absolutely.

I want to talk about something else, and that is this idea of lingering doubt.

And I want to be very careful about this in the sense that I've told you when I first stood up here that I -- that I respect your verdict. And I do. And it would be a foolish lawyer indeed to try to stand up here and try to offend you. That's not my purpose.

What I'm suggesting is that on my chart that I had that I showed you, giving the different degrees of certainty, where there's a maybe and a possibility and then there's reasonable doubt, there's room between reasonable doubt and all possible doubt.

And I'd like to read you what -- just a definition. It says:

Possible innocence is a mitigating factor which the jury, determining the penalty, may properly consider.

The jury's task, like the historians, must be to discover and evaluate events that have faded into the past. And no human mind can perform that function with certainty.

Judges and juries must time and again reach

decisions that are not free from doubt. Only the most fatuous would claim the adjudication of guilt to be infallible.

Maybe -- maybe he didn't do it. We know, ladies and gentlemen, that a blue jacket, that probably belonged to David Cerda - and I submit it did belong to David Cerda - was found under Mr. Galloway full of blood.

We had a bloody footprint that didn't belong to Mr. Cain. The only way it could have got there was at the time of the killing. Maybe he didn't do it.

This is a circumstantial evidence case. Oh, yeah, he was there to burglarize. No doubt about that.

Did he kill Mr. Galloway?

He's denied that all the way through. He admitted that he was there.

If he didn't do it, think about -- think about these other people. You know, think about justice, ladies and gentlemen.

What about these guys? What about Ulie Mendoza and David Cerda?

If we're going to talk about justice, what about those guys?

Mr. Mendoza, who lied to you. Even the prosecutor admitted he lied to you when he said he just fenced some property.

But, of course, Ulie Mendoza, when he was -- took the oath and testified, he says he didn't sell any

of that property, he got a free one. He's -- he's not arrested.

Rick Albis, you know the deal that he got. He got immunity.

And David Cerda -- David Cerda. He's not looking at the death penalty, is he? He's not looking at life without parole.

We've got an information here somewhere charging David Cerda. He's looking at 25 to life.

And, of course, Mr. Holmes looks at that allegation of a conspiracy.

Well, you know, that information, just as it is in our case here, that's not evidence. I mean, you either commit murder or you don't. You're not a little bit pregnant.

You know, if all he did was hold up a garage door, where are they getting him for 25 to life? Why is he charged with two murders if that's all he did?

But he's not getting the death penalty.

What about those guys?

Justice?

What about Mr. Albis?

Mr. Cain didn't go in that house alone. You know it, and I know it. I think everybody knows it.

But yet Mr. Cain is the only one -- the only one that's going to end up in jail for the rest of his life, whether he gets the gas chamber in jail or whether he dies in jail.

Is that justice?

You know, since Mr. Holmes brought it up, about race, this case has been absolutely devoid of race. I haven't mentioned anything about it because I believe that this case should be decided on the facts. Because I live in this county. I would hate to think that our court system and our jurors decide this case on race.

But why is it that the only black guy faces the death penalty?

Now Mr. Holmes is not a racist. I don't think he has a racist bone in his body. I don't think the Court in any way would allow any of that to enter into that. And I'm not suggesting for a moment that you should consider it; but look at perceptions, ladies and gentlemen.

How many questions have you heard the prosecutor mention about Mr. Cain's size?

He shows you a picture about how big he is.

You know what?

I'm bigger than Cain.

Cain is five eleven, 185, 190.

I'm six two, 202.

Yet the perception -- the perception -- the perception that Dr. Irwin talked about is real because you look at Mr. Cain over there and he looks mean.

He's big. Yet I'm bigger than he is.

No, I don't have bigger arms; but I've never been accused of being puny.

Look at Mr. Jarosz. He's six six, 230, 235.

Does he look mean?

No.

You know, when you look over there, who's the mean guy? Who sticks out?

That's perception, ladies and gentlemen.

Now I could have dressed -- I could have dressed him up in a suit. I could have cleaned his hair up. He's not thumbing his nose at you, ladies and gentlemen. This is Tracy Cain. That's him.

He's not trying to be cute. He's not disruptive. He's -- that's him. This case is going to be decided on him, not on illusion.

But the fact that we can counter every time the big black guy with the hairdo or the guy with the big arms -- look at the man.

Did you actually think that Mr. Cain was quite a bit bigger than I was?

You probably did, but that's myth.

So when you look at him there's an illusion. You say he's different than us. You say he's different than Mr. Jarosz and myself. When I lean over, maybe I laugh. I sit a little bit away from him. He's different from us.

No, that's not true. He's one of us. He's just exactly like us.

Is that justice when those people get a free one? Mr. Cain falls all the way into the gas chamber?

No, ladies and gentlemen.

Ladies and gentlemen, justice in this case is life without possibility of parole because there's a redemptive quality about Mr. Cain. He's proved that in prison. He's proved that as a worker.

Mr. Holmes can scoff about that little labor story. Why didn't he get a job?

He did get a job. He wasn't getting food stamps.

The fact he doesn't have a high school diploma might not enter into Mr. Holmes' calculation. The fact that he's unskilled might factor into why he's working at the kind of labor he's working at.

But he is working, and he was working with Mr. Clayton. He is a good worker.

And there are redemptive qualities about Mr. Cain.

There's no premeditation involved in this case.

His mind was impaired without question.

There's a serious lingering doubt.

And I -- believe me. I'm not -- I'm not quarreling with your verdict. There -- there can be -- reasonable people, as you have done, said yes, there's proof beyond a reasonable doubt he's guilty.

Fine. I've accepted that. I've respected that. I'm asking you to consider maybe that gap between reasonable doubt and all doubt.

As I said, the most fatuous -- only the most fatuous would claim the adjudication of guilt to be infallible.

And would others -- Albis gets absolute immunity. Ulie, who sat up here and lied to you. And David Cerda, who will be free one day.

Right now he's -- hasn't gone to trial, but no matter what happens he will be free one day. Be eligible for parole.

Is that fair? Is that justice?

Justice is punishment, ladies and gentlemen, because we want to punish Mr. Cain. He went into that house. That was wrong. The killings took part in that house. That was wrong.

We want to punish the defendant. That's No. 3. And I think it's proper that we punish the defendant. Absolutely.

Now I brought on Dr. Irwin. Mr. Holmes thinks very little of Dr. Irwin. I brought Dr. Irwin on because I think you have to have a tool to properly complete your work.

You know what death is. Doesn't take an expert to tell you what death is.

I submit, since none of you -- since we know by your questionnaires none of you have ever spent time in prison: Do you really know what prison is?

What do you know it from? A James Cagney movie or Geraldo Rivera show?

No. Dr. Irwin was brought in as a tool. And I suppose you have to minimize it, and you have to scoff at it because what he said was very important. It is punishment in its severest form.

And, you know, when you look at Mr. Cain, I think you might be tempted to say: You know, jail's not going to bother him because he's different from you and I. He's been to jail before. It's not going to bother him.

Well, that's wrong. He's no different than you and me.

Do you think he wants to go to prison for the rest of his life?

He doesn't.

Do you think he wants to be executed?

No, he doesn't.

You take away -- when you take away some rough edges, what you've got -- you've got a scared young man. He probably wouldn't want me to say that. That's what you've got. But to say that prison wouldn't bother him, it would bother you, is absolutely wrong.

I was in a hotel room once, very nice hotel room. And it had the Movie Channel and everything. And I thought, you know, if I had to stay in this hotel room, they told me I couldn't leave -- I have room service, I have phones, I have a balcony, but I couldn't leave for 30 days, I'd go nuts.

Well, what's prison like?

Prison is punishment. You have your constant monitoring. Absolutely no privacy. You can't go to the bathroom.

You know -- you know, you should be monitored, and you shouldn't have any privacy. If you have privacy, you can be doing things you're not supposed to be doing. But it's a reality.

Can you imagine having every conversation monitored with visitors?

That's what happens. As Percy Cain talked to him in the last 15 months, he's never touched his son. He's talked to him through the glass.

Seeing others released when he goes to jail. If in your mercy you can give him jail, if you can see fit for that, he will see others released. Others in there for murder will be released, and he's done. He's doomed.

And that's the thing. He knows he's done. And that's probably the biggest punishment of all, if you send him to prison. And he knows he can never get out. Think about that. No light at the end of the tunnel. Just think about that. You're done for the rest of your life.

Well, put it in context. What does that mean? Think to yourself for a moment.

We have a holiday coming up. Memorial Day.

Are you going to have a picnic? Have some friends over? Kick back and take it off?

Cain's in jail.

How about the summer? You going someplace? Yellowstone? Yosemite? Maybe just the backyard?

Cain's in jail.

Christmas holidays -- long way off, isn't it?

Cain's in jail.

One of the ways to look to the future is to look at the past. It's 1988. 1978 was ten years ago. My life, I have had vast changes in the last ten years; and I imagine so has every one of you.

How many dinners have you gone out and had? How many trips? New cars you bought?

Just a new shirt made you feel good, new dress.

It's the end of the line for Tracy Cain.

For the last ten years -- think about -- just for a moment, think about all the things you've done in this last ten years because the next ten years are the same. His next ten years are the same as yesterday.

It's somebody like the bailiff or the marshal saying: Let's go, Tracy. Grab the ball, Tracy. Let's go, Cain.

That's not just the next ten years. That's forever. That's until he's dead. And there's no getting around it.

You know, I suppose the best things that I have are my dreams because my dreams are my wishes and

my wants. I dream my kids can be happy and healthy, that I can have some measure of success and maybe just enjoy life that way.

You have dreams. You have wants. You have wishes. You have some remodeling you're going to do at the house. Career advancement.

Tracy Cain lost his dreams. He can't even dream. He has nothing because he's a dead man. He's a living dead man one way or the other.

Now I look up there and I see, "punish the defendant."

He's in maximum security, ladies and gentlemen. These little jobs for ten cents an hour he had in Florence, that's the best thing he's ever going to have. A memory. Because he don't get no jobs like that anymore. He's done. He's in maximum security.

Now Mr. Holmes mentions the death penalty, but he doesn't mention life without parole because that is a staggering punishment.

He has no wife, Mr. Cain. He has no kids.

You think he's going to have some visitors?

It's the biggest day of his life. I'm arguing for his life. Look at the audience. Go ahead. Just look. Take a second. Look at the audience.

See a lot of Cain people out there?

He has 11 brothers and sisters. How many cousins. How many nephews. How many dads. How many moms. How many grandparents.

What he's got there is he's not nothing.

Percy Cain loves his son. Oh, yes, he loves his son. Maybe he couldn't bear to be here.

But what about his brothers? What about somebody?

Well, Mr. Cain goes to prison. Mr. Cain goes to prison. Mr. Irwin said, you know, it's tough to get to San Quentin, and Mr. Holmes was real shocked by that.

San Quentin, that's on Highway 1, right before San Francisco. I go down to the airport and I get on the plane and I fly and I rent a car and I arrive at San Quentin. Piece of cake for me.

Do you think Percy Cain can do that?

That's what Dr. Irwin is talking about. I don't think Mr. Holmes understands what it's like to stand in line, in that sense, to wait to be a faceless relative going someplace you don't want to be, taking public transportation to get there.

How many visits do you think Mr. Cain is going to get when he goes to Folsom or San Quentin or wherever he goes if his dad sees him twice a month here in Ventura? Twice a year for the first year? Once a year after that?

His punishment is life without possibility of parole.

Punishing defendant.

Is there any question about it? Is there

really any serious question about it?

He's going to die in jail. And first-degree murderers, willful, deliberate, premeditated murderers, are eligible for parole.

David Cerda is eligible for parole or will be at the worse. Ulie Mendoza didn't even have to answer charges. Rick Albis, he got himself an attorney and he got himself immunity.

What about the last one, "following the law"?

That's important. Absolutely 100 percent important.

What is the law about the death penalty?

Because jurors have told me that they're in favor of the death penalty because that's the law. "I'm in favor of the death penalty because that's the law, law of the land."

If you find the aggravating circumstances so substantial in comparison to the mitigating circumstances, you are not required to vote for death.

You may return a verdict of life without possibility of parole based on any evidence of mitigation you find sufficient to warrant such a verdict.

There's no requirement, ladies and gentlemen, that you bring back a verdict of death.

Aggravation is limited to those areas I've talked about before. Mitigation is unlimited. Maybe there's something about Mr. Cain that I haven't talked

on, that you've noticed about him. Anything.

Sympathy, mercy -- you bet.

And is mercy proper? Is mercy proper?

If what he did in a drug-impaired state, that's -- my goodness. That's such a far cry from what you're doing. If you miss something I said, you have a court reporter read it back. You calmly decide whether or not somebody lives or dies.

Mr. Cain didn't intend to kill anybody when he went into that house. In a drug-impaired mental state terrible, unforeseen consequences happened, which has cost him his life. He has forfeited his life outside of prison. That's what he's done. He's forfeited his life outside of prison.

It's up to you whether or not he gets the gas chamber; but, you know, this idea of, you know, he didn't show anybody mercy -- well, you know, no killer ever does.

Does any deliberate, premeditated murderer ever show mercy?

No. Of course, they don't.

So that -- that argument, that he didn't show mercy so he shouldn't get mercy, I don't think is applicable because mercy is a virtue. It's a virtue for you. If you weren't allowed to show mercy and sympathy, I couldn't be asking you for it.

Mr. Holmes spent a great deal of time talking about his attitude. His attitude, ladies and

gentlemen, quite frankly, if you want to follow the law, is not an aggravating factor.

You will be told, ladies and gentlemen, the only aggravating factors which you may consider are those previously read. No other factors or circumstances may be considered in aggravation or as a reason to impose a verdict of death.

And attitude isn't one of them.

But even beyond that, even if it wasn't the legal standard, when he was talking to the police, he was denying the crime. I don't think I can -- I don't think you can take a leap from his -- from what he said to the police and say that his attitude is that of a cold person.

He said: Didn't you feel anything when you go into the house?

That was the question.

He said: I was scared.

Well, didn't you feel anything?

Those guys laugh at me -- or those guys laugh at stuff like that. Expletive deleted.

That's not an answer to that.

How does he feel?

Listen to the tape.

You going to tell me his voice is a callous, cold person?

It's not.

Not only can't you consider his attitude in

aggravation, but I think his attitude shows you some mitigation. That he's a warm person.

And Mr. Holmes mentioned that too.

He says: You know, why didn't we hear any good about Mr. Cain?

How can I do that? Am I going to put a witness on that says, you know, he sent me a birthday card?

Can you imagine what an articulate man like Mr. Holmes would do to trivialize testimony like that?

Ask yourselves if you were on trial like Mr. Cain, what witnesses would come forward for you and what would they say?

They would probably say about me: Seems like a nice fella.

Well, what -- what do people do in the form of witnesses -- outside of the fact that Wilma Cain says that doesn't sound like Tracy. That doesn't sound like Tracy. Tracy wouldn't do anything like that.

Percy Cain: That's not my boy. He wouldn't do anything like that.

For me to come up with a few insignificant opportunities for him to do something for somebody, buy them a gift, say a good word, help them move --

Can you imagine if I put a witness on to promise to tell the truth, the whole truth and nothing but the truth, who said Tracy Cain selfishly helped me move?

What would Mr. Holmes say?

He'd say that really compares to killing the Galloways, doesn't it?

You see the point of it is, ladies and gentlemen, that showing these little episodes of good is impossible. And I think you have to consider that.

There isn't a void of goodness. Certainly Mr. Cain is a good person.

And, yes, mercy is proper.

How can I convey to you those times when -- when he'll say something and we'll laugh or when he'll do something just that I note, just little things in passing that all of us have.

He's not a beast. He's not an animal. He's not evil. He may have committed a terrible act. He should not die for that. He should be punished for that. He should go to jail for that. And I'm asking you to send him to jail for the rest of his life because of that.

But when you follow the law -- let me tell you what the law doesn't allow you to do because I think this is something you might want to consider.

The law does not allow you to give the death penalty as a deterrence to others. You can't do that. You can't send a message out on the street on Tracy Cain. No, sir.

The cost of housing is one that people say: Well, that's why I'm in favor of the death penalty.

Because we spend so much money feeding these guys.

No, you can't consider that.

Cost. You may not consider that.

Revenge. Vengence. Because it makes you feel good. That's not a proper motive.

So, ladies and gentlemen, when you follow the law -- the law is right now he's dead. It's over. And that's what's going to happen to him one way or the other.

And life without possibility of parole certainly follows the law. And life without possibility of parole satisfies everything. It absolutely protects society 100 percent. It serves justice in this particular case.

There are cases, ladies and gentlemen, where the death penalty is appropriate. This isn't one of them.

It punishes the defendant.

Dr. Irwin was important to show you that life in jail isn't looking forward to Johnny Cash singing a song and watching television. And it's the proper verdict if you follow the law.

I know, facing reality, that all of you are in favor of capital punishment to some degree. If you were absolutely opposed to capital punishment, you wouldn't be here.

So you're in favor of the death penalty in certain cases, and in certain cases I will submit the

death penalty is appropriate.

This case, the strength in this case is to recognize that this is not the appropriate case. The strength in this case for you is to recognize that life without possibility of parole satisfies every logical possible objective of sentencing.

An unplanned, drug-impaired act with no foreseen consequences has cost Tracy Cain his life. But, you know, there still is value in his life. He proved it in prison before. He proved it with his prison records, and he can prove it again if you give him the chance.

He does have good qualities. What happened to the Galloways is inexcusable. I can't and will not even attempt to excuse that, but killing Tracy Cain won't bring the Galloways back. Oh, if it could; but it can't.

So I'm going to ask you -- and I wanted to ask you logically and I wanted to ask you using reason and intellect -- reasons why he should not be executed. And I think I've done that.

And I'm just going to ask you in closing for mercy for poor Tracy Cain, who for the rest of his life, if he gets a break and if you can see it in your hearts to give it to him, will take with him to jail for the rest of his life, knowing that he'll never get out. Never get out.

So I ask you please, just please, don't give him the gas chamber.

Thank you.

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, TERI T. CAIN, CSR 4062, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 1-36, 66-92, 121-131, 170-187, 214-241, 286-322, 361-374, 402-439, 476-491, 492-519, 556-564, 597-637, 685-729, 770-789, 790-818, 855-874, 900-906, 936-962, 976-1007, 1045-1079, 1119-1155, 1202-1228, 1269-1300, 1336-1371, 1410-1443, 1476-1489, 1490-1521, 1558-1590, 1631-1667, 1707-1736, 1793-1828, 1866-1975, 1976-2006, 2045-2077, 2120-2158, 2233-2272, 2312-2348, 2375-2403, 2404-2436, 2474-2509, 2546-2580, 2652-2693, 2737-2774, 2775-2808, 2849-2886, 2929-2965, 3024-3061, 3100-3135, 3172-3212, 3257-3263, 3264-3309, 3351-3384, 3418-3459, 3509-3538, 3560-3580, 3596-3607, 3644-3683, 3721-3753, 3787-3801, 3802-3840, 3876-3908, 3949-3984, 4035-4066, 4105-4143, 4177-4213, 4236-4241, 4242-4272, 4315-4350, 4384-4425, 4519-4576, 4614-4649, 4666-4696, 4734-4769, 4805-4833, 4879-4894, 4895-4931, 4972-5013, 5060-5079, 5119-5144,

5145-5176, 5213-5258, 5302-5330, 5384-5423, 5465-5511, 5580-5613, 5649-5671, 5702-5731, 5862-5892, 5922-5946, 5977-6000, 6001-6035, 6070-6102, 6137-6169, 6220-6254, 6274-6293, 6294-6319, 6350-6405, 6436-6469, 6492-6512, 6513-6550, 6593-6622, 6655-6683, 6705-6757, 6790-6820, 6851-6880, 6881-6896, 6897-6938, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20, 26, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 14, 19, 20, 21, 22, and 26, 1988; May 2, 11, 12, 13, 18, and 20, 1988; July 12, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Teri T. Cain

TERI T. CAIN, CSR 4062
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, CHRISTIE MONTGOMERY, CSR 4921, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 132-169, 188-213, 242-285, 323-360, 375-401, 440-475, 520-555, 565-596, 638-684, 730-769, 819-854, 875-899, 907-935, 963-975, 1008-1044, 1080-1118, 1156-1201, 1229-1231, 1232-1268, 1301-1335, 1372-1409, 1444-1475, 1522-1557, 1591-1630, 1668-1706, 1737-1755, 1756-1792, 1829-1865, 2007-2044, 2078-2119, 2159-2195, 2196-2232, 2273-2311, 2349-2374, 2437-2473, 2510-2545, 2581-2617, 2618-2651, 2694-2736, 2809-2848, 2887-2928, 2966-2990, 2991-3023, 3062-3099, 3136-3171, 3213-3256, 3310-3350, 3385-3417, 3460-3474, 3475-3508, 3539-3559, 3581-3595, 3608-3610, 3611-3643, 3684-3720, 3754-3786, 3841-3875, 3909-3948, 3985-4002, 4003-4034, 4067-4104, 4144-4176, 4214-4235, 4273-4314, 4351-4383, 4426-4450, 4451-4518, 4577-4613, 4650-4665, 4697-4733, 4770-4804, 4834-4855, 4856-4878, 4932-4971, 5014-5059, 5080-5091, 5092-5118, 5177-5212, 5259-5301, 5331-5344, 5345-5383,

5424-5464, 5512-5544, 5545-5579, 5614-5648, 5672-5701, 5732-5776, 5834-5861, 5893-5921, 5947-5976, 6036-6069, 6103-6136, 6170-6190, 6191-6219, 6255-6273, 6320-6349, 6406-6435, 6470-6491, 6551-6592, 6623-6654, 6684-6704, 6758-6789, 6821-6850, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 26, 27, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 13, 14, 19, 20, 21, and 27, 1988; May 11, 12, and 18, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Christie Montgomery

CHRISTIE MONTGOMERY, CSR 4921
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, DAVID O'GRADY, CSR 3146, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 37-65, 93-120, 5777-5833, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20 and 26, 1988; April 13, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

DAVID O'GRADY, CSR 3146
Official Reporter

PRESENTENCE REPORT

STATE OF ARIZONA, Plaintiff, vs. CAIN, Tracy Darrell, Defendant.		CASE NO:	10921
JUDGE:	The Honorable B.L. Helm Division Two	AGE:	19(DOB: 12/29/62)
DATE:	February 19, 1982	ATTY:	Paul Hunter
ADDRESS:	1821 18th Place Yuma, Arizona 85364	FBI NO:	Not available
ALIAS:	Michael Parker and Kevin Knight	OFFENSE:	Theft, of a Motor Vehicle having a Value of more than $1,000.00, a Class 3 Felony.
ETHNIC:	Negro		
PROSECUTOR:	Tim Holtzen	PENALTY:	§§ 13-1802 (A)(1), 13-1801,13-701 & 13-801

STATEMENT OF OFFENSE: On October 13, 1981, Tracy Darrell Cain,aka, Kevin Knight and Michael Parker, and co-defendants Mack Arthur Blair and Robert Ross, Jr., were arrested and charged on October 14, 1981.

An Indictment was filed accusing the defendants of the crime of Theft, a Class 3 felony.

A trial by jury was held and the defendant Tracy Darrell Cain, was found guilty of Theft of a Motor Vehicle having a value of more than $1,000.00, a Class 3 felony.

STATEMENT OF OFFENSE CONTINUED: A summary of the offense as taken from the police reports is as follows:

Between the hours of 8:00 p.m., October 12, 1981, and 7:30 a.m., October 13, 1981, a 1964 white two door Chevrolet, belonging to Joel Gaona, Marine Corps Air Station, was stolen from the Marine Base. Through investigation by the Department of Public Safety, and Naval Investigative Services, it was ascertained that a Mr. Cain (defendant) and one other person entered the Marine Base in a gray Chrysler New Yorker (registered to Wilma Cain) and left the base a short time later closely followed by a white Chevrolet.

Mr. Gaona, victim, received information his car might be at 1557 E. 23rd Street (Cain residence). He and a friend went to this address and the Chevrolet was in the fenced yard. The Chevrolet left the yard and Mr. Gaona gave chase.

On Interstate 8 at milepost 21 the Chevrolet ran off the road and Mr. Gaona saw two persons flee from the area. The Department of Public Safety, Highway Patrol, arrived and was informed of what had occured and given descriptions of those seen fleeing. Two persons, Cain and Blair were arrested after admitting being in the Chevrolet. These two implicated a third person, Robert Ross, Jr., who was later arrested. All three defendants gave the same residence address (1567 E. 23rd Street), but denied knowing each other. They were evasive and uncooperative, giving conflicting statements.

After being booked into the Yuma County Jail at Wellton, all three acknowledged knowing each other, but all three denied knowledge of who stole the car.

STATEMENT OF OFFENSE CONTINUED: The sentencing judge having presided during the trial, other details will not be elaborated upon.

The Department of Public Safety reports are attached.

DEFENDANT'S STATEMENT: A written statement was presented to this officer by the defendant. The statement is as follows: " I showed Robert Ross were the car was. Robert ask me if I new wear he could find a nice car, and I said I did, and he said if he buy a car her he would give me his car in L.A. but I didn't know he was going to steal it cause he had a lot of money. My involvement was I showed him were the car was and the car was in my back yard and the owner seen me get out of the car."

Verbally states his written statement is true and correct. Admits taking Ross to the Marine Base to visit a girl friend and the next thing he knows Ross stole the car and followed him off the base. Maintains that he didn't know Ross was going to steal it. Admits that Ross parked the car in his back yard. States he, Mack Blair and Ross, with Ross driving went for a ride and were later arrested. Admits using an alias at time of arrest.

CO-DEFENDANTS: Mack Arthur Blair, DOB: 02/22/58. Sentenced to Arizona State Prison.
Robert Ross, DOB: 1/28/62. Acquitted.

RESTITUTION: NONE.

OTHER PENDING CHARGES: NONE.

PREVIOUS RECORD: The FBI report not available.

Appended are copies of the Incident Cards from the Yuma County Sheriff's Department and Yuma City Police Department.

The defendant admits five (5) juvenile arrests; Burglaries, Possession of Stolen Property, Aggravated Assault, Escape and Fighting.

The defendant denies any misdemeanor arrests as an adult. Denies any felony arrests or convictions.

BACKGROUND INFORMATION: Tracy Darrell Cain was born on December 29, 1962, in Los Angeles, California to Percy Cain, age 43, residing at 1821 18th Place, Yuma, Arizona and Ruthie Mae Cain, nee, Quinn (deceased, 1978).

The defendant is the fourth child of five children of this marriage. The mother brought two children to the marriage. Parents divorced in 1966, the children staying with father. Father married Wilma Jean Taylor, age 33, residing at 1821 18th Place, Yuma and there were four children from this union. The family are all citizens of the United States.

The defendant resided in Los Angeles, California until 1976, when family moved to Yuma and the family still reside in Yuma.

Father is employed in construction in California and has been so employed for many years.

Mother and step-mother were not employed outside the home.

BACKGROUND HISTORY CONTIUNED: Defendant had a good home life, close family ties; strict upbringing. Discipline was maintained by spankings and later by restrictions (father was away most of the time, except for weekends, step-mother was the disciplinarian). Defendant states that he was unable to communicate with the father, but could always talk with step-mother and that she taught right from wrong, although, he states he didn't always follow his parents advice. Considers the economic status of the family as average, always had the necessary food, clothing and shelter.

Parents are aware of this Court action and are upset about it.

MARITAL STATUS: Single. Has no immediate plans for marriage. The defendant believes that he is the father of a child which will be born out of wedlock.

PRESENT PHYSICAL ENVIRONMENT: The defendant is residing with his parents at 1821 18th Place, Yuma, Arizona.

ACADEMIC EDUCATION: The defendant completed 11 grades of schooling at Kofa High School, Yuma (the defendant was sent to Adobe Mountain (reform school) and did not complete his schooling). This is the extent of the defendant's formal education.

RELIGION: Defendant is a member of The Beautiful Gate of God and Christ with irregular attendance. Attended regularly as a child.

PHYSICAL HEALTH: Defendant is a negro male, age 19, is 5'10", weighs 185 pounds, of good posture, good proportions, has " Hoover Cuzz, tattooed on left upper arm, zodiac sign on outer left forearm and .T.A." on inner left fore arm. Present health is good, has had no serious illnesses, operations, serious injuries or accidents. Attended psychological and psychiatric counseling sessions while an inmate at Adobe Mountain Reform School.

Drinks about two six packs of beer a week; sometimes drinks to excess. Started drinking at age 18.

Denies the usage of narcotics, marijuana and dangerous drugs. In leisure time enjoys lifting weights, watching televison,etc

MILITARY HISTORY: NONE.

EMPLOYMENT HISTORY: The defendant is unemployed at this time.
Previously has been employed as a laborer by several employers for short periods of time.

FINANCIAL STATUS: Assets: a 1955 Ford, valued at $2,000.00.
Claims no liabilities.

COLLATERAL INFORMATION: The FBI fingerprint report has not been received.
Juvenile record from the Yuma County Juvenile Court Center is attached.

COLLATERAL INFORMATION CONTINUED: This officer contacted the Juvenile Court Center and it was reported that on his escape from the juvenile center on September 28, 1979, the guard was severely assaulted and more than $1,500.00 damage was done to the center.

The defendant was arrested for Shoplifting on February 8, 1982, while on "O.R." release.

AGGRAVATING CIRCUMSTANCES: Value of property (vehicle) taken was more than $1,000.00.

Two (2) accomplices present.

The defendant has an extensive juvenile record (attached) which began in 1976, shortly after his arrival in Yuma.

MITIGATING CIRCUMSTANCES: The defendant is 19 years old.

SUMMARY AND RECOMMENDATION: Tracy Darrell Cain, age 19, now faces the Court after having been found guilty, by jury, of Theft of a Motor Vehicle having a value of more than $1,000.00, a Class 3 felony.

The defendant is in basic agreement with the police reports, stating he did drive co-defendant Ross onto the base, but maintains that he didn't know Ross was going to steal the car. Admits Ross parked the car in his (defendant's) backyard. Admits all three, himself, Blair and Ross were in the car when it left the defendant's yard. (co-defendant Blair stated that Ross and Cain picked him up near Arizona Western College). Admits all three were well acquainted with each other.

This officer believes the theft was planned. That the defendant and Ross entered the base with the intention to steal the car.

SUMMARY AND RECOMMENDATION CONTINUED: The vehicle had been on display a few days prior to the theft, the defendant and one other, believed to be Ross had shown undue interest in it while on display.

Ross was living in the defendant's home during this period. There is no doubt that the defendant was being decietful in his account of the theft.

The defendant Cain spoke of his juvenile record without any showing of shame, but with some pride. He readily admits to using aliases.

He shows no remorse, shame or regret, no concern or anxiety.

It is extremely doubtful(considering his juvenile record) that the defendant would or could comply with with conditions of probation, therefore, it is respectfully recommended to the Honorable Court that Tracy Darrell Cain, be sentenced to the Arizona State Prison for the presumptive term of five (5) years.

Respectfully submitted,

John W. Pool
Adult Probation Officer
Superior Court, Division Two
Yuma County, Yuma, Arizona

PRESENTENCE REPORT

STATE OF ARIZONA,
Plaintiff,

vs.

BLAIR, Mack Arthur,
Defendant,

CASE NO.: 10921

JUDGE: Honorable B. L. Helm
Division Two
DATE: January 25, 1982
ADDRESS: 2550 Kennedy Lane
Yuma, Arizona 85364
ALIAS: "Mike Lomon Blair; Mike Lamore Blair; McArthur Blair; and Michael Anthony Blair"
ETHNIC: Negro

PROSECUTOR: Tim Holtzen
AGE: 23 (02-22-58)
ATTY: Tom Moran
FBI NO.: 123-778-J9
OFFENSE: Unlawful Use of Means of Transportation, Class 6 Felony
PENALTY: 13-1803; 13-1801; 13-701; and 13-801

STATEMENT OF OFFENSE:

On October 13, 1981, Mack Arthur Blair, aka Mike Lomon Blair, Mike Lamore Blair, McArthur Blair, and Michael Anthony Williams; and Tracy D. Cain and Robert Ross, Jr., were arrested and charged on October 14, 1981.

An Indictment was filed accusing the defendant and co-defendants of the crime of Theft, a Class 3 Felony. Through Plea Bargaining, the defendant plead guilty to Unlawful Use of Means of Transportation, a Class 6 Felony.

STATEMENT OF OFFENSE CONTINUED: A summary of the offense as taken from the police reports is as follows:

Between the hours of 8 p.m., October 12, 1981, and 7:30 a.m., October 13, 1981, a 1964 white 2 door Chevrolet, belonging to Joel Gaona, MCAS, was stolen from the Marine Base. Through investigation by the Department of Public Safety, and Naval Investigative Services, it was ascertained that a Mr. Cain and one other person entered the Marine Base in a gray Chrysler New Yorker (registered to Wilma Cain) and left the base a short time later closely followed by a white Chevrolet.

Mr. Gaona, victim, received information his car might be at 1567 E. 23rd Street (Cain residence). He and a friend went to this address and the Chevrolet was in the fenced back yard. The Chevrolet left the yard and Mr. Gaona gave chase.

On I-8, at mp 21, the Chevrolet ran off the road and Mr. Gaona saw two persons flee the area. The Department of Public Safety Highway Patrol arrived and was informed of what had occured and given descriptions of those seen fleeing. Two persons, Cain and Blair were arrested after admiting being in the Chrevolet. These two implicated a third person, Robert Ross, Jr., who was later arrested. All three defendants gave the same residence address (1567 E. 23rd Street), but denied knowing each other. They were evasive and uncooperative; giving conflicting statements.

STATEMENT OF OFFENSE CONTINUED: After being booked into the Yuma County Jail, at Wellton, all three acknowledged knowing each other, but all three denied any knowledge of who stole the car.

For a more detailed account of this offense, the Department of Public Safety reports are attached.

DEFENDANT'S STATEMENT: A written statement was presented to this officer by the defendant:

"Well on Oct. 12-1981 I was at my friend Kirths house trying to get a ride to AWC. to visit some students I knew to talk over some plans about classes and the liter, and Kirth is white, he took me to AWC. and after I got there I only stayed till about 8:30 or 9:00, and I couldn't get a ride so I started to walk. I got to a pay phone and I tried to get someone to come and pick me up no one came so I called my old lady or girl friend and said I would try to make it to her house, In (Wellton) and she said fine, so I waited for a while and then I thought of calling my brother because my step mother lets him use the car so I called him, and he said he would get his friends car and come to pick me up and he came but he wasn't driving the car there some other guy was. this guy I never saw before that night, and they picked me up and we were on our way to my girls house. as we were riding I was in the back seat and I kept seeing bright lights flash on and off behind us, so I asked what it was and no one said anything, so I asked who's car was it. and the guy up front driving said its mine now."

DEFENDANT'S STATEMENT CONTINUED: "that's when I knew it was something wrong. so I said, pull over and let me out man, and then my 1/2 brother said man that's the dude that owns the car hungh? and then Ross guy said I don't know. so the car behind got closer then I guess they knew for sure because the car sped up and so did we, I said man slow down, and I was not heard, then I just layed down in the back seat because the car was sciding from side to side in the street and some one said he's got a gun man and after that I felt the car slam into a guard rail or another car, any way it must have because it cut off and would'nt start anymore but it was rolling, and I didn't hear anyone talking so I got up to look and nobody was in the car but me, they jumped out, I guess so before it hit the embankment I jumped out, and fell in the rocks from the down grade of the hill and I got up and that's when I saw my 1/2 brother on the other side of the fence, calling me so I ran and jumped on the fence, and as we walked to the tracks, he told me all about what went on with the car. after that we made it to this liquor or bar, and went in to get a drink and some cigarettes, after we left and were about 300 yards away from the bar, the D.P.S. picked us up for auto theft."

Verbally the defendant states his written statement is true and correct. He states that even though the co-defendant Ross gave the same address, he didn't know him, as he had moved out before Ross moved in. He denies knowing who went with Cain to get the white Chevrolet from the base, but thinks it was probably Ross. Denies knowing the white Chevrolet was stolen prior to the arrest.

CO-DEFENDANT'S: Tracy D. Cain, dob: 12-19-62; released on bond; pending.

Robert Ross, Jr., aka Julian Ross, dob: 9-28-62; released on bond; pending.

RESTITUTION: None.

OTHER PENDING CHARGES: None.

PREVIOUS RECORD: FBI report shows one previous felony arrest and conviction. Appended are copies of incident cards from the Sheriff's Office and Yuma Police Department.

Admits one juvenile arrest in 1971, at Clarksdale, Mississippi, for Breaking and Entering. Sentenced to nine months at Columbia Training School (reform school) at Columbia, Mississippi.

Admits one adult misdemeanor arrest for Drinking in Public in 1980, in Yuma. 120 days with 90 days suspended in Yuma Municipal Court.

Admits one previous felony arrest and conviction for Possession of Stolen Property, in 1975, at Parschman, Mississippi. Sentenced to 2 1/2 years.

BACKGROUND INFORMATION: Mack Arthur Blair, was born February 22, 1958, in Isola, Mississippi, to Collins Blair, age 43, whereabouts unknown and Ruthie Mae Blair, nee Quinn, (deceased 1978). The second child of the marriage.

BACKGROUND INFORMATION CONTINUED: Parents divorced and mother married Percy Cain, age 42, residing at 1567 E. 23rd Street, Yuma, Arizona. From this union there were five children. This marriage ended in 1969.

In 1970-1971, Percy Cain married Wilma Taylor and there were five children from this union.

The family are all citizens of the United States.

Percy Cain and Ruthie Mae Cain raised the defendant until age of 10. Good home life, residing in East Los Angeles. Upbringing was strict, discipline was maintained by whippings. After Ruthie Mae and Percy divorced, all seven children stayed with Mr. Cain. Mr. Cain married Wilma Taylor. Defendant states upbringing was very strict, discipline was maintained by restrictions and communications. The step-father was away on construction jobs and step-mother was the disciplinarian. The defendant considers Percy Cain as the only father he has known. The family moved to Yuma in 1976 and the defendant considers Yuma as his home.

Father is a construction foreman and has been so employed for the past 20 years.

Mother was employed on a part-time basis during the defendants formative years.

Step-mother, Wilma Cain is not employed outside the home.

BACKGROUND INFORMATION CONTINUED: There was no understanding atmosphere between the defendant and step-mother as she continued to "put down" the defendant's mother and made it clear that she resented having the Blair children underfoot. Defendant states that his father Percy was understanding and tried to provide the proper guidance, teaching right from wrong.

Considers the economic status of the family as average, always had the necessary food, clothing and shelter. The Cain family received Welfare for the two Blair children. Parents are aware of this court action, but neither the step-father or step-mother has visited or talked to the defendant.

MARITAL STATUS: Single. The defendant is enamoured with Janet Meyers, age 19, of Wellton, plans have been made for marriage in February 1982.

PRESENT PHYSICAL ENVIRONMENT: The defendant was renting a mobile home at 2550 Kennedy Lane, Yuma, at time of arrest.

ACADEMIC EDUCATION: Completed 10 grades of schooling. Received a GED at Parchman, Mississippi, in 1975.

In 1976, received CETA training in tree trimming, carpenter apprentice, and cabinet making. Also at AWC, under the CETA program, took meat cutting.

RELIGION: God and Christ (Baptist). Regular attendance.

PHYSICAL HEALTH: Male/Negro, age 23, height 5'9", weight 178. Good posture, good proportions. 2" scar on back of left hand, 4" scar on left inner arm. Present health good. No serious illnesses or operation. No serious injuries or accidents. No psychiatrict or psychological counseling. Attended group counseling sessions while in prison.

The defendant denies the use of alcohol.

Admits smoking marijuana about 1-2 joints a day after work. Started at about age 17. States he hasn't used for about 2 years.

Denies the use of narcotics or dangerous drugs.

In leisure time enjoys painting scenery-art.

MILITARY HISTORY: None.

EMPLOYMENT HISTORY: The defendant was not employed at time of arrest.

Last employment was Jordon Construction at San Leandro, California, for one year, earning $13.89 per hour.

Previously employed by National City, California Parks Department for about five months, earning $7.05 per hour.

EMPLOYMENT HISTORY CONTINUED: Previously employed by Marley Construction, Yuma, Arizona, for about 2 years, earning $8.85 per hour.

Previously employed by Ashton Construction, Tucson, Arizona, earning $9.95 per hour.

FINANCIAL STATUS: Assets: None.

Liabilities: AEA Credit Union, $1,900.00, payments of $25.00 per month; Dr. Lalani, $250.00.

COLLATERAL INFORMATION: FBI fingerprint report shows two juvenile arrests-no disposition-the defendant admits the juvenile arrest on July 9, 1971, at Clarksdale, Mississippi and the sentence of nine months to the Columbia Reform School at Columbia, Mississippi. He made no mention of the juvenile arrest of July 19, 1974, at Clarksdale, Mississippi and no disposition shown.

The defendant admits the adult felony arrest of January 27, 1975, at Clarksdale, Mississippi and his being sentenced to Parchman, Mississippi. All the above took place in Mississippi. Although the defendant had stated that he lived in East Los Angeles, California from the age of 10 until age 18 (1968-1976).

The defendant stated that his arrest June 20, 1981, at Richmond, California, was dismissed. This was verified by Richmond Police Department.

AGGRAVATING CIRCUMSTANCES: Value of vehicle taken was more than $1,000.00.

Two accomplices present.

One known previous felony arrest and conviction.

MITIGATING CIRCUMSTANCES: None.

SUMMARY AND RECOMMENDATION: Mack Arthur Blair, age 23, now faces the Court after having plead guilty to Unlawful Use of a Means of Transportation, a Class 6 Felony.

A vehicle was stolen from the Marine Base. It was located and chased by the owner until it ran off the road. The three defendants were arrested in the area. The defendant denies any knowledge of the theft, but admits being in the car. All three were evasive and decietful to the police in the initial interview.

All three gave the same resident addresss, the defendant stated that he had moved out of this residence of his step-mother and step-father (Cain), but uses the address for his mail. Knew co-defendant Cain lived there, but maintains he didn't know co-defendant Ross and didn't know he had moved into the residence.

The defendant accused the two co-defendants of the theft of the vehicle.

It is doubtful that the defendant has been completely honest and truthful during this interview.

SUMMARY & RECOMMENDATION CONTINUED: He does admit to the use of several other names. At one point, he stated he hasn't used marijuana for two years and at another point, stated he was smoking marijuana with the others on the night of arrest-when this contradiction was mentioned, his comeback was that he hadn't bought any for a couple of years.

The defendant is a good talker and has an answer for everything.

There was a lack of concern, no remorse, shame or regret shown.

He admits his guilt only to the extent that he was riding in the vehicle, maintaining he didn't know it was stolen.

This officer does not believe that the defendant could or would comply with conditions of probation. Therefore, it is respectfully recommended to the Honorable Court that Mack Arthur Blair, be sentenced to the Arizona State Prison for the term of 1.9 years, to commence October 13, 1981.

Respectfully submitted,

John W. Pool
Adult Probation Officer
Superior Court, Division Two
Yuma County, Yuma, Arizona

001004

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

52092

The following FBI record, NUMBER 123 778 J9, is furnished FOR OFFICIAL USE ONLY. Information shown on this Identification Record represents data furnished FBI by fingerprint contributors. WHERE DISPOSITION IS NOT SHOWN OR FURTHER EXPLANATION OF CHARGE OR DISPOSITION IS DESIRED, COMMUNICATE WITH AGENCY CONTRIBUTING THOSE FINGERPRINTS.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
PD Clarksdale Miss	Mack Arthur Blair 42582	7-9-71	burg	
PD Clarksdale Miss	McArthur Blair 42582	7-19-74	burg	
PD Clarksdale MS MS	Mack Arthur Blair	1-27-75 1-27-75	burg	
SPen Parchman MS	Mack Arthur Blair 39821	8-7-75	Burg	5 yrs W/last 3 yrs Susp discharged on expiration of sent 5-21-76
SO Yuma AZ	Mike Lamore Blair 41074	11-21-78	28-4901 resist arrest 39-4901 escape drinking from an open container	
PD Richmond CA	Mack Arthur Blair 71836 SID 7035367	6-20-81	inv fel poss stln prop 496 PC	
PD Yuma AZ	Mack Arthur Blair 52092 SID 606778-6	7-30-81	34-5411 DC 28-4901 resist arr	

001005

HcP00005084

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UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D. C. 20537

Use of the following FBI record, NUMBER 123 778 J9, is REGULATED BY LAW. It is furnished FOR OFFICIAL USE ONLY and should ONLY BE USED FOR PURPOSE REQUESTED. When further explanation of arrest charge or disposition is needed, communicate directly with the agency that contributed the fingerprints.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
DPS Yuma AZ	Mack Arthur Blair 41074 SID 606778-6	10-13-81	41-2300 Theft(F)	

001006

FILED
C.C. NEWMAN
CLERK OF SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YUMA 1982 JAN 14 AM 10 35

YUMA COUNTY ARIZONA
BY _____ DEPUTY

STATE OF ARIZONA,

Plaintiff,

vs.

MACK ARTHUR BLAIR

Defendant.

GUILTY PLEA PROCEEDINGS

NO. 10921

The defendant personally appearing before me, I have ascertained the following facts, noting each by initialing it.

Judge's Initial

h 1. That the defendant understands the nature of the charges against him unlawful use of means of transportation Class 6 felony ARS 13-1803

h 2. That the defendant understands the range of possible sentence for the offenses charged, from a suspended sentence to a maximum of 1.9 yrs and that the mandatory minimum (if any) is none.

h 3. That the defendant understands the following constitutional rights which he gives up by pleading guilty:

h (a) His right to trial by jury, if any.

h (b) His right to the assistance of an attorney at all stages of the proceedings, and to an appointed attorney, to be furnished free of charge, if he cannot afford one.

h (c) His right to confront the witnesses against him and to cross-examine them as to the truthfulness of their testimony.

h (d) His right to present evidence on his own behalf, and to have the State compel witnesses of his choosing to appear and testify.

h (e) His right to remain silent and to be presumed innocent until proven guilty beyond a reasonable doubt.

h 4. That the defendant wishes to give up the constitutional rights of which he has been advised.

h 5. That there exists a basis in fact for believing the defendant guilty of the offenses charged.

h 6. That the defendant and the prosecutor have entered into a plea agreement and that the defendant understands and consents to its terms.

h 7. That the plea is voluntary and not the result of force, threats or promises other than a plea agreement.

On the basis of these findings, I conclude that the defendant knowingly, voluntarily and intelligently pleads guilty to the above charges.

( ) Acceptance of the plea is deferred until sentencing.

(✓) The plea of guilty is accepted.

January 14, 1982 — Date

S E Hall — Judge

CERTIFICATION BY DEFENDANT

I certify that the judge personally advised me of the matters noted above, that I understand the constitutional rights that I am giving up by pleading guilty, and that I desire to plead guilty to the charges stated.

Thomas A. Moran — Defense Counsel

Mack [illegible] — Defendant

001025

IN THE SUPERIOR COURT

OF

YUMA COUNTY, STATE OF ARIZONA

CASE NO. 10921

C. C. NEWMAN, CLERK

JOYCE URTUZUASTEGUI
COURT REPORTER

TWO
DIV.

February 4, 1982
DATE

Hon. B. L. Helm
JUDGE OF SUPERIOR COURT

STATE OF ARIZONA
vs.
MACK ARTHUR BLAIR

SENTENCE

9:00 A.M.

This matter coming on regularly to be heard, Jon Thompson, Deputy County Attorney is present on behalf of the State, and the defendant is present in person and represented by his counsel, Thomas A. Moran. Court reporter, Joyce Urtuzuastegui is present.

The defendant is formally arraigned for sentence by being informed of past proceedings. A statement is made on behalf of the defendant by Thomas A. Moran, who request a mitigated sentence.

IT IS THEREFORE ORDERED that the judgment of the Court is that the defendant is guilty of the crime of Theft, a class 6 felony.

IT IS FURTHER ORDERED that the defendant be imprisoned at Arizona State Prison for a period of one and one half years beginning this date.

Copies to: County Attorney
Thomas A. Moran

THEODORE S. DONALDSON, PH.D.
Clinical Psychologist
License #PP2744

350 Arbutus Avenue
Morro Bay, CA 93442
(805) 772-5086

15 North Fir Street
Ventura, CA 93001
(805) 648-2548

February 26, 1987

Willard Wicksell
Attorney at Law
674 County Square Drive
Ventura, CA 93003

PSYCHOLOGICAL EVALUATION RE: TRACY DEARIL CAIN

Dear Mr. Wicksell:

As you requested, Mr. Cain was seen in the Ventura County Main Jail on February 11, 1987. He was interviewed and administered the Minnesota Multiphasic Personality Inventory, the Rorschach Personality Test, The Bender Visual Motor Gestalt Test, and Projective Drawings. His case file was reviewed, including police crime reports and numerous reports by Mr. Stone, investigator for the District Attorney's office who interviewed a number of witnesses to the crime and people who knew Mr. Cain. David Cerda, co-defendant with Mr. Cain, was evaluated by me on November 26, 1986.

CURRENT SITUATION. Mr. Cain and the co-defendant, David Cerda, were arrested on October 22, 1986, following a robbery and murder on October 17, 1986, in which they are allegedly implicated. Mr. Cain stated that he, David Cerda, David Mendoza, and Rick Alvira all entered the house in which the robbery and murder occurred. He goes on to state that he went into the bedroom where he found a wallet with $500 in it, but he denied beating the victims or raping the woman. When they were arrested, he admitted to stealing the $500 and although he thought it was "foolish" he did not think he would be implicated in more serious charges. He stated that when they broke into the house, he didn't think about being caught or about the possibilities of going to prison. They had been drinking beer, and he stated that he thought he just went along with whatever everyone else wanted to do. Mr. Cain's account of events that occurred on the night of the crime are significantly different from the account by Mr. Cerda. Mr. Cerda stated that only Mr. Cain entered the house and that only he and Mr. Cain even went to the victims' house prior to the robbery and murder. Moreover, Mr. Cerda stated that Mr. Cain was the one who originated the idea of entering the neighbors' house and that he threatened to "kick ass" if someone did not go with him.

BACKGROUND. Mr. Cain was born and raised in the Watts area of Gardena. His father was a construction foreman, and there were thirteen children in the family. He has two sisters and three brothers older than himself. He stated that his parents separated when he was an infant and his father married shortly after that. He described getting along well with his father and stepmother. His father and stepmother separated in 1983, and his mother now lives in Phoenix and his father is remarried and lives in Oxnard. Mr. Cain completed elementary school in the Los Angeles area and started junior high school in 1975, but in the middle of his first semester the family moved to Arizona where his father had obtained a bridge construction job. He attended junior high school and high school in Arizona. He stated that he was active in wrestling, basketball, football, and weight lifting while a student. He

stated that he made average grades and that his only trouble was in math. He denied the use of illegal drugs or alcohol. He stated that the move was a big change in his life, because he moved from an all black school to one in which there were only about fifteen blacks in the entire Arizona school. He described getting into a few fights, but in general integrated well.

When he was in the eleventh grade Mr. Cain visited San Diego, and while there stole an automobile from a cousin's friend and drove the car back to Arizona. He was placed in Juvenile Hall for a brief period and then sent to a boys' camp for approximately eleven months. He described being in counseling while at the camp, and stated that his counselor told him that he didn't think he had a problem. He then attended trade school through the CETA program, but at about this time he was caught riding in an automobile stolen by his brother-in-law and was convicted along with his brother-in-law. He was sentenced to five years and served three years and four months in prison.

Mr. Cain was released from prison on December 27, 1984, and came to Ventura on January 1, 1985, where he lived with his parents and worked in the Santa Barbara/Goleta area as an apprentice painter. He remained on that job for about four or five months, and quit after joining the construction labor union and began working with his father. After a few weeks, his father had a heart attack and Mr. Cain began having trouble on the job, and the Union Hall refused to call him out on other jobs. He then went to work for one Richard Clayton, who was a friend of his father, where he worked for approximately four or five months. He described getting into a fight with his boss on his first day on the job, and he was charged with four counts of assault with a deadly weapon on November 4, 1985. In jury trial he was acquitted on three counts and the other was dropped to a misdemeanor. He reported that he was sentenced to 36 months probation and 91 days work furlough of which he actually served 59 days.

Mr. Cain stated that his parents moved to Oxnard around September 1985, and he moved in with a girlfriend for approximately two and a half months. He then lived with his parents for a brief time in Oxnard, and after that he and his girlfriend moved to the Los Angeles area, where he remained for a few months and did not work. He stated that she "got into dope" and he "kicked her out." He then stayed with an old girlfriend in the Los Angeles area for a while before returning to his father's home in Oxnard.

MENTAL STATUS. Mr. Cain's speech was clear, articulate, and of fair quality. Initially, he appeared rather defiant and cocky, but as the interview progressed he became increasingly cooperative and friendly. There were no indi cations of tension, anxiety, or nervousness. He tended to answer questions rather directly, but there was a definite self-serving quality in answers related to the current charges. There were no indications of a thought disorder, and his memory for both recent and past, events was excellent.

PSYCHOLOGICAL TEST RESULTS AND INTERPRETATION. For the most part, results of psychological testing were highly consistent among tests and with the clinical impression. There were no indications of significant psychopathology nor indications of significant ego deficits or inadequacies in reality testing. The tests are most remarkable in a general lack of indications of serious

psychological problems. Testing did indicate the existence of significant situational stress which was not noted in the interview, and which under the circumstances is expected. There is evidence of a basic coping style, in which he attempts to oversimplify stimuli in order to make the world less threatening, and as a result he tends to experience frequent social difficulties because the style promotes neglect of the demands of the environment. Although he displays a marked interest in people, he does not experience the needs for closeness in ways which are common to most people, and he tends to be somewhat uncomfortable in interpersonal situations. He tends to avoid emotionally toned situations, and he tends to keep his own emotions under control. He is psychologically naive and his insight is essentially nonexistent. In general, Mr. Cain appears as an emotionally unstable personality characterized by poorly controlled anger and a tendency to temper outburst.

CONCLUSIONS. Although Mr. Cain is interesting from a diagnostic point of view, there is nothing in this evaluation that appears to have any substantial bearing on legal issues in his case. Mr. Cain displays many of the features of sociopathy, although that is too simple a diagnosis, and there are also hysteroid and narcissistic features as well. His antisocial acting out appears to have not started until he was in his late teens, but indications are that this acting out has increased in frequency and severity at a rapid rate. This suggested the possibility of central nervous system dysfunction, but none was found in this evaluation, although that part of the evaluation was somewhat limited. Nonetheless, there were certainly no indications of gross brain disorder. Mr. Cain seems predisposed to episodic and violent acting out, and there are no indications in this evaluation that such episodes are the result of dissociation or psychosis.

Theodore S. Donaldson, Ph.D.

DECLARATION OF RUTH ZITNER, Psy.D.

I, RUTH ZITNER, Psy.D., declare as follows:

1. I am a clinical psychologist specializing in adult and adolescent psychotherapy and psychotherapy with homeless women. I am licensed in the State of California. I received my Bachelor of Arts Degree in English with minors in Women's Studies and Integrated Liberal Studies from the University of Wisconsin in 1986. I received my Psy. D. in Clinical Psychology from the California School of Professional Psychology in 1993. I received training in individual, marital and family therapy using psychodynamic, humanistic, cognitive/behavioral treatment modalities at West County Counseling Center, Huntington Beach, California from 1991 to 1992. From 1992 to 1993 I received training in individual short and long term psychotherapy at Verdugo Psychotherapy Institute, Glendale, California. My post doctoral training from 1993 to 1994 was at the Wright Institute, Beverly Hills, California where I conducted individual long-term psychodynamic psychotherapy and conjoint therapy. Additionally, I attended classes and received extensive group and individual supervision.

2. From 1993 to 1997 I was in private practice in California as both a psychological assistant and psychotherapist working with adolescents, families, couples and individuals. I have been a staff psychologist at Catholic Charities, Hollywood,

California from 1995 to 1996 working with homeless mothers and their children. Prior to that, from 1993 to 1996 I was a staff psychologist in the Skid Row area of Los Angeles for The Downtown Women's Center and the United American Indian Initiative. During this time I conducted assessments and treated women with histories of poverty, marganalization, homelessness, substance abuse, chronic mental illness and incarceration. I received ongoing training from the Skid Row Mental Health Center in the treatment of chronic mental illness, severe psychopathology, and women living in large structured housing situations.

3. From 1995 to 1996 I worked as a consultant to Herbody, Beverly Hills, California, where I was responsible for psychological assessment and post-operative follow-up of women undergoing female reconstructive surgery.

4. I am the co-producer and writer of a nationally distributed video covering aspects of teenage dating behavior and violence in teen relationships. I have lectured nationally on this topic. I have also lectured extensively on the topic of child abuse and prevention.

5. I am currently a psychologist in the psychiatric department at John's Hopkins University, Baltimore, Maryland where I conduct research in Obsessive Compulsive Disorder.

6. I am currently a member of the American Psychological Association, the Maryland Psychological Association, the Greater Washington Coalition of Mental Health Professionals, and the

Washington Society for the Study of Psychoanalysis. Prior memberships and affiliations include the California Psychological Association (1991-1996) and the Los Angeles Psychological Association (1993-1996). I have been asked by counsel for Tracy Dearl Cain. to investigate and evaluate his social history and background, paying particular attention to his family and medical history. This assessment was conducted:

- to determine what social, emotional, and intellectual factors influenced Tracy''s prenatal development, infancy, childhood, adolescence and adulthood;

- to determine whether Tracy experienced childhood trauma (i.e., physical, sexual, and emotional abuse, deprivation, abandonment or neglect); and if so, to identify the effects of childhood maltreatment on his subsequent social, emotional and intellectual development; and

- to determine if his family, social service agencies, schools and correctional institutions failed to intervene in such a manner as to affect his social, psychological and intellectual development from birth to adulthood.

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6. In preparation for my evaluation of Mr. Cain I reviewed the following documents:

Life Chronology of Tracy Cain; Cain Family Tree; Birth Certificates of Tracy Dearl Cain, Rosie Lee Gates Forrest, Percy Cain, Jr., Mack Arthur Blair, Larry Darnell Cain a.k.a. Danny Cain, Janice Renee Cain, Valender Eugene Cain, Percy (Kato) Cain III, Candice Nicole Cain, Cantana Yvette Cain, Durez Onashe Cain, Gaberil Jemal Cain, and Heavy Williams; Marriage Certificate of Ruthie Mae Quinn and Percy Cain, Jr.; Death Certificates of Ruthie Mae Cain, Percy Cain, Jr. And Collins Blair, Jr.; Divorce papers of Percy Cain, Jr., and Ruthie Mae Cain; Family Photographs of Percy Cain, Jr., Ruthie Mae Cain and Brenda Cain, Percy "Kato" Cain III and Wilma Cain, Heavy Williams and of the family residence in Yuma, Arizona taken in 1996; School records for Tracy Cain from Markham Jr. High School, Adobe Mountain School, and Yuma Union High School District; Work records for Tracy Cain consisting of an itemized statement of earnings for 1/85-12/86, a letter from Paul Lozano Painting, Manpower Inc. personnel records; and work records for Percy Cain, Jr., from Granite Construction Company and Laborers Pension Trust;

Mental Health Records from Adobe Mountain School, Arizona Department of Corrections, from 1984, 1987 Donaldson evaluation at Ventura County Jail, 1988 evaluation from Ronald K. Siegel, Ph.D., at San Quentin; Medical Records from Yuma Medical Center for Tracy D. Cain; Transcripts of interviews with Brunell Cain, Wilma Cain, Valendar Cain, Tracy Cain and Darnell Cain; Summaries of interviews with Collins and Hope Blair, Brenda Cain Ross, Rosielee Forrest, Janice Cain Fortune and Valendar Cain; Family Members' Trial Testimony of Wilma Cain and Percy Cain; Court Records of Ruthie Mae Quinn Blair Cain a.k.a. Linda Jones, Probation and presentence reports for Larry Darnell (Danny) Cain, Mack Arthur Blair a.k.a. Mike Lamore Blair, Valendar Eugene Cain and Wilma Jean Cain; general Jonestown Information, including letters written on behalf of Ruthie Mae Cain by members of People's Temple Ms. Laurie B. Efren, Sandra Bradshaw, Richard Tropp, Karen Layton, and June B. Crym; and Declarations from Larry Darnell (Danny) Cain, Valendar Cain, Janice Renee Cain Fortune, Brenda Cain Johnson, Ida Mae McDonald, Aron Bush, Hugh Fortson, Majil Fausel, M.A., David Cerda, Clarence Wade, Mack Arthur Blair, Floyd E. Clements and Kathy Lazoff-Aldana;

Neuropsychological assessment by Karen Bronk Froming, Ph.D., and Psychiatric assessment by Jay M. Jackman, M.D.

INTRODUCTION

1. On November 18, 1978, Tracy Cain's mother died in Jonestown, Guyana. Forced to drink poisonous Kool-Aid along with hundreds of others, Tracy's mother was finally a victim of Jim Jones' religious delusions. Her path to Guyana was the life story of the vast majority of other victims of Jonestown, as marginalized, poor African-American women, and their children. The survivors of those who died in Jonestown struggle with their own legacy of the 913 deaths in a jungle they never understood. Tracy Cain was 16 years old when his mother died.

2. The tragedy of Jonestown is common knowledge today, the standard all other "cult" deaths are measured against. What is less commonly understood is the exploitation and desperation that brought so many to the Peoples Temple in the first place.

3. A real understanding of Tracy Cain does not begin with the nearly one thousand suicides and murders committed in Jonestown. When Tracy's mother went to Guyuana, she went there willingly as her only alternative to the hopelessness and desperation that was her life as she knew it. Tracy could not accept her death for years afterward because to do so would mean he had given into his own hopelessness.

4. A full and accurate assessment of Mr. Cain requires consideration of the economic and social deprivation within his family and the communities they grew up in, the pervasive history of severe abuse and probable fetal alcohol exposure in his family, the abandonment and neglect suffered throughout his life, traumatic head injuries he suffered as a child and his own history of learning disabilities and limited intelligence.

Any assessment of Mr. Cain's development and cognitive functioning must include careful attention to the unique ethnic and cultural factors which affected his development, perceptions, behavior, opportunities and role in the larger community.

BACKGROUND

5. In 1939 everything about life in Isola, Mississippi was defined by cotton. The business of growing, buying and selling cotton was visible on every block. Every road leading out of town threaded through vast stretches of cotton fields. Many residential streets simply dead-ended in a cotton field. The economics of the cotton industry defined all housing. The wealth of cotton growers was displayed in pretentious semi-mansions along the river. The poverty of cotton pickers and sharecroppers was captured in the tar paper shacks on the opposite riverbank.

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6. The mid-Delta area of Mississippi is to this day, the richest natural cotton farming land in the United States. Before 1945, cotton was the most labor intensive agricultural crop in America. It was also one of the most physically demanding crops to pick. The cotton bolls were waist high, which meant pickers either had to bend over or crawl on their knees to harvest the crop. Every puff of cotton was attached to a thorny stem. Cotton pickers hands were constantly pierced by the thorns, causing the entire hand to form thick calluses. Once picked, the cotton was put into a sack, which the cotton picker drug around all day by a shoulder strap. Cotton pickers worked from sunrise to sunset in fields where there were no outhouses.

7. The end of slavery and the continued demand for field laborers to pick cotton gave rise to the sharecropping system. The Delta was home to the biggest plantations in the cotton belt, and consequently became the capital of the sharecropping system. Segregation was the political institution that gave a death grip to the sharecropping system, ensuring that most African-Americans would have no opportunity in life except in the cotton fields.

8. The sharecropper was given a plot of land to cultivate, by the plantation owner. The size of the plot depended on the generosity of the landowner, and the number of children in the sharecropper's family who could help work the land. The landowner would front the money for planting the plot to purchase seed, fertilizer and tools. The planter also provided the sharecropper a monthly stipend to cover his living expenses until

his crops came in. Money often ran out before the end of the month. The cotton was picked in October and November after being carefully tended all summer. At the plantation's gin, the cotton was separated from the seeds, and weighed. The landowner packed the cotton into bales and sold it. Then, usually just before the holidays, the landowner would call the sharecropper into his office to settle up. The plantation manager would hand the sharecropper a piece of paper showing much money he had actually cleared from his crop, and pay him. The settle was almost always a bitter moment. The sharecropper would usually learn he had cleared a few dollars, or no money, or that he actually owed the plantation owner money. This left the sharecropper and his family without many good options, truly trapped in their life.

9. The advent of a machine to pick cotton moved the southern economy from a complete dependence on segregation. In 1940, 77 percent of black Americans still lived in the South, with a full 50 percent living in the rural South. The mechanization of cotton picking was crucial to the great migration by African-Americans from the Southern countryside to the cities of the South, the West, and the North. Between 1910 and 1970, six and a half million African-Americans moved from the South to the North.

10. This migration of African-Americans has in part, made race a national issue in the second half of this century. Previously the reality of a caste system had been localized to places like Isola, Mississippi. Now the nation could not ignore

politicians mouthing democracy and equality while living with the human tragedy of race relations in the United States.

11. In the 1930's and '40's, the closest cities to the Delta were Jackson, Memphis, New Orleans and St. Louis. None of these cities were fully desegregated. Most job-seekers leaving Mississippi headed for Chicago, looking for the opportunity to be judged by their work skills rather then the color of their skin.

12. Isola is in the middle of mid-Delta Mississippi. Settled in 1854 by the owners of the Dawson Plantation, Isola was considered so isolated that the school superintendent referred to the plantation's one-room school as the "Isolated Schoolhouse." Black children in Isola, as throughout the Delta, walked to the plantation-owned school. Education was extremely casual, with all grades taught together, using tattered textbooks, hand-me-downs from white schools. The schools were shut down by the landowner whenever there was work that needed to be done in the fields. It was not uncommon for sharecroppers' children to only attend school when it rained. The phrase "Isolated Schoolhouse" was eventually shortened to Isola. In Isola, the sharecroppers were always black, always poor and not unlike slaves before them in their debt to white plantation owners.

13. It was at this time and place that Tracy Cain's father, Percy Cain, Jr., was born. Born on March 15, 1939, in Isola, Percy Jr.'s birth was attended by a midwife in his parents' tar paper shack on land owned by the Croffit Plantation. He was the second child of his parents. His mother, Rosie Lee Gates,

divorced his father, Percy, Sr., shortly after Percy Jr's birth. Her marriage to her second husband, Willie, produced eight children. Only three of her ten children survive today. Seven of Rosie Lee's children, including Percy, Jr., died of sickle cell anemia and related heart problems.

14. Tracy Cain's mother, Ruthie Mae Quinn was born in 1940 a few miles further up the Delta in Clarksdale, Mississippi. Ruthie Mae's father, Lucius Quinn never married her mother, Ruthie Bee Chandler. Ruthie Bee was a welfare recipient most of her life, crippled by mental illness and dependent on her own mother. Ruthie Mae never really knew her father. Lucius' family was from Inverness, Mississippi. Lucius moved north shortly after Ruthie Mae's birth. He became a barber in Chicago.

FAMILY HISTORY

15. Tracy Cain was born to Ruthie Mae and Percy Cain, Jr., on December 29, 1962, in Los Angeles' County Hospital. His family was living in a tract house in the Watts section of Los Angeles. Tracy was the fourth of five children born to Ruthie Mae and Percy. Ruthie Mae had been married once before briefly, at the age of 16, to Collins Blair, Sr., Ruthie Mae and Collins had two children together, Tracy's half-brothers Collins, Jr., and Mack Arthur. By the time Ruthie Mae was 24 years old, she had seven children living at home ranging in age from infant to seven years. She had a baby each year from 1957 through 1962, then

giving birth to Tracy's younger brother, Val in 1964.

Mississippi

16. Percy met and married Ruthie Mae in Isola, Mississippi. Ruthie Mae had been brought up by her grandmother in Clarksdale, Mississippi. Ruthie Mae's own mother, Ruthie Bee struggled throughout her life with mental illness. Ruthie Bee was on medication most of her adulthood, living under the care of her mother, Morbelia Chandler. Morbelia supported Ruthie Bee and Ruthie Mae, until Ruthie Mae left home at the age of 14.

17. Ruthie Mae dropped out of school in the eighth grade. She had been attending Coleman School, a segregated school with elementary through eighth grades, in Clarksdale. She quit school at the age of 14 to leave home and head to the slightly larger town of Greenville, Mississippi. There she looked for any work other than picking cotton. Desperate to get away from the back-breaking field work, she took a job washing dishes at a restaurant. It was there that Ruthie Mae met her first husband, Collins Blair.

18. Collins Blair and Ruthie Mae married in February of 1956 in Greenville. Ruthie Mae was only sixteen years old. In order to get married legally she listed her age as 18 on the marriage license. Her Grandmother Chandler signed as her witness. Ruthie Mae's first child, Collins Blair, Jr., was born the following year. In 1958, she had a second child, Mack Arthur

Blair. Mack Arthur was born at the Sugg Clinic in Isola, Mississippi, the only clinic for miles around where African-Americans could be seen for medical care.

19. Shortly after Mack Arthur's birth, Ruthie Mae and Collins parted. They were never officially divorced. With two babies, Ruthie Mae stayed in Isola returning to the only work available to support herself and her children, cotton picking.

20. Percy Cain had grown up in Isola and was working at the Croffit Plantation driving a tractor. In the very small farming community of Isola, where segregation defined all social contact, it is no surprise that Percy and Ruthie Mae met through mutual family friends. Ruthie Mae was an attractive woman and friendly, and she and Percy were soon courting. In August of 1959 Percy and Ruthie Mae were married. Their marriage license listed both of their occupations as farmers. Their first home together was a small, one-room shack on the property of the Croffit Plantation in Isola. The first child born to Ruthie Mae and Percy, Larry Darnell [Danny] Cain, was born two months before their marriage. Again, Ruthie Mae delivered at the Sugg Clinic, her only option for a medically supervised birth and delivery.

Los Angeles

21. Within months of their marriage, Ruthie Mae and Percy packed up their new baby and Ruthie Mae's two toddlers from her first marriage and moved to Los Angeles. Both Percy and Ruthie

Mae were anxious to get away from the Delta economy driven by cotton. The mechanization of cotton picking had begun the great migration of African-Americans away from the south, toward the north and west a decade before. Percy's sister, Ida Mae and her husband had moved to Los Angeles a couple of years earlier. Ida Mae was homesick and missed her family, all of whom still lived in Mississippi. With her encouragement, Ida Mae's husband found Percy construction work. Percy and Ruthie Mae gladly headed west following the lure of new opportunity and the promise of leaving segregation behind.

22. Once in Los Angeles Percy and Ruthie Mae and their children settled near Ida Mae. Percy began his career in construction, work that he would continue to do all his life. Shortly after settling in Los Angeles, Percy helped his mother and her husband move out to Los Angeles from Mississippi. Eventually three of Percy's siblings and their families, as well as his mother lived within a few blocks of each other in and around Watts.

23. Ruthie Mae and Percy had four more children in rapid succession; Brenda born in 1960, Janice born in 1961, Tracy born in 1962, and Val in 1964. Ruthie Mae always liked people and enjoyed being around them. Percy worked long hours and frequently came home exhausted. Away from home, living in the big city with small children Ruthie Mae quickly developed a life style that involved having friends over all day, every day while her husband was at work. She began to drink on a regular basis,

and soon the partying consumed her. Not content with partying at home, Ruthie Mae frequently left her children in the care of her husband's sisters and brothers. At first, she was gone for hours. Eventually the hours stretched into unexplained days of absence.

> "One night when Ruthie Mae went out, she just never came home. Percy was worried half to death. He went out to look for Ruthie Mae and found out she had taken up with a pimp, Arthur Ree. Percy wanted to find Arthur Ree and tear him up. Percy never did find him. I think Arthur Ree knew better then to be found. He was really tough with women, but a coward with men. Ruthie Mae never lived with Percy again."
> [Declaration of Aron Bush]

24. Percy was holding down his job during this time, working to feed his seven children and pay the mortgage. Described by his sister, Ida Mae, as a quiet and steady man, Percy didn't share Ruthie Mae's love for good times and the fast life.

> "Ruthie Mae was always a party type of girl. She liked a faster life style than my brother was used to. She enjoyed drinking and dancing and having a good time, all the time. Most days when Percy was at work

Ruthie Mae would have friends over. As far as I know, Ruthie Mae was drinking and partying every day. Ruthie Mae always said that Percy worked too hard and didn't have enough fun, and didn't have enough time for her. He didn't drink at all. He reminded me of a preacher, just a steady, quiet, hard working man. They separated really because Percy was too slow for Ruthie Mae." [Declaration of Ida Mae Cain McDonald]

Childhood Abandonment, Abuse and Neglect

25. In January of 1966, five and a half years after moving to Los Angeles, Percy and Ruthie Mae officially separated. Their marriage had been over in all but name for quite some time before that. Within four months of the filing for legal separation, Ruthie Mae was arrested for prostitution. It was Ruthie Mae's first arrest of fifty-nine separate appearances in the Los Angeles county courts, over the next decade for prostitution and related crimes.

26. When Ruthie Mae moved out of Percy's home, her children were devastated. Tracy was only three years old. For the next several years she lived in the same area as Percy and the kids, residing in public housing at Jordan Downs, in Watts. She saw the children often. Percy never tried to keep the children from continuing a relationship with their mother. While it was sporadic contact, given Ruthie Mae's lifestyle and frequent

arrests, all her children wanted to be with her. Tracy and Val cried when they had to leave her following a visit. All of Ruthie Mae's children at one point or another begged her to allow them to live with her.

27. Percy's family helped with the child care after Ruthie Mae left until the end of 1966, when a young woman moved into Percy's house to help out. Wilma Taylor was 19 years old when she began taking care of the seven Cain children. Wilma would eventually become their stepmother.

28. Tracy's life became dominated by Wilma. From the first day, she was brutal with the kids. Initially she was an extremely strict disciplinarian. She established a rigid daily routine.

> "We had chores to do both before and after school. We got up early every morning and before we left for school we had to do all the dishes, make up all the beds and pick up our rooms. There was laundry to wash and fold. Each weekend we would have to stay home and do the heavy cleaning. In our two story house, Wilma would have us scrubbing walls and baseboards. I can remember being very young and down on my hands and knees scrubbing the crevices of tiles with a toothbrush and bleach."
>
> [Declaration of Brenda Cain Johnson]

29. The children were swiftly punished for any infraction, no matter how small. Wilma's punishments were physical and painful.

> "From the beginning Wilma was mean to us kids. She beat us for nothing just about every day. She would whip us with anything and everything. I can remember being whipped with extension cords, the cord cut off of an old iron, and with rope. I can remember being beaten with a broom handle, a baseball bat and with sticks. She hit me so hard in the head, many times it made me dizzy.
>
> [Declaration of Valender Cain]

30. At a time when the Cain children were struggling with the loss of their mother and their father was gone most waking hours, their surrogate parent was cruel and abusive.

31. On August 25, 1969, Percy and Ruthie Mae's divorce decree was entered by default. Six days later, Percy and Wilma got married. The following month Tracy began first grade in Compton. Ten days after school started, the Cain family moved from Compton where they had been living, to 132nd Street in Gardena. Following the move, Tracy and his sisters and brother entered 135th Street Elementary School.

32. In an already chaotic household, 1970 brought a new chapter of dysfunction to the Cain household. Percy and Wilma's first child, Percy Cain, III was born in the summer. Nicknamed

Kato by his family, the baby seemed to make Wilma determined to mark a division between her child and the children Percy had brought to their marriage. Tracy and his siblings were subjected to constant humiliation which included telling the children that their birth mother was a whore and that they were no better.

> "My half-brother, Kato was the first child my father and Wilma had. His real name is Percy Cain III, but we always called him Kato. Once he was born, it seemed like Wilma got even meaner. I remember her buying Kato a Big Wheels, one of those little plastic tricycles that little kids ride. No one else in our family had one, and none of the rest of us were allowed to touch it. When Kato broke it, Tracy and I got blamed for it. I know Wilma gave us a beating for that broken Big Wheels, even though we hadn't touched it."
> [Declaration of Valender Cain]

> "Once my stepmother Wilma, started having her own children with my father, things got pretty bad for the rest of us kids. My stepmother was always very strict. She would hit us over any little thing. And it was not just a quick spanking or something like that, but really beating us.
> [Declaration of Janice Cain Fortune]

33. During this time, Tracy and his brother, Val ran away at every opportunity. Though they were too young to make it very far, the boys always said they were running away to be with their mother. Tracy and his brother and sisters continued to visit Ruthie Mae frequently. The contrast between the love they felt from their mother and the brutality they experienced from Wilma, drove all of them to yearn for their mother, no matter what her circumstances or how unattainable she was.

34. One of the terrifying aspects of Wilma's discipline was its unpredictable and surprise element. Wilma was moody and inconsistent in her punishments. One day not making a bed might be ignored, and the next day Wilma might beat the errant child mercilessly with an extension cord. Wilma also liked to wait to catch the child to receive punishment unaware.

> "I seemed to get picked on by Wilma, probably because I was a runner. I wouldn't just stand and take my punishment, which made her furious. I would run away. Wilma would holler after me, 'I'm gonna get you.' Then later she would whoop me when I was in the bathtub and couldn't get away. Or she would wait a couple of nights and when I was asleep in my bed, she would pull covers off me and whoop me."
>
> [Declaration of Janice Cain Fortune]

No place was safe from Wilma's vengeance.

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35. Wilma also liked to keep her weapons of punishment in plain view. An array of old extension cords and belts were kept available, as a reminder of what misbehavior might bring.

> "Wilma would beat us with just about anything. I remember mostly getting hit by belts and extension cords. She would have two or three around all the time, just out in plain sight so it was always on my mind what she could do to me.
>
> "Wilma also like to send us outside to get our own switches from bushes or tree branches. Then she would use that very switch to beat us."
>
> [Declaration of Janice Cain Fortune]

36. In one of her most vicious attacks, Wilma held a coat hanger over the stove's burner until it was red with heat.

> "When I was about three or four years old, Wilma heated up a clothes hanger over the stove burner until it glowed red and then she laid it across my hand. It burned me so badly I have a scar you can see to this day. I got physically hurt so often by her, I can't even remember now why she burned my hand that day."
>
> [Declaration of Valender Cain]

37. In another particularly sadistic attack, Val witnessed Wilma knock Brenda down a flight of stairs.

> "I remember a time when Wilma hit my sister Brenda in the head with a heavy glass Vaseline jar. It was back in the days when Vaseline didn't come in plastic jars. It was a big jar, that was more like a heavy rock. They were upstairs arguing about something and Wilma picked up this jar and slammed it into my sister's head. Wilma hit her so hard that Brenda fell all the way down the stairs, and landed in a heap at the bottom."
>
> [Declaration of Valender Cain]

38. The month following Kato's birth, Tracy's older brother Danny was declared an incorrigible by juvenile authorities in Los Angeles, at his father's request. Danny and Mack Arthur were sent to Mississippi to live with their grandmother.

39. Ruthie Mae, Tracy's mother, lived in Inglewood during this period of her life. She spent the first half of 1970 in county jail on a prostitution charge. She was arrested within two months of her release on a new prostitution charge. In November of the same year, Ruthie Mae was sentenced to another six month county jail term on the new charge. Ruthie Mae also delivered a baby girl sometime in 1970. She became pregnant when she was passed out at a party and did not know who the baby's

father was. The baby, Latunia, was eventually given up to foster care and later relinquished for adoption.

40. Over the next four years, Percy and Wilma had two daughters and a son. Candice was born in 1971, Cantana in 1974, and Durez in 1975. Percy worked various construction jobs throughout the late 1960's and early 1970's. He was never without work, and was generally regarded as a reliable hard worker. He was supporting ten children by the end of 1975, eight of whom were living at home. Danny was committed to California Youth Authority in November of 1974 and Mack Arthur was sentenced to two years in the Mississippi State Penitentiary at Parchman in August of 1975. The other children were living at home with Percy and Wilma.

Childhood Head Injuries

41. One summer in the mid-1970's the entire Cain family went on vacation. They drove to Tulsa, Oklahoma to visit Wilma's parents, Othelia and James Massey. The visit extended over the 4th of July holiday. Wilma's parents' home fronted on a large drainage ditch, with a walkway over the top of the ditch itself. The kids were outside enjoying fireworks as it got dark, when a firecracker went off very close to Tracy.

> "It startled him and he jumped. He fell right off the path into the ditch and cracked his head on the cement. I remember hearing him yell and then go

silent. He was knocked unconscious. We went running up to the house hollering for help. One of the adults came out and climbed down into the ditch and got Tracy out. I remember his head being very swollen on the back and on one side."

[Declaration of Brenda Cain Johnson]

42. Tracy developed a large, painful lump which made him feel sick for a day or two. Despite this very severe injury, Tracy was never taken to a doctor.

43. After the family returned home from Tulsa, Tracy had another accident riding his bike. He fell and hit his head on the pavement. Again, his head injury made him ill and left him with a large knot on the side of his head. Tracy's sister remembers calling him "Gumby-head" because his head was swollen into such a strange shape. Again, Tracy received no medical treatment.

Early Education

44. Percy was offered a position as construction foreman on a bridge building project in Yuma, Arizona at the end of 1975. At the time the family moved to Arizona, Tracy's cumulative records with Los Angeles Unified School District show the progression of difficulty he experienced with school. Tracy's first grade teacher at 135th Street Elementary School noted that

he, "Tries hard, anxious to learn. Has shown improvement in reading." In 1970 in second grade Tracy is labeled as a boy with "behavior problems, who does not get along with peers." By the third grade Tracy 's teacher noted that he was "Very slow academically." His fourth grade record note is the same. At fifth grade Tracy's record stated, "Markedly below average in all areas." Tracy's sixth grade teacher, Mrs. Mulligan, prior to his transfer took a special interest in him. She wrote in his record:

> "Tracy would seldom try to do his best. Lack of reading skills slowed him down considerably. We gave him much individualized help, which aided him a lot. A leader - but of those who are 'losers.' Excellent artist, but this creativity did not extend to other areas of study. My husband and I had him join us for a holiday in hopes of improving his attitude. Immediately after this he moved. Tracy's emotional needs are neglected at home - many relatives live with them (14). All academic areas way below average, yet I am sure he could do quite well if he'd apply himself. Good athlete, but poor sportsman."

45. This is the elementary school performance record Tracy took to Arizona, where he began junior high school.

Yuma

46. Yuma, Arizona is a small town surrounded by desert, located within twenty miles of the United States and Mexico border. There are two major military bases in the immediate area. The U.S. Marine Corps has an Air Station on the southern edge of Yuma. The U.S. Army Proving Ground, is north of town. These military installations and the Colorado River are what sustain Yuma.

47. The move from Watts to Yuma in 1976 was a much larger move then the mere miles would indicate. While Los Angeles county had unspoken color boundaries, in Yuma outright segregation was a reality. A primary source of entertainment in Yuma for African-American adults was the "Black" Elks Club. Tracy was one of only a handful of African-American students in attendance at Gila Vista Junior High School in Yuma. The Cain family was the only African-American family in their neighborhood. They were constantly harassed by their neighbors.

> "My family moved to Yuma, Arizona when I was ten years old. I hated Yuma. It was a real hell hole. People were picking on me and my brothers and sisters all the time because of the color of our skin. We had a neighbor, George Bailey, that always harassed me. He frequently would call the police and complain about our family. Once when the police came to talk to one of my brothers about something, Bailey came over after they

left and said to me, 'You're next,' as if he were trying to set me up for arrest."

[Declaration of Valender Cain]

48. One of Tracy's sisters realized, only as an adult, how difficult life was in Yuma.

"I didn't really understand then what a prejudiced place Yuma was. I knew there weren't very many black people there, and I knew that one of our neighbors was constantly letting us know how much he hated us because of our skin color, but I didn't really understand it. Looking back on that time, I can see living there only made how badly I already felt about myself, that much worse."

[Declaration of Janice Cain Fortune]

49. Within a year of his arrival in Yuma, Tracy was committed to the Arizona Juvenile Authority on an attempted burglary charge and sent to the Adobe Mountain School facility, north of Phoenix. Tracy was 14 years old.

50. Over the next four years Tracy had a total of twelve Arizona court referrals. Tracy spent nearly all of his adolescence in court ordered juvenile placements, primarily at Adobe Mountain School.

"Adobe Mountain School was a part of the Arizona

Youth Corrections system. It was called a school but it looked like a traditional correctional facility with guards and razor wire around the parameter. The Adobe Mountain program worked as a psychological and social model of corrections. It was set up with cottages, where about twelve kids lived together. There was one cottage for girls, four cottages for boys and one lock-down cottage for boys. Approximately 75 kids were in the program at any one time.

"Kids who came to Adobe Mountain were sent there when they had gotten into enough trouble in their local jurisdiction in Arizona, that commitment to a juvenile facility seemed appropriate. There was no specific standard of criminal behavior that caused a boy or girl to be sent to Adobe Mountain.

"Kids who were sent to Adobe Mountain came without a determinate sentence. The first six weeks at Adobe Mountain were spent in an intense assessment program. Once the assessment was complete the staff met to work out a program tailored to the needs of the individual adolescent. It was really up to the staff to decide how long a stay at Adobe Mountain was appropriate in each case. A stay for any one adolescent could be from a couple of months to a couple of years."
[Declaration of Majil Fausel, M.A.]

51. Tracy's first personality and social assessment at Adobe Mountain School was prepared in March of 1977, by Robert Goldsworthy, Psychology Intern, and noted the following:

> "Testing indicates that Tracy will use an inordinate amount of repression and denial in dealing with conflicts...He denied the presence of family conflict although two different tests suggested such conflicts were present in the home."

Data from the testing also indicated that Tracy,

> "...is very immature for his age, that is, he fails to express attitudes and perceptions which are common for his age group."

52. A family evaluator, Ms. Titcomb, attempted to arrange an interview with Tracy's stepmother and father. All attempts to arrange an in-person interview were unsuccessful and the family evaluation was eventually based on a telephone interview with Wilma Cain. [Adobe Mountain Family Evaluation notes of 3/27/77, Ms. Titcomb]

53. A short term treatment program was ultimately recommended for Tracy, with a return home following treatment. Tracy was transferred to the Arizona Youth Center in Tucson, Arizona for a four month treatment program. Testing conducted at the Arizona Youth Center indicate that Tracy had:

> "...very deficient verbal abilities...reasoning

skills, poor vocabulary and deficient verbal expression. Low reasoning and comprehension skills are reflected in Tracy's deviant social behavior in unstructured situations. [Tracy] attempts to present an overly optimistic picture of himself by denying problems."

[Arizona Youth Center Treatment Plan, prepared by John Del Bene]

54. Tracy was paroled home in August of 1977, at the conclusion of a four month stay at the Arizona Youth Center. Prior to his placement at home, Tracy was tested and placed at grade 4.6 in reading and 6.5 in math. He was however, promoted to the 9th grade through the Arizona Youth Center. [Yuma Union High School District cumulative record; Arizona Juvenile Case No: J-76-208]

55. By February of 1978, Tracy was dropped from the rolls of Kofa High School in Yuma for non-attendance.

"Tracy...has been involved in too many fights, has many unexcused absences, and his mother did not have time to confer with school administrators regarding Tracy's poor attendance and behavior."

[Tom May, Administrative Assistant, Yuma Union High School District cumulative record]

56. The following month, March of 1978, Tracy's juvenile parole was revoked following his arrest for burglary and possession of stolen property, and he was returned to the Arizona

juvenile system with a placement at Young Acres. Tracy stayed at Young Acres only a few days before he and another boy ran away. Tracy was reportedly heading to California.

57. Two months later, Tracy was arrested in Yuma on the arrest warrant from Young Acres, and placed at the Arizona Youth Center again. As part of his treatment plan, Tracy reported a desire to live with his natural mother in California and to leave Yuma. By October of 1978, Tracy was released on parole to Percy and Wilma Cain in Yuma. Less than two weeks after Tracy returned home, his older brother Danny was sentenced to six years in the Arizona State Prison on burglary and robbery charges. Within the month after Tracy returned home, his natural mother and a half-brother died at Jonestown.

58. Tracy managed to stay home for eight months following his release from the Arizona Youth Center. His parole was suspended in July of 1979 due to his involvement in two burglaries in Yuma. Tracy was arrested and held in custody at the Yuma County Juvenile Center to await disposition of his new offenses and parole violation. While in custody, Tracy assaulted a detention officer in the process of escaping. Tracy fled to California where he hoped to live with his mother, Ruthie Mae Cain. [Arizona Juvenile Court Case No: J-76-208]

59. In January of 1980 Tracy elected to return to Arizona to clear his warrant before he turned eighteen years old. Tracy was recommitted to the Arizona juvenile system, and transferred to Adobe Mountain School.

"I first met Tracy Cain at Adobe Mountain School in 1980. It was his second time at Adobe Mountain. Tracy had the average number of court appearances prior to his placement there. I remember him as very personable and cooperative in the assessment process. My job was to conduct the initial assessment of him both through a lengthy personal interview and through a variety of testing formats. I would assemble my results and then write a social casework summary. That summary was compiled together with a psychological evaluation. Together those were the tools used in making a recommendation for Tracy's eventual transition out of Adobe Mountain and back into the community.

"Tracy really wanted to do well at Adobe Mountain but did not understand how to accomplish that. His learning disabilities played a part in that, but also it was a copying strategy for him. Like so many things in his presentation of himself, Tracy wanted to look 'okay' or 'normal' but there was nothing to sustain that appearance beneath the surface."

[Declaration of Majil Fausel, M.A.]

60. Dr. Richard Kapp, consulting psychologist to Adobe Mountain School conducted a neuropsychological assessment of Tracy as part of his evaluation and reported:

"...Tracy had deficient verbal abilities and a limited fund of information...poor reasoning skills, poor vocabulary, and poor verbal expression. Difficulty understanding the meaning of what he hears, severe short term auditory memory impairment, faulty social judgment."

Tracy also exhibited, "...underlying feelings of personal inadequacy, poor self-esteem." [Adobe Mountain Psychological Evaluation of 2/19/80]

61. In re-examining Tracy's records today, Ms. Fausel's evaluation and assessment of him in 1980, become even clearer.

"When I met him [at Adobe Mountain], Tracy's mother had been found dead in Jonestown. Nonetheless, Tracy's identification with his mother was very strong, and enduring. She was completely unavailable to him and yet he felt a strong connection with her. Tracy seemed to believe that amidst his various troubles with the juvenile system, his mother would understand him where others had not.

"Knowing now that Tracy's stepmother was physically and emotionally abusive to him, I can see why Tracy's attachment to his natural mother was unbreakable even with her death. He needed to know that someone, somewhere loved him, understood him, and

appreciated his value. His stepmother clearly did not. His father was not there. Tracy was left to construct a belief system that gave him some self-esteem, however remote the source. Ruthie Mae's own brushes with the criminal system also, may have caused Tracy to identify with her as a family outcast. He thought his mother would understand what he was going through."
[Declaration of Majil Fausel, M.A.]

62. Tracy spent nearly all of 1980 at Adobe Mountain School. During that time his overall performance was so positive that the Superintendent of Adobe Mountain School, Kelly Spencer, requested that Tracy be released one month prior to his eighteenth birthday. Tracy was ultimately allowed released a month early due to the improvement in his behavior and attitude. Upon Tracy's release all aspects of his parole plan were termed "favorable." [Arizona Juvenile Case No: J-76-208]

Learning Disabilities

63. At Adobe Mountain Tracy's case summary included an acknowledgment of his learning disabilities which were plaguing him in school, combined with his dull-normal IQ. Upon his return home in 1977, it was recommended that Tracy be placed in special education classes. The first time Tracy was released and sent home, this placement did not happen, and he drifted along in

the mainstream curriculum in the local junior high school. Tracy expressed an interest in school and a desire to continue to high school graduation, but demonstrated frustration in his inability to progress academically.

64. When Tracy was readmitted to Adobe Mountain School in early 1980, he tested at grade level 2.7 in math, and 5.3 in reading. He was 17 years old. Upon a second evaluation a month after his initial test, Tracy tested at 4.1 grade level in math, and 4.8 in reading. The evaluator Mickey Mast stated, "...a G.E.D. is not within close reach for him." The goal established for Tracy was remediation to sixth grade level. [Adobe Mountain Report of 3/5 - 6/80]

65. A certified school psychologist who also evaluated Tracy during 1980 reported in his summary that Tracy had specific learning disabilities and "ongoing emotional problems" which have subsequently "retarded his academic progress." Further Tracy was diagnosed with a severe deficit of auditory memory which prevented him from following simple oral directions. Finally his diagnosis concluded that Tracy had a "possible borderline developmental disability." [Adobe Mountain Learning Disabilities Evaluation of Michael D. Fidler, Examiner dated 3/8/80]

Adolescence

66. During the same time frame of Tracy's commitment to the Arizona Youth Center and Adobe Mountain School, the chaos in

Tracy's family continued unabated. Tracy's older brother, Danny, was arrested regularly by the Yuma Police Department. Mack Arthur was released from Parchman Prison in Mississippi and came to Yuma to live with the family. Tracy's father, Percy was gone from home longer hours then ever before, working on the bridge construction project. Wilma, Tracy's stepmother, was drinking heavily and often out late at night with other men. Percy was unhappy with Wilma, but reluctant to leave her. They fought frequently over her drinking.

> "Wilma was messing around with other men in Yuma. I don't know for sure if my father ever knew or not. I can remember them arguing about her drinking. One night when Wilma was drunk, my father came home from work. She had been about to leave to go out for the evening. He didn't want her to drive the car, because she was drunk. Wilma got so angry at him, that she picked up the telephone and threw it at him, hitting him in the head. I just remember my father grabbing her arms and holding them against her sides to hold her still and saying to her, 'What's wrong with you?'" [Declaration of Valender Cain]

67. Wilma made a career of shoplifting in Yuma. She usually used Tracy and Val when she wanted to shoplift. Wilma would instruct the boys to create a diversion in order to allow her to shoplift unnoticed. Wilma also would ask the boys to hang

out in front of the store and intimidate anyone who might want to stop her and question her as she left with items in her purse. Wilma got away with several years of shoplifting before she was finally arrested.

68. Wilma's scathing verbal and emotional abuse of her stepchildren continued until each of them left her care. She was intent on tearing down Ruthie Mae's children. Wilma would suggest to her stepchildren that Percy wasn't really their father, and that their mother was worthless. She would not buy her stepchildren new clothes, though her own children were always well-dressed.

> "Wilma treated her own children different from the rest of us in every possible way. She bought her children better clothes and new clothes when they grew out of things. The rest of us always had to make do with what clothes we had, or with hand-me-downs, or go without what we needed. Even the way she talked to her own kids was different. She was constantly praising her kids for being good and for being good students. To the rest of us Wilma was not only not encouraging, she was constantly telling us how we were a good for nothing bunch, with a worthless mother, and that not one of us was going to amount to anything."
> [Declaration of Janice Cain Fortune]

69. This message was so thoroughly internalized by Tracy that later in life when he was offered opportunities it was always difficult for him to believe he could actually follow through on any accomplishments. Ruthie Mae's children found their self-esteem attacked at every turn.

70. Tracy's oldest sister, Brenda, tried to tell her father how Wilma treated them and begged him to intervene on their behalf.

> "I hated Wilma. I had tried talking to my father and explaining to him what Wilma was doing to us kids. I tried to get him to intervene with Wilma and stop her from abusing us. He would sort of avoid the whole issue by saying she was the disciplinarian and he had to be at work. I know he loved us, and was tired from working so hard all the time."
> [Declaration of Brenda Cain Johnson]

71. Brenda finally gave up, and went back to Los Angeles to live with her paternal grandmother, Rosie Lee Forrest. Tracy and his siblings who remained at home, felt terribly isolated from any source of help in the world outside their home.

72. By the summer of 1977 Tracy's mother, Ruthie Mae, had spent several months each year for the previous ten years in jail for prostitution. Ruthie Mae was living with her pimp, Arthur Ree Williams in Inglewood.

"Ruthie Mae's love for money really trapped her. She ended up with a guy, Arthur Ree Williams, who tricked her out onto the streets. She went with him thinking he was going to do so much for her, and then couldn't get out of the life. Arthur Ree was a pimp who was running all kinds of women. I know he was a bookmaker too. If it made money, he did it."
[Declaration of Ida Mae Cain McDonald]

73. Despite continual abuse from Arthur Ree, Ruthie Mae could not break away from his control.

"Not too long after Ruthie Mae disappeared from home she called me one night, begging me to come and pick her up. Arthur Ree had beaten her up and she wanted to get away from him. I did go and get her. Arthur Ree had beaten her with a coat hanger and she was bruised and sore.

"Ruthie Mae only stayed at my house a couple of days before she went back to Arthur Ree. I could not believe it when she left to go back to him. By then I knew Arthur Ree had some kind of control over Ruthie Mae. He had put her to work out on the streets, beaten her up, and she still went back to him."
[Declaration of Aron Bush]

74. In a progression from heavy drinking to heroin, Ruthie Mae used drugs to numb the horror that was her life.

> "I know Ruthie Mae was a heroin user. I saw her using and always afterward she would be nodding off. She had to use drugs to be able to keep up doing the stuff she was doing on the street."
> [Declaration of Ida Mae Cain McDonald]

75. Ruthie Mae and Arthur Ree had at least one child together, Nouye. Arthur Ree once threw Nouye down a flight of stairs causing the baby a serious concussion. Nouye had to have surgery. The injury was so severe a metal plate was placed in his skull as part of the repair process. Arthur Ree didn't limit his abuse to his son. Ruthie Mae also suffered beatings by him, including beatings in front of her children.

> "Sometime in the mid-1970's Ruthie Mae went back to Mississippi to try to get away from Arthur Ree. She still had people there, but Arthur Ree knew she had relatives there, and so she couldn't stay there. He would have found her. Ruthie Mae went up to Chicago from Mississippi. Arthur Ree finally found her there and brought her back to Los Angeles. She couldn't get away from him."
> [Declaration of Ida Mae Cain McDonald]

"It seemed like Arthur Ree hunted Ruthie Mae all the time she was not with him. He could not let her go, and she would always go back to him."

[Declaration of Aron Bush]

Ruthie Mae was trapped in the life, and it was killing her.

76. In June of 1977, Ruthie Mae was indicted by a federal grand jury for possession of stolen welfare checks; she appeared on an outstanding bench warrant for failure to report to her probation officer since 1974; and she had been ordered to do 30 days county jail time on a prostitution charge.

77. While in custody Ruthie Mae was interviewed by her probation officer, who reported the following:

"She reports that she left Los Angeles for Chicago because she was '...having problems with a pimp...influencing me beyond my control.' She went to Chicago to get away from the pimp and to avoid jail time for the prostitution arrest which was a probation violation.

'I now feel the People's Temple Christian Church has helped me to realize my mistakes in the past, and I would like very much to clear up my record so that I might go to South America and begin a new start in life. I am fed up with my past lifestyle, and I would also like to be in a good position in life so I can be

with my son, Nouye, again.'"

The Peoples Temple and Jonestown

78. Jim Jones and the Peoples Temple had come through many evolutions by the time Ruthie Mae was recruited in the summer of 1977. Jones was ordained a minister in the Disciples of Christ Church in 1964. He had been preaching for a number of years prior to his ordination, most recently in a church in Indianapolis. Jones led the Full Gospel Church of Indianapolis which was devoted to social work, including serving 1000 free meals each week to people in need.

79. The year after his ordination, Jones moved with 100 families from Indianapolis to Redwood Valley in northern California. In the next five years, Jones built up his congregation, the congregation's property and his own reputation. In 1971, the Peoples Temple bought a large building in San Francisco and a second building in Los Angeles. The headquarters of their operation was moved to the San Francisco site. It was in San Francisco that the congregation grew by leaps and bounds. In the next three years the church built up a social program of jobs, health care, and a way of life.

80. In 1974, the Peoples Temple negotiated a lease with the government of Guyana for 27,000 acres of land near the Venezuelan border. The land was part of Jones' grand vision to build a sanctuary far from the problems of urban America, where a "new

world order" could grow.

81. Jones was very astute politically, and well thought of by politicians in California. It was known that he could turn out large numbers of people, and particularly people of color, at political rallies. When George Moscone was elected mayor of San Francisco by a slim majority in 1975 following Jones' endorsement, the Peoples Temple and Jim Jones' stature blossomed.

> "There were a lot of things that were really attractive about the People's Temple and being a member there. It was a completely ethnically integrated group during a time when that was still unusual. It was also a group that blended both young and old. Politically the People's Temple was very progressive, and that attracted many people. If you remember that this group really caught fire during the early 1970's, it is easy to understand why to someone on the outside Jim Jones' vision looked good. Once you were wooed in as a member, Jones would work on turning your focus from God to him as 'Father'."
>
> [Declaration of Hue Fortson]

82. Acknowledged by then Governor Jerry Brown for his good works, Jones was appointed by Moscone to the City's Housing Authority. Jones was courted by politicians. At the same time he packed public meetings with his temple members who applauded

his every word. Eventually rumors surfaced that the Peoples Temple was not all it had been touted to be. Stories of beatings, stockpiles of cash and weapons, and fake healings begin to hound Jones who took to traveling with bodyguards.

83. In August of 1977, Jones retreated to Guyana to what was ultimately called Jonestown. From this outpost, Jones resigned his city post in San Francisco and issued a call to his followers to emigrate to Jonestown and start a new life there.

84. A new life was exactly what Ruthie Mae was desperate for. She had spent the better part of a decade using her body to make a living. Literally sick and tired, Ruthie Mae saw Jonestown as a chance to avoid another jail term. Faced with a pending federal offense which threatened significant prison time, and a tragic past Ruthie Mae gratefully followed the first person to offer her hope in her adult life, Jim Jones.

> "I was a part of the Counseling Group at the Los Angeles [People's] Temple. That is where I first met Ruthie Mae Cain. I believe she came into the Temple originally with some friends who were members. She let it be known that she was in trouble with the law, and that there was a warrant out for her arrest. I don't remember now what the charges were. She asked for help. All of this information was passed on to Jones. Jones in turn talked with his legal advisors about the risk of taking Ruthie Mae in, and how to help her. His

advisors told him to have Ruthie Mae turn herself in, and then the Temple would attempt together released to go to the new project in Guyana. The plan seemed like a good one, because people were already in Jonestown working on the project there but more help was needed. Also having Ruthie Mae go to Jonestown would not cost the government a dime, and would avoid sending her to prison. Jones liked the idea."

[Declaration of Hue Fortson]

85. Ruthie Mae attended a meeting at the Los Angeles Temple with the Counseling Group. She told her story, describing her problems and her desire to straighten out her life. It was at this meeting that Ruthie Mae met Jim Jones for the first time.

"Ruthie Mae agreed to Jones' plan that she give herself up. Jones promised that Temple members would then write letters of support for her, in an attempt to get her released to Guyana in the custody of the People's Temple rather than go to jail. That kind of letter writing was very common. It was a letter writing mill really. We were often asked to write letters in support of some issue, or some politician, or an individual."

[Declaration of Hue Fortson]

"Jones' attorneys arranged for Ruthie Mae Cain to give herself up to the authorities. There was actually a press conference arranged by the public relations person, Jean Brown, for the event. Jones was always looking for publicity about himself and about those he helped. Ruthie Mae was taken to Sybil Brand Women's jail, here in Los Angeles, where she was held to await the outcome of her case. Jones assigned me to visit Ruthie Mae in Sybil Brand daily. He told me that he wanted Ruthie Mae to know that the People's Temple members were there for her, and I should visit her every day until she was released."
[Declaration of Hue Fortson]

86. On July 6, 1977 Ruthie Mae pled guilty to the federal offense of possession of stolen mail. She was sentenced to a three year suspended sentence and three years probation, specifically to allow her a last attempt at rehabilitation by going to reside with the Peoples Temple in Guyana during the probationary period. Her probation report had attached to it several letters of recommendation from members of the Peoples Temple, as well as an offer by a member of the temple who was a probation officer to take on Ruthie Mae's informal supervision in Guyana.

87. In the midst of her new hope, and desire to start a new life, Ruthie Mae's children came from Yuma to visit her. Tracy

was granted a three week furlough from the Arizona Youth Authority with permission to visit his family in order to evaluate his performance in the community. Together with Mack Arthur, Danny, Brenda, Janice and Val, Tracy spent the time with his mother in Inglewood. One of Tracy's most poignant memories is of how happy he was to be spending time with his mother, together with his brothers and sisters as a family.

88. Ruthie Mae was secretive about her plans to go to Jonestown with the Peoples Temple. She was glad to be leaving for Guyana soon, and at the same time very cautious about sharing the specifics, even with her children. Ruthie Mae appealed to Percy to allow her to take Brenda and Janice with her to Jonestown. She knew how unhappy all of her children were with their stepmother and was anxious to provide them with a chance at the better life she believed she was going to.

> "I remember that my mother really wanted my sister and I to go with her to Jonestown. I know she knew how unhappy we were with my stepmother, and I believe she thought we would be moving to a better life. When my mother asked my father if my sister and I could stay with her and go to Jonestown, he said, 'No.' He had custody of us since their divorce and he didn't want to give us up. I'm sure both Brenda and I would be dead now, along with my mother and half-brother, Nouye, if we had gone with her.

89. At the end of the visit, all of Ruthie Mae's children went back to Yuma, except Brenda. She stayed on in Los Angeles with her grandmother.

90. At the end of the summer, Ruthie Mae left for Guyana with her youngest son, Nouye. Tracy returned to the Arizona Youth Authority and was paroled to his father's home in Yuma within two weeks, his visit having been termed a success. He was nearly 15 years old.

91. One year later Ruthie Mae was interviewed in Guyana in September of 1978, by investigative journalist, Mark Lane. She was described by him as a strikingly beautiful woman. Ruthie Mae was working in the fields in Guyana, supervising agricultural work. She was still working the crops, as she had spent so many of her earlier years, but she told Lane she felt she was working for all of the Jonestown residents, and that she was no longer a victim. Her interview is contained in Lane's book *The Strongest Poison: Jim Jones and His Peoples Temple*. The following are excerpts:

> "I had some really bad beatings when I was a prostitute. If I wouldn't get his three hundred and fifty dollars every day that he wanted me to get, if the police kept messing with me and I be hiding - go sit down at a bar - get them off my back, then I couldn't make that money. When I get ready to go home

he would get me. He'd ask how much money would you make. And I'd tell him I couldn't get the amount because the police was after me....so he would give me a real good beating if I wouldn't bring in the amount. He would take this coat hanger and beat me 'til blood just ran out of my ass and throw me right back out there on the street and tell me better get it.

"So I was up in the thousands...sometimes two thousand dollars a week. It was a lot of money for a girl to be using her body day and night. It's terrible, really terrible. I didn't...have nobody to turn to. I just didn't know no better. I was in this for eleven years. I was trapped in it. The only way I could get out would have been to get killed 'cause it was just like a game.

"I was in that life for eleven years and I didn't know how to get out of it. I ran away three times and I came back because I had nobody to turn to. I was hooked on that life - anything to do something that I was sure that I could do and that I was sure that I was pleasing somebody, because I wasn't pleasing myself.

"He was just a greedy man. All I could see - he didn't do nothing but turn into a dope fiend...he got five to life for selling dope...[then] I chose this Muslim man. And he used me too, but he didn't use my body - he made me use my brain. I used my brain for

forgeries. I forged checks from Inglewood, California to Kansas City, Missouri.

"I knew the cops was after me - they had been after me for about three or four years. Around this time I had been over to these friends' house. They had been to some of Jim's meetings. They told me how good Jim Jones was. So, I wrote him a letter and he answered my letter.

"He spent $4,500 to bail me out and I go to court and the judge kicked the whole thing out and gave me three years in Guyana. All through my life, it was just me being used - I was a guinea pig. He gave me three years probation because he knew I'd been used. "My life is completely different now. I am the supervisor of one of the agricultural crews. We plant Cuban black beans, banana suckers, citrus trees. I also teach some of the high school students how to farm. I enjoy everything I do here. It's exciting when you know what you're doing, I was running from myself. Couldn't look back and see nothing I had did but something wrong. Now, I can look back and see plants growing. I can be sure that there's going to be some food in this place and we can pick it off, cook it, and eat it the same day. My life once was in a mess, but it's straightened up now - it's clear. Now, I'm free do you understand what that means?"

92. Two months later, Ruthie Mae was dead. Congressman Leo Ryan of San Mateo had decided to go and investigate what was happening in Jonestown. He had been besieged with requests from relatives living in the Bay Area to find out what was happening to their loved ones. Ryan and a party of 20 others arrived in Guyana on November 14, 1978. It took them two days of negotiation with Peoples Temple representatives to get permission to visit Jonestown. On November 17, Ryan and the others made it to Jonestown. Almost immediately it was clear something was seriously wrong. Many Temple members passed Ryan's group notes begging to be rescued, to leave with the congressman. Ryan decided to leave the following day. He was killed at the airstrip, along with four others.

93. Jones knew the killing of Ryan would bring retribution. Jones ordered Ruthie Mae and 912 other Jonestown victims to drink cyanide-laced Kool-Aid. Those who refused to do so, were forced to drink the poison. Ruthie Mae and her young son, Nouye died in Guyana.

> "My wife and child died in Jonestown, along with nearly one thousand others. I am sure that Ruthie Mae Cain and her son died there too. I do not know if she drank poison, or was shot, but she was murdered by Jim Jones as were all the other Temple members who died there.
>
> "I know it is hard to understand how smart and sincere people could have been so taken in by one man's

insanity. We know now that Temple members were getting drugs in their food without knowing it. There was sleep deprivation. There was the charisma of Jones himself. Once you were a member, becoming a defector was almost unthinkable. Those members who did leave were said by Jones to have done one of three things, always. A defector had either stolen money from the Temple, molested a child, or wanted Jones to have sex with him or her. The smeared reputation of the defector kept any Temple member from wanting to have anything to do with whoever left. Some defectors were killed. Jim Jones literally captured the body and soul of the members of the People's Temple."
[Declaration of Hue Fortson]

94. According to government statistics about 80% of those who lived and died in Guyana were African-American women. Many of the people who died in Jonestown were elderly or children. Like Ruthie Mae, many victims of Jonestown had found it difficult, if not impossible to survive in the United States. Ruthie Mae had literally been sentenced to death in Guyana by the court system of the United States.

95. When Ruthie Mae first left for Jonestown in the fall of 1977, she kept in touch with her children. Brenda received letters from her mother frequently, at least monthly. In the fall of 1978, when Brenda did not hear from her mother she began

to worry. She asked her father at one point, what she should do. He suggested she file a missing person's report if she was seriously concerned, which Brenda did.

96. One Saturday night in November of 1978, Brenda got a phone call from the State Department telling her they had located her mother's body. They had a copy of her passport, as well as Nouye's. Nouye's body was identified in part by the steel plate in his head, a remnant of the brutality experienced in his short life in the United States.

97. Brenda had kept a photo of Jim Jones hidden, since her mother had given it to her before leaving the country.

> "She called Jim Jones "Father". She gave me a small card, the size of a playing card with his picture on the back. She told me to keep it a secret and not to show it to anyone unless it was a matter of life and death. Members of the People's Temple had gotten my mother out of jail. I think she chose to go to Jonestown with them because she felt she owed it to them for bailing her out."
> [Declaration of Brenda Cain Johnson]

Brenda kept that secret, until the day she was notified of her mother's death.

98. For years after her death, Tracy did not believe his mother had died in Jonestown. Perhaps because he had spent years

longing to be with his mother, and not living with her, Tracy held out the stubborn hope that she would show up eventually. None of the children ever saw their mother's body. Ruthie Mae and Nouye's remains were shipped to Chicago, to Ruthie Mae's brother, Harvey Mack. Long estranged from his family, Mack made no effort to connect with Ruthie Mae's children for any memorial arrangements.

> "I am a survivor of Jonestown. I know how easy it is to feel ashamed and scared, to have your life completely torn up by the events in Guyana in 1978. I was an adult when my family died at Jonestown. I cannot imagine how much harder it must be for someone like Tracy Cain, who was only 15 years old at the time, to comprehend what happened to his mother and little brother. If society cannot make sense of a Jim Jones, how can we expect a child to do so?"
> [Declaration of Hue Fortson]

Instability, Incarceration and Addiction

99. The legacy of each of Ruthie Mae's children as they approached their young adult hood was their struggle to make their way in the world. Tracy entered Kofa High School in Yuma, and despite gains he made as a student while in the Arizona juvenile justice system, he flunked every subject his first

semester. He was suspended for a month, for fighting. When Tracy returned to school after the Christmas, he was dropped from the rolls of the high school for non-attendance. Tracy's mother was too busy to respond to the school official's request for a meeting. Within a week of being dropped from the high school Tracy was arrested for burglary and possession of stolen property [car stereos] and returned to the Arizona Youth Center.

100. Tracy was placed on parole status at a group home in Peoria, Arizona called Young Acres. Tracy stayed in the group home less than two weeks before running away with another boy. Tracy was eventually picked up on an arrest warrant in Yuma. Ray Mendoza, the corrections officer assigned Tracy's case, recommended a more structured setting for Tracy noting that he cannot handle a home setting. Mendoza also recommended individual counseling for Tracy. Returned to the structured setting of Adobe Mountain School, Tracy maintained a B average in summer school, and again during the fall semester. He was released one month before his eighteenth birthday, with promising reports for his future.

101. Danny Cain's young adulthood continued to be defined by arrests and jail time. At the time Tracy was returned to the Arizona Youth Center, Danny was arrested for armed robbery and first degree burglary in Yuma. In a presentence report Danny was quoted as saying he had visual hallucinations and lost track of where he was and what he was doing. He reported that the hallucinations had been occurring for 3 or 4 years. Danny was

sentenced to 6 to 9 years in Arizona State Prison.

102. Janice Cain gave birth to her first child, a boy, in Yuma when she was 17 years old. Janice named her baby Duvon. When Duvon was born Janice was homeless, living on the streets in an area of Yuma. The baby's father was a military man assigned to the local base. He had made no permanent commitment to Janice or their son. A harsh town, with an extreme climate, Janice was barely able to maintain herself and her sanity without a permanent home. She understood the impossibility of giving her baby a life, and was desperate for him to survive. Janice gave Duvon up for adoption when he was less than a month old.

> "One of the greatest pains of my life is that I had to give that child up. I really believe I had to, for him to survive. I have registered with all the birth parent and adopted children's' groups. My dream is that now that Duvon has turned 18 years old, he will look for me. I want to tell him how much I love him and that I wanted him to have a chance. I live on the hope of seeing him again."
> [Declaration of Janice Cain Fortune]

103. Mack Arthur's adolescence and young adult hood has been defined by incarceration. He had done time in Parchman State Prison in Mississippi, county jail time in Richmond and Los Angeles, California and time in Florence State Prison in Arizona.

104. Collins, Jr., died in 1992 at the age of 35. The previous year he had been awarded Supplemental Security Income, a Social Security program based on indigence and disability. He was receiving $645 a month. The basis of Collins' disability was a substance abuse disorder due to his addiction to alcohol. His arrests for being under the influence, driving under the influence and other drunk driving violations date back to 1983. Arrested in 1991 on a cocaine possession charge one month before his death, his presentence report included his statement:

> "I have been drinking for as long as I can remember. I don't like drugs, but I find myself using them. I have never been to any counseling, but I have dealt with some of my problems on my own. I have been to de-tox twice in the past few months."

105. The probation officer concluded the report saying Collins' was disabled due to drugs and alcohol. His substance abuse problem was classified as far beyond the scope of a diversion program. Collins was found dead of an overdose in a motel room in Ventura county before he could be sentenced.

106. Val also was committed to the Arizona juvenile justice system while living in Yuma. He was assigned to the Catalina Mountain School at the age of 17, where he stayed for nine months. Shortly after his release he was arrested again in Yuma

on four burglary counts, and two counts of criminal damage involving four cars parked at Yuma High School. Val was released on bond November 8, 1982, while awaiting trial. A bench warrant was issued for Val on the day of trial due to his nonappearance.

107. Val didn't appear in the Yuma Court because ten days after he was released on bond to his stepmother, Wilma, she was sentenced to five years in the Arizona State Prison. Wilma was originally arrested on a forged check charge and after she pled guilty to theft, was sentenced to probation. Following two shoplifting arrests, a summons was issued for Wilma by the Yuma County Superior Court on her violation of probation. Wilma was sentenced to five years in the Arizona State Prison on November 18, 1982.

108. Danny Cain was convicted of burglary and sexual assault following a jury trial in Yuma. Danny had entered the home of an unknown woman, gotten into bed with her, and promptly passed out. Danny was chased from the woman's home and later approached another woman outside washing her car in the early morning. At trial Danny testified that he was drunk and thought he had gotten into bed in his own home. On November 21, 1982, Danny was sentenced to ten years in the Arizona State Prison.

109. When both his stepmother and older brother were sentenced to prison within three days of each other, Val called his father. There were no adult, or older siblings at home with Wilma's younger children Kato, Candice, Cantana and Durez. Val knew he was facing his own sentencing in just two months.

110. Percy had finished working on the bridge construction in Arizona the prior year. He had almost immediately taken a new job working in Richmond, California. In a pattern of avoidance that Percy used his whole life with his wives, he simply worked hard and rarely came home. Wilma's drinking escalated, along with her violent outbursts. Percy and Wilma had not lived together for months when Wilma was arrested. Percy met his third wife, Brunell McBride, while working in Richmond. Brunell was twenty years younger then Percy. Percy was granted a divorce from Wilma in July of 1983 and married Brunell the following year.

111. Percy came to Yuma and packed up Val, and the younger kids. They all moved together to Oxnard, California where Percy and Brunell had established a home.

Oxnard

112. Tracy was released from the Arizona Department of Corrections' Florence State Prison on December 27, 1984, just two days before his twenty-second birthday. He was specifically paroled to his father's home in Oxnard.

113. Percy had retired from full-time construction work in approximately 1983, because of his sickle cell anemia and related heart condition. Richard Clayton, a long-time friend and co-worker of Percy's, had gone into business for himself. Clayton gave Percy work from time-to-time. Shortly after Tracy came to

Oxnard, Percy asked Clayton to give Tracy a job to keep him busy. Tracy did work for Clayton as a non-union, laborer-trainee. He did his job well, particularly given his lack of experience. Tracy was a hard worker, and continued to work for Clayton until the work ran out about four months later.

114. Tracy was hired onto another construction site through contacts of his father's and on Clayton's recommendation. When Percy was hospitalized due to his health problems, Tracy was laid off of the job. There was never a question about Tracy's ability to do the work, or the quality of the work he did. As a non-union laborer, he was always vulnerable to a lay-off. Tracy could not join the union without work experience. When his father was no longer at the job site, Tracy was quickly put out of work.

115. Tracy was at home, out of work, with time on his hands. He applied for, and did minimal day labor jobs when he could find work. Tracy quickly fell into the ways of his siblings, including drinking and smoking PCP on nearly a daily basis.

116. On the weekend of the Galloways' homicides, Percy and his third wife, Nell, were out of town. Val and Tracy were at home, planning to party with friends all weekend. Many party-goers were in and out of the Cain house during the course of the weekend. Many of the party-goers were drinking, were high, or otherwise under the influence of a variety of illegal drugs. What actually happened at the Galloways home, has never been clear.

Conclusions

117. Tracy Cain was born into a chaotic and dysfunctional family. He was raised by a stepmother who was physically and emotionally abusive, while his natural parents were completely unavailable to him. Tracy idolized his father, who worked long hours and days away from home, thereby avoiding the very issues that made his family dysfunctional. Tracy's father did little to sustain and support Tracy, beyond providing a paycheck. Tracy's natural mother virtually disappeared from his life before he was three years old. Nonetheless, Tracy's attachment to his mother was enduring beyond her grave. Left to face a stepmother who beat him, humiliated him, and deprived him of any sense of a loving family, Tracy constructed a myth in order to survive. His myth included the constant refrain that everything was fine within his family. Tracy's need to have order in his world was so fierce, that in the face of constant upheaval, disruption and tumult he denied the death of his mother, the failings of his father, and the criminal careers of his brothers. To name the serious dysfunction of his family, would have been to acknowledge the disregard of his parents for his basic needs. Tracy faced parental beatings and humiliations, serious injury, abandonment, and his life long struggle with learning disabilities without adult support. These experiences occurred against a backdrop of widespread racial segregation in his community, and alcoholism, criminal behavior - including prostitution, and homelessness

within his immediate family.

Several historical facts strongly suggest that Tracy may have been exposed to alcohol and other brain damaging drugs in utero. Family members describe Tracy's mother as a woman who was "not a good mother," who liked to "party" and who "refused to accept her responsibilities." Court records indicate that Tracy's mother was repeatedly arrested for prostitution, and it is very likely that her prostitution was accompanied by alcohol and illicit drugs.

Tracy's mother's alcohol use predated his birth. The combination of Tracy's appearance, coupled with the depth and breadth of his organic impairments, makes the diagnosis of Fetal Alcohol Syndrome a diagnosis that fits both maternal history, physical findings, neurological findings, and the scientific literature.

Tracy's school records offer evidence that he suffers from an organic impairment such as fetal alcohol syndrome or fetal alcohol effect. He was labeled hyperactive early in elementary school as was "slow academically," "extremely talkative," and learning disabled in auditory reception. He performed in the lowest one percentile on standardized achievement testing, and his IQ was classified as "dull normal". Although none of these symptoms alone proves fetal alcohol syndrome or effect, they are characteristic of children who were exposed to alcohol in utero.

There is also evidence from Tracy's history that he became dependent on psychotropic drugs early in his teen years. Friends

report that he consumed nearly fatal quantities of PCP, alcohol, and cocaine as an adolescent. This kind of drug and alcohol use is frequently an attempt to self medicate for serious psychiatric disorders such as depression and post traumatic stress disorder. Reports from friends that Tracy habitually drank and used drugs excessively suggest that he was either intoxicated at the time of the offense or that he was in withdrawal from intoxicants at the time of the offense.

Tracy's cognitive functioning may have been further impaired by a series of traumatic head injuries that he sustained with no subsequent treatment. In addition, he was subjected to repeated blows by his step mother during her physical assaults on him. He was also assaulted by a group of other boys and hit on the head with a door. On another occasion he accidentally fell against a truck bumper and lost consciousness. These head injuries, combined with in utero exposure to alcohol and possible other substances, can cause permanent brain damage. The combination of these effects also may make Tracy him more vulnerable to the effects of his own drug and alcohol abuse.

According to neurological testing by Karen Bronk Froming, Ph.D., Tracy has extensive neurological impairments in academics, memory, attention, problem solving, conceptualizing, as well as motor difficulties. These cognitive deficits are severe enough to put him in the moderate range of global impairment. These impairments are reflected in Tracy's difficulties navigating the world. He is a poor student, has difficulty integrating complex

data, and typically reacts impulsively to frustration. These difficulties impair his leadership capabilities, making him more apt to be a follower. It is reasonable to believe that the combination of Tracy's head traumas, chronic ingestion of alcohol and drugs and in utero alcohol exposure caused brain damage that has effected his behavior and mental functioning throughout his entire life, including the time of his crime.

Tracy's emotional development was severely compromised by the conditions surrounding him. He was consistently humiliated by his own family members and disappointed by the adults around him. This made Tracy unable to place trust in adults. He was provided with no moral rudder from which to decipher right from wrong. Tracy, like other abused children, developed low self esteem, extremely poor coping mechanisms, and distorted perceptions of his personal and social relationships. Faced with abandonment, neglect and constant abuse he retreated into a world of denial, developing a facade that he was O.K. By the age of fifteen, Tracy's self protection was so entrenched that he refused to believe in his own mother's death. Instead he held on to the delusion myth that sustained him through his early years that his mother would return to him, that everything would be all right. His denial of his mother's death at a time when he should have had full comprehension was labeled as "irrational" and "delusional". Tracy had very little insight into the loss and deprivation which characterized his early years. He lacked the maturity to seek help on his own. Tracy reached adulthood as a

hard-working young man, with few skills, a minimal education and only the very fragile construction of a "normal" life.

It was clear early on that Tracy was a child who not only needed help, but responded well to intervention when given the opportunity. It is noted throughout his life history that Tracy "has a good capacity to follow rules and manage himself in structure." It is in these situations, with attention, guidance and reinforcement, that Tracy is able to succeed. Unfortunately, these opportunities for success were limited. When he is returned to his chaotic home life, Tracy is unable to translate what he has learned. There is no guidance, no consistency, no follow up. Only cruelty, neglect and the chronic role modeling of crime and pathology from those closest to him.

Throughout his life, Tracy displays himself as a young man who is eager to identify with those around him. He lacks both the intelligence and the charisma to be a leader, and, as noted in previous documents, is not a fighter. Majel Fausel, M.A., in an evaluation of Tracy finds that "his impulsivity as well as feelings of inadequacy leave him vulnerable to be easily led into negative directions." It should be emphasized that Tracy's own criminal history is not one of violence and cruelty, but of impulsivity and immaturity. On his own, without adult support, he is unable to accomplish the normal developmental tasks of his age. He consistently fails in his attempts to provide his own parenting. Instead he must rely on his facade of cohesion and his constant refrain that all is fine.

Despite Tracy's difficulties he presents himself throughout his life as a likable and pleasant person. Many physically abused children internalize hostility and sadism. Tracy, to his credit, has a history of non-violence and cooperation. He is most often compliant and passive. Tracy does well with authority figures. He is most often described as "friendly and cooperative". He is able to maintain himself quite well when provided with security and structure. It is when he is left on his own that Tracy's immaturity, low self esteem and poor judgment lead him to trouble.

The psychological evaluation prepared by Dr. Donaldson prior to trial grossly overlooked several factors that should have been included in any mental health assessment of Tracy Cain. Missing are the two most influential factors in Tracy's life, his cognitive impairments and the traumatic suicide/death of his mother during his adolescence. Also missing is Tracy's irrational and delusional response to his mother's death.

Dr. Donaldson erroneously implies that Tracy was an average student, failing to note several documented reports of Tracy's learning disabilities and impairments. Dr. Donaldson failed to perform a standardized evaluation for the serious type of cognitive impairment and brain dysfunction from which Tracy suffers. The tests that he did administer have been shown to be ineffective for evaluating organicity and learning impairment.

Dr. Donaldson's report is also problematic because it states that he evaluated Tracy's co-defendant, Mr. Davis Cerda, and

incorporates findings from Mr. Cerda's evaluation into Tracy's evaluation. Dr. Donaldson does not address the serious ethical issue of the conflict in evaluating two person's charged with the same crime and incorporating the results of one evaluation into the other. Standard procedure for a mental health evaluation would view any such information from another defendant with extreme skepticism.

118. Tracy's family history of near slavery conditions as sharecroppers in Mississippi, the mental illness on his mother's side, his mother's and siblings' substance abuse, extreme educational deficits and learning impairments of Tracy himself, his history of abuse and loss, left Tracy extremely vulnerable. These experiences and conditions formed the context for his behavior on the weekend of the Galloway's homicides.

119. If called as a witness, I would testify to the facts and conclusions set forth above and the assessments based thereon.

The foregoing is true and correct and executed under penalty of perjury under the laws of the State of California and the United States on this 27th day of October, 1997.

Ruth Zitner Psy.D.
Ruth Zitner, Psy.D

DECLARATION OF KAREN BRONK FROMING, Ph.D.

I, Karen Bronk Froming, Ph.D., declare as follows:

1. I am a licensed clinical psychologist in the state of California. I specialize in the practice of clinical neuropsychology and neuropsychological assessment. I have received training in this speciality in accordance with the American Psychological Association's (APA) Division 40 standards. I am a member in good standing of the APA and its subspecialty division of clinical neuropsychology. I am board eligible for credentialing by the American Board of Professional Psychology-American Board of Clinical Neuropsychology, having passed their written examination in August of 1994; work samples are currently under peer review in preparation for oral examination.

2. I am a member of the International Neuropsychological Society, the National Academy of Neuropsychology, American Psychological Association and Division 40 (Clinical Neuropsychology), and the California Psychological Association. I am the former chair of the Education Committee of the Northern California Neuropsychology Forum, a position I held in 1993-1994 and in 1990-1991, and a past president (1991-1992) of the organization as well.

3. I received my B.A. degree in 1979 in psychology from the University of Florida. Shortly after graduation, I received training in neuropsychological assessment at the Shands Teaching Hospital and J. Hillis Miller Health Center Psychological Clinic. As a trained neuropsychological technician, I administered and scored neuropsychological tests and provided neuropsychology services to over 300 patients.

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4. In 1984, I received my M.S. in psychology from the University of Florida. From 1986 through 1987, following two years at Shands Teaching Hospital, I completed my pre-doctoral internship training at the San Francisco Veteran's Administration Medical Center. In 1988, I successfully defended my dissertation and received a Ph.D. in psychology from the University of Florida. I was awarded a post-doctoral fellowship in neuropsychology in the Department of Clinical and Health Psychology at the University of Florida and received advanced training in behavioral neurology, behavioral brain syndromes, neuroanatomy, neurophysiology, memory disorders and aphasiology or language disorders.

5. I have performed research in the areas of memory disorders and assessment, aphasic symptoms and their lateralizing significance, the effect of chronic alcohol use on frontal lobe or cognitive function, hemispheric processing of emotions, and the effects of various medical conditions on neurocognitive functioning. I have published in these areas, and have presented the results of my research at several local, national and international meetings.

6. I am currently in private practice with continued faculty appointments in the Department of Psychiatry at the University of California-San Francisco. I continue to teach both at Langley Porter Psychiatric Institute and at San Francisco General Hospital. My past position included the following duties: Director, Behavioral Medicine Unit, in the Division General Internal Medicine at the University of California - San Francisco School of Medicine, Staff Psychologist III and Triage Coordinator; Consulting Neuropsychologist with the Langley Porter Psychiatric Institute's Psychological Assessment Unit; Assistant Clinical Professor of Medicine and Psychiatry at the University of California-San Francisco; and Adjunct Faculty Member at the Pacific Graduate School of Psychology.

7. In connection with my duties at the UC-San Francisco School of Medicine, I was responsible for accepting, evaluating and assigning for treatment patients suffering from organic and/or psychiatric complaints. The department for which I was responsible handles several thousand patient visits per year. I established the first neuropsychological assessment subspecialty service within our department.

8. At request of lawyers working on behalf of Tracy Dearl Cain, I met, interviewed, tested and evaluated Mr. Cain in connection with his pending post-conviction challenge to his conviction and sentence of death. My examination was conducted on two separate days. The evaluation consisted of a series of tests that took eleven hours. The purpose of the testing was to determine Mr. Cain's neuropsychological functioning and to determine whether there was evidence of organic impairment.

9. In addition, I reviewed Mr. Cain's school records, statements of family members and other witnesses, background materials on the Cain family, and a summary of the trial testimony of defense and prosecution witnesses. This is the kind of information relied upon by neuropsychologists in order to offer their expert opinions.

10. The purpose of a neuropsychological evaluation is to determine the existence, severity, and effect of brain damage and cognitive impairment and to analyze the individual's performance in light of one or multiple etiologic factors, including inherited physical or psychiatric dysfunction, substance use or abuse, pre- or perinatal trauma, acquired brain injury, and psychiatric disorders.

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11. In performing the neuropsychological evaluation and reporting the results the examiner keeps in mind the model of information processing the underlies the choice of tests and areas of the brain examined. Information is processed by the brain in stages and tests tap both input of information and the ability of the brain to output information. Input may be via multiple sensory channels such as visual, auditory, tactile, olfactory, or gustatory (taste). The most commonly assessed are visual and auditory with some screening paid to olfactory/gustatory. The type of material that may be input through these most commonly assessed channels are verbal/linguistic and nonverbal/spatial. Thus, material and modality are tested for both input and output.

12. Attention is the first stage of information processing that is a necessary prerequisite for later stages of complex cognitive function. The forms of attention are sustained attention or vigilance, divided attention or tracking two tasks at one time, selective attention which requires alternating between two tasks of different value, and susceptibility to distraction which may impair all aspects of attention ability. In addition, one brain system which is the basis for attention involves motor functions. Consequently, fine and gross motor ability is also evaluated.

13. When attentional capacity is understood, memory ability is evaluated next. Once material is attended to it must be manipulated, organized for storage and encoded. The most efficient and functional encoding requires that the remembered material be organized so that it can be found when necessary. The best analogy for this process is a file cabinet which is divided into logical sections. The sections are organized to promote the ease and efficiency of placing important material and later retrieving it. Varying periods of delay are then utilized to test the

ability to remember after intervening tasks. Certain memory disorders have characteristic stages of failure. These characteristics are then used to localize defects in the brain.

14. Associated functions are analyzed by asking about language abilities, pattern/shape analysis, vision, hearing, and tactile functions. In this way the examiner can talk about the relative strengths and weaknesses of brain function. When weaknesses reach a critical level that differs from expected age and education corrected norms, the deficit is interpretable as an area of damage.

FAMILY HISTORY

15. On November 18, 1978, Tracy Cain's mother died in Jonestown, Guyana. Forced to drink poisonous Kool-Aid along with hundreds of others, Tracy's mother was finally a victim of Jim Jones' religious delusions. Her path to Guyana was the life story of the vast majority of other victims of Jonestown, as marginalized, poor African-American women, and their children. The survivors of those who died in Jonestown struggle with their own legacy of the 913 deaths in a jungle they never understood. Tracy Cain was 16 years old when his mother died.

16. The tragedy of Jonestown is common knowledge today, the standard all other "cult" deaths are measured against. What is less commonly understood is the exploitation and desperation that brought so many to the Peoples Temple in the first place.

17. A full and accurate assessment of Mr. Cain requires consideration of the economic and social deprivation within his family and the communities they grew up in, the pervasive history of severe abuse and probable fetal alcohol exposure in his family, the abandonment and neglect suffered throughout his life, traumatic head injuries he suffered as a child and his own history of learning disabilities and limited intelligence.

18. Tracy Cain's father, Percy Cain, Jr., was born on March 15, 1939, in Isola, Mississippi. Percy Jr.'s birth was attended by a midwife in his parents' tar paper shack on land owned by the Croffit Plantation. His mother, Rosie Lee Gates, divorced his father, Percy, Sr., shortly after Percy Jr's birth. Her marriage to her second husband, Willie, produced eight children. Only three of her ten children survive today. Seven of Rosie Lee's children, including Percy, Jr., are dead of sickle cell anemia and related heart problems.

19. Tracy Cain's mother, Ruthie Mae Quinn was born in 1940 a few miles further up the Delta in Clarksdale, Mississippi. Ruthie Mae's father, Lucius Quinn never married her mother, Ruthie Bee Chandler. Ruthie Bee was a welfare recipient most of her life, crippled by mental illness and dependent on her own mother. Ruthie Mae never really knew her father. Lucius' family was from Inverness, Mississippi. Lucius moved north shortly after Ruthie Mae's birth. He became a barber in Chicago.

20. Tracy Cain was born to Ruthie Mae and Percy Cain, Jr. on December 29, 1962, in Los Angeles' County Hospital. His family was living in a tract house in the Watts section of Los Angeles. Tracy was the fourth of five children born to Ruthie Mae and Percy. Ruthie Mae had been married once before briefly, at the age of 16, to Collins Blair, Sr. Ruthie Mae and Collins had two children together, Tracy's half-brothers Collins, Jr. and Mack Arthur. By the time Ruthie Mae was 24 years old, she had seven children living at home ranging in age from infant to seven years. She had a baby each year from 1957 through 1962, then giving birth to Tracy's younger brother, Val in 1964.

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21. Percy met and married Ruthie Mae in Isola, Mississippi. Ruthie Mae had been brought up by her grandmother in Clarksdale, Mississippi. Ruthie Mae's own mother, Ruthie Bee struggled throughout her life with mental illness. Ruthie Bee was on medication most of her adulthood, living under the care of her mother, Morbelia Chandler. Morbelia supported Ruthie Bee and Ruthie Mae, until Ruthie Mae left home at the age of 14. Ruthie Mae dropped out of school in the eighth grade. She had been attending Coleman School, a segregated school with elementary through eighth grades, in Clarksdale. She quit school at the age of 14 to leave home and head to the slightly larger town of Greenville, Mississippi. There she looked for any work other than picking cotton. Desperate to get away from the back-breaking field work, she took a job washing dishes at a restaurant. It was there that Ruthie Mae met her first husband, Collins Blair.

22. Collins Blair and Ruthie Mae married in February of 1956 in Greenville. Ruthie Mae was only sixteen years old. In order to get married legally she listed her age as 18 on the marriage license. Her Grandmother Chandler signed as her witness. Ruthie Mae's first child, Collins Blair, Jr. was born the following year. In 1958, she had a second child, Mack Arthur Blair. Mack Arthur was born at the Sugg Clinic in Isola, Mississippi, the only clinic for miles around where African-Americans could be seen for medical care. Shortly after Mack Arthur's birth, Ruthie Mae and Collins parted. They were never officially divorced. With two babies, Ruthie Mae stayed in Isola returning to the only work available to support herself and her children, cotton picking.

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23. Percy Cain had grown up in Isola and was working at the Croffit Plantation driving a tractor. In the very small farming community of Isola, where segregation defined all social contact, it is no surprise that Percy and Ruthie Mae met through mutual family friends. Ruthie Mae was an attractive woman and friendly, and she and Percy were soon courting. In August of 1959 Percy and Ruthie Mae were married. Their marriage license listed both of their occupations as farmers. Their first home together was a small, one-room shack on the property of the Croffit Plantation in Isola. The first child born to Ruthie Mae and Percy, Larry Darnell [Danny] Cain, was born two months before their marriage. Again, Ruthie Mae delivered at the Sugg Clinic, her only option for a medically supervised birth and delivery.

24. Within months of their marriage, Ruthie Mae and Percy packed up their new baby and Ruthie Mae's two toddlers from her first marriage and moved to Los Angeles. Both Percy and Ruthie Mae were anxious to get away from the Delta economy driven by cotton. The mechanization of cotton picking had begun the great migration of African-Americans away from the south, toward the north and west a decade before. Percy's sister, Ida Mae and her husband had moved to Los Angeles a couple of years earlier. Ida Mae was homesick and missed her family, all of whom still lived in Mississippi. With her encouragement, Ida Mae's husband found Percy construction work. Percy and Ruthie Mae gladly headed west following the lure of new opportunity and the promise of leaving segregation behind.

25. Ruthie Mae and Percy had four more children in rapid succession; Brenda born in 1960, Janice born in 1961, Tracy born in 1962, and Val in 1964. Ruthie Mae had always liked people and enjoyed being around them. Percy worked long hours and frequently came home exhausted. Away from home, living in the big city with small children Ruthie Mae quickly

developed a life style that involved having friends over all day, every day while her husband was at work. She began to drink on a regular basis, and soon the partying consumed her. Not content with partying at home, or perhaps concerned for its effect on her children, Ruthie Mae frequently left her children in the care of her husband's sisters and brothers. At first, she was gone for hours. Eventually the hours stretched into unexplained days of absence.

26. In January of 1966, five and a half years after moving to Los Angeles, Percy and Ruthie Mae officially separated. Their marriage had been over in all but name for quite some time before that. Within four months of the filing for legal separation, Ruthie Mae was arrested for prostitution. It was Ruthie Mae's first arrest of fifty-nine separate appearances in the Los Angeles county courts, over the next decade for prostitution and related crimes.

27. When Ruthie Mae moved out of Percy's home, her children were devastated. Tracy was only three years old. For the next several years she lived in the same area as Percy and the kids, residing in public housing at Jordan Downs, in Watts. She saw the children often. Percy never tried to keep the children from continuing a relationship with their mother. While it was sporadic contact, given Ruthie Mae's lifestyle and frequent arrests, all her children wanted to be with her. Tracy and Val cried when they had to leave her following a visit. All of Ruthie Mae's children at one point or another begged her to allow them to live with her.

28. Percy's family helped with the child care after Ruthie Mae left until the end of 1966, when a young woman moved into Percy's house to help out. Wilma Taylor was 19 years old when she began taking care of the seven Cain children. Wilma would eventually become their stepmother. Tracy's life became dominated by Wilma. From the first day, she was brutal with the kids. Initially she was an extremely strict disciplinarian. She established a rigid daily

routine.

29. The children were swiftly punished for any infraction, no matter how small. Wilma's punishments were physical and painful. At a time when the Cain children were struggling with the loss of their mother and their father was gone most waking hours, their surrogate parent was cruel and abusive.

30. On August 25, 1969, Percy and Ruthie Mae's divorce decree was entered by default. Six days later, Percy and Wilma got married. The following month Tracy began first grade in Compton. Ten days after school started, the Cain family moved from Compton where they had been living, to 132nd Street in Gardena. Following the move, Tracy and his sisters and brother entered 135th Street Elementary School.

31. In an already chaotic household, 1970 brought a new chapter of dysfunction to the Cain household. Percy and Wilma's first child, Percy Cain, III was born in the summer. Nicknamed Kato by his family, the baby seemed to make Wilma determined to mark a division between her child and the children Percy had brought to their marriage. Tracy and his siblings were subjected to constant humiliation which included telling the children that their birth mother was a whore and that they were no better.

32. During this time, Tracy and his brother, Val ran away at every opportunity. Though they were too young to make it very far, the boys always said they were running away to be with their mother. Tracy and his brother and sisters continued to visit Ruthie Mae frequently. The contrast between the love they felt from their mother and the brutality they experienced from Wilma, drove all of them to yearn for their mother, no matter what her circumstances or how unattainable she was.

33. One of the terrifying aspects of Wilma's discipline was its unpredictable and surprise element. Wilma was moody and inconsistent in her punishments. One day not making a bed might be ignored, and the next day Wilma might beat the errant child mercilessly with an extension cord. Wilma also liked to wait to catch the child to receive punishment unaware.

34. Ruthie Mae, Tracy's mother, lived in Inglewood during this period of her life. She spent the first half of 1970 in county jail on a prostitution charge. She was arrested within two months of her release on a new prostitution charge. In November of the same year, Ruthie Mae was sentenced to another six month county jail term on the new charge. Ruthie Mae also delivered a baby girl sometime in 1970. She became pregnant when she was passed out at a party and did not know who the baby's father was. The baby, Latunia, was eventually given up to foster care and later relinquished for adoption.

35. Over the next four years, Percy and Wilma had two daughters and a son. Candice was born in 1971, Cantana in 1974, and Durez in 1975. Percy worked various construction jobs throughout the late 1960's and early 1970's. He was never without work, and termed by one employer a reliable hard worker. He was supporting ten children by the end of 1975, eight of whom were living at home. Danny was committed to California Youth Authority in November of 1974 and Mack Arthur was sentenced to two years in the Mississippi State Penitentiary at Parchman in August of 1975. The other children were living at home with Percy and Wilma.

36. One summer in the mid-1970's the entire Cain family went on vacation. They drove to Tulsa, Oklahoma to visit Wilma's parents, Othelia and James Massey. The visit extended over the 4th of July holiday. Wilma's parents' home fronted on a large drainage ditch, with a walkway over the top of the ditch itself. The kids were outside enjoying fireworks as it

got dark, when a firecracker went off very close to Tracy. Tracy was startled and fell off the walkway into the ditch hitting his head on the concrete. He yelled and became silent. He lost consciousness. One of the adults went into the ditch and got him out. Tracy developed a large, painful lump which made him feel sick for a day or two. Despite this very severe injury, Tracy was never taken to a doctor.

37. After the family returned home from Tulsa, Tracy had another accident riding his bike. He fell and hit his head on the pavement. Again, his head injury made him ill and left him with a large knot on the side of his head. Tracy's sister remembers calling him "Gumby-head" because his head was swollen into such a strange shape. Again, Tracy received no medical treatment.

38. Percy was offered a position as construction foreman on a bridge building project in Yuma, Arizona at the end of 1975. At the time the family moved to Arizona, Tracy's cumulative records with Los Angeles Unified School District show the progression of difficulty he experienced with school. Tracy's first grade teacher at 135th Street Elementary School noted that he, "Tries hard, anxious to learn. Has shown improvement in reading." In 1970, in second grade Tracy is labeled as a boy with "behavior problems, who does not get along with peers." By the third grade Tracy 's teacher noted that he was "Very slow academically." His fourth grade record note is the same. At fifth grade Tracy's record stated, "Markedly below average in all areas." Tracy's sixth grade teacher, Mrs. Mulligan, prior to his transfer took a special interest in him. She wrote in his record:

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"Tracy would seldom try to do his best. Lack of reading skills slowed him down considerably. We gave him much individualized help, which aided him a lot. A leader, but of those who are 'losers.' Excellent artist but this creativity did not extend to other areas of study. My husband and I had him join us for a holiday in hopes of improving his attitude. Immediately after this he moved."

39. The family moved from Watts to Yuma, Arizona, in 1976. While Los Angeles county had unspoken color boundaries, in Yuma outright segregation was a reality. Tracy was one of only a handful of African-American students in attendance at Gila Vista Junior High School in Yuma. The Cain family was the only African-American family in their neighborhood. They were constantly harassed by their neighbors.

40. Within a year of his arrival in Yuma, Tracy was committed to the Arizona Juvenile Authority on an attempted burglary charge and sent to the Adobe Mountain School facility, north of Phoenix. Tracy was 14 years old.

41. Over the next four years Tracy had a total of twelve Arizona court referrals. Tracy spent nearly all of his adolescence in court ordered juvenile placements, primarily at Adobe Mountain School.

42. Tracy's first personality and social assessment at Adobe Mountain School was prepared in March of 1977, by Robert Goldsworthy, Psychology Intern, who noted the following, "Testing indicates that Tracy will use an inordinate amount of repression and denial in dealing with conflicts...He denied the presence of family conflict although two different tests suggested such conflicts were present in the home." Data from the testing also indicated that Tracy, "...is very immature for his age, that is, he fails to express attitudes and perceptions which

are common for his age group."

43. A family evaluator, Ms. Titcomb, attempted to arrange an interview with Tracy's stepmother and father. All attempts to arrange an in-person interview were unsuccessful and the family evaluation was eventually based on a telephone interview with Wilma Cain.

44. A short term treatment program was ultimately recommended for Tracy, with a return home following treatment. Tracy was transferred to the Arizona Youth Center in Tucson, Arizona for a four month treatment program. Testing conducted at the Arizona Youth Center indicates that Tracy had: "...very deficient verbal abilities...reasoning skills, poor vocabulary and deficient verbal expression. Low reasoning and comprehension skills are reflected in Tracy's deviant social behavior in unstructured situations. [Tracy] attempts to present an overly optimistic picture of himself by denying problems."

45. Tracy was paroled home in August of 1977, at the conclusion of a four month stay at the Arizona Youth Center. Prior to his placement at home, Tracy was tested and placed at grade 4.6 in reading and 6.5 in math. He was however, promoted to the 9th grade through the Arizona Youth Center.

46. The following month, March of 1978, Tracy's juvenile parole was revoked following his arrest for burglary and possession of stolen property, and he was returned to the Arizona juvenile system with a placement at Young Acres. Tracy stayed at Young Acres only a few days before he and another boy ran away. Tracy was reportedly heading to California.

47. Two months later, Tracy was arrested in Yuma on the arrest warrant from Young Acres, and placed at the Arizona Youth Center again. As part of his treatment plan, Tracy reported a desire to live with his natural mother in California and to leave Yuma. By October of

1978, Tracy was released on parole to Percy and Wilma Cain in Yuma. Less than two weeks after Tracy returned home, his older brother Danny was sentenced to six years in the Arizona State Prison on burglary and robbery charges. Within the month after Tracy returned home, his natural mother and a half-brother died at Jonestown.

48. Tracy managed to stay home for eight months following his release from the Arizona Youth Center. His parole was suspended in July of 1979 due to his involvement in two burglaries in Yuma. Tracy was arrested and held in custody at the Yuma County Juvenile Center to await disposition of his new offenses and parole violation. While in custody, Tracy assaulted a detention officer in the process of escaping. Tracy fled to California where he hoped to live with his mother, Ruthie Mae Cain.

49. In January of 1980 Tracy elected to return to Arizona to clear his warrant before he turned eighteen years old. Tracy was recommitted to the Arizona juvenile system, and transferred to Adobe Mountain School.

50. Dr. Richard Kapp, consulting psychologist to Adobe Mountain School conducted a neuropsychological assessment of Tracy as part of his evaluation and reported: "...Tracy had deficient verbal abilities and a limited fund of information...poor reasoning skills, poor vocabulary, and poor verbal expression. Difficulty understanding the meaning of what he hears, severe short term auditory memory impairment, faulty social judgment." Tracy also exhibited,"...underlying feelings of personal inadequacy, poor self-esteem."

51. At Adobe Mountain, Tracy's case summary included an acknowledgment of his learning disabilities which were plaguing him in school, combined with his dull-normal IQ. Upon his return home in 1977, it was recommended that Tracy be placed in special education

classes. The first time Tracy was released and sent home, this placement did not happen, and he drifted along in the mainstream curriculum in the local junior high school. Tracy would express an interest in school and a desire to continue to high school graduation, but demonstrate frustration in his inability to progress academically.

52. When Tracy was readmitted to Adobe Mountain School in early 1980, he tested at grade level 2.7 in math, and 5.3 in reading. He was 17 years old. Upon a second evaluation a month after his initial test, Tracy tested at 4.1 grade level in math, and 4.8 in reading. The evaluator Mickey Mast stated, "...a G.E.D. is not within close reach for him." The goal established for Tracy was remediation to sixth grade level.

53. A certified school psychologist who also evaluated Tracy during 1980 reported in his summary that Tracy had specific learning disabilities and "ongoing emotional problems" which have subsequently "retarded his academic progress." Further Tracy was diagnosed with a severe deficit of auditory memory which prevented him from following simple oral directions. Finally his diagnosis concluded that Tracy had a "possible borderline developmental disability."

54. Tracy Cain was born into a chaotic and dysfunctional family. He was raised by a stepmother who was physically and emotionally abusive, while his natural parents were completely unavailable to him. Tracy idolized his father, who worked long hours and days away from home, thereby avoiding the very issues that made his family dysfunctional. Tracy's father did little to sustain and support Tracy, beyond providing a paycheck. Tracy's natural mother virtually disappeared from his life before he was three years old. Nonetheless, Tracy's attachment to this mother was enduring beyond her grave. Left to face a stepmother who beat him, humiliated him, and deprived him of any sense of a loving family, Tracy constructed a myth

in order to survive. His myth included the constant refrain that everything was fine within his family. Tracy's need to have order in his world was so fierce, that in the face of constant upheaval, disruption and tumult he denied the death of his mother, the failings of his father, and the criminal careers of his brothers. To name the serious dysfunction of his family, would have been to acknowledge the disregard of his parents for his basic needs. Tracy faced parental beatings and humiliations, serious injury, abandonment, and his life long struggle with learning disabilities without adult support. These experiences occurred against a backdrop of widespread racial segregation in his community, and alcoholism, criminal behavior - including prostitution, and homelessness within his immediate family.

55. This combination of factors had longstanding and debilitating effects on his psychological development and cognitive and emotional functioning. Even as a child, Tracy Cain suffered with low self-esteem, extremely poor coping mechanisms, and distorted perceptions of his personal and social relationships. Tracy had very little insight into the loss and deprivation which characterized his early years. He reached adulthood as a hard-working young man, with few skills, a minimal education and only the very fragile construction of a "normal" life.

56. Tracy's family history of near slavery conditions as sharecroppers in Mississippi, the mental illness on his mother's side, his mother's and siblings' substance abuse, extreme educational deficits and learning impairments of Tracy himself, his history of abuse and loss, left Tracy extremely vulnerable.

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RESULTS OF TESTING

57. Over a two-day period I administered the Halstead-Reitan Battery and additional standard neuropsychological tests designed to test frontal, parietal, temporal and occipital lobe functions. I assessed Mr. Cain's ability, behaviorally, to perceive, process and remember information through a variety of modalities. I conducted a full battery of intelligence and achievement tests.

58. Mr. Cain's test findings indicate overall brain impairment in the moderate range of severity. This is measured by the Halstead Reitan impairment index of 0.6. On the Halstead-Reitan Battery, 7 tests serve as the critical predictors of brain impairment. The impairment index is computed by the number of tests that fall in the impaired range divided by 7. For Mr. Cain, the 4 indicators of brain impairment that fell in the impaired range included the Category test, the Tactual Performance Test (overall time to completion and the Location score), and the Seashore Rhythm Test. Taken together these impairments involve anterior brain impairments that involve speed of processing, motor skills, and problem-solving.

59. Mr. Cain's impairments arise in the context of Borderline retarded intellectual performance as it is measured on the Wechsler Adult Intelligence Scale-Revised. Mr. Cain's most deficient skills are again on speeded processing and recall of digits. Throughout the subtests in which time was a factor, Mr. Cain had difficulty completing tasks within a time constraint. It did not appear to be through lack of effort. He repeated needed instructions repeated so that he could comprehend a task and once he had that understanding performed to the best of his ability. However, it would take 2-3 repetitions for his understanding. He was always polite and shy about his impediments.

60. When one measures brain function, it is important to tap all aspects of the input and output of information. Therefore, primary sensory and perceptual functions are assessed as is the ability of the subject to attend to the stimuli for varying lengths of time. Many aspects of attention are measured including the ability to sustain attention or vigilance, selective attention when one must choose between one more salient stimulus, divided attention when one must keep two things in mind at one time, as well as freedom from distraction. These are the necessary precursors to more complex cognitive functions such as the manipulation of information, memory, and language skills.

61. Mr. Cain's ability to sustain attention and remain focused on the task at hand is unimpaired but his ability to quickly process two stimuli at once or to switch between two tasks is impaired (Trails B, Wisconsin-6 impersistent errors, Stroop Interference procedure). He has a tendency to stick to "tried and true" responses that were previously useful but no longer are correct. Such persevarative responding was found on the written responses to the spelling test, the copy of the Rey-Osterrieth Complex Figure, and severe perseverative deficits on the Ruff Figural Fluency task. These deficits collectively demonstrate moderate deficits in cognitive flexibility, particularly with a visually guided graphomotor output (written). They are less obvious with a verbal response, although Mr. Cain's slowed comprehension of instructions may likely be from his lack of cognitive flexibility and poor divided attention.

62. Associated frontal-mediated skills include decrements in visuomotor performance for the dominant hand on the Grooved Pegboard, Tactual Performance Test, and Luria motor programs. While there were dominant hand deficits for visual motor performance, the Tactual Performance Test included severely impaired performance for the non-dominant hand

performance. This atypical performance is a strongly lateralizing sign implicating impaired right anterior, white matter dysfunction. Specifically, the corpus callosum, which is the white matter connection between the right and left hemispheres, is not properly functioning. There is also impaired motor impersistence and smell identification involving the orbitofrontal regions of the frontal lobes. The functions of initiation and behavioral fluency are intact.

63. Frontal lobe functions can be divided loosely into the following subsections of behavior: Initiation, fluency, autonomy from the environment (stimulus boundedness), freedom from distraction, response inhibition, anticipation of the future. Analysis of failures of performance may demonstrate these deficits.

64. A behavioral observation of Mr. Cain that further implicated right parietal or frontal dysfunction was the tendency for Mr. Cain to avoid using his left arm/hand in tasks requiring both hands, his tendency to ineffectively explore the environment, particularly on the left side of space (evidenced on the Tactual Performance test). He appeared to have a mild neglect.

65. Mr. Cain's memory performance was characterized by the need for repetition when verbal material was used but a maintenance of material after delay periods because of multiple trial repetitions required to learn the target stimuli (he needed 4 trials to learn a simple story, Reitan verbal memory). The opposite was true for visual material which was learned quickly but was rapidly lost after delay periods (Reitan visual memory).

66. Mr. Cain's deficits are most pronounced for anterior brain functions, particularly frontal-limbic areas that are responsible for rapid learning and apprehension of information. He is particularly deficient in rapid comprehension of verbal material, his ability to do two things at

once and to selectively attend to information. He has borderline intellectual functioning but the typical pleasant demeanor of the individual with compromised intellective skills that frequently masks the impairments that exist.

67. I have been asked by attorneys for Mr. Tracy Cain whether these areas of deficit would impact Mr. Cain's ability to follow others' conversations, to simultaneously listen to what someone was saying and maintain his own train of thought and whether these deficits impact his ability to assist counsel. It is my belief based on my observations, the test results and behavior, that while Mr. Cain would have maintained alertness throughout the discussions about him, he would have had difficulty quickly comprehending the meaning of what was said, to have quickly responded to the material and that these combined deficits would make it difficult for him to assist his counsel at various points of his case.

68. I hold each one of these opinions and conclusions to a reasonable degree of professional certainty. They are based on my training as a psychologist and neuropsychologist, the documents I reviewed and my testing of Mr. Cain.

69. Every test I administered was routinely accepted by mental health professionals at the time of Mr. Cain's trial. Every conclusion and finding could have been made by competent mental health professionals provided with appropriate historical data about Mr. Cain and provided with access to Mr. Cain for testing.

The foregoing is true and correct and executed under penalty of perjury under the laws of the State of California and the United States on this 10th day of Sept, 1997.

Karen B. Froming PhD

KAREN BRONK FROMING, Ph.D.

DECLARATION OF JAY M. JACKMAN, M.D.

I, Jay M. Jackman, M.D., being first duly sworn, depose and say:

1. I am a licensed physician specializing in psychiatry, certified by the American Board of Psychiatry and Neurology.

2. I received my B.A. from Columbia University in New York in 1960 and my M.D. degree from Harvard Medical School in 1964. I completed a rotating internship at San Francisco County General Hospital in 1965 and a clinical assistanceship at the University of London Institute of Psychiatry, Maudsley Hospital in 1966. I was a psychiatric resident at Stanford University medical Center from 1966 to 1969.

3. Since 1975, I have been in private practices in both California and Hawaii, specializing in outpatient psychotherapy and forensic psychiatry, with a special emphasis on substance abuse, competency and criminal responsibility. From 1975 through 1981, I served as a member of numerous Sanity Commissions for the State of Hawaii. From 1974 to 1975, I was the Director of Lanakila Mental Health Clinic at the Kalihi Palama Community Mental Health Center in Honolulu. Prior to that, from 1970 to 1974, I was Director of Drug Treatment Programs at The Westside Community Mental Health Center in San Francisco. I held a Clinical Faculty position at Mt. Zion Hospital and Medical Center in San Francisco from 1969 to 1974. I was on the Clinical Faculty at the University of Hawaii's John A. Burns School of Medicine, a position I held from 1975 to 1990.

4. I am the author of a number of publications on substance abuse and treatment. Since 1971, I have served as representative and advisor to several public and private agencies, including the Joint commission on the Accreditation of Hospitals, Psychiatric Facilities Section; White House Special Action Office of Drug Abuse Prevention; and the National Council of Community Mental Health Centers. In addition, I have served as consultant to private and public hospitals, drug treatment facilities, private enterprises, and physicians in private practice in both California and Hawaii. I have been a consultant and expert witness in over 300 cases in a variety of legal proceedings and have testified in over 75 cases on both criminal and civil matters in state, federal and military courts. In these contexts, my areas of expertise include mental competence, criminal responsibility, and the psychiatric consequences of alcohol and drug abuse, including substance abuse as a factor in determining criminal responsibility.

5. I am currently a member of the American Psychiatric Association, California Psychiatric Association, Northern California Psychiatric Society, the American Academy of Psychiatry and the Law and the American Academy of Forensic Psychiatry. Prior memberships and affiliations include the APA Commission on Drugs (1973-1977), Chairman of the Northern Section of the California Association of Methadone Programs (1973-1974), World Psychiatric Associate (1976-1981), and the Honolulu Mayor's Advisory Committee on Drug Abuse (1975-1977). From 1971 through

1975, I served as Chairman of the National Council of Community Mental Health Centers' Task Force on Drugs.

6. At the request of Willard P. Norberg of Cooper, White, and Cooper, counsel for Tracy D. Cain, I reviewed a number of records related to Mr. Cain to determine what additional information, examinations, and evaluation should be conducted in order to offer a reliable and competent mental status assessment and psychiatric diagnosis. I was also asked to comment on the psychological evaluation of Mr. Cain prepared by Theodore S. Donaldson, Ph.D., at the request of Mr. Cain's trial counsel in 1987.

7. In preparation for my evaluation of Mr. Cain, I reviewed the following documents:

Life Chronology of Tracy Cain; Cain Family Tree; Birth certificates of Tracy Dearl Cain, Rosie Lee Gates Forrest, Percy Cain, Jr., Mack Arthur Blair, Larry Darnell Cain a.k.a. Danny Cain, Janice Renée Cain, Valendar Eugene Cain, Percy (Kato) Cain III, Candice Nicole Cain, Cantana Yvette Cain, Durez Onashe Cain, Gaberil Jemal Cain, and Heavy Williams; Marriage Certificate of Ruthie Mae Quinn and Percy Cain, Jr.; Death Certificates of Ruthie Mae Cain, Percy Cain, Jr. and Collins Blair, Jr.; Divorce papers of Percy Cain, Jr., and Ruthie Mae Cain; Family Photographs of Percy Cain, Jr., Ruthie Mae Cain and Brenda Cain, Percy "Kato" Cain III and Wilma Cain, Heavy Williams and of the family residence in Yuma, AZ taken in 1996; School records for Tracy Cain from Markham Jr. High School, Adobe Mountain School,

and Yuma Union High School District; Work records for Tracy Cain consisting of an itemized statement of earnings for 1/85-12/86, a letter from Paul Lozano Painting, Manpower Inc. personnel records; and work records for Percy Cain, Jr., from Granite Construction Company and Laborers Pension Trust; Mental Health Records from Adobe Mountain School, Arizona Dept. of Corrections, from 1984, 1987 Donaldson evaluation at Ventura County Jail, 1988 evaluation from Ronald K. Siegel, Ph.D., at San Quentin; Medical Records from Yuma Medical Center for Tracy D. Cain; Transcripts of interviews with Brunell Cain, Wilma Cain, Valendar Cain, Tracy Cain and Darnell Cain; Summaries of interviews with Collins and Hope Blair, Brenda Cain Ross, Rosielee Forrest, Janice Cain Fortune and Valdendar Cain; Family Members' Trial Testimony of Wilma Cain and Percy Cain; Court Records of Ruthie Mae Quinn Blair Cain a.k.a. Linda Jones, Probation and presentence reports for Larry Darnell (Danny) Cain, Mack Arthur Blair a.k.a. Mike Lamore Blair, Valendar Eugene Cain and Wilma Jean Cain; general Jonestown Information, including letters written on behalf of Ruthie Mae Cain by members of People's Temple Ms. Laurie B. Efren, Sandra Bradshaw, Richard Tropp, Karen Layton, and June B. Crym; and Declarations from Larry Darnell "Danny" Cain, Valendar Cain, Janice Renée Cain Fortune, Brenda Cain Johnson, Ida Mae McDonald, Aron Bush, Hugh Fortson, Majil Fausel, M.A., David Cerda, Floyd E. Clements and Kathy Lazoff-Aldana; Social history and background by Ruth Zitner, Psy.D. and Neuropsychological assessment by Karen Bronk Froming, Ph.D.

FAMILY HISTORY

8. On November 18, 1978, Tracy Cain's mother died in Jonestown, Guyana. Forced to drink poisonous Kool-Aid along with hundreds of others, Tracy's mother was finally a victim of Jim Jones' religious delusions. Her path to Guyana was the life story of the vast majority of other victims of Jonestown, as marginalized, poor African-American women, and their children. The survivors of those who died in Jonestown struggle with their own legacy of the 913 deaths in a jungle they never understood. Tracy Cain was 16 years old when his mother died.

9. The tragedy of Jonestown is common knowledge today, the standard all other "cult" deaths are measured against. What is less commonly understood is the exploitation and desperation that brought so many to the Peoples Temple in the first place.

10. A full and accurate assessment of Mr. Cain requires consideration of the economic and social deprivation within his family and the communities they grew up in, the pervasive history of severe abuse and probable fetal alcohol exposure in his family, the abandonment and neglect suffered throughout his life, traumatic head injuries he suffered as a child and his own history of learning disabilities and limited intelligence.

11. Any assessment of Mr. Cain's development and cognitive functioning must include careful attention to the unique ethnic and cultural factors which affected his development, perceptions, behavior, opportunities and role in the larger community.

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12. Tracy Cain's father, Percy Cain, Jr., was born on March 15, 1939, in Isola, Mississippi. Percy Jr.'s birth was attended by a midwife in his parents' tar paper shack on land owned by the Croffit Plantation. He was the second child of his parents. His mother, Rosie Lee Gates, divorced his father, Percy, Sr. shortly after Percy Jr.'s birth. Her marriage to her second husband, Willie, produced eight children. Only three of her ten children survive today. Seven of Rosie Lee's children, including Percy, Jr., are dead of sickle cell anemia and related heart problems.

13. Tracy Cain's mother, Ruthie Mae Quinn was born in 1940 a few miles further up the Delta in Clarksdale, Mississippi. Ruthie Mae's father, Lucius Quinn never married her mother, Ruthie Bee Chandler. Ruthie Bee was a welfare recipient most of her life, crippled by mental illness and dependent on her own mother. Ruthie Mae never really knew her father. Lucius' family was from Inverness, Mississippi. Lucius moved north shortly after Ruthie Mae's birth. He became a barber in Chicago.

14. Tracy Cain was born to Ruthie Mae and Percy Cain, Jr. on December 29, 1962, in Los Angeles' County Hospital. His family was living in a tract house in the Watts section of Los Angeles. Tracy was the fourth of five children born to Ruthie Mae and Percy. Ruthie Mae had been married once before briefly, at the age of 16, to Collins Blair, Sr. Ruthie Mae and Collins had two children together, Tracy's half-brothers Collins, Jr., and Mack Arthur. By the time Ruthie Mae was 24 years old, she had seven children living at home ranging in age from infant to

seven years. She had a baby each year from 1957 through 1962, then giving birth to Tracy's younger brother, Val in 1964.

15. Percy met and married Ruthie Mae in Isola, Mississippi. Ruthie Mae had been brought up by her grandmother in Clarksdale, Mississippi. Ruthie Mae's own mother, Ruthie Bee struggled throughout her life with mental illness. Ruthie Bee was on medication most of her adulthood, living under the care of her mother, Morbelia Chandler. Morbelia supported Ruthie Bee and Ruthie Mae, until Ruthie Mae left home at the age of 14. Ruthie Mae dropped out of school in the eighth grade. She had been attending Coleman School, a segregated school with elementary through eighth grades, in Clarksdale. She quit school at the age of 14 to leave home and head to the slightly larger town of Greenville, Mississippi. There she looked for any work other than picking cotton. Desperate to get away from the back-breaking field work, she took a job washing dishes at a restaurant. It was there that Ruthie Mae met her first husband, Collins Blair.

16. Collins Blair and Ruthie Mae married in February of 1956 in Greenville. Ruthie Mae was only sixteen years old. In order to get married legally she listed her age as 18 on the marriage license. Her Grandmother Chandler signed as her witness. Ruthie Mae's first child, Collins Blair, Jr., was born the following year. In 1958, she had a second child, Mack Arthur Blair. Mack Arthur was born at the Sugg Clinic in Isola, Mississippi, the only clinic for miles around where African-

Americans could be seen for medical care. Shortly after Mack Arthur's birth, Ruthie Mae and Collins parted. They were never officially divorced. With two babies, Ruthie Mae stayed in Isola returning to the only work available to support herself and her children, cotton picking.

17. Percy Cain had grown up in Isola and was working at the Croffit Plantation driving a tractor. In the very small farming community of Isola, where segregation defined all social contact, it is no surprise that Percy and Ruthie Mae met through mutual family friends. Ruthie Mae was an attractive woman and friendly, and she and Percy were soon courting. In August of 1959 Percy and Ruthie Mae were married. Their marriage license listed both of their occupations as farmers. Their first home together was a small, one-room shack on the property of the Croffit Plantation in Isola. The first child born to Ruthie Mae and Percy, Larry Darnell [Danny] Cain, was born two months before their marriage. Again, Ruthie Mae delivered at the Sugg Clinic, her only option for a medically supervised birth and delivery.

18. Within months of their marriage, Ruthie Mae and Percy packed up their new baby and Ruthie Mae's two toddlers from her first marriage and moved to Los Angeles. Both Percy and Ruthie Mae were anxious to get away from the Delta economy driven by cotton. The mechanization of cotton picking had begun the great migration of African-Americans away from the south, toward the north and west a decade before. Percy's sister, Ida Mae and her husband had moved to Los Angeles a couple of years earlier. Ida

Mae was homesick and missed her family, all of whom still lived in Mississippi. With her encouragement, Ida Mae's husband found Percy construction work. Percy and Ruthie Mae gladly headed west following the lure of new opportunity and the promise of leaving segregation behind.

19. Ruthie Mae and Percy had four more children in rapid succession; Brenda born in 1960, Janice born in 1961, Tracy born in 1962, and Val in 1964. Ruthie Mae had always liked people and enjoyed being around them. Percy worked long hours and frequently came home exhausted. Away from home, living in the big city with small children Ruthie Mae quickly developed a life style that involved having friends over all day, every day while her husband was at work. She began to drink on a regular basis, and soon the partying consumed her. Not content with partying at home, or perhaps concerned for its effect on her children, Ruthie Mae frequently left her children in the care of her husband's sisters and brothers. At first, she was gone for hours. Eventually the hours stretched into unexplained days of absence.

20. In January of 1966, five and a half years after moving to Los Angeles, Percy and Ruthie Mae officially separated. Their marriage had been over in all but name for quite some time before that. Within four months of the filing for legal separation, Ruthie Mae was arrested for prostitution. It was Ruthie Mae's first arrest of fifty-nine separate appearances in the Los Angeles county courts, over the next decade for prostitution and related crimes.

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24. On August 25, 1969, Percy and Ruthie Mae's divorce decree was entered by default. Six days later, Percy and Wilma got married. The following month Tracy began first grade in Compton. Ten days after school started, the Cain family moved from Compton where they had been living, to 132nd Street in Gardena. Following the move, Tracy and his sisters and brother entered 135th Street Elementary School.

25. In an already chaotic household, 1970 brought a new chapter of dysfunction to the Cain household. Percy and Wilma's first child, Percy Cain, III was born in the summer. Nicknamed Kato by his family, the baby seemed to make Wilma determined to mark a division between her child and the children Percy had brought to their marriage. Tracy and his siblings were subjected to constant humiliation which included telling the children that their birth mother was a whore and that they were no better.

26. During this time, Tracy and his brother, Val ran away at every opportunity. Though they were too young to make it very far, the boys always said they were running away to be with their mother. Tracy and his brother and sisters continued to visit Ruthie Mae frequently. The contrast between the love they felt from their mother and the brutality they experienced from Wilma, drove all of them to yearn for their mother, no matter what her circumstances or how unattainable she was.

27. One of the terrifying aspects of Wilma's discipline was its unpredictable and surprise element. Wilma was moody and inconsistent in her punishments. One day not making a bed might

be ignored, and the next day Wilma might beat the errant child mercilessly with an extension cord. Wilma also liked to wait to catch unaware the child to receive punishment.

28. Ruthie Mae, Tracy's mother, lived in Inglewood during this period of her life. She spent the first half of 1970 in county jail on a prostitution charge. She was arrested within two months of her release on a new prostitution charge. In November of the same year, Ruthie Mae was sentenced to another six month county jail term on the new charge. Ruthie Mae also delivered a baby girl sometime in 1970. She became pregnant when she was passed out at a party and did not know who the baby's father was. The baby, Latunia, was eventually given up to foster care and later relinquished for adoption.

29. Over the next four years, Percy and Wilma had two daughters and a son. Candice was born in 1971, Cantana in 1974, and Durez in 1975. Percy worked various construction jobs throughout the late 1960's and early 1970's. He was never without work, and termed by one employer a reliable hard worker. He was supporting ten children by the end of 1975, eight of whom were living at home. Danny was committed to California Youth Authority in November of 1974 and Mack Arthur was sentenced to two years in the Mississippi State Penitentiary at Parchman in August of 1975. The other children were living at home with Percy and Wilma.

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30. One summer in the mid-1970's the entire Cain family went on vacation. They drove to Tulsa, Oklahoma to visit Wilma's parents, Othelia and James Massey. The visit extended over the 4th of July holiday. Wilma's parents' home fronted on a large drainage ditch, with a walkway over the top of the ditch itself. The kids were outside enjoying fireworks as it got dark, when a firecracker went off very close to Tracy. Tracy was startled and fell off the walkway into the ditch hitting his head on the concrete. He yelled and became silent. He lost consciousness. One of the adults went into the ditch and got him out. Tracy developed a large, painful lump which made him feel sick for a day or two. Despite this very severe injury, Tracy was never taken to a doctor.

31. After the family returned home from Tulsa, Tracy had another accident riding his bike. He fell and hit his head on the pavement. Again, his head injury made him ill and left him with a large knot on the side of his head. Tracy's sister remembers calling him "Gumby-head" because his head was swollen into such a strange shape. Again, Tracy received no medical treatment.

32. Percy was offered a position as construction foreman on a bridge building project in Yuma, Arizona at the end of 1975. At the time the family moved to Arizona, Tracy's cumulative records with Los Angeles Unified School District show the progression of difficulty he experienced with school. Tracy's first grade teacher at 135th Street Elementary School noted that

he, "Tries hard, anxious to learn. Has shown improvement in reading." In 1970, in second grade Tracy is labeled as a boy with "behavior problems, who does not get along with peers." By the third grade Tracy's teacher noted that he was "Very slow academically." His fourth grade record note is the same. At fifth grade Tracy's record stated, "Markedly below average in all areas." Tracy's sixth grade teacher, Mrs. Mulligan, prior to his transfer took a special interest in him. She wrote in his record:

> "Tracy would seldom try to do his best. Lack of reading skills slowed him down considerably. We gave him much individualized help, which aided him a lot. A leader, but of those who are 'losers.' Excellent artist but this creativity did not extend to other areas of study. My husband and I had him join us for a holiday in hopes of improving his attitude. Immediately after this he moved."

33. The family moved from Watts to Yuma, Arizona, in 1976. While Los Angeles county had unspoken color boundaries, in Yuma outright segregation was a reality. Tracy was one of only a handful of African-American students in attendance at Gila Vista Junior High School in Yuma. The Cain family was the only African-American family in their neighborhood. They were constantly harassed by their neighbors.

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34. Within a year of his arrival in Yuma, Tracy was committed to the Arizona Juvenile Authority on an attempted burglary charge and sent to the Adobe Mountain School facility, north of Phoenix. Tracy was 14 years old.

35. Over the next four years Tracy had a total of twelve Arizona court referrals. Tracy spent nearly all of his adolescence in court ordered juvenile placements, primarily at Adobe Mountain School.

36. Tracy's first personality and social assessment at Adobe Mountain School was prepared in March of 1977, by Robert Goldsworthy, Psychology Intern, and noted the following, "Testing indicates that Tracy will use an inordinate amount of repression and denial in dealing with conflicts . . . He denied the presence of family conflict although two different tests suggested such conflicts were present in the home." Data from the testing also indicated that Tracy, ". . . is very immature for his age, that is, he fails to express attitudes and perceptions which are common for his age group."

37. A family evaluator, Ms. Titcomb, attempted to arrange an interview with Tracy's stepmother and father. All attempts to arrange an in-person interview were unsuccessful and the family evaluation was eventually based on a telephone interview with Wilma Cain.

38. A short term treatment program was ultimately recommended for Tracy, with a return home following treatment. Tracy was transferred to the Arizona Youth Center in Tucson,

Arizona for a four-month treatment program. Testing conducted at the Arizona Youth Center indicates that Tracy had: ". . .very deficient verbal abilities . . . reasoning skills, poor vocabulary and deficient verbal expression. Low reasoning and comprehension skills are reflected in Tracy's deviant social behavior in unstructured situations. [Tracy] attempts to present an overly optimistic picture of himself by denying problems."

39. Tracy was paroled home in August of 1977, at the conclusion of a four-month stay at the Arizona Youth Center. Prior to his placement at home, Tracy was tested and placed at grade 4.6 in reading and 6.5 in math. He was however, promoted to the 9th grade through the Arizona Youth Center.

40. The following month, March of 1978, Tracy's juvenile parole was revoked following his arrest for burglary and possession of stolen property. He was returned to the Arizona juvenile system with a placement at Young Acres. Tracy stayed at Young Acres only a few days before he and another boy ran away. Tracy was reportedly heading to California.

41. Two months later, Tracy was arrested in Yuma on the arrest warrant from Young Acres, and placed at the Arizona Youth Center again. As part of his treatment plan, Tracy reported a desire to live with his natural mother in California and to leave Yuma. By October of 1978, Tracy was released on parole to Percy and Wilma Cain in Yuma. Less than two weeks after Tracy returned home, his older brother Danny was sentenced to six years in the Arizona State Prison on burglary and robbery charges. Within the

month after Tracy returned home, his natural mother and a half-brother died at Jonestown.

42. Tracy managed to stay home for eight months following his release from the Arizona Youth Center. His parole was suspended in July of 1979 due to his involvement in two burglaries in Yuma. Tracy was arrested and held in custody at the Yuma County Juvenile Center to await disposition of his new offenses and parole violation. While in custody, Tracy assaulted a detention officer in the process of escaping. Tracy fled to California where he hoped to live with his mother, Ruthie Mae Cain.

43. In January of 1980 Tracy elected to return to Arizona to clear his warrant before he turned eighteen years old. Tracy was recommitted to the Arizona juvenile system, and transferred to Adobe Mountain School.

44. Dr. Richard Kapp, consulting psychologist to Adobe Mountain School conducted a neuropsychological assessment of Tracy as part of his evaluation and reported: "...Tracy had deficient verbal abilities and a limited fund of information...poor reasoning skills, poor vocabulary, and poor verbal expression. Difficulty understanding the meaning of what he hears, severe short term auditory memory impairment, faulty social judgment." Tracy also exhibited, ". . . underlying feelings of personal inadequacy, poor self-esteem."

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45. At Adobe Mountain, Tracy's case summary included an acknowledgment of his learning disabilities which were plaguing him in school, combined with his dull-normal IQ. Upon his return home in 1977, it was recommended that Tracy be placed in special education classes. The first time Tracy was released and sent home, this placement did not happen, and he drifted along in the mainstream curriculum in the local junior high school. Tracy would express an interest in school and a desire to continue to high school graduation, but demonstrate frustration in his inability to progress academically.

46. When Tracy was readmitted to Adobe Mountain School in early 1980, he tested at grade level 2.7 in Math, and 5.3 in Reading. He was 17 years old. Upon a second evaluation a month after his initial test, Tracy tested at 4.1 grade level in Math, and 4.8 in Reading. The evaluator Mickey Mast stated, "...a G.E.D. is not within close reach for him." The goal established for Tracy was remediation to sixth grade level.

47. A certified school psychologist who also evaluated Tracy during 1980 reported in his summary that Tracy had specific learning disabilities and "ongoing emotional problems" which have subsequently "retarded his academic progress." Further Tracy was diagnosed with a severe deficit of auditory memory which prevented him from following simple oral directions. Finally his diagnosis concluded that Tracy had a "possible borderline developmental disability."

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48. Tracy Cain was born into a chaotic and dysfunctional family. He was raised by a stepmother who was physically and emotionally abusive, while his natural parents were completely unavailable to him. Tracy idolized his father, who worked long hours and days away from home, thereby avoiding the very issues that made his family dysfunctional. Tracy's father did little to sustain and support Tracy, beyond providing a paycheck. Tracy's natural mother virtually disappeared from his life before he was three years old. Nonetheless, Tracy's attachment to this mother was enduring beyond her grave. Left to face a stepmother who beat him, humiliated him, and deprived him of any sense of a loving family, Tracy constructed a myth in order to survive. His myth included the constant refrain that everything was fine within his family. Tracy's need to have order in his world was so fierce, that in the face of constant upheaval, disruption and tumult he denied the death of his mother, the failings of his father, and the criminal careers of his brothers. To name the serious dysfunction of his family, would have been to acknowledge the disregard of his parents for his basic needs. Tracy faced parental beatings and humiliations, serious injury, abandonment, and his life long struggle with learning disabilities without adult support. These experiences occurred against a backdrop of widespread racial segregation in his community, alcoholism, criminal behavior - including prostitution, and homelessness within his immediate family.

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49. This combination of factors had longstanding and debilitating effects on his psychological development and cognitive and emotional functioning. Even as a child, Tracy Cain suffered with low self-esteem, extremely poor coping mechanisms, and distorted perceptions of his personal and social relationships. Tracy had very little insight into the loss and deprivation which characterized his early years. He reached adulthood as a hard-working young man, with few skills, a minimal education and only the very fragile construction of a "normal" life.

50. Tracy's family history of near slavery conditions as sharecroppers in Mississippi, the mental illness on his mother's side, his mother's and siblings' substance abuse, extreme educational deficits and learning impairments of Tracy himself, his history of abuse and loss, left Tracy extremely vulnerable.

51. Several historical facts strongly suggest that Mr. Cain may have been exposed to alcohol and other brain damaging drugs in utero. Family members describe Mr. Cain's mother as a woman who was "not a good mother," who like to "party" and who "refused to accept her responsibilities." Court records indicate the mother was arrested repeatedly for prostitution, and it is very likely that her prostitution was accompanied by alcohol and illicit drugs. She ultimately deserted her family while Mr. Cain was a small child and a divorce was granted to Mr. Cain's father on the grounds of desertion.

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52. Mr. Cain's mother's alcohol use predated his birth. The combination of Mr. Cain's appearance, coupled with the depth and breadth of his organic impairments, makes the diagnosis of Fetal Alcohol Syndrome (FAS), a diagnosis that fits both maternal history, physical findings, neurological findings, and the scientific literature.

53. The *Journal of the American Medical Association* discusses FAS in adolescents and adults in its April 17th, 1991 issue. Streissguth, Aase, et al note that "... The average IQ was 68, but the range of IQ's varied widely. Average academic functioning was at the second to fourth grade levels with arithmetic deficits most characteristic. Maladaptive behaviors such as poor judgment, distractibility, and difficulty perceiving social cues were common. Family environments were remarkably unstable. Fetal Alcohol Syndrome is not just a childhood disorder; there is predictable long term progression of the disorder into adulthood, in which maladaptive behaviors present the greatest challenge to management.

54. Mr. Cain's school records offer evidence that he suffers from an organic impairment such as fetal alcohol syndrome or fetal alcohol effect. He was labeled hyperactive early in elementary school and was "slow academically," "extremely talkative," and learning disabled in auditory reception. He performed in the lowest one percentile on standardized achievement testing, and his IQ was classified as "dull normal." Although none of these symptoms alone proves fetal alcohol

syndrome or effect, they are characteristic of children who were exposed to alcohol in utero.

55. Evidence also suggests that Mr. Cain became dependent on alcohol and psychotropic drugs early in his teen years. Friends report that he consumed nearly fatal quantities of PCP, alcohol, and cocaine as an adolescent. This kind of drug and alcohol use is frequently an attempt to self medicate for serious psychiatric disorders such as depression and post traumatic stress disorder. Clarence Wade, a contemporary and friend of Tracy's states that Tracy was constantly high on "sherm," (PCP). He notes that most of the Cain family were drug users. Even Wilma, Tracy's step-mother, was known to smoke crack. Tracy's brothers lived together in their own apartment, and Tracy would often visit them. Wade remembers that there was never any food present, only alcohol and drugs. Reports from friends that he habitually drank and used drugs excessively suggest that he was either intoxicated at the time of the offense or that he was in withdrawal from intoxicants at the time of the offense. Floyd E. Clements, who was present with Tracy on the night the Galloways were killed, states that he remembered drinking at least 12, but perhaps as many as 20 cans of beer. He said that everybody "smoked weed and drank beer that night."

56. Mr. Cain's cognitive functioning may also have been impaired by a series of head injuries he sustained. In addition to the earlier listed incidents of head trauma, he was subjected to repeated blows by his step mother during her physical assaults

on him. He also was assaulted by a group of other boys and hit on the head with a door. On another occasion he accidentally fell against a truck bumper and lost consciousness. These head injuries, combined with chronic ingestion of alcohol and drugs, can cause permanent brain damage. Under these facts it is reasonable to believe that Mr. Cain has brain damage that affected his behavior and/or mental functioning at the time of the crime.

57. Karen Bronk Froming, Ph.D., has conducted extensive neuropsychological testing with Mr. Cain and has determined that Mr. Cain has extensive neurological impairments in academics, memory, attention, problem solving, conceptualizing, as well as motor deficiencies. These cognitive deficits are severe enough to place Mr. Cain in the moderate range of global impairment.

58. This level of neurological impairment found by Dr. Froming is significantly different than an estimation of IQ, which only tests intellectual function. Mr. Cain does have very low IQ. However, IQ does not reflect just the types of neurological deficits that are seen by Dr. Froming's testing. The ways in which his cognitive deficits limit him have little, if anything, to do with the superficial material that Dr. Donaldson attempted to present. It is for that reason that a diagnosis of Fetal Alcohol Syndrome takes on such importance.

59. The psychological evaluation prepared by Dr. Donaldson prior to trial did not address several basic factors that should have been included in any mental health assessment of Mr. Cain.

Two of the most important known factors that influenced Mr. Cain's life are his cognitive impairments and the traumatic death of his mother during his adolescence. Neither one of them is mentioned in Dr. Donaldson's evaluation. The social history in the report is sparse and inadequate; it apparently is based solely on an interview with Mr. Cain and on information provided by the District Attorney's office rather than by defense counsel. One of the most glaring deficiencies in the history cited by Dr. Donaldson is its failure to refer at all to Mr. Cain's mother's death in Guyana and the unusual circumstances surrounding the event. This is significant because from all other accounts the macabre suicide-murder of his mother devastated Mr. Cain and his response to her death was irrational and delusional.

60. Dr. Donaldson's report erroneously implies that Mr. Cain was an average student and fails to note his serious "learning disabilities in auditory reception, auditory association, verbal expressiveness and short term auditory memory" documented in previous social assessments. One such report not referred to at all in Dr. Donaldson's evaluation was prepared by the Arizona Department of Corrections and concluded, "Some of Tracy's difficulties may have related to . . . his learning disabilities combined with an IQ in the dull-normal range." The scant school records which I have reviewed offer substantial information contrary to Dr. Donaldson's report. The results of standardized testing administered to Mr. Cain indicate he performed in the lowest one percentile, was "slow

academically" and was hyperactive. These consistent reports of intellectual impairment clearly spotlight the need for thorough neuropsychological testing accompanied by additional information from teachers and counselors about Mr. Cain's academic performance and behavior during is developmental years.

61. Dr. Donaldson administered an extremely limited battery of psychological tests to Mr. Cain as part of his pre-trial evaluation. These tests were wholly inadequate to assess cognitive functioning and brain dysfunction. He did not administer any of the several available and appropriate tests, such as the Wechsler Adult Intelligence Score - Revised (WAIS-R), aimed at determining Mr. Cain's intelligence quotient (IQ). Nor did Dr. Donaldson administer screening tests that can be relied upon to identify potential areas of brain dysfunction. The tests he administered, in fact, have been not been shown effective in performing this function.

62. Dr. Donaldson's report is also problematic because it states that he evaluated Mr. Cain's co-defendant, Mr. David Cerda, and incorporates findings from Mr. Cerda's evaluation into Mr. Cain's evaluation. Dr. Donaldson does not, however, give adequate details of his evaluation of Mr. Cerda to determine if it too suffers from some of the same flaws found in Dr. Donaldson's evaluation of Mr. Cain. Dr. Donaldson does not address the issue of his potential conflict in evaluating two persons charged with the same crime and incorporating the results of one evaluation into the other. It is unclear if Mr. Cerda

knew at the time of his evaluation by Dr. Donaldson that Dr. Donaldson would incorporate Mr. Cerda's statements into Mr. Cain's evaluation. Certainly, any statement made by Mr. Cerda should be viewed skeptically given the circumstances of the evaluation and should be independently corroborated before being accepted as fact.

63. Mr. Cain has significant psychiatric and neurologic dysfunction that affected his behavior at the time of the offense for which he has been sentenced to death. My review of Mr. Cain's records revealed several factors that have serious psychiatric consequences: his high risk for in utero exposure to alcohol and other neurotoxins; his abandonment by his mother and her later demise at Jonestown; the likely abuse and maltreatment by his stepmother; his documented learning disabilities and limited intelligence and his heavy use of mind altering drugs, some of which have seemingly permanent ill effects such as PCP.

64. His cognitive deficits preclude him from being able to follow both written and verbal material, and he does not possess the ability to focus for extended periods of time, which would be necessary in the type of trial that he had. It would also have been difficult for him to incorporate the material that was presented to him.

65. In summary, Mr. Cain was born into a life of poverty, isolation, racism, mental and neurological limitations. His native potential was profoundly limited by intrauterine assaults which occurred through a combination of alcohol and

inattentiveness. Those limitations make him, in my professional opinion, unable to rationally assist his attorney not only in the preparation of his defense, but also in his ability to knowingly and intelligently respond to waivers of his rights. These same limitations were never raised in mitigation in the penalty phase and are a dramatic departure from the wholly inadequate and contradictory material that was discussed at the penalty phase of his trial.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and that this declaration was executed in Stanford, California, on 8-1, 1997, 1997.

Jay M. Jackman M.D.
JAY M. JACKMAN, M.D.

DECLARATION OF RICARDO WEINSTEIN, Ph.D.

I, Ricardo Weinstein, declare as follows:

1. I am a psychologist licensed to practice in the State of California. I received a Ph.D. in Clinical Psychology from the International College in Los Angeles, California, and received a Post-Doctoral Certificate in Neuropsychology from the Fielding Institute in Santa Barbara, California. I am a member of the National Academy of Neuropsychology, American Neuropsychiatric Association, International Neuropsychological Society, and Division 41 of the American Psychological Association. My practice areas include clinical, neuropsychological, and forensic psychology. I am eligible for board certification by the American Board of Professional Neuropsychology.

2. I currently am in private practice in San Diego, California, where I specialize in clinical and forensic Neuropsychology. In addition to maintaining a private practice, I am a member of the San Diego County Superior Court panel of approved psychologists for criminal court referrals.

3. I have served as an adjunct professor at San Diego State University, and worked as a consultant in the Comer Program in elementary public schools for over eight years. I frequently lecture on issues of psychology and neuropsychological assessment as well as child abuse and neglect. I have lectured extensively in the areas of drug abuse and suicide prevention and Quantitative electroencephalography. I have presented papers on issues of neuropsychology and neuropsychological assessment, as well as on child abuse and neglect, at national and international scientific meetings and conferences, and have published articles on topics in neuropsychology in peer-reviewed journals. I have qualified as an expert witness in federal court and in state courts in California, Washington, Florida and Arizona. I have conducted court-appointed neuropsychological evaluations in California, Washington, Oregon, Arizona, New Mexico, and Florida.

4. Throughout my practice, I have conducted more than 300 neuropsychological and/or forensic psychological assessments. As part of these evaluations, I often have been asked to determine whether the individual meets the criteria for mental retardation. In making this determination, I apply the most recent diagnostic manual of the American Association on Mental Retardation (AAMR), AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS (10th Edition, 2002) (hereinafter "the 2002 AAMR Manual").

5. I was asked by federal habeas counsel for Tracy Dearl Cain to give an informed opinion as to whether Mr. Cain currently qualifies for the diagnostic label of "Mental Retardation." In addressing this question, I have: (a) reviewed the extensive medical, psychological and descriptive records that are available on Mr. Cain, (b) conducted an in-person interview with Mr. Cain, and (c) administered a test to measure Mr. Cain's Intelligence Quotient-(IQ), as well as reviewed a previous test administered by another neuropsychologist.

6. In determining if Mr. Cain qualified for a diagnosis of Mental Retardation, I examined whether he fit the three major criteria contained in the 2002 AAMR definitions: (1) significant subaverage intellectual functioning; (2) significant deficits in adaptive skills; and (3) the condition had to be manifested before the age of 18.[1] In addition to relying on test scores, I also

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[1] Because the DSM IV-TR standards are the same as the 1992 AAMR standards, my evaluation also meets the criteria set forth in the DSM.

considered available clinical information, both from my own observations and from the reports available to me. In determining eligibility for the diagnosis, I considered both the overall category of Mental Retardation, and the various AAMR sub-categories.

A. Mr. Cain Meets the Intellectual Criterion for Mental Retardation

7. On June 24, 2005, I tested Mr. Cain using the Stanford-Binet Intelligence Scale, Fifth Edition ("SB5"). The SB5 is an individually administered assessment of intelligence and cognitive abilities and is appropriate for individuals ages 2 to 85+. It yields Non Verbal IQ scores, Verbal IQ scores and a Full Scale IQ scores. This test is generally accepted in the psychological and neuropsychological communities as one of the best and most reliable measure. It consists of 10 subtests, all of which were administered to Mr. Cain. The test is constructed on the theoretical model known as the Catell-Horn-Carroll theory of intellectual abilities. This model considers five factors as contributing to the overall cognitive abilities of an individual. These factors are: 1) Fluid Reasoning or Fluid Intelligence, 2) Knowledge or Crystallized Knowledge also known as Crystallized Intelligence, 3) Quantitative Reasoning or Quantitative Knowledge, 4) Visual-Spatial Processing and 5) Working Memory.

8. Mr. Cain obtained the following scores in the SB5:

IQ and Factor Index Score Results

	Sum of Scaled Scores	Standard Score	Percentile	95% Confidence Interval	
				Score Range	Percentile
IQ Scores					
Full Scale IQ (FSIQ)	57	71	3	68-76	2-5
Nonverbal IQ (NVIQ)	24	66	1	62-74	1-4
Verbal IQ (VIQ)	33	78	7	73-85	4-16
Factor Index Scores					
Fluid Reasoning (FR)	13	79	8	73-89	4-23
Knowledge (KN)	13	80	9	74-90	4-25
Quantitative Reasoning (QR)	13	81	10	75-91	5-27
Visual Spatial (VS)	11	74	4	68-84	2-14
Working Memory (WM)	7	63	1	58-74	0.3-4

9. These findings on the SB5 are consistent with the prior testing results which I have reviewed. Mr. Cain's intelligence quotient was previously tested in February 1997 by Dr. Karen Froming. Dr. Froming administered the Wechsler Adult Intelligence Scale Revised (WAIS R) to Mr. Cain. She computed a score of 75, which falls within the range of mental retardation, ranking approximately in the bottom second percentile of the population. The WAIS-R was last updated in 1981 and was superseded by the WAIS-III, published in 1997. The scores found by Dr. Froming on the WAIS-R, as a result of the Flynn effect and the 16 years between the norming and the use of the test instrument, are likely 3 to 6 points higher than Mr. Cain's true IQ. The Flynn Effect is a well studied phenomenon that demonstrates that the IQ scores of a population increase over time as a result of which tests of intelligence become obsolete and require revisions and renormalization for adequate standardization and reliability of the testing instrument. *See*, James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 Psych. Bull. 171-91 (1987 No. 2). The Flynn effect posits a shift in intelligence of approximately 3.3 points per decade. Considering Mr. Cain's WAIS-R score in light of the Flynn effect, it is likely that his scores on the WAIS III in the range of 69-72.

10. Therefore, on the two properly administered tests of IQ, Mr. Cain's scores place him in the mild mental retardation range and demonstrate a consistency of effort and performance further enhancing the confidence in the results.

B. Mr. Cain's Social Deficits Meet the Adaptive Behavior Deficits Criterion for Mental Retardation

11. Mr. Cain meets the criterion for adaptive behavior deficits. The records that I have reviewed regarding Mr. Cain provide consistent evidence of his significant deficits in conceptual, social and practical skills.

a. March 21, 1977: A personality and social assessment was conducted by Robert Goldsworthy, Psychology Intern at Adobe Mountain School. He described Mr. Cain's test data as indicating that he is "very immature for his age, that is, he fails to express attitudes and perceptions which are common for his age group."

b. April 4, 1977: Richard Flage of Adobe Mountain School, provided a diagnostic summary of Mr. Cain. Mr. Flage found that Tracy Cain "...testing indicates very deficient verbal abilities: a limited fund of information; deficient reasoning skills; poor vocabulary and deficient verbal expression; difficulty understanding the meaning of what he hears; severe short-term auditory memory impairment..." He concluded that "[Tracy Cain] tends to let others do his thinking and decision making." In addition to assessing social deficits, Mr. Flage evaluated Mr. Cain's intellectual functioning. Although he did not provide the IQ test results, he found that the scores indicated significant learning disabilities in verbal learning skills. He also determined that Mr. Cain, who was then 14 years old, was reading at 4.5 grade level and math at 3.5 grade level.

c. May 2, 1977: John Del Bene, one of Mr. Cain's counselor at the Arizona Youth Center, developed a Treatment Plan. In his report, he summarized testing which indicated that Mr. Cain possessed "very deficient verbal abilities...reasoning skills, poor vocabulary and deficient verbal expression." Despite his adaptive deficits, Mr. Bene found that he "present[ed] an overly optimistic picture of himself by denying problems."

d. July 12, 1977: Frank E. Esquer, Evaluator at the Arizona Youth Center issued a document entitled, " Pre-Home Investigation Request/Progress Summary." He concluded that Mr. Cain lacked adequate problem-solving and coping skills.

e. February19, 1980: Richard Kapp, Ph.D., conducted a

neuropsychological assessment of Mr. Cain. Dr. Kapp found that Mr. Cain indicated "poor reasoning skills, poor vocabulary, poor verbal expression." Dr. Kapp also concluded that Mr. Cain had "[d]ifficulty understanding the meaning of what he hears, severe short term auditory memory impairment, faulty social judgment." Mr. Cain's IQ score measured at 73 on the Peabody Picture Vocabulary Test (PPVT).

f. March 5, 1980: An evaluation by Mickey Mast, Evaluator at Adobe Mountain School, reflected that Mr. Cain was reading at a 4.8 grade level," which was approximately 7 years below his last grade in school. Ms. Mast opined that "[Mr. Cain] needs a lot of remediation to bring his reading up to GED level. GED not within close reach for him."

g. March 6, 1980: Individualized Education Program devised by Vicki Vance, Evaluator. Ms. Vance concluded that Mr. Cain math ability was just slightly above a 4th grade level (4.1). Her goal was to raise his math through remediation to a 6th grade level.

h. March 8, 1980: Michael D. Fidler, Educational Psychologist, conducted a Specific Learning Disabilities Evaluation. Mr. Fidler concluded that Mr. Cain had specific learning disabilities and ongoing emotional problems. Mr. Fidler also diagnosed him with a severe deficit of auditory memory which prevents him from following simple oral directions. He also speculated that Mr. Cain might have a possible "borderline developmental disability."

i. March 10, 1980: Majil Fausel, Social Worker at Adobe Mountain prepared a social casework summary on Mr. Cain. Ms. Fausel recommended that Mr. Cain be enrolled in special education classes. Ms. Fausel also found that Mr. Cain had made very little progress in terms of remediation in reading and math since being tested in 1977. In Ms. Fausel's view, "Tracy [Cain] in fact may be more swayed by peer influences than he is willing to admit."

j. In a declaration dated March 15, 1997, Ms. Majil Fausel stated, "Tracy really wanted to do well at Adobe Mountain but did not understand how to accomplish that. His learning disabilities played a part in that, but also it was a coping strategy for him. Like so many things in his presentation of himself, Tracy wanted to look 'okay' or 'normal' but there was nothing to sustain that appearance beneath the surface."

12. These documents provide strong evidence of Mr. Cain's striking social and educational impairments from childhood onward.

C. Mr. Cain Meets the Developmental Criterion for Mental Retardation

An examination of the records available for Mr. Cain reveals that the onset of Mr. Cain's intellectual and social deficiencies occurred before he attained the age of 18.

13. Based on my expertise and experience in the field of Mental Retardation, and the data I had available to me, I can draw the following conclusions with a reasonable degree of scientific certainty:

14. From childhood through the time of his current incarceration, Mr. Cain qualified for a diagnosis of mild Mental Retardation. I.Q. scores fell at or below the 70 to 75 range, which meets the AAMR definition of intellectual functioning two standard deviations or more below normal. Moreover, Mr. Cain's adaptive functioning met the AAMR standards for Mental Retardation.

15. Mr. Cain meets the developmental criteria for the diagnosis of Mental Retardation, in that his intellectual and adaptive problems first clearly manifested themselves during early childhood.

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16. Therefore, it is my opinion that Mr. Cain is mentally retarded.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 16 day of July, 2005.

Ricardo Weinstein, Ph.D.

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June 24, 2006

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Senior Deputy District Attorney
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Ventura, CA 93009

RE: In re Tracy Dearl Cain
CDC No. D91800
Ventura Co. Superior Court No. CR22297
California Supreme Court No. S116805

Dear Mr. Schwartz:

Pursuant to your request for a comprehensive assessment, this examiner evaluated Mr. Tracy Dearl Cain to assess his cognitive and adaptive functioning in order to render an opinion concerning mental retardation.

The evaluation consisted of a clinical interview, anamnesis, mental status examination, record review, and psychological testing. All facets of the interview and testing were performed by this examiner. Mr. Cain was evaluated on 03/18/06 and 03/25/06 at the Ventura County Jail, Ventura, California. Mr. Cain was evaluated on 05/01/06 and 05/02/06 at San Quentin State Prison, San Quentin, California. In preparation for this report, this examiner reviewed several volumes of records including, but not limited to, the following documentation.

1. Criminal History Transcript.
2. Undated Institutional Staff Recommendation Summary.
3. Mr. Cain's Medical File D-91800.
4. Mr. Cain's Central File D- 91800.
5. Mr. Cain's Certificate of Life Birth.
6. Mr. Cain's Social Security Earnings Information.
7. Mr. Cain's School Records (Exhibit 43).
8. Mr. Cain's Juvenile Criminal History.
9. Chanda Smith v. LAUSD Consultant's Report, October 1995.
10. Correspondence dated 01/12/87 from Paul Lozano, Lozano Painting Company.
11. Correspondence dated 01/06/03 from Federal Public Defender to Deputy Attorney General.

12. Transcript of interview of Mr. Cain by Detectives Billy Tatum and John Garcia on 10/22/86.
13. Report of Probation Officer dated 07/12/88 & 06/17/86.
14. Ventura Police Department Arrest Report dated 09/14/86.
15. Undated "To Whom It May Concern" and written letter from Vickie Mehaffie.
16. Correspondence dated 06/06/88 from Hortense Coats to Judge Bruce Thompson.
17. Correspondence dated 07/06/88 from Tina Casso to Judge Thompson.
18. Correspondence dated 07/88 from Dee Crawford to Judge Thompson.
19. Correspondence dated 06/14/88 from Jeanie Salyers to Judge Bruce Thompson.
20. Yuma, AZ, Follow-Up Investigation Report dated 12/11/87 by David R. Stone, Investigator.
21. Psychological Evaluation by Ronald K. Siegel, Ph.D., Inc., dated 05/09/88. (Exhibit 46).
22. Psychological Evaluation by Theodore S. Donaldson, Ph.D., dated 02/26/87. (Exhibit 46).
23. Arizona Department of Corrections Certificate of Absolute Discharge dated 11/08/84.
24. Arizona Department Of Corrections Psychological Reports to Medical Staff dated 03/26/84 & 03/25/82.
25. Order of Commitment, Juvenile Court, Superior Court, State of Arizona, dated 01/23/80.
26. Juvenile Court Petition, Yuma County, Arizona, dated 10/01/79.
27. Arizona Department of Corrections, Division of Parole, Parole Report dated 05/22/78.
28. Juvenile Complaint/Referral, Yuma County, Arizona, dated 05/16/78.
29. Order of Commitment, Juvenile Court, Superior Court, State of Arizona, dated 02/23/77.
30. California DMV records pertaining to the following members of the Cain family: Jason Lamar, Tiffany Adele, Durez Onshea, Candice N., Percy Kato, Darnell (Larry), Wilma Jean, Valender Eugène, and Gabriel Jemal Cain. DMV records pertaining to the following members of the Cain family were also reviewed. Cantana Yvette Andersen, Vernice Nell Haynes, Brenda Lee Cain, Janice René Fortune, and Anita Parker.
31. Yuma School District - Gila Vista Junior High School academic record, 1975-1976.
32. Yuma School District - Gila Vista Junior High School academic record, 1976-1977.
33. The State of Arizona, Department of Corrections, Youth Parole Plan dated 12/18/80.
34. Adobe Mountain School Administrative Report dated 11/08/80.
35. Adobe Mountain School Monthly Summary dated November 1980.
36. Adobe Mountain School Updated Accumulative Report dated 10/14/80.
37. Adobe Mountain School Diagnostic Treatment Plan dated 03/13/80.
38. Adobe Mountain School Social Casework Summary dated 03/10/80.
39. Adobe Mountain School Specific Learning Disabilities Evaluation dated 03/08/80.
40. Adobe Mountain School Psychological Evaluation dated 02/19/80.
41. Adobe Mountain School Diagnostic Staffing Summary dated 04/04/77.
42. Adobe Mountain School Education Evaluation dated 03/28/77 & 04/05/77.
43. Adobe Mountain School Family Evaluation dated 03/27/77.
44. Adobe Mountain School Psychological Evaluation dated 03/23/77.
45. Adobe Mountain School Social Casework Summary dated 03/11/77.
46. WAIS-R scoring summary sheet from Dr. Karen Bronk Froming dated 02/26/97.
47. Psychological test data from Dr. Karen Bronk Froming, Ph.D. (DISC 1-99).
48. Psychological test data from Dr. Ricardo Weinstein, Ph.D. (DISC 100-131).
49. Report of Probation Officer dated 07/12/88.
50. Transcript of interview of Tracy Cain by television reporter Larry Good.
51. Work records from Manpower Temporary Services.

52. Declaration of Dr. Ricardo Weinstein, Ph.D., dated 07/16/05.
53. Declaration of Anita Parker dated 05/18/99.
54. Declaration of Fausto Poza dated 01/07/98.
55. Declaration of Theodore S. Donaldson, Ph.D., dated 01/07/98.
56. Declaration of Ruth Zitner, Psy.D., dated 10/27/97.
57. Declaration of Jay M. Jackman, M.D., dated 10/01/97.
58. Declaration of Karen Bronk Froming, Ph.D., dated 09/10/97.
59. Declaration of Clarence Wade dated 09/10/97.
60. Declaration of Mack Arthur Blair signed 09/10/97.
61. Declaration of Richard Clayton dated 07/22/97.
62. Declaration of Majil Fausel, M.A., dated 05/15/97.
63. Declaration of Larry Darnell "Danny" Cain dated 04/01/1997.
64. Declaration of Brenda Cain Johnson dated March 1997.
65. Declaration of Paul Lozano dated 04/01/1993.
66. Telephone interview with Sean Sampson by Investigator David R. Stone dated 01/14/88.
67. Telephone interview with Sean Sampson by Investigator David R. Stone dated 01/14/88.
68. Interview of Collins Blair by Investigator David R. Stone dated 01/11/88.
69. Interview of Arthur Bivens by Investigator David R. Stone dated 01/07/88.
70. Interview of Hope Sanchez by Investigator David R. Stone dated 01/07/88.
71. Interview of Gonzalo and Mark Pina by Investigator David R. Stone dated 01/06/88.
72. Interview of Vernice Roberts by Investigator David R. Stone dated 10/27/87.
73. Follow-Up Interview of Anita Haynes-Parker by investigator David R. Stone dated 10/26/87.
74. Interview of Wilma Cain by Willard Wiksell, Esq., & Michael Jarosz dated 02/17/87.
75. Interview of Rick Albis by Investigator David R. Stone dated 12/04/86.
76. Interview of Ulysses A. Mendoza by Investigator David R. Stone dated 11/18/86.
77. Interview with Richard Gifford by Investigator David R. Stone dated 01/15/88.
78. Interview with Richard Willis by Investigator David R. Stone dated 01/25/88.
79. Interview of David Cerda, Jr., by Investigator David R. Stone dated 03/29/88.
80. Interview of Ulysses Mendoza by Investigator David R. Stone dated 04/14/87.
81. Interview with Mr. Bill Miller by Investigator David R. Stone dated 04/13/87.
82. Interview of Val Cain by Investigator David R. Stone dated 11/17/86.
83. Interview of Urissa Moten by Investigator David R. Stone dated 11/19/86.
84. Interview of Anita Haynes-Parker by Investigator David R. Stone dated 11/24/86.
85. Interview of Floyd Clements by Investigator David R. Stone dated 11/18/86.
86. Interview of Kathy Lazoff by Investigator David R. Stone dated 11/18/86.
87. Follow-up interview of Valander Cain by Investigator David R. Stone dated 06/07/88.
88. Medical Records, Ventura County Medical Center re Anita Haynes-Parker David 10/28/87.
89. Interview of David Cerda by Detectives Billy Tatum and John Garcia dated 10/22/86.
90. Presentence Report dated 02/19/82.
91. Arrest Report dated 10/13/81.
92. Olsen's Security Department Incident Report dated 02/08/82.
93. Offense and Incident Report dated 01/10/82.
94. Offense and Incident Report dated 02/18/81.
95. Juvenile Complaint/Referral, Yuma County, Arizona, dated 09/26/79.
96. Supplement Case Report, Yuma Police Department, dated 09/26/79.

97. Juvenile Complaint/Referral, Yuma County, Arizona, dated 07/11/79.
98. Offense and Incident Report dated 07/10/79.
99. Offense and Incident Report dated 05/04/79.
100. Pre-Home Investigation Request/Progress Summary dated 10/11/78.
101. Arizona Youth Center Treatment Plan Review dated 09/08/78.
102. Arizona Youth Center Administrative Report dated 08/08/78.
103. Arizona Youth Center Treatment Plan Review dated 07/28/78.
104. Arizona Youth Center Administrative Report dated 06/30/80.
105. Offense and Incident Report and Supplement Case Report dated 05/16/78.
106. Supplement Case Report, Yuma Police Department, dated 02/16/78.
107. Supplement Case Report, Yuma Police Department, dated 02/15/78.
108. Juvenile Complaint/Referral, Yuma County, Arizona, dated 02/15/78.
109. Juvenile Complaint/Referral, Yuma County, Arizona, dated 12/19/77.
110. Offense and Incident Report and Supplement Case Report dated 12/19/77.
111. Offense and Incident Report, undated, Stamped 001123.
112. Incident Report dated the 09/28/79.
113. Court testimony of Ralph Sheridan Bailey.
114. Court testimony of Anita Parker dated 01/26/88.
115. Court testimony of Vernice Roberts.
116. Court testimony of Virginia Fontes dated 01/27/88.
117. Transcript of court proceedings dated 05/13/88.
118. Transcript of court proceedings dated 05/12/88.
119. Excerpts from Informal Response to Petition for Writ of Habeas Corpus.
120. Excerpts from Petition for Writ of Habeas Corpus, Volume 1.
121. Excerpts from Respondent's Brief.
122. Excerpts from The State of Arizona versus Mack Arthur Blair, Robert Ross Jr., Tracy Cain.
123. People versus Tracy Dearl Cain, Transcript No. S006544. Supreme Court of California.
124. Return to Petition for Writ of Habeas Corpus; Points and Authorities.
125. Darnel Cain Interview by Willard Wiksell, Esq., and Michael Jarosz, Investigator.

IDENTIFYING DATA

Mr. Tracy Dearl Cain is a 43 year-old African-American male convicted on 04/27/88 and 05/02/88 of two counts of first-degree murder, with the special circumstances of multiple murder, murder during a robbery (two counts) and murder during an attempted rape, found to be true. On 07/12/88, the Superior Court entered a judgment of death. The crime occurred on or about 10/18/86. Mr. Cain was arrested and has been incarcerated since 10/22/86. He has been housed at San Quentin State Prison, San Quentin, California, for the past 19 years.

Prior to his incarceration, Mr. Cain was living with his 43 year-old father, Percy Cain, and Percy Cain's 26 year-old wife in Ventura, California. Mr. Cain stated that, although he has been listed as having completed 11 years of school, "The only grades I really completed were kindergarten through sixth. From the seventh to the twelfth, I never completed any of those classes. They just passed me on to the next grade."

Mr. Cain was the primary informant for this report and provided most of the information contained in this report. His statements were substantiated via record review and so noted in each section below. The interviews were conducted in the Ventura County Jail, Ventura, California and San Quentin State Prison, San Quentin, California.

SYMPTOMS ELICITED AT TIME OF INTERVIEW

Mr. Cain denied significant psychiatric symptomatology. His sleep is fair as he averages only four hours per night. Mr. Cain noted he has maintained this scheduled for approximately 20 years. He described his appetite as fair with a corresponding 10-pound weight loss in the four months prior to this assessment. Mr. Cain noted that his appetite loss coincided with the execution of Stanley "Tookie" Williams. He described his energy level as fair as well. Attention and concentration skills were reported to be mildly impaired. Mr. Cain denied a history of anxiety or panic attacks. He also denied obsessive-compulsive behaviors or rituals. Mr. Cain further denied suicidal or homicidal behavior or ideation.

During the first set of interviews on 3/18/06 and 3/25/06, Mr. Cain was noticeably sad and tearful. He stated that the site of his detention, Ventura County Jail, brought back painful memories. "This was the last place I saw my father and my brother alive. My brother came to my trial. They both died in 1992, six months apart. They are buried near here. Thursday was the first chance to say goodbye to them. I think about how I broke my father's heart. I misrepresented my parents by the things I did. I focus on my dad and it's a heartbreaker. It's too much." Mr. Cain became tearful on several occasions during these interviews. Mr. Cain added, "I just didn't listen. I took everything and everybody for granted. I was on drugs. It was stupid. It was all about getting money to continue a drug binge. By far, the lowest point of my life."

Mr. Cain denied new or additional symptoms during the remaining evaluation sessions. During the 05/01/06 session in San Quentin State Prison, Mr. Cain expressed how emotional it was for him during the Ventura County interviews in March and how helpful they had been for him in terms of dealing with the death of his father and brother.

MEDICAL HISTORY

Mr. Cain could not recall the date of his last comprehensive medical evaluation. He stated that approximately one or two years ago he was hospitalized due to a bleeding ulcer. He had been taking aspirin every day since 1995. The bleeding ulcer resolved after Mr. Cain discontinued the daily aspirin regimen. Mr. Cain is not taking medication at this time. He previously received one prescription for Novocaine while imprisoned at San Quentin.

Mr. Cain initially denied significant past or present medical problems. During another interview he emphasized multiple falls and subsequent head trauma. Mr. Cain reported good health from early childhood through present-day. He qualified this statement by reporting "a lot of nosebleeds and I fell a few times." Mr. Cain required one trip to the hospital during childhood due to a nosebleed.

Mr. Cain provided detailed information concerning head trauma. He mentioned the head trauma incidents on several occasions and expressed his concern that these incidents may have ultimately affected his overall behaviors. At age 5 or 6, a bedroom closet door fell on his head. Mr. Cain offered for review two, 1-inch indentations on the left side of his scalp. Mr. Cain believes he may have lost consciousness. "I seen a white light, I remember my father picking me up, then I don't remember." Mr. Cain does not know whether he went to an emergency room, required sutures, hospitalization, et cetera.

At age 9, Mr. Cain fell from a brick wall approximately 25 to 30 feet high and landed on his head. Mr. Cain offered for review a small indentation on the left side of his scalp above his left ear. His older brothers observed the fall and carried him to the family home. "I don't remember anything. But I wasn't hospitalized. Just ice on my head."

At age 11, Mr. Cain lost control of his bicycle while racing a friend and flipped over twice, chipping three upper front teeth and scraping his hands and knuckles. He did not lose consciousness, did not see a physician, and did not go to an emergency room.

At age 11 or 12, an older male threw a brick at Mr. Cain from a distance of about 5 feet and hit him on the back of his head. Mr. Cain went home and did not seek or require medical treatment.

At age 11, Mr. Cain fell in a ditch outside of his maternal grandmother's home in Tulsa, Oklahoma. The family was celebrating July 4th and, while lighting fireworks, Mr. Cain was accidentally pushed backwards into a ditch. He suffered abrasions to his head and arms but did not seek or require medical attention.

At age 12, Mr. Cain flipped his bicycle and suffered bruises on his head and knuckles. He did not lose consciousness and did not seek or require medical attention.

According to the information filed in the Petition for Writ of Habeas Corpus, Mr. Cain experienced several childhood head injuries (Page 35). These included the ditch incident that occurred on July 4 in Tulsa, Oklahoma and the bicycle accident that occurred at age 12. Neither injury required 911 assistance nor emergency room treatment, neurology consultation, sutures, surgery, or hospitalization.

A review of Mr. Cain's San Quentin State Prison Medical File did not reveal significant medical problems. Mr. Cain has been treated with antibiotics, pain medicine, and blood pressure medication in the past. He has been evaluated in the past for bradycardia, possible vasovagal attack, and treated for GI bleed, follicular abscesses, pharyngitis, and flu symptoms. Mr. Cain has never been in acute medical distress requiring emergency intervention or extended hospitalization in an acute unit. Mr. Cain consented to preventive tuberculosis drug treatment on 07/13/92.

A Physician's Progress Notes entry dated 05/24/04 diagnosed hypertension. Mr. Cain was placed on Hydrochlorothiazide 25 mg per day. There was one 'near faint' episode suggesting a possible

vasovagal attack in December 2004. An ophthalmology consult dated 06/04/04 evaluated nearsightedness and recommended reading lenses. Mr. Cain was scheduled for surgical repair of left inguinal hernia on 12/13/02. Records do not indicate whether or not Mr. Cain underwent surgery and/or if this condition remains active.

A consultation dated 11/19/04 from Marin General Hospital was precipitated by Mr. Cain's complaint of a near faint episode on the morning of admission. He never lost consciousness, did not have chest pain, nausea, or vomiting. A review of his systems revealed no chest pain, no dyspnea, no headache, no visual disturbance. No dysuria, frequency, or urgency. A vasovagal attack was suspected. A stress echocardiogram performed on 11/19/04 yielded negative results. Mr. Cain was discharged with a finding of Near Fainting: Uncertain Cause. He was advised to return to the hospital if symptoms reappeared or his condition worsened.

Mr. Cain provided written consent on 07/14/05 for Oral Surgery to extract teeth #29 on 07/14/05. Mr. Cain provided similar consent to surgery for another tooth extraction (#18) on 10/12/04. Mr. Cain underwent blood transfusion on 01/04/96 following a consultation that revealed marked anemia. Physical examination revealed a well-developed black male in no acute distress.

The Declaration of Larry Darnell "Danny" Cain described Mr. Cain's July 4th incident in which he fell into a ditch while visiting in Tulsa, Oklahoma. Larry Cain also recalled a bicycle incident in Gardena in which Mr. Cain suffered head trauma. Neither event resulted in a trip to an emergency room or the need for 911 intervention.

The Declaration of Jay M. Jackman, M.D., dated 10/01/97 raised the issue of Fetal Alcohol Syndrome (FAS). Dr. Jackman further opined that Mr. Cain's school records suggested an organic impairment such as fetal alcohol syndrome or fetal alcohol affect. Dr. Jackman also reported Mr. Cain's dependency on alcohol and psychotropic drugs early in his teen years. According to Dr. Jackman, "Friends report that he consumed nearly fatal quantities of PCP, alcohol, and cocaine as an adolescent." Dr. Jackman described the Cain family, including stepmother Wilma Cain, as "drug users." Dr. Jackman speculated that the substance abuse and series of head injuries most likely caused permanent brain damage. Dr. Jackman reviewed the evaluation performed by Dr. Theodore S. Donaldson in 1987 and challenged Dr. Donaldson's findings. Dr. Jackson concluded that Dr. Donaldson did not conduct a thorough evaluation.

The medical history and medical records reviewed by this examiner did not include diagnoses of fetal alcohol syndrome, fetal alcohol affect, alcohol/drug dependency, or significant brain damage. The only mention of brain damage or neurological impairment was by defense expert Dr. Karen Bronk Froming, Ph.D., in her 1997 report.

Mr. Cain did report that he was the victim of a stabbing incident in 1985. "I let this one guy sell this crack for me while I went to work. While I was gone, he sold my girlfriend's brother-in-law a $20 rock of cocaine for $150. When I got home back from work she came and told me he beat her brother-in-law out of some money. So I told her don't worry. So went to my homeboy's house. He was in the kitchen table cutting up rocks of Coke with some knives and my girlfriend shows up. She tried to attack my homeboy. I stopped her and told her I'd take care of her

brother-in-law. She left, but took a knife. So we went back to her house to pay her brother-in-law, to pay him back his $30. I told homeboy to stay in the car. When I got out of the car my girlfriend, she approaches, my homeboy gets out of the car behind me, she tried to hit him, I thought, but she was actually trying to stab him. She cut me across my nose. I tried to hold her back, I didn't know she was stabbing. When I got into my car, I realized she cut me. Then as I was driving home I stopped at a gas station and found out I was cut. I went to the ER and told them I was jumped."

In this event, Mr. Cain managed to avoid serious injury, defend his friend, drive a motor vehicle away from the scene, discover injuries, drive himself to an emergency room, get medical assistance, and develop a story designed to protect himself, girlfriend, and homeboy. These behaviors do not support a finding of mental retardation.

PSYCHIATRIC HISTORY

Mr. Cain denied inpatient or outpatient psychiatric treatment. He further denied referral to a mental health professional during childhood or adolescence. When Mr. Cain was asked to describe himself using five adjectives, he responded, "I'm still trying to figure out who I am. I could be affable. You know, I'm still trying to figure myself out. I never even gave that a thought." Mr. Cain eventually described himself in the following manner. "Easy-going, affable, mind my own business, standoffish, peaceful." He later referred to himself as "A person with influence over others: disruptive gang members (Crips), shot callers."

Mr. Cain was also asked to consider how he would have described himself during his adolescent years. He responded, "Confused, no direction, upset a lot, selfish, scared, but not sure."

Mr. Cain denied a family history of suicide, homicide, mental illness, depression, mania, and sociopathy. One brother died from a drug overdose. Mr. Cain's mother, one sister, and three brothers have been imprisoned in the past.

Dr. M. Lyons, Ph.D., San Quentin State Prison Staff Psychologist, evaluated Mr. Cain on 08/21/90, 05/22/90, and 02/22/90, as part of a routine, 90-day, brief clinical interview to assess adaptive functioning and found no evidence of psychosis, organicity, or serious psychological impairment in social functioning.

A psychiatry consult dated 12/28/95 found no major mental disorder. Mr. Cain declined to respond to interviews attempted by Dr. J. Geiger, M.D., for purposes of completing 90-Day Reviews on 04/06/93, 01/12/93, and 10/19/92.

PSYCHOLOGICAL EVALUATIONS

The Declaration of Dr. Ricardo Weinstein, Ph.D., dated 07/16/05 provided the following scores obtained on the Stanford-Binet Intelligence Scale, Fifth Edition:

IQ Scores:	Sum of Standard Scores	Standard Score
Full Scale IQ:	57	71
Nonverbal IQ:	24	66
Verbal IQ:	33	78

Dr. Weinstein did not discuss alternative explanations for Mr. Cain's low performance. He did not address intratest scatter within each subtest and did not discuss the possible impact of Mr. Cain's family dysfunction, substance abuse, truancy, reading disability, and motivational issues on school performance, academic achievement, and subsequent test performance in general. Dr. Weinstein also failed to administer at least one other measure of intelligence. In complex cases, it is best to administer several measures of intelligence for the following reasons. The ideal situation would be to obtain near similar scores across several measures of intelligence. Individuals with mental retardation, for example, typically function below normal independent of the test used for the assessment. There is rarely any significant difference within or across tests. This is due to the fact that individuals with mental retardation have essential cognitive inefficiency. That is, they are unlikely to function better no matter what the circumstance. In cases where there is considerable variance across test scores, mental retardation is less likely and something other than essential cognitive inefficiency is at play. This inconsistency occurs most frequently among individuals who are not mentally retarded. Test performance and subsequent scores are impacted by a variety of internal and external factors. Unfortunately, Dr. Weinstein elected to formulate his expert opinion on the basis of only one measure of intelligence.

Dr. Weinstein administered the Wide Range Achievement Test Revision 3, Blue Form. The photocopy of the protocol provided for review was not legible.

Dr. Weinstein did not administer a measure of adaptive functioning. A comprehensive assessment of adaptive functioning is required in order to make a diagnosis of mental retardation. Dr. Weinstein did not address this prong in making his final determination.

In summary, Dr. Weinstein's report is not complete for purposes of opining about mental retardation. Test scores do not necessarily support a diagnosis of mental retardation. Dr. Weinstein failed to take into consideration the multiple factors that might have contributed to Mr. Cain's poor performance and low scores. These factors include malingering, secondary gain, poor academic performance, learning disabilities, lack of motivation, test taking anxiety, truancy, substance abuse, and delinquency. Additionally, Dr. Weinstein failed to assess Mr. Cain's adaptive functioning, which is required in order to make a diagnosis of mental retardation.

The Declaration of Dr. Karen Bronk Froming, Ph.D., dated 09/10/97 yielded the following information. Dr. Froming found a moderate degree of brain impairment as measured by the Halstead Reitan impairment index of 0.6. Dr. Froming concluded that with Mr. Cain's particular brain dysfunction he would "... have had difficulty quickly comprehending the meaning of what was said, to have quickly responded to the material and that these combined deficits would make it difficult for him to assist his counsel at various points in his case." Mr. Cain obtained the following IQ scores on the Wechsler Adult Intelligence Scale-Revised:

Verbal: 74 Performance: 79 Full Scale: 75
Dr. Froming did not administer the Object Assembly subtest, which may have served to lower the Performance and Full Scale IQ scores. Although the Wechsler allows for prorating a particular subtest when it is not administered, the problem with this scoring practice is that the prorated score is typically an average of the administered subtests. This becomes problematic when the subject has significant scatter. For example, if Mr. Cain has scored higher than the average of the other four subtests, this would have had dramatic effect in the final IQ scores.

Dr. Froming concluded that these scores placed Mr. Cain within the Borderline range of intellectual functioning. Dr. Froming did not discuss the impact of Mr. Cain's reading disability on his test performance and subsequent IQ scores and did not provide alternative explanations for his poor test performance. More specifically, Dr. Froming failed to discuss how secondary gain, learning disabilities, family dysfunction, low motivation, dysfunctional family, substance abuse, truancy, poor effort, and a culturally impoverished family environment may adversely impact test performance and subsequent scores.

Dr. Froming administered the Wide Range Achievement Test Revision 3 and obtained the following test results:

	Standard Score	Percentile	Grade
Reading:	96	39	High School
Spelling:	79	8	Sixth Grade
Arithmetic:	62	1	Third Grade

These scores were almost identical to the test results obtained by this examiner during this most recent assessment (Beliz Report, Page 37). Test results do not suggest mental retardation and are more consistent with learning disabilities.

There was no data submitted for review to suggest that Dr. Froming evaluated Mr. Cain's adaptive level of functioning, which is required in order to make a diagnosis of mental retardation. Absent this evaluation and assessment, Dr. Froming's report is, at best, incomplete for purposes of rendering an expert opinion on the issue of mental retardation.

In summary, the evaluations performed by Dr. Weinstein and Dr. Froming are inadequate for purposes of providing an expert opinion concerning mental retardation. The diagnosis requires an assessment of both cognitive and adaptive functioning. The diagnosis also requires the examiner to differentiate, when necessary, genuine inability from problem or maladaptive behavior. These issues were not addressed by either expert, thereby rendering their final conclusions inconclusive for purposes of making an informed opinion about mental retardation. It is also noteworthy that Dr. Froming and Dr. Weinstein were the only evaluators to conclude that Mr. Cain has mental retardation.

The Psychological Evaluation dated 11/14/89 performed by Dr. M. Lyons, Ph.D., San Quentin State Prison Staff Psychologist, diagnosed Psychoactive Substance Abuse, NOS; Antisocial Personality Disorder with underlying Narcissistic features. Dr. Lyons noted, "As the interview progressed it was evident that his cognitive functions were adequately developed, and that his conceptual thinking, reasoning, cognitive awareness, and ability to comprehend the quite

adequate for the formation of good judgment. In sum, there was no evidence of psychosis, organic brain dysfunction, or any serious psychological impairment in social functioning."

Test results from the Minnesota Multiphasic Personality Inventory dated 07/25/88 supported a diagnosis of Antisocial Personality Disorder. The Bender Visual Motor Gestalt Test dated 07/26/88 and signed by Mr. Cain yielded well-executed designs with no evidence for significant organic impairment. A drawing of a man's face by Mr. Cain dated 07/26/88 was well executed and included the following handwritten statements:

Doing:	Doing Something He Has No Business Doing
Thinking:	if he is going to get away with it
	what he's going to do next
Feeling:	happy

Mr. Cain also executed a drawing of a woman's face on 07/26/88 and provided the following statements:

Doing:	looking at me!
Thinking:	one hell of-a guy
Feeling:	attracted

The Psychiatric Evaluation dated 07/27/88 performed by Dr. Mr. Cain Geiger, M.D., San Quentin State Prison Staff Psychiatrist, found No Mental Disorder. Dr. Geiger found Mr. Cain to have good memory and cognitive functioning with an intellectual capacity estimated to fall within the "middle of the average range."

The Neuropsychiatric Committee Examination Summary dated 08/16/88 found Mr. Cain to be fully oriented, observant, and appropriate. "He demonstrated that he was capable of responding adequately to the requirements of his sentence. He discussed his attitude toward his sentence in a rational manner."

The Psychological Evaluation by Ronald K. Siegel, Ph.D., Inc., dated 05/09/88, made no mention of mental retardation or deficits in cognitive or adaptive functioning. The Psychological Evaluation by Theodore S. Donaldson, Ph.D., dated 02/26/87, found no evidence for significant psychopathology nor indications of significant ego deficits or inadequacies in reality testing. "Mr. Cain displays many of the features of sociopathy, although that is too simple a diagnosis, and there are also hysteroid and narcissistic features as well... this suggested the possibility of central nervous system dysfunction, but none was noted in this evaluation, although that part of the evaluation was somewhat limited. Nonetheless, there were certainly no indications of gross brain disorder." Furthermore, Dr. Donaldson did not find evidence for mental retardation. The raw test data provided by Dr. Donaldson included a Bender Gestalt reproduction free from organic impairment. Likewise, Mr. Cain's drawing of a person did not suggest organicity nor mental retardation. Mr. Cain completed both the Rorschach Inkblot Test and Minnesota Multiphasic Personality Inventory and produced valid profiles. This ability is typically not found among individuals with mental retardation. Mentally retarded individuals are typically unable to make sense of the MMPI-2 or Rorschach and, do not provide sufficient information with which

to produce a valid profile. Dr. Donaldson's declaration in 1998 noted that his evaluation was limited by the information provided by Mr. Cain's counsel.

The Adobe Mountain School Psychological Evaluation dated 02/19/80 was performed by Richard A. Kapp, Ph.D., Consulting Psychologist, and approved by Paul S. Duda, Ph.D., Clinical Psychologist. Dr. Kapp reported that Mr. Cain performed well during his detention at the Arizona Youth Center. "He volunteered for extra duties and he performed his assigned duties well." His main problems concerned his inappropriate interactions with peers. During the clinical interview, Mr. Cain, who was 17 years old at the time, stated that, although he had attended the eleventh grade as late as October 1979, he had not been fully involved in school since the eighth grade. He stated he was passed on from one grade to another without academic mastery.

Psychological test results yielded the following information.

Wide Range Achievement Test (WRAT):	Arithmetic: 2.7 grade level.
Peabody Picture Vocabulary Test:	Standard Score:73.
Culture Fair Scale II Test:	IQ score: 87.

Prior testing completed in March 1977 yielded the following results:

Wide Range Achievement Test:	Reading: 4.5 grade level
	Math: 3.5 grade level
Peabody Picture Vocabulary Test:	Standard Score: 85

The Neuropsychological Assessment session of Dr. Kapp's report did not find evidence for major organic deficits or impairments in cerebral functions. "He does have a history of learning disabilities." (Page 3). Mr. Cain was recommended for placement in learning disabilities classes within a public school setting.

Under the Personality Functioning section of Dr. Kapp's report, Mr. Cain was found to present his thoughts in an organized, logical, and relevant manner. His exterior image of a cool, controlled confident person mast an individual with personal inadequacy and low self-esteem. "He does not take responsibility for himself and his behavior." (Page 3).

Under the Treatment Recommendation section of this report, low frustration tolerance, problems dealing with anger, and a tendency to act out his feelings of frustration and angry aggressive ways were documented. Individual and group therapies were recommended, along with practice in differentiating assertiveness from aggressiveness. A history of conflict with authority figures was noted and family therapy was also recommended. Finally, an effort to assist Mr. Cain in assuming responsibility for his problems with document.

In summary, there was no evidence for mental retardation reported by Dr. Kapp. Test scores were low and compromised by his lack of school attendance and learning disabilities. Academic subjects were below grade level. There was no evidence for neurological impairment.

The Adobe Mountain School Diagnostic Treatment Plan dated 03/13/80 found no evidence for mental retardation or significant deficits in cognitive and adaptive functioning. The Adobe Mountain School Social Casework Summary dated 03/10/80 yielded information consistent with Mr. Cain's self-report of his situation. Mr. Cain was described as friendly and cooperative with good verbal skills but limited insight. Problems with credibility were noted and a tendency to minimize his involvement in situations and project blame onto others. Low academic performance was noted along with specific learning disabilities. There was no evidence to suggest that Mr. Cain had received remedial instruction. Mr. Cain also admitted to a long history of periodic truancy. Mr. Cain expressed little interest in academia but was very interested in athletics. Personal inadequacy and low self-esteem were noted. Mr. Cain was described as having good social skills and presenting well during interviews but with difficulties in his peer interactions.

The Adobe Mountain School Specific Learning Disabilities Evaluation report dated 03/08/80 identified specific learning disabilities and ongoing emotional problems as retarding his academic progress. Specific curriculum recommendations were made. There was no evidence for mental retardation. (Stamp 167).

The Adobe Mountain School Psychological Evaluation dated 03/23/77 found no evidence for mental retardation. Psychological test scores were as follows:

Peabody Picture Vocabulary Test: Standard Score: 85
Culture Fair Scale II: IQ Score: 75
Nelson Reading Test: Grade Level: 4.5
Wechsler Intelligence Scale for Children-Revised
Verbal IQ: 67 Performance IQ: 93 Full Scale IQ: 78

Mr. Cain was described as someone who would try to put himself in an improbably favorable light but at the cost of appearing psychologically naive. There was no evidence for mental retardation or marked neurological problems.

The Adobe Mountain School Education Evaluation dated 04/05/77 documented prior testing including the following test scores not previously noted:

Wide Range Achievement Test
Reading Grade Level: 4.8
Spelling Grade Level: 4.3
Arithmetic Grade Level: 3.4

Peabody Individual Achievement Test
Reading Recognition Grade Level: 3.8
Reading Comprehension Grade Level: 4.1

Slosson Intelligence Test
MA: 9.2 IQ: 64

Mr. Cain was also administered several other tests documented in the report. Final conclusions were that Mr. Cain was functioning within the low average range of intelligence. There was no evidence for mental retardation. (Stamped 130). In summary, Mr. Cain received extensive evaluations and testing beginning at age 14. The multitude of reports never considered Mr. Cain

mentally retarded. Remediation in reading and arithmetic were frequently advised along with special classes/resources targeting his learning disability.

The Adobe Mountain School Updated Accumulative Report dated 10/14/80 noted that Mr. Cain had maintained a steady job in the woodshop for four months without difficulty. At that time, Mr. Cain expressed an interest in pursuing counseling as a profession. (Stamp 141). The Adobe Mountain School Accumulative Summary Report dated 09/20/80 described Mr. Cain as follows. "He has shown the capability to find tangible solutions to problems instead of offering excuses or not facing up to the situation. This has been demonstrated through 1:1 counseling sessions, peer confrontation and group sessions." (Stamp 145).

Correspondence dated 11/17/80 from Kelly E. Spencer, Superintendent, Adobe Mountain School, to John E. Wright, Deputy Director, Juvenile Services, Department of Corrections, documented Mr. Cain's positive performance during his detention. "In a review hearing in September 1980 he was capable of verbalizing realistic plans for his return to the community... Through his performance he has demonstrated the ability to return to the community and follow through with appropriate plans to positively establish himself in the community." This memo facilitated Mr. Cain's release one month prior to his 18th birthday as originally requested by the judge. This memo is yet another example of how Mr. Cain functioned well enough to endear his supporters and how he demonstrated sufficient cognitive and adaptive capacity, including verbal skills, to negotiate his own affairs, including early release from detention. These personal maneuvers and associated behaviors are incompatible with mental retardation.

The Declaration of Majil Fausel, M.A., dated 05/15/97, did not report mental retardation, neurological impairment, or significant cognitive and adaptive disabilities. Learning disabilities were noted along with a deteriorated family life.

In summary, the majority of evaluations administered over the years noted academic deficiencies but never diagnosed mental retardation.

SUBSTANCE ABUSE HISTORY

Mr. Cain denied a drug or alcohol abuse problem. He does not drink in prison. He first drank at 17 and reported a total of five episodes in which he drank to the point of intoxication. These incidents occurred between ages 17 and 23. One event was precipitated by his grandfather's death. Mr. Cain has never been arrested for drinking and driving. He drank to the point that he lost consciousness on approximately 5 occasions. Mr. Cain was never referred for alcohol detoxification or residential programming.

Mr. Cain experimented with PCP and marijuana between ages 13 through 19. He binged on PCP in October 1981. "I was high the whole time. A friend of mine gave me 90 units to sell and I only sold one." At 22, Mr. Cain experimented with cocaine and crack. "I'd spend my whole paycheck in several hours. I'd say 'no more' to myself but I'd do it again. That's why I'm in this situation now." Mr. Cain noted that a girlfriend influenced him to continue to use and get high.

Mr. Cain's report of his alcohol and drug use is consistent with the information contained in the Probation Report dated 07/12/88. The Declaration of Clarence Wade dated 09/10/97 documented Mr. Cain's substance abuse, specifically PCP, when he was 21 years old.

HISTORY OF FAMILY OF ORIGIN

Mr. Cain was born in Watts, moved to Gardena, CA, with his family, relocated with this family to Yuma, AZ, and finally lived with his family in Ventura, CA. Mr. Cain is the sixth of sixteen children in a blended family. Mr. Cain's biological parents produced a total of five children. The eleven remaining children came from different combinations of relationships involving Mr. Cain or Mrs. Cain.

Mr. Cain was raised by his biological father and several stepmothers. Biological mother left the family when Mr. Cain was four years old. Mr. Cain described a working-to-middle-class lifestyle with his father. "They provided us with a good life." The family lived in a four-bedroom, two-story home in Gardena, CA. They moved to a five-bedroom home in Yuma, AZ.

Biological father, Percy Cain, died in 1992 at age 53 from a viral infection that reportedly infiltrated his heart muscle. Mr. Cain was born in Isola, Mississippi. He completed eight years of school. "That is as far as he could go." Mr. Cain worked as a foreman for a construction company for a total of 35 years. "He told me he worked ever since he was eight years old. He never really retired. He left the job, but his buddies would call him and he'd help out and take me to earn a little something."

Percy Cain was in good health until the time of his death. Mr. Cain described his father as an honest, hard-working, and respectful man who loved his family. "He was a good man and a good father." Mr. Cain recalled hugs and kisses as well as playful interaction with his father. Percy Cain did not have any vices and was not verbally or physically abusive to family members. "I remember him teaching me things. I didn't realize he was teaching me, but he was. He'd say 'come out and help me out' and he was actually showing you things. We had hot rods. We'd go riding and talking and stuff like that." Despite the fact that Percy Cain worked long hours, Mr. Cain described a positive relationship with him during childhood. During adolescence, "I never had any problems with my father. I'd get in trouble at school, my mother would tell him, and he would talk to me. I'd tell him I understood but I always got into trouble. When I'd come home from camps we'd dialogue about staying out of trouble. I believed myself and he would too, but there was always that turning moment." Mr. Cain denied significant problems with his father. "Our relationship never changed by me getting into trouble. I just kept on breaking promises. That's how that was."

Biological mother, Ruthie Mae Cain, died in 1978 in Jonestown, Guyana. She was born in Vernance, Mississippi and dropped out of school in the eighth grade. She worked in cotton fields or restaurants after she quit school. She was reportedly in good health at the time of her death by suicide in the Jonestown massacre. Mr. Cain provided this explanation about his mother's decision to go to Jonestown. "Well, she was arrested a few times for prostitution and arrested on a federal charge, mail or something. She wrote to Jim Jones. He arranged for her

bail and talked to her. She got probation with suspended sentence and to complete it in Jonestown. She was there for about six months." Mr. Cain's analysis was consistent with records reviewed by this examiner.

The Petition for Writ of Habeas Corpus provided additional information about Mrs. Ruthie Mae Cain. By the time she was 24 years old, she had seven children living at home ranging in age from infancy to seven years (Page 31). Mr. Cain lived with his mother until he was four years old. "I don't remember her till I seen her/met her and knew who she was in 1970. Then the next time was in 1972. She came to Gardena. I had relatives that talked bad about her. That she didn't want us or love us. But I never developed a disdain for her. The times I saw her, I couldn't believe she was my mother because she was so childlike, so young." Mr. Cain added, "My dad never talked bad about her. He just said she wasn't ready to be your mother. She chose a street life over me." Ruthie Mae Cain left the family when Mr. Cain was three years old. According to information filed in the Writ of Habeas Corpus, Ruthie Mae Cain quickly developed a preference for "good times" and the "fast life" (Page 31). Mrs. Cain left the children for hours at a time to drink and party. Eventually, she would leave for days at a time. Not surprisingly, the marriage deteriorated and Percy Cain and Ruthie Mae Cain separated in January 1966, 5.5 years after moving to Los Angeles. Shortly thereafter, Ruthie Mae was arrested for prostitution.

Following the separation, Percy Cain moved Wilma Taylor into his home to care for his children. Wilma Taylor was 19 years old when she assumed responsibility for the seven children. Wilma married Percy Cain several days after his divorce from Ruthie Mae Cain was finalized. Wilma Cain was described as an excessively strict disciplinarian who reportedly dominated and brutalized the Cain children (Writ, page 33).

Percy Cain was Mr. Cain's primary disciplinarian. At 15 or 16, Mr. Cain hit him twice for talking back to his stepmother. "It was appropriate and it was warranted." Mr. Percy Cain whipped Mr. Cain with a belt because he beat up his 12-year-old sister. I think I got my ass whipped because I ran away. I only left for a few hours, but between being out in the streets and getting an ass whipping, and being home and getting an ass whipping, I chose home. Another time, he disciplined me because I fought at school after a guy said something about my mother. My dad told me that the other guy didn't know my mother so what difference would it make if he talked about her."

Mr. Cain provided detailed information concerning his siblings. Thirteen of the fifteen siblings were fathered by Percy Cain. Mr. Cain managed to separate his siblings by marriages in a manner consistent with other documentation reviewed for this report. Mr. Cain's ability to provide detailed information concerning his fourteen siblings does not support a finding of neurological impairments or mental retardation.

Mr. Cain's older brothers, Collins and Mack Arthur, are from Mr. Cain's biological mother and her first spouse. Collins died in 1992 from a drug overdose. He was an alcoholic and was in the process of entering an alcohol detoxification program immediately before he expired. Mack Arthur is 48 years old and serving time in a prison in Arizona. "I don't know the charge. I

haven't seen him and 25 years. I don't know if he graduated from high school or not. He lives in Arizona."

The following siblings were from the marriage of Mr. Percy Cain and his spouse, Ruth. Danny is 47 years old and was recently in prison for charges unknown to Mr. Cain. He lives in Phoenix, Arizona. Brenda is 46 years old and gainfully employed. She lives in Long Beach, California. She is a single parent with four children. Mr. Cain has not seen her in approximately 5 years. Janice is 45 years old and a single parent of one child. She graduated from high school and is employed full-time in San Diego, California. Valerie is 41 years old and is divorced with four children. She lives in San Diego and is unemployed.

The following siblings came from the marriage of Percy Cain and his spouse, Wilma. Percy Jr. (a.k.a. Cato) is 39 years old and employed by trucking company. He is divorced with two children and lives in Phoenix, Arizona. Candace is 35 years old and a single mother with two children. She works and lives in Phoenix, Arizona. Katana is 33 years old and married with two children. She lives and works in Phoenix, Arizona. Durez is 31 years old and living in Phoenix, Arizona with his spouse and two children.

The following siblings were from Percy Cain and his third wife. Tiffany is approximately 24 years old and is married with one child. She lives in Palmdale, California. Her husband is gainfully employed in the production business. Jason lives in Oxnard and is gainfully employed. Gabriel was approximately 6 months old when Mr. Cain was arrested. "I haven't even talked to him. He lives in Oxnard."

The following sibling was the product of Mr. Cain's biological mother and her pimp. Noya died with Mr. Cain's mother in 1978 in Jonestown, Guyana. Mr. Cain noted that there is another sister born to his biological mother who is unknown to the family.

None of his siblings suffered from significant psychiatric or medical problems. Two brothers had a drinking problem and at least four siblings had a drug abuse problem. At least four siblings have been incarcerated in the past.

Mr. Cain described his childhood life as "fun." He denied physical or sexual abuse as a child or adolescent. His brother, Darnel Cain, also denied child abuse (Exhibit 20). The total number of children at home at one time numbered 11. "It was fun. We had a five-bedroom house. I was the only one that was missing something. That was common sense." The family took vacations to Mississippi, Tennessee, Big Bear Lake, and Arizona. "We had a station wagon with a mobile home hooked back to it. It slept eight. They were long trips, but fun." Mr. Cain has tried to maintain contact with his siblings but has not heard from several in over 25 years. "I let them know that I can't get upset about not hearing from them. They have their own lives. I had the same opportunities. I don't need their money I would like to hear from them." Mr. Cain's mother visited with him for Mother's Day 1998. His brother Cato visited with him in 2005.

Although Mr. Cain described a generally positive family life, records reviewed for this report indicate otherwise. The Petition for Writ of Habeas Corpus provided documentation describing

the chaotic and dysfunctional nature of the Cain family. At age 12 (1974), Mr. Cain lived in a chaotic home that numbered 14 individuals, the majority children. In the same year, Mr. Cain's brother, Danny, was committed to the California Youth Authority. At age 13 (1975), Mr. Cain's brother, Mack Arthur, was sentenced to two years in the Mississippi State Penitentiary, Parchman, Mississippi.

Excerpts from the Informal Response to Petition for Writ of Habeas Corpus (page 204) described a dysfunctional home during Mr. Cain's early childhood. Biological mother abused alcohol and left the home for hours to days at a time. Biological parents separated when Mr. Cain was 5.5 years of age. "Four months prior to filing for legal separation, Ruthie Mae was arrested for prostitution (page 205)." By the time Mr. Cain was 15 years old, his mother was living with her pimp in Inglewood. Ruthie Mae was eventually indicted by a federal grand jury for possession of stolen welfare checks. At the same time, she was ordered to serve 30 days in county jail for prostitution. Prior to sentencing on the federal case, Ruthie Mae joined the People's Temple. She was granted a three-year suspended sentence and placed on three years probation specifically to allow her to move to the Anna with People's Temple to rehabilitate herself.

During this same period of time, the Cain family was in disarray. Mr. Percy Cain was frequently away from home on construction projects, Wilma Cain drank heavily and stayed out late with other men; Mr. Cain's older brother, Danny, was in and out of prison; his younger brother, Valender, was in the juvenile justice system, and one of Mr. Cain's sisters gave birth to a child and gave him up for adoption. Wilma Cain made a career of shoplifting and reportedly involved Mr. Cain and his younger brother, Valender (page 206). This report also documented stepmother Wilma Cain's emotional and physical abusiveness towards Mr. Cain and his siblings. Mr. Percy Cain divorced Wilma and remarried a woman 20 years younger in 1984. Wilma Cain went to prison for five years for shoplifting.

The Declaration of Ruth Zitner, Psy.D., dated 10/27/97, provided information consistent with Mr. Cain's self-report. Dr. Zitner's comprehensive report did not include psychological testing but provided information concerning Mr. Cain's bio-psycho-social development, childhood trauma, and other factors. Dr. Zitner's report provided a comprehensive background by which to better understand Mr. Cain's development and ultimate dilemma. Dr. Zitner concluded that Mr. Cain suffered from a chaotic and dysfunctional family, parental neglect and abuse, racial segregation, alcoholism, and criminal behavior within the family Dr. Zitner further opined that Fetal Alcohol Syndrome might best explain "the depth and breadth of his organic impairments."

The report by David R. Stone dated 12/11/87 with Mr. Cain's neighbor in Yuma, Arizona, Detective Ralph Bailey, provided the following information. Detective Bailey lived across the street from the Cain family in Yuma, Arizona. Detective Bailey personally arrested Mr. Cain at age 16 for a residential burglary where weapons were taken. Detective Bailey convinced Mr. Cain to return the weapons. Detective Bailey described Mr. Cain as extremely athletic and in good physical condition. Mr. Cain frequently became involved in fights in and around his residence, including one fight with his cousin in the front yard of the residence. Detective Bailey recalled one incident when Mr. Cain was between 12 and 14 years of age in which Detective Bailey had to throw him to the floor in order to restrain him with handcuffs. Detective Bailey

characterized Mr. Cain as possessing very aggressive behavior with no respect whatsoever for authority.

In this same report, Investigator Stone interviewed Mr. and Mrs. McCarty, the couple who were the victims of the burglary described above. Mr. McCarty lived nearby the Cain family. He expressed his fear of coming home late at night due to the people that loitered in the area. He stated that the Cain family was evicted from the residence for nonpayment of rent.

HISTORY OF TRAUMATIC EVENTS

Mr. Cain identified the death of his parents and younger brother as significant traumatic events. He denied physical or sexual abuse as a child. He believes that extended family members emotionally abused him by teasing him about his mother. Although Mr. Cain felt accepted by his stepmother, he did not like the fact that they talked negatively about his mother.

DATE OF EMANCIPATION

Mr. Cain was 13 years old the first time he left the family residence. Mr. Cain was placed at the Adobe Mountain School, Phoenix, AZ, where he completed 60 days of programming before transferring to another facility in Tucson, Arizona, for six months.

DATE/PLACES OF RESIDENCE

Mr. Cain was born in South Central Los Angeles. He later lived in Watts followed by Compton, Park Village, and Gardena. The family returned to Watts for about six months. After completing the sixth grade, the family moved to Yuma, Arizona.

Mr. Cain was 12 years old when his family moved to Arizona. The move was precipitated by Percy Cain's employment. "They was (sic) building a bridge up there and so he went with the construction company to build the bridge. It was supposed to take 10 years. Plus, we had relatives out there. My relatives found us a five-bedroom house out there and we bought it and moved in. We were the only black family in our neighborhood."

"Altogether there were only seven black families in a 20-30 mile radius. But, it was all right. Our neighbors was (sic) cool. On one side they were semi-retired and always on vacation and shit. The other side had kids the same age and we went to school with them. Plus, we had FBI agents, sheriffs, police detectives, city police, and CHP all in the neighborhood. There was one detective across the street and another around the corner. The Cain family was a cool family. Everybody was doing their own thing. The only one messing up was me and my brother Danny. When we'd go on vacation, a detective across the street, Mr. Ralph Bailey, he stayed across the street, my dad would give him the keys to check on our home. He arrested me about two times. My first probation officer lived across the street." When queried about racial tension, Mr. Cain responded, "It depends. It wasn't the first time we've been around whites. My father had white friends. There might have been a time when I might be jogging and someone might drive by and say 'run nigger'. In junior high school, I got assaulted by three white boys. We all got

suspended, but they treated me like I was the problem. It was weird shit. But after that, even though I didn't hate white people, every time I saw them (the three who assaulted him), people kept us apart."

Although Mr. Cain never reported family dysfunction or chaos, other records suggest that the family dysfunction continued in Yuma, Arizona. His older brother, Danny, was frequently in trouble with the Yuma Police Department. Another brother, Mack Arthur, completed his prison term in Mississippi and also joined the family in Yuma. Percy Cain worked long hours and construction, and stepmother Wilma Cain was drinking and staying out late. During this time, Wilma Cain reportedly pursued a career in shoplifting, using Mr. Cain and his brother, Valender, for diversionary purposes.

Mr. Cain denied gang affiliation in Los Angeles, California and Yuma, Arizona. Mr. Cain was familiar with the Mexican gangs in Yuma and named several gangs. "I can't even tell you why I did the shit I did. From 12 to 18, whenever my mother talked to me, no shit [nothing happened]. When she didn't talk to me, that's when I got into things." He did not join a gang in Arizona. Mr. Cain named several local gangs in Los Angeles. "They had all these Crip gangs forming: Paid Back, Raymond Avenue, and Shotgun Crips. None of my uncles were in that type of stuff. Plus, I'd be more worried about what my parents would do to me than any rival gang." When queried about whether or not he is a gang member now, Mr. Cain responded, "I don't know what good it is to join a gang. No medical, no retirement. It's just the same old stuff repeating itself. You're either going to die or go to prison."

An "Order and Hearing for Placement in Segregated Housing" dated 05/16/89 documented that Mr. Cain's name was listed on a "Rollin Sixty Crips" President-made card found in the cell of another inmate. A photocopy of the card identified Mr. Cain as one of four members posing for a picture.

The General Chrono report dated 04/22/94 reported one confiscated photo from an inmate that featured nine inmates displaying Crip gang hand signals. Mr. Cain was pictured in this photo. An Investigative Employee Report dated 06/02/89 addressing the issue of Mr. Cain's gang involvement documented mixed reports from both inmates and Correctional Officers.

The State of Arizona Department of Corrections Certificate of Absolute Discharge dated 03/25/82 documented the following tattoo on Mr. Cain's left arm: "Hoover Cuzz."
The interview with Mr. Cain's brother, Darnel Cain (Exhibit 20), a member of the Crips gang, reported that Mr. Cain was favorable to the Crips.

HISTORY OF FAMILY OF PROCREATION

Mr. Cain has never been married. He considers himself heterosexual. He denied homosexual fantasies, experiences, or desires. Mr. Cain reported a total of three common-law relationships prior to his incarceration. He has a 23 year-old son from one of his girlfriends. "I never met him or talked to him. When I went to prison in Yuma in 1982, his mother, Victoria, was pregnant. I had a case pending when I met her. I got remanded. We were dating when she told me she was

pregnant. Then I got subpoenaed. In 1995, I found out she had another child through a friend. My federal attorney found her in 1995. They talked to her and she confirmed everything." Mr. Cain has not had contact with her in over 4.5 years. Mr. Cain noted that his girlfriend and his sister did not like one another. "Vicki and my sister had disdain for each other. Vicki said my sister would keep her as if she told anyone she was pregnant with my baby. She also told the boyfriend it was his baby and when he found out he wanted to kill her and the baby. She sent me a picture of him and I sent the picture to all my family. Personally, if I was in the same situation my son is in, I'd want to meet me and I've written a lot of letters to him, but he never responded. Maybe she didn't give it to him."

Mr. Cain's first common-law relationship was at 18 with a 21 year-old Hispanic female. They met through one of his cousins and he moved in with her four days after meeting her. Mr. Cain was living in Yuma at the time and his girlfriend lived in San Diego. They lived together in San Diego for an entire summer until he returned to Yuma. "She stayed in San Diego because that was home for her. She didn't work, her family had money, she had her own apartment and shit. She just hung out. I wasn't ready to settle down."

Mr. Cain was 23 years old when he met and moved in with a 33 year-old girlfriend. This relationship ultimately broke up because of their mutual substance abuse. During this period of time, Mr. Cain also had another girlfriend who was also into drug abuse. "It was the flirting that got out of hand." Mr. Cain was 22 years old when he dated a 30 year-old female. They dated off and on until he was arrested.

Mr. Cain provided detailed information about his psychosexual development. He did not have a parent-son conversation about sex. He had girlfriends in elementary school and high school. At 16, Mr. Cain dated a 16 year-old Caucasian female whose parents were reportedly racist and did not approve of the relationship. "She was the first white girl I ever fooled around with. She told me her parents were racist. One day I actually took her home. Her parents were at work and we were outside. Just as I was leaving her mother pulled up. She called her daughter and slapped the shit out of her. I got my car and left. Later that night I called, her mother answered, she told me 'For all this time I didn't know you were black but if you and my daughter have to stick around you shouldn't have a relationship. Then she had her brother and sister sneaking around on us. In Arizona, a white family will let their daughter date a black man if he is an athlete." The relationship ended after one year due to the parental harassment.

At 17, Mr. Cain dated the 14 year-old sister of one of his friends. This relationship ended when he left Arizona to avoid arrest for a burglary that he stated he did not commit. "The only reason we started dating was her brother was a friend of mine. Her mother sensed that her daughter liked me and I wouldn't do nothing because I was older and I knew her brother. Her mother called me about her and I told her I liked her but she was too young. We dated, I started loving this girl, but I was going to wait till she became legal before he did the sex part. So I met her, must have been the summer of 79. My cousin came down for the summer in Arizona. He broke into my neighbor's house. My brother wanted some of the items. He didn't get any, so he went and told my brother's mother-in-law, who called my mother, who called the police. Our neighbor, Detective Bailey, went to see the neighbor's home, saw it was broken into, and told me

to get all the stuff back. I didn't drop a dime on my cousin but I told him to get all the stuff back. My mother knew my cousin did it, so she put him on the bus to Los Angeles. The next day, I took a bus to San Diego, running from the police. I stayed with my aunt for one week. My mother called everyone and told them I was running from the police. My dad talked to me and told me I must be tired of running. So, I went back, did time, and meanwhile my younger brother started to date this girl. When my mother first met her my mother said 'she is too young.' When I was in jail by mother told me 'your brother is dating her, they make a good couple.' I told him don't be too happy because I know I can get her back and it happened that way. Just to show him."

Mr. Cain's first sexual experience was a one-time encounter at 15 with an 18 year-old friend of one of his sisters. His next sexual experience was at 18 with a 15 year-old girlfriend. "I actually got her pregnant and had a stillborn son. Her mother took her to Memphis to have the child and he was born stillborn." Thereafter, Mr. Cain reported sexual relationships with the girlfriends previously described. "I didn't have too many sexual relationships with women because I was always locked up."

Mr. Cain's most erotic sexual experience involved his first experience with oral sex. He offered the insight that, in his view, oral sex seemed to precipitate jealousy and possession and noted that the two females with whom he engaged in this behavior ultimately became violent towards him.

The Declaration of Anita Parker dated 05/18/99 described Mr. Cain as "very good to my kids. He would always spend his money to buy clothes and toys for them. I very rarely had money of my own for them and what I did have I spent on alcohol and drugs." Ms. Parker did not describe Mr. Cain as someone who required special assistance or as someone who could not fend for himself. Ms. Parker did not provide any information to suggest that Mr. Cain was mentally retarded.

When queried about hobbies, Mr. Cain noted that as an adolescent he enjoyed working on models and typically built models of the cars his father drove. Mr. Cain also occupied his time building go carts, skateboards, and raising pigeons. In Yuma, "I had about 75 birds. It was a big ass cage. I'd catch "Commies". They are wild birds that just eat should but you can train them. I'd trade them for tumblers or pollards, birds that flip. I had at least 75. I trained them in 30 days."

As an adolescent, Mr. Cain developed an interest in working on cars. He learned to prime bodies, take dents out, work on motors, and install hydraulics. Mr. Cain had two cars prior to incarceration. "I never got a chance to drive any of the cars I had because I went to jail." Mr. Cain learned to drive by age 13. "My father taught me how to drive a stick. I learned to drive a five-speed Toyota Corolla. I could drive good. My parents would tell me to go to the store. I'd purchase something and come back. I got my license when I was 18. I didn't get it earlier because I was in camp or if I was in school my friends were driving." Mr. Cain further noted that his poor academic performance adversely affected his ability to get a car and license at 16.

Mr. Cain also enjoyed listening to oldies including the Temptations, Smokey Robinson, Marvin Gaye, and the Dells. Mr. Cain did not play Little League or other childhood sports because he did not receive support from his family. Mr. Cain stated that he preferred to have the proper attire for physical education and league sports. He did not attend physical education at school because he did not have nice tennis shoes. He played on the freshman football team in high school but was taken off the team due to low grades. Mr. Cain played football while in juvenile camp placements. Although he played both running back and linebacker positions, he noted that he preferred linebacker because the running back position was contingent on having a good offensive line. "Or, you get tore up every time." Mr. Cain's ability to analyze the relative strength of each position and develop a relatively good degree of insight about his preference is not the type of reasoning one would expect from someone with mental retardation.

EDUCATIONAL HISTORY

Mr. Cain completed kindergarten and first grade at Russell Elementary School, Watts, CA. He completed a portion of the first grade in Park Village, Compton and completed the second through sixth grades at 135th St School, Gardena, CA. Mr. Cain also completed the sixth grade at 102nd St Elementary School, Watts, CA. Mr. Cain stated that the various schools were due to the family's move from one location to another.

With regards to school performance during grades one through six, Mr. Cain stated, "From what I understand, I did all right. No special classes. I ditched school one day, my brother and I, to go where my biological mother lived but we never made it. We got our ass whipped and that went to school regularly after that. I remember all my teachers name. Mrs. Bernhardt was first grade, next was Ms. Page, Ms. Orange, and Ms. Marilyn Mulligan. She was my last teacher in Gardena. In Yuma, I only remember Mr. Smith. He was my history teacher and I was dating his daughter. School wasn't hard for me. But was hard was me asking for help. I just assumed the teachers would help me but they never did. I wouldn't do my homework and I'd like to my parents that I didn't have any." Mr. Cain noted that the last grade he actually mastered was the sixth grade. "Everything else was like a blur."

Mr. Cain stated that he obtained good grades from kindergarten through grade four. His grades went down in the fifth and sixth grades because, "I started slacking off." Mr. Cain also reported that he began to fall behind academically in the fourth grade. Mr. Cain recalled that his sixth grade school teacher, Maryland Mulligan, was most helpful. "She take me on family outings with her and her family. She actually was hands-on with me. She saw something in the others weren't willing to do. But after her, everything went downhill." The various records reviewed by this examiner supported Mr. Cain's recollection of Ms. Mulligan's efforts.

Mr. Cain completed the seventh grade at Markham Junior High. "I think I was doing pretty good. I resumed junior high at Gila Vista Junior High School, Yuma, Arizona. During that time I got locked up."

Mr. Cain was sent to Adobe Mountain School for 60 days and was then transferred to the Arizona Youth Authority for a six-month placement. "I have no idea how I did in those

programs. I only completed kindergarten through six. I never completed 7th, 8th, 9th, 10th, or 11th, but I made it all the way to the 12th. And in between all that time I got into some shit. So, I'd go to camp and they put me in whatever grade I should be in school. Camp isn't the same. Everyone has a discipline problem. There might be a few that are smart. I had a problem understanding stuff. I couldn't understand and couldn't remember. Even today at 43, I don't know the first thing about algebra, dividing, and barely know my timetables. I've been trying to teach myself all these years. From age 12 to 21 or 22, I had no concept of the month and day of the year. I actually don't even remember. Like now, I'm conscious of the days, months in the year. But between 12 - 22, that type of stuff I just didn't know. Even now I can't even tell you how long a semester is in school because I never even completed one."

The Declaration of Jay M. Jackman, M.D., dated 10/01/97 included documentation by Mr. Cain's sixth-grade teacher, Mrs. Mulligan. "Tracy would seldom try to do his best. Lack of reading skills slowed him down considerably. We gave him much individualized help, which aided him a lot. A leader, but of those who are 'losers.' Excellent artist but his creativity did not extend to other areas of study. My husband and I had him join us for a holiday in hopes of improving his attitude. Immediately after this he moved." Mrs. Mulligan made no mention of mental retardation.

Court records indicate that Adobe Mountain teaching staff documented learning disabilities and recommended special-education classes after discharge. This did not happen (Writ, Page 538). The Adobe Mountain School Monthly Summary report dated November 1980 noted that Mr. Cain "...made great improvements in some areas of his goals. It wasn't easy for Tracy to control his aggressiveness. But he did his best and that's one of the reasons he was released 30 days earlier." This report made no reference to mental retardation or marked cognitive or adaptive deficits. The Arizona Youth Center Treatment Plan Review dated 07/28/78 described Mr. Cain as maintaining an average to above-average level in school. "According to reports by several of his teachers, he is applying himself quite well in class as well as his studies." There was no report of below average cognitive or adaptive skills and no referral for assessment to rule out mental retardation.

The Arizona Youth Center Treatment Plan dated 05/02/77 recommended placing Mr. Cain in a resource learning disabilities program for remedial assistance in verbal learning skill deficits. (Stamped 118).

The Adobe Mountain School Diagnostic Staffing Summary dated 04/04/77 documented the following in the "Identified Problem Area" section: (c) "testing shows average perceptual-motor and performance skills which indicate specific verbal learning disabilities rather than below average intelligence." (Stamped 122).

The Probation Report dated 07/12/88 stated that Mr. Cain last attended Kafa (Kofa) High School, Yuma, Arizona. At that time, Mr. Cain stated that while enrolled in the 12th grade he became involved in a fight and was suspended for three weeks. He was "kicked out" by school officials upon completion of his suspension. Information contained in the Petition for Writ of Habeas

Corpus further noted that nonattendance, aggressiveness, and unexcused absences precipitated the suspension. Furthermore, his parents never contacted the school to confer with school administrators (Page 44).

Mr. Cain's school records (Exhibit 43) documented the following.
First entry: "Tries hard, anxious to learn. Has shown improvement in reading."
Second entry: "Does not try to do any work at all. Behavior problems. Does not get along with peers."
Third entry: "Very slow academically. Still learning control but improving. Recognized leader."
Fourth entry: "Slow academically-aggressive leader."
Fifth entry: "Markedly below average in all areas. Does not try to succeed. Needs to develop a better attitude toward school, authority, and peers."
Sixth entry: "Tracy would seldom try to do his best. Lack of reading skills slowed him down academically... all academic areas way below average; yet I'm sure he could do quite well if he applied himself. Good athlete but poor sportsmen."
The final entry noted, "Has leadership ability. Needs to practice self-control. Is ready to solve all problems by fighting. Extremely talkative and does not try to do his best work or does he complete assignments. Works far below grade level in all academic areas."

Mr. Cain's Grade 10 report card from Kofa High School, Yuma Union High School District, documented eleven Fs, one D, and one C. Mr. Cain's Arizona Youth Center report card yielded the following information.

Subject	Summer 1978	Fall 1978-79
Science	B-	A
Social Studies	C	B+
Career Education	A-	B
Reading	B-	B
Math	C	B-
Physical Education	A-	B

Mr. Cain failed every class in his first semester at Kofa High School. He was suspended one month for fighting and dropped for non-attendance after the Christmas holidays. Mr. Cain ran away from a group home and was later placed at Adobe Mountain School, a structured residential program. Mr. Cain maintained a B average in summer school and the fall semester.

The record review of Mr. Cain's academic performance at Gila Vista Junior High School from 1975 through 1977 documented the following. Mr. Cain was not enrolled long enough to receive grades for the seventh grade, second quarter. His grades for the third and fourth quarter ranged from Average (3) in Science-Health and English. He received grades of Below Average (4) or Fail (5) in literature, Spelling, Mathematics, and History. Mr. Cain received a grade of Above Average (2) in English in his fourth quarter.

During the eighth grade 1976-1977 academic period, Mr. Cain received Below Average or Fail in all academic subjects.

VOCATIONAL HISTORY

Mr. Cain worked for the first time at 18 for the City of Yuma. The summer job consisted of cleaning public areas. His second job was at 19 for one month at a yarn mill. "I liked it but I had no transportation to get there every day on time. They fired me after I was tardy twice." Mr. Cain worked for Toys "R" Us at age 17 by telling them he was 18 years old. Mr. Cain worked the Christmas season and left when he turned himself in and returned to Yuma.

Mr. Cain work for three months for a painting contractor, Paul Lozano. "I did interior and exterior caulking, sanding, and finishing. I left when my father put me in the union and I started working at Rasmussen Construction Company with my dad. I worked for about six to seven weeks and then got laid off." The Declaration of Paul Lozano dated 04/01/1993 described Mr. Cain as a hard and conscientious worker. "I was sorry to lose him as an employee." Mr. Cain was initially paid $4.50 per hour when he started in March 1985. His salary was raised to $7.00 per hour by April 1985. He was terminated on 05/14/85 because he went to work with another construction company where he would be working with his father at a higher wage scale. Mr. Lozano made no mention of cognitive or adaptive problems affecting Mr. Cain's work performance.

Mr. Cain's last employment prior to incarceration was with Clayton Construction Company. The Declaration of Richard Clayton dated 07/22/97 documented Mr. Cain's work experience. Mr. Cain worked with Mr. Clayton for, "...four to six months until the work ran out. I never had problems of any kind with Tracy. He did his job well considering his lack of experience. Without experience he couldn't join the union. Tracy was definitely a hard worker." (Exhibit 161). Mr. Cain worked sporadically for two months until he was arrested. Mr. Cain returned to work for Paul Lozano for a brief period of time. He later joined Kelly Girl Temporary Agency and worked for one month for a medical company assembling pieces to artificial hearts. He worked for Procter and Gamble Co. operating a machine that packed and sealed packages. He worked on other job for a few days and returned to Procter and Gamble Co. until the time of his arrest.

In Yuma, Mr. Cain worked one summer as a city hire performing landscaping on a military base. Mr. Cain denied interpersonal or behavioral conflict on the job. He stated he was never disciplined, suspended, or fired for productivity or interpersonal problems.

An evaluation by David Wheat concerning Mr. Cain's work skills on a fence crew documented the following. "Res Cain has made a good turn for the better in his work habbits [sic] ___ is doing a very good job, and is working well. Shows for work every day." (RT 6567-6576). Mr. Wheat rated Mr. Cain a "12" using a 9 (lowest possible score) through 15 (highest possible score) rating system. (RT 6567-6572).

An evaluation by Reynaldo Duran concerning Mr. Cain's work skills on a ground crew documented the following. "Mr. Cain is a leader, motivator, gets assignments done, and always completes what is asked of him. He has ___ and awaiting for movement. Recommend for kitchen. C____ is leading my crew I know you'll give 110%. Good luck. 15 points out of 15."

(RT 6576-6583).

There were no reports by Mr. Lozano, Mr. Wheat, or Mr. Duran suggesting cognitive impairment consistent with mental retardation.

MILITARY HISTORY

None. Mr. Cain went to a recruiting station to join the Army one week prior to his arrest. "My intention at 18 was to go to the Army. My parents knew. I was ready to do it. I got drunk one night, decided to join the Army. But then I started to think about the asinine shit I wouldn't be able to do: partying, girls, and decided not to go. I even thought about going to the judge to ask him to seal my juvenile record."

CRIMINAL HISTORY

Mr. Cain was not queried about the murders that resulted in a death penalty verdict as per court order. Mr. Cain provided detailed information about several of his arrests. His accounts were later compared to the corresponding arrest reports. Mr. Cain's statements typically matched the information found in the arrest reports. His statements, however, provided either a reasonable version of innocence or an attempt to minimize the incidents. Mr. Cain also provided the following insights about his difficulties. "Also, once I hit 11 or 12, they stopped disciplining you. It made a difference, not a big difference, as I wasn't getting an ass whipping all the time, but it was enough to keep me in check for a period of time. So, I'd stop, but then I might steal candy and get away with it, go back, do it again, then get caught, they'd send me home and give me an ass-whipping, then I'd stop. Then I'd start. I figured I could get away with it. The fucked-up part was I usually had change in my pocket. Fact is, I continued doing it because I got better at it. That was it. It escalated when I started with the weed and Sherms. I always admitted what I did. My whole thing was that this delinquent stuff I was doing, I just kept doing it. I needed someone to be more hands-on with me. My father was always working. He talked to me and gave me the benefit of the doubt that I'd change. I'd give him the impression that I understood, but I never changed. Maybe too many shots to the head."

Mr. Cain continued, "What led me to stray was not respecting other people's property. I'd do stuff because I figured I could get away with it. I didn't need to steal, my dad was always trying to help me find a way to work, but I had my own ways. Plus, all the people in the neighborhoods I lived in were so trusting, so if I went and took something, they wouldn't suspect me. But what lead to my current situation was drugs and stupidity. But stupidity would be the one word to describe it all." Mr. Cain further noted that between ages eight through ten he had all kinds of toys in his bedroom: racing hot cars, hot wheels, slot cars, robots, et cetera. "So, I had all that stuff. It started to change when I left Watts for Yuma."

In Yuma, Mr. Cain initially enjoyed building car models. "Then, my father bought me a motorcycle. There's lots of desert in Yuma. But all this time I was not doing my homework. I was showing up in school but not doing my homework. I stayed away from the gang shit in Watts, but maybe I emulated some of them. In Watts, Schwinn bikes were the best. So, in

Yuma, they were everywhere. So, I'd just take them. I don't know why I did the things but I'd just do it. I stole not because we were poor but because I was just stupid."

The Probation Report dated 07/12/88 provided the following information concerning Mr. Cain's criminal history. Mr. Cain has been arrested in Arizona, Ventura County, California, Santa Paula, California, and Oxnard, California. Prior charges include theft of motor vehicle, robbery, shoplifting, harassment, disorderly conduct, simple assault, battery, aggravated assault, escape, receiving stolen property, failure to obey court order, and dangerous assault.

Mr. Cain's juvenile criminal history began when he was 12 years old and charged as a burglary suspect (November 1974). His next arrest was at age 13 as a burglary suspect (March 1975). In 1976, at age 14, Mr. Cain had five contacts with law enforcement on the following charges: Burglary (June 1976), Trespassing and Malicious Mischief (September 1976), Possession of Stolen Property (October 1976), Failure to Obey Court (October 1976), and Aggravated Assault (December 1976). Dispositions ranged from formal probation to commitment.

In 1977, at the age of 15, Mr. Cain had four contacts with law enforcement. Unlawful Possession of Pellet Gun (January 1977), Disorderly Conduct (February 1977), Trespass on School Campus (November 1977), and Burglary Forced Entry-Residence (December 1977). Dispositions ranged from brief detention to formal probation.

Mr. Cain had three contacts in 1978. Charges included burglary and possession of stolen property, runaway, and school nonattendance. Mr. Cain had four contacts with law enforcement in 1979. Charges included burglary, dangerous assault, escape from detention facility, and grand theft auto.

The various Incident and Offense Reports and Supplement Case Reports reviewed by this examiner provide ample evidence illustrating Mr. Cain's attempts to evade arrest in ways that are not compatible with mental retardation or severe neurological impairments. The Supplement Case Report dated 05/16/78 documented Mr. Cain's focused effort to avoid capture. This included pushing and getting away from a senior police officer, running away from officers on foot and in patrol vehicles, and jumping several fences in an attempt to elude capture. The Supplement Case Report dated 07/10/79 Mr. Cain's attempt to avoid suspicion by lying about his presence at a particular location. This report also documents Mr. Cain's ability to engage in premeditated acts, i.e., demonstrating a capacity to engage in anticipatory planning activities.

Mr. Cain provided detailed information concerning the events that led to a charge of a misdemeanor battery charge. Mr. Cain was 23 years old and living with his parents in Ventura County. He was working full-time as a construction worker for Clayton Construction Company, Santa Paula, California. Mr. Cain was not on probation or parole at the time of the incident. The owner of Clayton Construction, Richard Clayton, and his colleague, Mark are longtime friends of Mr. Cain's father, Percy Cain. "I've known Richard and Mark since I was 12 through my father, who knew them for many years. They were friends since the 60s." According to Mr. Cain, Mark's wife had left him and started dating a younger man who had introduced her to the drug scene.

Mr. Cain was approached by Mark and Richard to beat Debbie's boyfriend up. "So, me, Mark, and Richard go to the place where this guy lives. It all happened the same day. I didn't know the guy, didn't know what he looked like and they didn't know what they were doing. They just wanted me to shake the guy out. I was in the truck in the front seat. I see all these white people. It was Richard, Mark, the parents of the guy, Debbie, and him. They're all talking. Suddenly, there are four males engaged in fisticuffs. I sat and watched it for a minute. After about 20 seconds, I went over there. The young guy had Mark on the ground beating him up. All I did was grabbed him and threw him off of him. He stopped. The other guy was fighting Richard. I just bumped him and knocked him down. Nobody said nothing and did nothing to me. They just thought I'd stop the fight. They didn't realize I was with Mark and Richard until I got into the car with them. The next day, Mark and Richard were arrested. They gave my name." Mr. Cain's ability to provide detailed information concerning the above incident in a manner consistent with court records does not support a finding of mental retardation.

Mr. Cain was found not guilty of Assault with Deadly Weapon but charged with Misdemeanor Battery. Mr. Cain and his employers were sentenced to a 90-day work furlough program. "Then about two weeks after that I got arrested for this s..."

LIFE ON DEATH ROW

Mr. Cain offered the following insights about Death Row. When I left here (Ventura County) for San Quentin I promised I was going to be sincere about my transformation. I got rid of the mentality that got me here in the first place. I taught myself how to read and spell. I'm still doing it and getting better. All of my siblings have bought their own homes. It's a trip. When I think of them I see them as kids, not grown. I hope to see them personally. I write to my nieces and nephews." Mr. Cain stated that he performs 500 push-ups every other day. "Sometimes I don't do it because too much on my mind." Mr. Cain added, "I have a brother that was three years old when I got locked up. It's a trip how time flies. He's getting married this year. I was able to talk to his girlfriend."

Mr. Cain provided detailed information about his current schedule. He wakes up between 4:30 a.m. and 5:00 a.m. He does not eat breakfast because he prefers to exercise on an empty stomach. Between 5:00 a.m. and 7:00 a.m. he listens to music or engages in "warfare prayer." Mr. Cain offered the following information about "warfare prayer." Mr. Cain was informed about this by a friend who sent him a book entitled, "A Divine Revelation to Hell, Time is Running Out." Mr. Cain continued, "You're asking God into your life and sometimes you read to make yourself feel good about yourself before you step out of yourself. It helps you feel good." Between 7:00 a.m. and 12:30 p.m. he exercises by way of push-ups, calisthenics, and burpies. Mr. Cain noted that he previously worked out with Stanley (Tookie) Williams. Mr. Cain exercises and showers on the yard. At approximately 9:30 a.m. he goes to Bible study. Mr. Cain does not converse readily with the others on the yard. "No time to bolt. 6 yards altogether. I stopped going to talk to others by the fence cuz, and let's say that person stabs someone. Everyone remembers you were at the fence." Mr. Cain stated that there are approximately 100 inmates per yard. "Not everybody comes out." Mr. Cain returns to his cell by 12:30 p.m. to clean up, eat lunch, and watched television. By 3:00 p.m., Mr. Cain goes to his typewriter to

"type to someone in my family. I can't take naps. I'm not a nap taker. I read or listen to music." Mr. Cain has dinner at 4:00 p.m. in his cell. He is ready for sleep between 7:30 p.m. and 8:00 p.m. but may not fall asleep until 12:30 p.m. or 1:00 a.m. "I might listen to music or maybe watch television." Mr. Cain complained of no hot water for bathing during the time he was incarcerated in Ventura. He also complained about not having shower shoes. "So, I take a birdbath in the cell."

When queried about whether or not other inmates know about his current location (Ventura County Jail), Mr. Cain stated, "Everybody knows I'm in the hole. When I go back, I go to the hole." Mr. Cain stated that he was written up in December of last year and accused of plotting to retaliate in the event that Stanley "Tookie" Williams was executed. "They took Tookie in early November. I didn't know he was gone. I didn't know for about two days. He was executed December 16. I got 90 days in the whole pending an investigation. I went from Grade A to Grade B. I hadn't had a problem for years."

Mr. Cain added that he knows to avoid hazards. He provided detailed examples of the culture on the yard and the expectations both within and across gang or racial boundaries. He enjoys playing dominoes and plays basketball every other weekend. He usually plays one game whether he wins or loses. "Plus, at my age, it takes longer to heal, so I watch myself." Mr. Cain stated he is a good domino player and also enjoys playing UNO, spades, or Scrabble. The losers usually must complete 20-50 push-ups.

Mr. Cain is currently in the Adjustment Center charged with planning to riot if inmate Stanley Tookie Williams was executed. Mr. Cain vehemently denied the charges and noted that he had not been written up for problematic behaviors for 19 years. "I was programming okay and then got wrote up for planning a riot. I was wrote up for suspicion of inciting to riot after Tookie Williams' execution. It goes with the territory. They think everybody is ignorant for the most part. I've proved over the years I'm not disruptive or a gang member. It's disappointing to be implicated with the guys. They (prison staff) create the environment. The temptation to fight is always there. It's a crazy environment. 600 people. There are no secrets at San Quentin. Things spread like wildfire whether or not there is credibility. That's disappointing and frustrating. You think they'd discipline you for what you did, not for something someone said. How can someone incriminate you? I tell the guys on the yard 'don't come around me playing.' The guard might mistake what we're doing and start shooting.'

The ICC report dated 12/16/05 reclassified Mr. Cain to Grade B program pending an investigation for possible involvement in a plan to assault staff in the event of the execution of inmate Stanley Williams. Mr. Cain adamantly denied the allegations against him and described in detail the problems inherent in programming. "If you are quiet and just doing your program, they can accuse you of being quiet because you are planning to do something. If you are causing a lot of hell then I guess they don't have to worry about you because you are not programming. So, if you program or if you don't program you are in the same situation. How can they believe another guy in here who can just accuse me or anybody else of something?"

When asked to describe how prison staff would describe him, Mr. Cain responded, "Easy-going, affable, standoffish, peaceful, and someone that minds his own business. I am a person with influence over others, disruptive gang members, shot callers." Mr. Cain proceeded to talk about San Quentin as creating a "compatible environment for different ethnic groups." Mr. Cain's analysis of his current situation and insights about how to manage difficult situations does not support a finding of mental retardation.

The General Chrono report dated 04/22/94 reported one confiscated photo from an inmate that featured nine inmates displaying Crip gang hand signals. Mr. Cain was pictured in this photo.

The ICC report dated 02/05/04 documented a meeting in which ICC personnel queried Mr. Cain about enemy concerns within the San Quentin condemned population. Mr. Cain denied enemy concerns or problems. ICC notes indicated that Mr. Cain had minimal disciplinary history. He was a member of the Hoover Crips. Mr. Cain was retained on Grade A status.

The ICC report dated 11/28/00 documented that "the inmate is able to participate effectively in the hearing, and clearly understands the process." In this hearing, Mr. Cain was classified Grade A and assigned to Exercise Yard-I. The composition of the yard was discussed, "at length with Cain, and he reiterated his position that he is compatible with inmates on that yard."

The ICC report dated 09/28/00 reviewed his Grade B Program status. Mr. Cain was reported to understand the process before him and did not require assistance.

The ICC report dated 07/06/00 documented Mr. Cain's affiliation with the Crips Disruptive Group and association with the Rolling 60's Disruptive Group. Mr. Cain requested assignment to the Grade-A Program. During this hearing, Mr. Cain denied affiliation with any disruptive group.

The ICC report dated 06/29/00 documented that Mr. Cain had been disciplinary free for approximately two years and was therefore referred to ICC for a Program Review. Mr. Cain apparently had no problems understanding the process.

The ICC reports dated 07/15/99 and 06/17/99, respectively, document Mr. Cain's ability to interact and participate appropriately in hearings concerning his behavior and classification status.

The ICC report dated 06/10/98 documented Mr. Cain's ability to present himself appropriately before the committee and express his situation without difficulty. Mr. Cain challenged the content of an anonymous note alleging a threat against him, shared with the committee this personal assessment of the note and the situation, and successfully argued to remain in his current yard on assignment. Mr. Cain further agreed to cooperate with correctional staff should he feel unsafe or threatened in the future. Mr. Cain did not need special assistance to manage this hearing or situation.

The ICC report dated 06/17/98 documented that Mr. Cain sent a note to the ICC committee indicating his desire to meet about a possible yard change.

The ICC report dated 03/31/94 documented Mr. Cain's request for assignment to a particular exercise yard. The committee granted his request.

The Rules Violation Report dated 07/12/94 documented Mr. Cain in possession of a "fish line", a self fashioned line utilized for passing contraband from one cell to another.

The ICC report dated 01/09/92 documented the following. "As per due process, a staff assistant was not assigned, as the inmate is not illiterate nor are the issues complex. An investigative employee was not assigned as the inmate is not illiterate and is able to present evidence for the purposes of this hearing."

MENTAL STATUS EXAMINATION

Mr. Cain presented in an alert, cordial, and articulate manner. Physical appearance revealed a well-groomed and well-nourished right-handed African American male 6 feet tall weighing 222 pounds. Mr. Cain is bald, wears glasses, and has a neatly trimmed goatee. He has a tattoo with his stepmother's name, "Wilma" on his left hand. Mr. Cain has the tattoo, "cocaine", on his left inner forearm and the symbol of the zodiac sign on his left inner arm just above his wrist. Mr. Cain offered for review a puncture stab wound on his right forearm above his elbow, the result of an incident with a girlfriend in 1985; a stab wound on the right side of his nose from the 1985 incident; two small puncture stab wounds on his right forearm below his elbow, also from the 1985 incident. Mr. Cain also offered for review two distinct indentations on his scalp, each approximately 1 inch in length, caused by the garage door incident that occurred when he was five or six years old.

Mr. Cain cooperated with the evaluation and answered questions without hesitation. His eye contact was good and rate of speech normal without evidence for slurred, pressured, or atypical speech. Mr. Cain displayed an appropriate range of affect. There was no evidence for flat, blunted, markedly depressed, or labile affect. Mr. Cain was noticeably sad and tearful when he talked about his father during the Ventura County Jail interview. Mr. Cain exhibited a sense of humor, wit, and sarcasm at various points throughout the interviews conducted at San Quentin State Prison. Mr. Cain's thought content and associations were normal. There was no evidence for hallucinatory, delusional, or loose associations. Mr. Cain answered questions appropriately without circumstantiality or tangentiality. There was no evidence for a preoccupation with internal stimuli and no evidence for thought blocking, thought broadcasting, or thought insertion.

Mr. Cain was oriented in all spheres with good recent and remote memory. His attention and concentration was not significantly impaired. There was no evidence for significant distractibility or psychomotor restlessness. Finally, there was no evidence for confusion, delirium, or dementia.

Mr. Cain did not present with the level or severity of neurological impairment described by Dr. Karen Bronk Froming, Ph.D. (Petitioner's Exhibit 170). Mr. Cain did not exhibit a limited capacity to see, comprehend, or respond to this examiner or the testing process. He was able to follow both written and verbal material, exhibited adequate attention and concentration, did not exhibit distractibility or problems with extended focus, and did not exhibit problems incorporating test material.

PSYCHOLOGICAL TESTS ADMINISTERED

Beta III Intelligence Test
Test of Nonverbal Intelligence-3
Bender Visual Motor Gestalt Test
Peabody Picture Vocabulary Test-III
Wechsler Adult Intelligence Scale-III
Wide Range Achievement Test-Revision 3
Vineland-II Adaptive Behavior Scales

BEHAVIORAL OBSERVATIONS

Mr. Cain presented in an alert, cooperative, and friendly manner. He exchanged a smile and verbal greeting with the examiner at the start of each session. Mr. Cain was handcuffed with only one hand free during the interviews and testing. Mr. Cain had less mobility during the sessions held at San Quentin State Prison because of his Grade B status. Mr. Cain was tethered to his chair with his left hand handcuffed to his waist. Correctional officers provided an extension to his right hand by using an extra set of handcuffs. This allowed Mr. Cain enough freedom to lift his right hand high enough to attempt paper and pencil tasks. His mobility, however, was compromised in that he did not have full range of his upper torso and right hand. Mr. Cain completed all of the tests administered within appropriate time limits and without protest. He did not report problems with test items or test instructions. He did not report fatigue and did not express other complaints.

Mr. Cain's problem solving abilities are adequately developed but compromised by his limited formal education. Mr. Cain approached test items in a calm and alert manner. He took his time working on complex or unfamiliar test items and never abandoned items out of anger or frustration. There was no evidence for distractibility or psychomotor restlessness consistent with an attention deficit disorder. Mr. Cain remained focused on his problem-solving activity and was able to shift from one cognitive set of operations to another without difficulty. Mr. Cain never became confused, frustrated, or bewildered by test demands. He surveyed the stimulus field before responding or initiating problem-solving activity.

COGNITIVE FUNCTIONING

Test scores obtained from the tests utilized for this assessment should be interpreted with caution for the following reasons. IQ scores, Standard Scores, and Percentile Ranks are not precise or exact numbers that can provide a definitive answer to the question of mental retardation. Test

scores merely represent one variable in the overall assessment of intelligence, as most intelligence tests have their respective strengths and weaknesses. The value and necessity of testing is in providing additional, albeit not definitive or exact, information relative to a person's ability to survey, organize, and integrate stimuli. To the extent that objective tests provide the opportunity to observe an individual's ability to think, reason, and analyze data, such information is helpful in developing an informed opinion about cognitive functioning, which is required for a diagnosis of mental retardation.

Another reason for not relying exclusively on IQ or other test scores to establish mental retardation is that test scores may well be influenced by a host of factors. While intelligence is extremely difficult, if not impossible, to manipulate or fake, mental retardation is extremely easy to manipulate or fake. Intelligence tests do not control for problems with motivation, secondary gain, malingering, lack of formal education, poor test taking performance, inconsistent formal education, poverty, quality of education, culture, language, and other issues. The pattern of over diagnosing mental retardation in minority communities is legendary and well documented in the literature.

In this particular case, the issue of mental retardation is a life and death matter, thus raising the question of motivation, effort, malingering, and secondary gain. In Mr. Cain's case, there is ample documentation to establish a less than adequate educational career. Prior to incarceration, Mr. Cain did not perform well in school due primarily to a reading problem. Reading is critical to school performance. Without age appropriate reading skills, a student is unable to acquire new information, master classroom material, and proceed to learn advanced and more complex material. Not surprisingly, students without basic mastery are at risk for dropping out of school and generally not succeeding well. Furthermore, they rarely test well, as this is an ability that is developed over the years based on adequate or successful school performance throughout the educational cycle. In the United States, reading is generally taught until the third grade. Thereafter, students are expected to learn by way of reading. Therefore, someone who does not master learning will have an increasingly more difficult time in school as he or she is passed from one grade to another. This was the case with Mr. Cain. More importantly, these are factors that ultimately affect an IQ score, and these factors were not addressed by Dr. Weinstein or Dr. Froming in their reports.

The test scores that follow should be interpreted with the factors outlined above. Test scores, while very helpful in establishing intelligence or mental retardation may, at best, simply reflect the subject's performance on the specific test instrument and not necessarily reflect intellectual abilities.

Mr. Cain completed the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) and obtained the following IQ scores:
Verbal IQ: 87 Performance IQ: 86 Full Scale IQ: 86

These scores fall within the Low Average range of intelligence (80-89). They do not support a diagnosis of mental retardation. On the Verbal subtests, Scaled Scores ranged from 5 to 11. As a point of reference, a Scaled Score of 10 typically translates into Average intelligence.

Mr. Cain consistently obtained credit on the easy to moderately difficult items. He consistently failed items that required exposure to undergraduate or graduate education.

The Verbal subtests of the WAIS-III measure crystallized intelligence, defined as the type of intelligence acquired by the individual through life experiences and education. Not surprisingly, crystallized intelligence suffers significantly when a person does not attend school, lives in a very difficult home environment, and/or has learning disabilities. In Mr. Cain's case, he admitted to academic problems along with motivational and other issues. He also reported, however, that since his incarceration at San Quentin, he has made an effort to master reading and spelling skills. This may help explain why he obtained his best score on the Vocabulary subtest (Scaled Score: 11). Mr. Cain's word knowledge is an area of strength and consistent with his above average ability to express himself clearly and articulate his thoughts without difficulty.

Mr. Cain's lowest score was on the Arithmetic subtest (Scaled Score: 5). His below average performance indicates a weakness in executing mental calculations. Mr. Cain was able to add, subtract, and multiply simple calculations. He encountered problems with more complex calculations. Mr. Cain also performed poorly on the Digit Span subtest (Scaled Score: 6). This subtest requires a subject to repeat a series of digits forwards and backwards. Mr. Cain managed to repeat only a three digit series in reverse. His performance raises the possibility of a deficiency in his ability to manipulate and visualize numbers. His working memory and sequential processing skills may also be below average. Mr. Cain's performance on the remaining three Verbal subtests suggests average skills in abstract reasoning, general fund of knowledge, and practical problem solving.

Mr. Cain performed within the low but normal range across the five Performance subtests. There was no significant intratest or intertest scatter. The Performance subtests measure fluid intelligence, which is not contingent on formal education and typically acquired through ones' natural interaction with the environment. Fluid intelligence typically refers to a person's ability to solve verbal and nonverbal problems using inductive or deductive reasoning. Individuals with problematic educational backgrounds that include truancy or specific learning disabilities typically perform better on the Performance subtests, as the subtests are not completely dependent on formal, classroom education.

Mr. Cain's performance yielded Scaled Scores ranging from 9 to 7, with no significant deviation from the mean score. Mr. Cain's performance was notable for his tendency to work slowly and sacrifice speed for accuracy. On the Block Design subtest, for example, Mr. Cain successfully completed 11/14 test items. He did not obtain a higher Scaled Score because he did not obtain bonus points for speed and accuracy on two test items. He obtained partial bonus points on three other timed tests. This subtest measures visual-motor coordination and integration and is considered a screening tool for organicity. Mr. Cain's performance did not suggest visual-motor integration problems of organic proportions. His performance on the Matrix Reasoning subtest fell within the low average range and did not reveal problems with nonverbal concept formation.

In summary, Mr. Cain's performance suggests that he possesses, at the very least, Low Average intelligence. There is no evidence for mental retardation. The range of scores obtained do not reflect essential cognitive inefficiency consistent with mental retardation. Mr. Cain might well have obtained a higher score were it not for his limited formal education. Finally, Mr. Cain's performance on the subtests sensitive to organicity did not yield positive results.

Mr. Cain also completed a Peabody Picture Vocabulary Test-Third Edition (Form III A) and obtained the following test scores.
Standard Score: 88 Percentile Rank: 21 Age Equivalent: 22+

The Peabody Picture Vocabulary Test measures receptive vocabulary, which is considered to be one measure of intelligence. The Peabody provides useful information in determining the extent to which an individual understands and uses words appropriately. Mr. Cain surveyed each picture card before making his final selection. He took this time with unfamiliar words and used a process of elimination with complex words. Mr. Cain understood words such as *incandescent, pilfering, reposing,* and *incertitude*. He failed words such as *filtration, spherical,* and *ladle*.

Mr. Cain's performance suggests adequate receptive language skills. There was no evidence for mental retardation. This is consistent with his current ability to communicate effectively with examiners, evaluators, investigators, prison personnel, and other inmates. There was never any indication, throughout this interview and assessment that Mr. Cain failed to understand the conversation at hand. There was no data submitted for review documenting an inability to understand verbal communication.

Mr. Cain completed the Test of Nonverbal Intelligence-Third Edition (Form A) without difficulty and obtained the following test scores:
Quotient: 84 Percentile Rank: 14

This test is considered a language free, culturally reduced measure of abstract/figural problem solving. Mr. Cain's performance fell within the Low Average range. Mr. Cain worked efficiently and effectively during the initial stage and answered correctly 21/22 of the easy to moderately difficult test items. He encountered problems with the more complex designs. Mr. Cain took his time before making his selection and self-corrected for credit on several items. His performance does not suggest mental retardation.

Mr. Cain completed the Beta III test without difficulty and obtained the following scores:
Beta IQ: 88 Percentile: 21

The Beta III is a nonverbal test measuring nonverbal intellectual ability. It is designed for use with individuals who are non-English speakers, relatively illiterate, or have language difficulties. Mr. Cain's performance fell within the upper limits of low average. Mr. Cain worked efficiently and effectively across the various subtests. Given his tendency to work slow and sacrifice speed for accuracy, this examiner tested the limits on the first three subtests by allowing Mr. Cain to exceed each time limit by 60 seconds (no credit was given for any item which he scored

correctly after the actual elapsed time limit). With an additional 60 seconds, Mr. Cain obtained additional credit such that his scaled scores changed in the following direction.

	Scaled Score Actual Time Limit	Scaled Score with additional 60 seconds
Test 1	8	12
Test 2	9	13
Test 3	9	19

In summary, there is no evidence whatsoever for mental retardation. This protocol provides information to suggest that Mr. Cain has the capacity to perform at a higher level under certain testing conditions. More specifically, he does not perform well under timed conditions. Extra time in this protocol yielded significantly higher results. These scores would have placed him within the Average to Above Average range.

ACADEMIC FUNCTIONING

Mr. Cain completed the Wide Range Achievement Test Revision 3 (Tan Test Form) and obtained the following scores.

	Standard Score	%ile	Grade
Reading	95	37	High School
Spelling	81	10	7
Arithmetic	65	1	4

The Wide Range Achievement Test is a widely used, standardized measure of a person's ability in three subject areas: Reading, Spelling, and Arithmetic. This test is useful in differentiating mental retardation from learning disabilities when used in combination with intelligence testing. Mr. Cain's scores were not significantly different than the scores obtained by Dr. Froming in 1997 (Beliz Report, Page 10). Reading skills are at a high school level, spelling skills are at a seventh-grade level, and arithmetic skills are most delayed and at a fourth-grade level.

Mr. Cain was able to read or sound out words such as *protuberance, longevity,* and *fictitious.* He was able to spell words with multiple syllables such as *equipment, museum,* and *occupy.* Mr. Cain is able to add, subtract, and multiply simple calculations. He was also able to compute a simple fraction. He failed to execute more complex calculations.

In summary, Mr. Cain's performance does not suggest mental retardation but rather accurately reflects his problems in specific academic areas. These problems were well documented during his teenage years and unfortunately were not addressed through the educational system.

OTHER TESTS

Mr. Cain completed in the Bender Gestalt protocol with his right hand cuffed to just above table line. Consequently, he encountered some difficulty reproducing the designs. Although this examiner asked the Watch Lieutenant to allow Mr. Cain one free hand, Mr. Cain's "Grade B" status prevented this possibility. Consequently, his Bender reproductions were limited by his inability to move his hands freely. This may best explain the difference in quality between his

Bender reproductions completed on 07/26/88 and his current Bender reproduction. However, despite the obvious challenge presented by his limitation, Mr. Cain produced a protocol free from significant distortions. His reproductions were quite similar to the original Gestalt and do not suggest significant visual-motor problems.

ADAPTIVE FUNCTIONING

The Vineland-II Adaptive Behavior Scales was used to estimate Mr. Cain's adaptive level of functioning. The Vineland-II is a widely used, standardized measure of adaptive functioning. The Vineland measures adaptive functioning across three domains, specifically, communication, daily living, and social skills. Each domain has three subdomains, and these will be referenced in the narrative below.

As with other tests, the Vineland has its limitations. The information required to score the Vineland is obtained by interviewing informants familiar with the subject and may include a spouse, adult sibling, work supervisor, or professional caregiver from an institution where the subject resides. Not surprisingly, an informant that either minimizes or exaggerates adaptive skills can influence the data gathering. Misreporting by naïve, poorly informed, or biased informants can produce markedly distorted findings.

Another potential source of information is the subject himself. A number of questions lend themselves to direct inquiry in a manner that minimizes biased reporting. For example, a wealth of information was obtained for purposes of scoring the Communication domain by conducting a comprehensive clinical interview with Mr. Cain. His ability to provide the detailed narrative contained in this report created an opportunity to assess his expressive and receptive abilities. The tests administered for this assessment also provided relevant information. Finally, the records reviewed for this report provided additional information with which to complete an assessment of Mr. Cain's adaptive abilities.

It is important to note that none of the records reviewed for this report reported or implied deficits in adaptive functioning skills suggestive of mental retardation.

Mr. Cain obtained the following scores on the Vineland-II. Communication skills are adequately developed and at age level (Standard Score: 100; Percentile Rank: 50). Mr. Cain obtained full credit on the Receptive and Expressive language domains. His v-Scale Score of 16 on these domains are the highest possible scores. Mr. Cain expresses himself well and is able to carry an adult conversation. He follows instructions, listens to an informational talk for at least 30 minutes, and can execute multipart instructions. Mr. Cain speaks in full sentences, asks appropriate questions about his environment, uses regular past tense verbs, modulates his tone of voice appropriately and provides complex directions to others.

Mr. Cain has seventh-grade writing skills, writes letters to others, reads newspaper articles regularly, and has written a couple of autobiographical excerpts. "I wrote a story in 1995. Someone edited it for me. It's called, 'Memories From the Dust'. I have had editors call to do an interview on me, but I don't feel it's cool to do."

Mr. Cain's communication skills are further evident in the 1986 transcript of his interview with Detectives Billy Tatum and John Garcia. (People's #18). Mr. Cain provided his age, birthdate, home address, and telephone number without difficulty. He responded to questions without any evidence for confusion or disorientation and was able to follow the conversation without assistance. Mr. Cain tolerated sustained questioning and maintained his innocence despite a sustained focused by the detectives. Mr. Cain countered the implication that he had spent stolen money by insisting that he bought new shoes with his work paycheck. He also queried the investigators about whether or not they have found his fingerprints and/or other evidence at the crime scene. Mr. Cain was able to provide the name, age, and address of his girlfriend. He also provided the names and ages of his brothers without evidence of memory malfunction. Mr. Cain was able to provide a detailed account of the events leading to the murders in question. He was able to name and describe his friends and others at the party.

In summary, Mr. Cain's communication skills are adequately developed. There is no evidence for mild, moderate, or severe delays in this domain.

The Daily Living skills domain includes the following subdomains: Personal, Domestic, and Community. Mr. Cain obtained the highest possible score on the Personal subdomain. Mr. Cain is completely independent with respect to self-care tasks. He is toilet trained, dresses and feeds himself independently, fastens fasteners, showers, shaves, and trims his goatee without assistance. Mr. Cain requests medical help when necessary and follows through with medical appointments and medication issues.

On the Domestic subdomain, Mr. Cain obtained a moderately low score due to the challenges of scoring specific test items. Mr. Cain obtained credit on 23/24 items but missed a perfect score by four points. These four points lowered his v-Scale Score to an 11. Otherwise, he would have obtained a v-Scale Score of 16. Mr. Cain was not given credit on the following test item for obvious reasons:
24. Plans and prepares main meal of the day.

Mr. Cain was not given full credit on the following items for similar reasons:
21. Prepares food from ingredients that require measuring, mixing, and cooking.
23. Performs maintenance tasks as needed (e.g., replaces light bulbs, changes vacuum cleaner bag, etc.).

Mr. Cain presents with adequate domestic skills. He is careful around hot objects, keeps his living space clean, and keeps his clothing neatly folded under his mattress. Mr. Cain has previous experience in construction operating a jackhammer, drills, saws, picks, and "everything in construction and landscaping." During the time he was on Grade A status, Mr. Cain had the use of a steamer in which he prepared beans and rice and Top Ramen soups. Overall, Mr. Cain exhibits adequate domestic skills. His relatively low score on this subdomain reflects the limitation of the Vineland protocol and not genuine inability.

On the Community subdomain, Mr. Cain functioned within the moderately low range (v-Scale Score: 10). Mr. Cain did not obtain credit on the following items:

10. Demonstrates computer skills necessary to play games or start programs with computer turned on; does not need to turn the computer on by self.
31. Demonstrates computer skills necessary to carry out complex tasks (e.g., word processing, accessing the Internet, installing software, etc."

Mr. Cain understands the function of the telephone and a clock. He follows prison rules and procedures without difficulty. He avoids hazards and exhibits an adequate capacity to scan his environment for signs of trouble. He understands the function of money and tells time without difficulty. He is able to order complete meals and restaurants, make change from purchases, and travel long distances by bus or car. Mr. Cain previously had a checking account and stated that he was never overdrawn. He is able to maintain good work productivity but was fired on one occasion for tardiness. Mr. Cain does not have trouble navigating the prison system or the gang system at San Quentin.

The Socialization Domain contains three subdomains: Interpersonal Relationships, Play and Leisure Time, and Coping Skills. Mr. Cain obtained a v-Scale Score of 16 on each subdomain, suggesting adequate adaptive skills. Mr. Cain exhibits a wide range of socially appropriate behaviors. He can be charming, pleasant and helpful when necessary. He can be assertive and friendly towards others. Mr. Cain can also mix assertiveness with aggressiveness to get his way. Although capable of engaging in adult conversation across the range of subjects, Mr. Cain stated that he does not seek out friendships or conversation. He explained that this activity can lead to problems on the yard. Mr. Cain will exercise with others, play basketball or dominoes, and communicate with fellow inmates on the yard in the same exercise yard. He does not communicate with other inmates across yards through fences for fear that their behaviors will be misinterpreted. Mr. Cain offered that he does not communicate via "kites". "I don't accept kites. They could be hot: drugs, assault someone. Officers will deliver stuff. It can be feces or weapons. So, if an officer comes with something, if they can't tell me who, I don't accept it. Same with kites. They know I don't accept kites and I don't pass kites." There was no evidence to suggest that Mr. Cain has ever been victimized or exploited by correctional officers or fellow inmates.

The various interviews conducted by Investigator David R. Stone provide ample evidence about Mr. Cain's functioning. Prior to incarceration, Mr. Cain had friends, albeit superficial, was never manipulated, victimized, or exploited by others, and was never observed by his friends to act in a manner that would suggest mental retardation. In fact, Mr. Cain frequently functioned as a leader. He could charm women, intimidate peers, and get along with persons in authority when necessary.

A number of reports reviewed by this examiner documented Mr. Cain's ability or tendency to assert himself over others to meet his needs or demands. The Pre-Home Investigation Request/Progress Summary dated 10/11/78 noted adequate social adjustment/emotionality. "Has done very well in group therapy and has applied some of the techniques in interacting with staff and peers. Internal control seems much better. He continues to do well on assigned and extra tasks; and is very helpful by setting an excellent example." Under the section Strengths, Mr. Cain was described as having "... a pleasant personality, and is always ready to volunteer for

extra work assignments. Tracy has on many occasions taken it upon himself to instruct and counsel the other students who are having problems adjusting to the structure of A.M.S." Mr. Cain's ability to mentor others does not suggest mental retardation.

The Arizona Youth Center Treatment Plan Review dated 09/08/78 provided the following information under "Social Adjustment/Emotionality." "Tracy continues to volunteer for extra duties around the cottage and performs his assigned duties well... group therapy reports indicate exceptionally good participation on Tracy's part, self-disclosure, taking risks, role-playing, and group interaction." These behavioral descriptors do not support a finding of mental retardation and do not suggest problematic social adjustment secondary to mental retardation.

The ICC meeting dated 02/05/04 concerning yard assignment and inmate classification demonstrated Mr. Cain's ability to state his case well enough to receive a favorable ruling. There was no evidence to suggest that Mr. Cain was unable to express himself or process the conversation or argument at hand. His ability to communicate with others or attempt to communicate with others is implied in the Rules Violation Report dated 07/12/94, which found Mr. Cain in possession of a fish line utilized for passing contraband from one cell to another.

Mr. Cain stated that he learned to drive by age 13. "My father taught me how to drive a stick. I learned to drive a five-speed Toyota Corolla 1969. I could drive good. My parents would tell me to go to the store. I'd purchase something and come back. I got my license when I was 18. [Why not age 16?] At 16 I was in camp, or if I was in school my friends were driving. Put it like this: I was acting the way I shouldn't, my grades weren't shit, I had to do something to get something in our house. You weren't just entitled."

In summary, Mr. Cain presents with moderately low to normal adaptive skills. There is no evidence for significant dysfunction in the Communication, Daily Living, or Socialization Domains. Mr. Cain engaged in a number of problematic or maladaptive behaviors in late childhood through young adulthood. These behaviors should not be interpreted as deficits in adaptive functioning. Pre-incarceration, Mr. Cain interacted actively with others and was never described as slow, retarded, or inadequate. He rather quickly developed a taste for taking others' belongings and was drawn to a variety of delinquent acts that involved stealing. Mr. Cain had an age appropriate interest in women and dated without difficulty. He did not have problems getting around in his community, worked when he wanted to, and established a number of friendships and acquaintances in Los Angeles and Yuma, Arizona. There is absolutely no evidence to suggest a level of impairment in communication, survival, or socialization skills that would support a finding of mental retardation.

Post sentencing and incarceration, Mr. Cain has adjusted well to prison life. He does not require special assistance and has never required special monitoring to prevent others from taking advantage of him. There is no data submitted for review indicating a need for supervision or support in this regard. Mr. Cain provided various examples of how he takes care of himself and navigates the prison system. He considers himself as someone of "influence" over others. Prison personnel apparently believe this to be true to some extent and are currently investigating

Mr. Cain because they believe he may have been involved in a plot to incite a riot following a recent execution.

DISCUSSION

The 10th edition of the American Association on Mental Retardation (AAMR) entitled, "Mental Retardation: Definition, Classification, and Systems of Supports", published by American Association on Mental Retardation, Copyright 2002, is referenced throughout this section relative to the definition and classification of mental retardation.

With respect to the diagnosis of mental retardation based entirely on an IQ score, neither the AAMR nor the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) rely on a fixed cut-off point for making a diagnosis of mental retardation. Adaptive behavior skills and the use of clinical judgment are given equal consideration. Clinical judgment, along with basic common sense, is essential given the limitation of test protocols in identifying subjects with secondary gain issues.

The totality of the data reviewed and collected for this assessment does not support a finding of mental retardation. Mr. Cain does not exhibit vulnerability, does not have special needs, and does not have specific deficits that necessitate support, protection, or special monitoring. Mr. Cain has adjusted rather well to his current environment. He exhibits social reciprocity and adequate participation in prison affairs. Mr. Cain initiates activity and engages in a variety of interpersonal interactions designed to keep him safe and preserve his status within the prison environment. He has a very clear rationale for his behaviors. Examples include his refusal to take kites from inmates or unknown gifts/packages from Correctional Officers and his refusal to converse with others openly from one yard to the next. These behaviors are designed to minimize adverse outcomes. Mr. Cain's self-protective behaviors are not typically found among individuals who are mentally retarded. Mentally retarded inmates are typically at risk for victimization and exploitation. Mr. Cain does not present as someone who has been victimized by others. As previously noted, Mr. Cain navigates his community relatively well. He previously enjoyed Grade A status. Despite having lost this status, Mr. Cain continues to act appropriately with inmate and prison personnel. Mr. Cain adheres to his schedule of exercise, activity, and reading. He does not isolate himself and has never withdrawn from prison life. He has friends, knows and respects his enemies, and demonstrates a good understanding of the prison and gang culture. Again, there is no evidence to suggest that Mr. Cain requires special assistance or monitoring.

There was no data offered for review to suggest that Mr. Cain functions significantly below the level of other inmates in his current environment. There is also very little data to suggest that Mr. Cain functioned significantly below average prior to incarceration. Unfortunately, Mr. Cain is the victim of a dysfunctional family. The lack of parental support and consistency created a very difficult situation for Mr. Cain and his siblings. His stepmother abused alcohol and engaged in sociopathic acts, his father was frequently away at job sites, and Mr. Cain struggled academically. Not surprisingly, Mr. Cain developed a variety of maladaptive and problematic behaviors.

In summary, this examiner reviewed multiple sources of information including progress reports, treatment plans, psychological evaluations, probation reports, case studies, etc., that took place prior to Mr. Cain's conviction on this instant matter and prior to the Atkins ruling. None of the evaluations prior to his conviction raised the issue of mental retardation. None of the reports found significant cognitive, adaptive, or neurological impairments. Virtually all of the reports were unanimous in identifying verbal deficits and associated academic difficulties. Mr. Cain has never required intermittent, limited, extensive, or pervasive supports as required by someone with mental retardation.

The evaluations provided by Dr. Froming and Dr. Weinstein were not complete in that they failed to address Mr. Cain's adaptive level of functioning. The absence of a comprehensive assessment of adaptive functioning essentially eliminates the use of these reports as sufficient for purposes of rendering an expert opinion on the issue of mental retardation. Furthermore, their interpretation of test data was limited to simply taking raw and converted scores at face value without explaining or presenting alternative explanations to account for the low scores.

SUMMARY

Mr. Cain is a 43 year-old African-American male sentenced to death for the murder of an elderly couple. The data reviewed by this examiner, as well as the information provided by Mr. Cain, leaves little doubt that Mr. Cain's overall development was compromised by his dysfunctional parents and associated factors.

Mr. Cain had a biological father that worked long hours but could not parent successfully or function adequately as husband; a substance abusing biological mother who abandoned the family during Mr. Cain's early childhood and later died in Jonestown; and a young, abusive, substance abusing stepmother who verbally and physically abused the Cain siblings. The end result was an angry young man with low frustration tolerance, poor impulse control, problems with authority figures, and a pre-incarceration pattern of using violence to compensate for low self-esteem and associated feelings of inadequacy. Mr. Cain's developmental progress was further compromised by his learning difficulties and lack of remedial instruction. Parental control during his most critical phase of development ranged from zero to harsh and punitive. These factors created a high-risk situation that clearly contributed to Mr. Cain's current situation.

Nevertheless, Mr. Cain is not mentally retarded. There is no evidence to suggest that Mr. Cain has significant cognitive and adaptive limitations. I should also note that clinical observation and common sense are critical in arriving at a final diagnosis. While test scores on particular instruments might yield extremely low scores suggestive of mental retardation, the scores can only be considered valid if the individual evaluated is a "good fit" with test scores. For example, if an x-ray provides complete certainty that a person has a compound leg fracture, the diagnosis is valid only if the person, upon direct observation, shows evidence of a compound leg fracture. Absent this factual observation, the x-ray findings would not be a valid measure of the individual. In Mr. Cain's case, the fact that he scores low on certain tests or that he exhibits soft neurological findings does not automatically translate into a diagnosis of mental retardation,

particularly when he does not exhibit behaviors indicative of significant cognitive and adaptive limitations or neurological impairment.

In conclusion, there is absolutely no evidence for mental retardation. Mr Cain is able to survey, organize, and integrate stimuli in a meaningful manner. Mr. Cain walks, talks, problem solves, socializes, thinks, reasons and interacts with others and his environment without significant difficulty. Cognitive and adaptive skills are adequately developed and free from significant impairment. This concludes my report on Mr. Tracy Dearl Cain. Please do not hesitate to contact me should you desire of additional information.

Sincerely,

Efrain A. Beliz, Jr., Ph.D., DABFM
Licensed Clinical Psychologist
Diplomate, American Board of Forensic Medicine
Assistant Clinical Professor, Department of Psychiatry
And Biobehavioral Sciences, UCLA School of Medicine

I, Stanley J. Huey, Jr., Ph.D., declare as follows:

1. I am a psychologist with expertise in psychotherapy with juvenile offenders and culture-responsive mental health treatment for ethnic minorities. I have been a Professor at the University of Southern California since 2000. I am also Clinical Supervisor, providing supervision to clinical psychology graduate students at the University of Southern California.

2. I received a Bachelor's Degree in Psychology from the University of California at Berkeley in 1990. In 1994, I received a Master's Degree in Clinical Psychology from the University of California at Los Angeles. I completed a Predoctoral Clinical Psychology Internship at the Medical University of South Carolina. In 1998, I received a Doctorate in Psychology, my major field being Clinical Psychology, from the University of California at Los Angeles. I completed Postdoctoral Clinical Training at the National Crime Victims Research Center and Clinic in the Department of Psychiatry and Behavioral Sciences at the Medical University of South Carolina.

3. I am a member of the American Psychology Association and the Association of Psychological Science, the Association for Behavioral and Cognitive Therapies, and the Society for Research in Child Development.

4. I have authored and coauthored numerous publications, including articles in such professional journals as *Journal of the American Academy of Child and Adolescent Psychiatry*, *Journal of Abnormal Psychology*, and *Journal of Consulting and Clinical Psychology*. Most of my articles address issues in mental health particularly regarding the evaluation and treatment of adolescents and children.

5. Since 1994 and continuing through the present, I have made numerous professional presentations.

6. I have been the recipient of and principal investigator for two major grants, including most recently a grant from the National Institute of Mental Health for research focused on intervention for gang-affiliated youth.

7. A true and correct copy of my curriculum vitae is attached as Exhibit 1 hereto.

8. I have been asked by attorneys for Tracy Cain to evaluate Tracy's social history and background, with particular attention to his family, cultural, education, medical and psychiatric history. This assessment was conducted to determine what social, emotional, and intellectual factors influenced Tracy's prenatal development, childhood, adolescence and adulthood. I was asked to determine whether Tracy experienced childhood trauma [i.e., physical and

emotional abuse, deprivation, abandonment and/or neglect]; and if so, to identify the possible effects of childhood maltreatment on Tracy's subsequent social, emotional and intellectual development. In addition, I was asked to consider Tracy's experiences growing up in abusive and neglectful circumstances in Los Angeles and in Yuma, Arizona. I was asked to determine if his family, social service agencies, schools and correctional institutions failed to intervene in such a manner as to affect his social, psychological and intellectual development from birth to childhood. One goal of my evaluation is to identify social history information that could have been presented at Tracy's capital murder trial, particularly at the sentencing or penalty phase of his trial.

9. In reaching my professional opinion, I have reviewed extensive documentary evidence pertaining to Mr. Cain, his family and the trial at which he was sentenced to death, including the following: medical and psychological records of Tracy Cain; school and employment records of Tracy Cain; institutional records of Tracy Cain; approximately fifteen written statements of Cain family members and friends; and the written statements of professionals who chronicle Tracy's life in his family, at school, in his community and in youth correctional settings. A true and correct copy of the list of materials I reviewed is attached as Exhibit 2 hereto.

Finally, I interviewed Mr. Cain in San Quentin State Prison. These are the kinds of materials and information mental health professionals oftentimes rely on in reaching clinical opinions.

10. Tracy Dearl Cain was born on December 29, 1962, in Los Angeles, California. [Ex. 41, Birth certificate] He is the fourth of five children born to Ruthie Mae Quinn and Percy Cain, Jr., both of rural Mississippi. [Ex. 153 Declaration of M. Blair, ¶ 1] Tracy's mother, Ruthie Mae, had two children from her previous marriage to Collins Blair, Tracy's half-brothers, Collins, Jr. and Mack Arthur. [Ex. 1 and 3, Birth certificates; Ex. 153, Declaration of M. Blair, ¶ 1] Ruthie Mae dropped out of school in the eighth grade and married Collins Blair at the age of 16, in 1956. [Ex. 37, Marriage certificate] Collins, Jr. was born in 1957 and Mack Arthur in 1958. Collins Blair and Ruthie Mae parted shortly after Mack Arthur's birth. [Ex. 153, Declaration of M. Blair, ¶ 1]

11. Ruthie Mae and Percy Cain's first child, Larry Darnell [Danny], was born in 1959; Ruthie Mae and Percy married two months later. [Ex. 19, Birth certificate; Ex. 31, Marriage certificate] Ruthie Mae, Percy, and Ruthie Mae's three small children moved to Los Angeles in 1960, following Percy's sister and her husband. [Ex. 167, Declaration of McDonald, ¶ 9]

12. In Los Angeles, Percy found work in construction. [Ex. 167, Declaration of McDonald, ¶ 9] Ruthie Mae and Percy had four more children in rapid succession; Brenda in 1960, Janice in 1961, Tracy in 1962 and Val in 1964. By 1964, Ruthie Mae had seven children under the age of eight; she was twenty-four years old. [Ex. 9, 16, 41 and 52, Birth certificates; Ex. 155, Declaration of Johnson, ¶ 10]

13. Percy worked long hours and frequently came home from work exhausted. With little support from her husband, Ruthie Mae seems to have coped by drinking and spending time with friends. [Ex. 167, Declaration of McDonald, ¶ 10; Ex. 159, Declaration of Bush, ¶ 4] Eventually Ruthie Mae left her children in the care of her in-laws, as she spent more and more time away from home. [Ex. 155, Declaration of Johnson, ¶ 11] Ruthie Mae left home one day and didn't return. Percy found out she had become involved with a pimp, Arthur Ree Williams. [Ex. 167, Delcaration of McDonald, ¶¶ 10 and 15; Ex. 159, Declaration of Bush, ¶ 5]

14. Ruthie Mae's lived the life of a prostitute and drug user while she was with Arthur Ree. Arthur Ree physically abused Ruthie Mae in front of Tracy and Val. [Ex. 159, Declaration of V. Cain, ¶¶ 13 and 18] Arthur Ree tried to recruit Tracy's older sister, Brenda, into prostitution. [Ex. 167, Declaration of McDonald,

¶ 18] Arthur Ree and Ruthie Mae had a son together, Nouye. While he was still a toddler, Arthur Ree threw Nouye down the stairs of their apartment. Nouye had to be hospitalized with a serious head injury. [xxxx] When Nouye died a few years later, he was identified by the plate surgically implanted in his head during that hospitalization. [Ex. 38, Report of a Death of American Citizen Abroad] Tracy didn't see Arthur Ree throw Nouye down the stairs, but he was very aware of the injury and violence Arthur Ree caused both his mother and baby, half-brother. [Ex. 167, Declaration of McDonald, 18] Percy's family tried to help Ruthie Mae leave Arthur Ree. Ruthie Mae appeared at her in-laws house after Arthur Ree had physically abused her. They took her in, but she left a few days later and returned to Ree. [Ex. 154, Declaration of Bush, ¶¶ 6-8]

15. In January of 1966, five and a half years after moving to Los Angeles, Percy and Ruthie Mae officially separated. Within four months of filing for legal separation, Ruthie Mae was arrested for prostitution. Over the next decade, Ruthie Mae made fifty-nine separate appearances in court on prostitution and related criminal charges. [Ex. 39, People v. Ruthie Mae Cain, Case no. A177571; Ex. 40, California Department of Justice Rap Sheet]

16. The Cain children were deeply traumatized by the separation of their

parents and the loss of their mother in their daily lives. [Ex. 153, Declaration of Bush, ¶ 6; Ex. 167, Declaration of McDonald, ¶ 13] Tracy was three years old when his mother moved out. For several years, Ruthie Mae lived in public housing at Jordan Downs, in Watts, near Percy and the children. [Ex. 154, Declaration of Bush, ¶ 12; Ex. 159, Declaration of V. Cain, ¶ 9] The kids maintained sporadic contact with their mother in those years. Tracy was depressed and cried over his mother's absence. [Ex. 167, Declaration of McDonald, ¶ 13] At one point, he and his younger brother, Val, ran away from school in an attempt find their mother's house and stay there. Tracy and his siblings all wanted to be with their mother; Tracy cried whenever he left Ruthie Mae following a visit. He begged his mother to let him stay with her, but Ruthie Mae said she couldn't take care of him. [Ex. 167, Declaration of McDonald, ¶ 13, Ex. 158, Declaration of Fortune, ¶¶ 4 and 16; Ex. 153, Declaration of M. Blair, ¶ 6]

17. Percy's family helped with the child care for several months after Ruthie Mae moved out, though some of Percy's family made frequent derogatory comments about Ruthie Mae leaving her children. [Ex. 155, Declaration of Johnson, ¶ 11] Percy continued to work long hours to try to provide for his children. [Ex. 155, Declaration of Johnson, ¶ 11; Ex. 157, Declaration of McDonald, ¶ 10] At the end of 1966, Percy found a young woman, Wilma Taylor,

to move into his house as a helper. Wilma was 19 years old when she began taking care of the seven Cain children. [Ex. 153, Declaration of M. Blair, ¶ 10; Ex. 157, Declaration of D. Cain, ¶ 5] She eventually became their stepmother. Tracy and his siblings' lives became dominated by Wilma. [Ex. 155, Declaration of Johnson, ¶ 16; Ex. 170, Declaration of Froming, ¶ 28-29]

18. Wilma had her hands full taking care of the Percy's kids. [Ex. 153, Declaration of M. Blair, ¶ 16] She established a rigid daily routine and was an extremely strict disciplinarian. [Ex. 158, Declaration of Fortune, ¶ 18] Chores were expected to be completed before and after school and on the weekends, no matter how time consuming or burdensome. [Ex. 155, Declaration of Johnson, ¶ 16] The children were swiftly punished for any infraction, no matter how small. [Ex. 159, Declaration of V. Cain, ¶ 7; Ex. 158, Declaration of Fortune ¶ 8; Ex. 155, Declaration of Johnson, ¶ 12] If the kids were told to play in the yard and one of them stepped onto the sidewalk, a whipping resulted. [Ex. 155, Declaration Johnson, ¶ 15] Wilma's punishments were physical and painful, including whipping Tracy and his siblings with extension cords and a rope, and striking them with broom handles, with baseball bats and sticks. [Val dec, ¶ 7, Brenda dec, ¶ 15, 17, Janice dec, ¶ 10-11] Wilma beat Tracy and his siblings nearly daily and often for no good reason. [Ex. 159, Declaration of V. Cain, ¶ 7; Ex. 158, Declaration of

Fortune, ¶¶ 8-11; Ex. 155. Johnson, ¶ 12] At a time when the Cain children were struggling with the loss of their mother and their father was gone most waking hours, their surrogate parent was abusive.

19. Percy and Ruthie Mae were officially divorced on August 25, 1969. Percy and Wilma married six days later. [Ex. 31, Application for Marriage Certificate; Ex. 33, L.A. County Superior Court case no. D712-902] The following month Tracy began first grade in Compton. Ten days later, the Cain family moved from Compton to Gardena, requiring Tracy and his siblings to change schools. [Ex. 43, Los Angeles Unified School records; Ex. 155, Declaration of Johnson, ¶ 13]

20. During the summer of 1970, Percy and Wilma had their first baby, Percy Cain, III. [Ex. 36, Birth Certificate] The family called the baby Kato. [Ex. 155, Declaration of Johnson, ¶ 15] In an already chaotic household, a new baby, Wilma's natural child, brought more tension into the house. Over the next four years, Percy and Wilma had three more children together, Candace, Cantana and Durez. [Exs. 12, 13, and 14, Birth certificates] Wilma increasingly marked a division between Ruthie Mae's children and her own children. As the household grew, Tracy and his siblings were subjected to cruel comments about their mother, forbidden to touch toys bought exclusively for Wilma's children, given cast off

clothing to wear when Wilma's children had new clothes and blamed for things they didn't do. [Ex. 159, Declaration of V. Cain, ¶ 10; Ex. 158, Declaration of Fortune, ¶ 14] Given the ongoing mistreatment they suffered from Wilma, Tracy and his siblings yearned for their mother, no matter what her circumstances or how unattainable she was. [Ex. 158, Declaration of Fortune, ¶ 14 and 25]

21. Wilma's discipline was unpredictable and harsh; she was moody and inconsistent. [Ex. 159, Declaration of V. Cain, ¶ 18 and 22; Ex. 155, Declaration of Johnson, ¶ 30] That unpredictability made the violent discipline even more frightening to the children. For example, Wilma once caught Tracy's sister, Janice, in the bathtub to beat her; another time, she pulled the covers off of Janice as she slept in order to hit her. [Ex. 158, Declaration of Fortune, ¶ 9] Wilma kept extension cords and belts available as visible reminders of the potential for punishment. [Ex. 158, Declaration of Fortune, ¶ 10] There were times when the kids were sent outside to get a switch from a bush or a tree to be used by Wilma in beatings them. [Ex. 158, Declaration of Fortune, ¶ 11] Once, Wilma heated a wire clothing hanger on a stove burner until it glowed and then laid it across Tracy's younger brother, Val's, hand as punishment. Val sustained a deep burn. [Ex. 159, Declaration of V. Cain, ¶ 7] Another time, Wilma hit Brenda, Tracy's older sister, in the head with a glass Vaseline jar, knocking her down the stairs. [Ex. 159,

Declaration of V. Cain, ¶ 14] Percy's children turned to him for help, telling him about Wilma's abusive treatment. Percy did nothing to stop it. [Ex. 158, Declaration of Fortune, ¶ 12; Ex. 155, Declaration of Johnson, ¶ 21]

22. Tracy's older brothers, Mack Arthur and Danny, did not often live in the Cain household during those years. Both brothers were incarcerated as juveniles and removed from the home. When they were sent to live with their great-grandparents in Mississippi as the result of juvenile arrests, they were arrested shortly afterward in Clarksdale on burglary charges and sentenced to six months in a reformatory. [Ex. 153, Declaration of M. Blair, ¶ 11; L.A. County Superior Court case no. CR 9308] Tracy was in second grade when his older brothers were sentenced to reform school. [Ex. 153, Dec of M. Blair, ¶ 11] When Danny was released from the Mississippi reformatory, he returned to Los Angeles and his father's home. Within three months Danny was arrested again, this time on an assault with a deadly weapon charge for brandishing a machete at school. [Ex. 21, Arizona Department of Corrections] Before Tracy entered sixth grade in 1975, both Mack Arthur and Danny were arrested a second time on burglary charges and sentenced to corrections facilities. [Ex. 21, Arizona Depart of Corrections file; Ex. 4, Clarksdale, Mississippi Court case nos. 5826 & 5827]

23. One summer in the mid-1970's, Percy and Wilma and their younger children took a vacation to Tulsa to visit Wilma's family. The visit extended over the 4th of July holiday. The kids were outside enjoying fireworks when Tracy was startled by a firecracker exploding near him. He fell into a nearby drainage ditch hitting his head on the concrete. He lost consciousness; one of the adults went into the ditch to carry Tracy out. Tracy's head was very swollen and painful as a result; he felt sick for a couple of days. Despite the seriousness of his injury, the family did not seek medical treatment for him. [Ex. 157, Declaration of D. Cain, ¶ 7; Ex. 155, Declaration of Johnson, ¶ 19]

24. Shortly after the trip to Tulsa, Tracy had a bike accident at home. He fell and hit his head on the pavement, resulting in a large lump on the side of his head. Tracy's head was so misshapen from the accident that his sister called him "Gumby-head." Again, the family did not seek medical treatment for him. [Ex. 157, Declaration of D. Cain, ¶ 8; Ex. 155, Declaration of Johnson, ¶ 20]

25. The Cain family moved to Yuma, Arizona at the end of 1975; Percy took a position as a construction foreman on a bridge project there. [Ex. 155, Declaration of Johnson, ¶ 21] Tracy's cumulative school records, transferred to Yuma from Los Angeles Unified School District, demonstrated a student experiencing significant difficulty in school. Tracy's elementary school records

show him below grade level by third grade, and labeled "slow" academically. [Ex. 43, Los Angeles Unified School District records] Tracy's sixth grade teacher made a special effort to help him academically and emotionally, noting in his permanent records his poor reading skills, below average performance in all academic areas, and neglect of his emotional needs at home. [Ex. 43, Los Angeles Unified School District records] Tracy's family moved during the second semester of Tracy's sixth grade year, ending his teacher's efforts on his behalf. Tracy entered Gila Vista Junior High school in Yuma.

26. Yuma was a racially isolating place for Tracy and his siblings. A handful of African-American students attended Gila Vista high School. There were no other African Americans living in the same Yuma neighborhood. Moreover, the Cain children were harassed constantly by a neighbor, in part based on their skin color. [Ex. 159, Declaration of V. Cain, ¶ 15; Ex. 158, Declaration of Fortune, ¶ 15] Tracy's father worked long hours for Novo Rados Construction Company, and Tracy's stepmother became a full-time student at Arizona Western College and worked part-time as a college radio announcer. [Exhibit 216, Adobe Mountain School records, Juvenile Case Summary written by Larry M. Mosley for Yuma County Superior Court Judge Wm. Nabours, dated 2/23/1977] Thus, neither parent

was able to spend much time at home, leaving Tracy and his brothers and sisters to manage the new environment on their own.

27. One of Tracy's friends in Yuma, another African American boy his age, met Tracy when they were both in middle school in Yuma. "I spent a lot of time hanging out with Tracy and his older brothers Mack Blair and Danny Cain. They got into quite a bit of trouble, but we looked up to them because they were older. Tracy's brothers were never positive role models for Tracy. Danny, who was the leader, was the most violent and dangerous. He usually supplied the drugs to the rest of us." [Ex. 168, Declaration of Wade, ¶¶ 2 and 9]

28. Within a year of moving to Yuma, Tracy was arrested on an attempted burglary charge. He was placed on probation. A few months later Tracy's arrest on additional burglary charges and a disorderly conduct charge resulted in a commitment to the Arizona Youth Authority. Tracy was sent to the Adobe Mountain School facility, north of Yuma. He was fourteen years old. [Exhibit 216, Adobe Mountain School records]

29. At that time, any juvenile committed to the Arizona Youth Authority underwent an initial comprehensive evaluation. [Ex. 163, Declaration of Fausel, ¶ 4] Social and educational assessments of Tracy were completed as part of his initial evaluation at Adobe Mountain in 1977. When evaluated for educational placement,

Tracy tested at the fourth grade/fifth month level in reading and the third grade/fifth month in mathematics. [Exhibit 216, Adobe Mountain School records, Education Evaluation dates 3/28/1977]

30. Tracy's test scores resulted in a referral to Dr. Larry Fidler, who conducted a Specific Learning Disabilities evaluation of Tracy. The evaluation spelled out the areas for other youth authority staff members to be aware of in working with Tracy. Dr. Fidler wrote, "Because of Tracy's specific learning disabilities, be aware that: a) he has difficulty attaching meaning to words; b) he has difficulty holding two or more concepts in mind and considering them in relation to each other; c) he lacks an adequate vocabulary; d) he will forget given concepts even though they have been repeated many times; and e) he may have difficulty remembering what he has seen and attended to." [Exhibit 216, Adobe Mountain School records, Specific Learning Disabilities Evaluation, Dr. Michael D. Fidler, dated 4/5/1977] Dr. Fidler further recommended de-accelerated classes in English, Math and Science for Tracy, as well as resource support daily, to be continued throughout his high school career. Finally, Dr. Fidler noted the strengths Tracy possessed: he was hard working, respectful of authority, patient, consistent and polite. [Exhibit 216, Adobe Mountain School records, Specific Learning Disabilities Evaluation, Dr. Michael D. Fidler, dated 4/5/1977]

31. Teri Titcomb, a family evaluator at Adobe Mountain School, attempted to arrange an interview with Tracy's father and stepmother for the purpose of conducting a family evaluation, but was unsuccessful. A telephone call with Tracy's stepmother, Wilma, formed the basis of her recommendation that Tracy be returned home following a short-term treatment program. [Exhibit 216, Adobe Mountain School records, Family Evaluation, Teri Titcomb, M.C., dated 3/27/1977] Tracy was moved to the Arizona Youth Center to complete his program.

32. At the Arizona Youth Center, Tracy's treatment plan again indicated that " low verbal abilities appear to impede his level of self-disclosure, problem-solving skills and level of interpersonal functioning." Further, "[t]est results suggest that [Tracy] tries to present an overly optimistic picture of himself by denying problems and projecting blame." [Exhibit 216, Arizona Youth Center, Treatment Plan, John Del Bene, dated 5/2/1977]

33. In July of 1977, Ruthie Mae pled guilty to a federal charge of possession of stolen mail [welfare checks]. Her sentence was suspended with the specific provision she attempt rehabilitation by residing with the Peoples Temple in Guyana during her probationary period. [Ex. 39, People v. Ruthie Mae Cain, Case no. A177571] Ruthie Mae previously met members of the Peoples Temple when she accompanied friends to a Temple meeting in Los Angeles. At the meeting,

Ruthie Mae asked for help with her life problems, including an outstanding arrest warrant. The resulting plan, approved by Peoples Temple leader, Jim Jones, instructed Ruthie Mae to turn herself in and plead guilty to the charges. The plan included recruiting members of the Peoples Temple to write support letters to the judge asking that Ruthie Mae be released to their new project in Guyana. [Ex. 164, Declaration of Hue Fortson, ¶ 8-13]

34. Arizona Youth Center granted Tracy a three week furlough during the summer of 1977, to be placed in the custody of his father and stepmother for the purpose of evaluating Tracy's performance in the community. [Ex. 216, Arizona Youth Center, Pre-Home Investigation Summary, dated 7/13/1977] Tracy, with full knowledge of his father and stepmother, spent his furlough with his mother in Los Angeles. Tracy and his siblings, Brenda, Janice, Mack Arthur, Danny and Val went to visit Ruthie Mae in Los Angeles. [Ex. 155, Declaration of Johnson, ¶ 23; Ex. 158, Declaration of Fortune, ¶ 18] This remains one of Tracy's most poignant memories, the happy time during the summer of 1977 staying as a family with his mother and siblings in Los Angeles.

35. At the end of the summer visit, all of Ruthie Mae's children went back to Yuma except Brenda. Brenda decided she could not continue living with Wilma. She stayed in Los Angeles with her grandmother. [Ex. 155, Declaration of Johnson,

¶ 22] A few weeks later, Ruthie Mae left for Guyana with her youngest son, Nouye, Arthur Ree's child. [Ex. 155, Declaration of Johnson, ¶ 25; Ex. 158, Declaration of Fortune, ¶¶ 19-20] Tracy returned to the Arizona Youth Center before being granted parole at the end of August of that year. A note on his parole plan dated August of 1977 reads, "Parents are not real enthusiastic [about Tracy's return to their home], but will accept." [Ex. 216, State of Arizona Youth Parole Plan, date 8/22/1977, Jerry Smith, CPO]

36. A social worker who evaluated Tracy a few years later commented that, "Older children tend to do better in dysfunctional families. Usually the depth of abuse and damage to children gains in its severity over the years. Tracy's older brothers and sisters may have had more of their father's attention, more of a sense of themselves before their mother left them and their stepmother began her reign of terror. That could have made them stronger in withstanding her abuse. A younger child like Tracy, with less of his father's time and attention, the direct brunt of his stepmother's abuse and possibly the effects of his natural mother's substance abuse in utero, would have little hope of understanding why his family's dysfunction wasn't his fault." [Ex. 163, Declaration of Fausel, ¶ 14]

37. Tracy entered Kofa High School in Yuma as part of the regular ninth grade class in September of 1977. He failed quickly, first suspended for a month for

fighting. There is some suggestion in the records that the fight was race-based, and began when three white students jumped Tracy. [Ex. 222, Dr. Beliz' report, pgs 19-20, dated 6/24/2006]. Tracy was expelled in February of 1978 for non-attendance. The school record noted Tracy's mother did not have time to confer with school administrators regarding Tracy's poor attendance and behavior. [Ex. 216, State of Arizona Youth Hearing Board Report, dated 3/3/1978]

38. At the same time Tracy was struggling at Kofa High School, the chaos in his family continued unabated. Tracy's brother, Mack Arthur, returned home following his incarceration at Parchman State Prison in Mississippi, but returned to custody shortly after in California and then in Florence State Prison in Arizona. [Ex. 4, Mississippi v. Blair, case nos. 5826 and 5827; Ex. 6, State of Arizona v. Mack Blair, cause no. 158170B] Tracy's brother, Darnell ,spent time in and out of jail in Yuma, including on an arrest for burglary and armed robbery. A pre-sentence report quoted Darnell as saying he had visual hallucinations and lost track of where he was and what he was doing, and that he had the hallucinations for the previous three or four years. [Ex. 22, State of Arizona vs. Larry Darnell Cain, case no. CR 94074938] Janice, Tracy's sister, became pregnant with her first child, Duvon, while she was seventeen years old, homeless and living on the streets in Yuma. She gave her child up for adoption. [Ex. 158, Declaration of Fortune, ¶ 20] Wilma, Tracy's

stepmother, drank and stayed out late with other men. [Ex. 159, Declaration of V. Cain, ¶ 17; Ex. 158, Declaration of Fortune, ¶ 16] Tracy's father, Percy, continued his pattern of working long hours, further from home. When he came home, he argued with Wilma about her drinking and going out. During one argument, Wilma got so angry she hit Percy in the head with a telephone. [Ex. 159, Declaration of V. Cain, ¶ 17] Wilma's verbal and emotional abuse of her stepchildren continued, with suggestions that Percy wasn't really their father, their mother was worthless and that Ruthie Mae's children would never amount to anything. [Ex. 155, Declaration of Johnson, ¶ 30; Ex. 158, Declaration of Fortune, ¶ 14; Ex. 168, Declaration of Wade, ¶ 7]

39. Tracy re-entered the Arizona juvenile system in March of 1978, following his arrest for burglary and possession of stolen property, resulting in a parole revocation. He was sent to Young Acres. Tracy and another boy ran away a few days following Tracy's placement. Tracy was reportedly heading to California. Tracy was picked up two months later and returned to the Arizona Youth Center. [Ex. 216, Arizona Department of Corrections Youth Hearing Board record, dated 4/6/1978; Yuma County Juvenile Complaint/Referral, dated 5/16/1978]

40. Upon his return, Tracy did well at the Arizona Youth Center. A later

treatment plan cited to a report dated August of 1978, in which Tracy was said to be learning social skills, decision making skills and volunteering for extra duties and performing those duties well. The same report noted during Tracy's previous stay at Adobe Mountain School in 1977 that, he had been cooperative, related well with staff, presented no management problems, and had shown a positive attitude. [Ex. 216, Adobe Mountain School, Diagnostic Treatment Plan, dated 3/13/1980]

41. Tracy's treatment plan, developed with staff at the Arizona Youth Center, reported his goal as returning to Los Angeles to live with his natural mother, Ruthie Mae, and to leave Yuma. [Ex. 216, Arizona Youth Center Report/Treatment Plan Review, dated 7/28/78, Kenneth E. Webb] In a later review of Tracy's juvenile corrections file, one social worker commented that he may have identified with his mother as a fellow family outcast. [Ex. 163, Declaration of Fausel, ¶ 11]

42. In October 1978, Tracy paroled from the Arizona Youth Center to Wilma and Percy's home in Yuma. [Ex. 216, Arizona Youth Center records] Within a few days of his return home, Tracy's older brother, Darnell entered the Arizona prison system to serve a six year sentence on a burglary charge. [Ex. 28, State of Arizona v. Darnell Cain, Case no. 11339] Within a month of Tracy's return, his natural mother and half-brother died at Jonestown in the mass suicide there. [Ex. 157, Declaration of McDonald, ¶ 21]

43. Tracy returned to Kofa High School with none of the specific supports or special class placements recommended by Dr. Fidler during the previous year's evaluation of Tracy's learning disabilities. Tracy excelled athletically, but struggled academically. He made little advancement in his remedial needs in reading and math. [Ex. 216, Adobe Mountain School Social Casework Summary, dated 3/10/1980, pg 2]

44. Tracy's involvement in two burglaries resulted in a suspension of his parole in July of 1979. While in custody awaiting the disposition of his most recent case, Tracy assaulted a detention officer during an escape. Tracy fled to Los Angeles. In January of 1980, Tracy decided to return to Arizona to clear his warrant prior to his eighteenth birthday. He told his father of his plan. Tracy was later arrested in Yuma, Arizona and was recommitted to the Arizona juvenile system. Shortly afterward Tracy was again sent to Adobe Mountain. [Ex. 216, Adobe Mountain School Social Casework Summary, dated 3/10/80]

45. Adobe Mountain again tested Tracy for evaluative purposes and to create his treatment plan. This time Tracy tested at second grade/seventh month level in math and fifth grade/third month in reading. The scores indicated Tracy scored at a level considerably below his actual grade placement and had lost ground academically since his previous testing in 1977. [Ex. 216, Adobe Mountain School

Diagnostic Treatment Plan, dated 3/13/80] Tracy read at a level seven years below his last grade in school; his individualized education plan determined a G.E.D. "not within close reach for him." His remediation goal was set at sixth grade level. [Ex. 216, Adobe Mountain School Diagnostic Treatment Plan, dated 3/5/80 and 3/6/80]

46. A neuropsychological assessment conducted by Dr. Richard Kapp concluded that Tracy had deficient verbal abilities, a limited fund of information, poor reasoning skills, poor vocabulary and poor verbal expression. Dr. Kapp's report also noted Tracy, "has difficulty understanding the meaning of what he hears, severe short term auditory memory impairment, faulty social judgment and underlying feelings of personal inadequacy with poor self-esteem." Tracy obtained an IQ score that put his level of intellectual functioning in the borderline range. [Ex. 216, Adobe Mountain School Psychological Evaluation, Dr. Richard Kapp 2/19/1980]

47. Dr. Michael Fidler followed up with a second Specific Learning Disabilities Evaluation on March 8, 1980. In his summary, Dr. Fidler stated, "[t]est results show that Tracy does possess specific learning disabilities and these coupled with ongoing emotional problems have retarded his academic progress. Primary deficits were notes in all auditory-vocal channels at both the conceptual and automatic levels. A severe deficit in auditory memory is interfering with his ability

to follow simple oral directions." Later in the report, Dr. Fidler referenced Tracy as having a possible borderline developmental disability. [Ex. 216, Adobe Mountain School Specific Learning Disabilities Evaluation; Educational Information and Testing Scores, dated 3/8/1980]

48. Tracy's psychological evaluation at Adobe Mountain revealed that despite Tracy's, "exterior of cool, confidence [he] has underlying feelings of personal inadequacy and poor self-esteem. He overcompensates for these feelings of insecurity by presenting himself as very confident and competent in what he is doing." The report also noted, "[De]spite the fact that Tracy has a fair amount of anxiety he denies that he is anxious in situations or that he feels uncomfortable in handling interpersonal relationships. As a result of the extensive use of denial and repression, Tracy lacks insight into an understanding of his own behavior." [Ex. 216, Adobe Mountain School Psychological Evaluation, dated 3/10/80 and Adobe Mountain School Diagnostic Treatment Plan, dated 3/13/80, pg 1]

49. The same psychological evaluation noted that despite the previous report that Tracy's mother, Ruthie Blair, died in the Jonestown mass suicides, Tracy flatly denied the possibility. Tracy told the evaluator his mother was alive and would surface again, as she has in the past following long absences. [Ex. 216, Adobe Mountain School Psychological Evaluation, dated 3/10/80, pgs 2-3]

50. Adobe Mountain released Tracy one month prior to his eighteenth birthday, in November of 1980. The final report from Adobe Mountain Superintendent Kelly E. Spencer to the Deputy Director of Juvenile Services/ Department of Corrections rated Tracy's over-all performance as positive. Based on his positive performance, Superintendent Spencer recommended Tracy's early release, one month prior to his birthday. [Ex. 216, Memo from Supt. Spencer to John Wright, Deputy Director, Juvenile Services, dated 11/17/1980]

51. Tracy returned to living in Yuma in the house owned by his father and stepmother. Tracy's father, Percy, no longer lived there. [Ex. 159, Declaration of V. Cain, ¶ 20] He had taken a new construction job in northern California. Wilma continued to live in Yuma. In February of 1981, Tracy was briefly detained during a traffic stop for what the police officer thought was an outstanding warrant. [Ex. 216, Yuma County Incident Report I#3388-81] Tracy's stepmother, Wilma, met Tracy at the Yuma County Sheriff's Department. The police confirmed that Tracy's warrant had been satisfied and he was released. However, there were two outstanding warrants for Wilma Cain; she was booked on felony theft and conspiracy charges. According to the indictment, Wilma had forged a check in one instance, and in a second instance she used a stolen check to purchase a Cadillac which she sold through a third party in Los Angeles. [Ex. 61, State of Arizona v.

Wilma Cain, case no. C10540] Wilma pled guilty to a felony charge of theft. [Ex. 61, State of Arizona v. Wilma Cain, case no. 10540-II]

52. During the same time period Tracy's youngest brother, Val, was arrested on burglary charges and committed to the Arizona Youth Authority/Catalina Mountain School [Ex. 54, State of Arizona v. Valendar Cain, case no. CR 11444]; Tracy's older brother, Darnell, escaped from Florence State Prison and remained AWOL for two weeks before being returned to custody [Ex. 22, State of Arizona v. Larry Darnell Cain, Case no. CR 94-07493A]; and Tracy's older brother, Mack Arthur, was arrested in California on possession of stolen property charges [Ex. 8, State of Arizona v. Mack Blair, case nos. 88-07434 and 103142].

53. In October of that year, Mack Arthur, Tracy and Robert Ross were arrested on car theft charges. Following a trial, Tracy was sentenced to five years in the Arizona State Prison at Florence, Arizona. [Ex. 5, State of Arizona v. Mack Blair, Robert Ross and Tracy Cain, Yuma County case no. 10921; AZ DOC Corrections file #44563] Tracy was nineteen years old.

54. On October 3, 1982, the same month Tracy was arrested on car theft charges, Tracy's father, Percy became a father again. His tenth child, Jason, was born. Jason's mother, Brunell, lived in Richmond, California. [Ex 15, vol. 1 birth certificate]

55. Shortly after Tracy's sentencing in June of 1982, Wilma pled no contest to shoplifting charges resulting from her putting two bottles of Seagram's Gin in her pursue and leaving a market in Yuma. [Ex. 60, Yuma Superior Court case no. 47379] Two months later, Wilma was again arrested for shoplifting. The arresting officer's report noted Wilma offered to give information on some unresolved armed robbery cases in exchange for leniency in her own case. [Ex. 60, Citation #199527, Yuma County Municipal Court No. 7476-82]

56. Val and a friend were arrested on four counts of burglary, also in early October of 1982. Val was released to Wilma's custody pending trial. [Ex. 54, State of Arizona v. Valendar Cain, Yuma County Case no. CR 11444] Ten days after Val's release, Wilma appeared in court on her probation violation charge resulting from her second shoplifting arrest. The court sentenced her to five years in the Arizona State Department of Corrections; she was taken into custody from the court. [Ex. 60, State of Arizona v. Wilma Cain, Yuma County Case no. CR 10540]

57. Three days after Wilma was taken into custody to begin serving her prison term, a jury convicted Danny on burglary, sexual abuse and attempted sexual assault charges. The court sentenced him to ten years in the Arizona State prison system. [Ex. 28, State of Arizona v. Larry Darnell Cain, Yuma County Case no. CR

11339]

58. By the end of 1982, Wilma, Mack Arthur, Danny and Tracy were all in the custody of the Arizona State Department of Corrections. Val was awaiting trial, scheduled for January of 1983, on his pending burglary charges. Percy Cain had begun a new family in California.

59. Two days before his twenty-second birthday, in December of 1984, Tracy returned to California following his release from the Arizona Department of Corrections. He served two and a half years in prison before being paroled to Ventura County, California. Tracy's father, Percy, and his third wife, Brunell McBride, lived in Oxnard. [Ex. 11, Marriage Certificate] Tracy planned to stay with them while he looked for work. It was not a comfortable situation; Brunell had begun her own family with Percy Cain and did not want Percy's children from his first two marriages in her home. [Ex. 159, Declaration of V. Cain, ¶¶ 20-21] Percy retired the previous year from full-time construction work due to his ill health. [Ex. 161, Declaration of Clayton, ¶ 4] Richard Clayton, a long-time friend and former co-worker of Percy had his own business. Clayton continued to give Percy occasional short-term work. When Tracy got to Oxnard, Clayton agreed to give him work as a non-union, laborer trainee. Tracy worked hard and maintained steady

employment until the work ran out about four months later. [Ex. 161, Declaration of Clayton, ¶ 5]

60. Tracy got work at another construction site through his father's contacts and with Clayton's recommendation. Percy's hospitalization coincided with Tracy's lay off from his job. As a non-union worker Tracy had little recourse and not enough work experience to be admitted to the union. Tracy went home, out of work. [Ex. 161, Declaration of Clayton, ¶ 6]

61. Throughout Tracy's years of juvenile incarceration, he denied or downplayed his use and abuse of substances. Evidence to the contrary from numerous sources suggests that Tracy became dependent on alcohol and drugs early in his teen years and continued his use of drugs and abuse of alcohol until the time of his arrest in the capital crime. Friends and acquaintances report that Tracy regularly smoked PCP-laced cigarettes, drank alcohol , smoked marijuana and crack cocaine as an adolescent and young adult. [Ex. 168, Declaration of Wade, ¶ 4; Ex. 160, Declaration of Cerda, ¶ 3; Ex. 178, Declaration of Parker, ¶ 7] In a more recent interview, Tracy described a time in 1981, when he had 90 units of PCP to sell. He sold only one unit and consumed the other 89 units. Tracy described himself as high the whole time during this period. [Ex. 122, Report of Dr. Beliz, pg 14] Tracy's siblings were also drug users. [Ex. 178, Declaration of Parker, ¶ 7; Ex. 168,

Declaration of Wade, ¶¶ 8 and 9; Ex. 2, People v. Collins Blair, case no. 92C003059]

62. With no regular employment, Tracy had time on his hands. He worked minimal day labor jobs when he could find work. Living in Oxnard with his father and Brunell. Tracy quickly fell into drinking and smoking PCP on nearly a daily basis. On the weekend the Galloways were killed, Percy and Nell were out of town. Val and Tracy spent the weekend at home, drinking and smoking drugs, including freebasing cocaine with their friends. [Ex. 162, Declaration of Floyd Clements, ¶ 5; Ex. 165, Declaration of Lazoff-Aldana, ¶ 6 and 8; Ex. 103, Oxnard Police Department interview with Teodorico Albis, dated 10/23/1986; Ex. 103, Oxnard Police Department interview with Mark Pina, dated 10/24/1986]

63. Some children grow up in well adjusted families, function normally intellectually. and live in supportive communities that provide social, physical and emotional resources. Such children usually develop an internal resilience which helps them bounce back from difficulties in their lives. That internal resilience allows most children to cope with low levels of trauma in their lives - a sick parent, the arrest of a sibling, or changing school mid-year. When a child is faced with chronic, repeated chaos and trauma, the risks to healthy childhood development accumulate and the ability to develop internal resources is greatly diminished.

64. Children like Tracy, who have faced recurrent loss and trauma, experience that cumulative effect which creates emotional and psychological vulnerabilities. Tracy's history is replete with risk factors for negative developmental outcomes: parental abuse, neglect and abandonment, a family history of crime and substance abuse, learning disabilities and low intelligence, multiple head traumas, academic failure, segregation and community racism, as well as his own substance abuse.

65. At the time of Tracy's birth, he was his mother's sixth child in six years. Tracy's father and mother had grown up, met and married in a very isolated and segregated farming community in the Mississippi delta. When they moved to Los Angeles, Tracy's father found steady employment. That pattern of employment kept Tracy's father gone from home for long hours and days throughout Tracy's childhood and adolescence. Tracy and his siblings were never hungry, but their father did little to support and sustain them beyond providing for their physical needs. Tracy's mother did not adjust to life in Los Angeles in a predictable manner, ultimately abandoning her family when Tracy was three years old.

66. Tracy was raised primarily by his stepmother, a nineteen year old woman who first arrived as the babysitter and who shortly afterward married Tracy's father. There is no doubt, Wilma Cain had her hands full with the demands of

taking care of Percy's seven children when she joined their household. However she was an erratic caretaker at best and an abusive parent at worst. Although present along the margins of Tracy's life, Percy Cain infrequently participated at best and was largely unavailable throughout Tracy's childhood and adolescence.

67. There is little surprise that Tracy's sense of loss and longing for his natural mother endured until her death and beyond. At a young age, Tracy ran away from school trying to reach his mother's house. Incarcerated in an Arizona juvenile facility, Tracy's stated goal was to live with his mother in Los Angeles. When granted an extended furlough, Tracy went to stay in Los Angeles with his mother, rather than return to the home of his father and stepmother. Tracy's desire for a supportive, loving relationship with a parent may have driven him to look past his mother's abandonment, criminal history, drug use and her long-term relationship with an abusive partner.

68. Tracy also has a significant family history of mental illness. Tracy's maternal grandmother had a history of bizarre behaviors, symptomatic of severe mental illness. One probation report written regarding Tracy's mother, Ruthie Mae, stated she was decidedly of below average intelligence. Tracy's older half-brother, Mack Arthur, received government benefits on the basis of his mental illness prior to

his incarceration. Tracy's sister, Janice, became homeless as a teenager through a combination of factors, including her own depression. Tracy's brother, Val, is diagnosed as Schizophrenic and was awarded Supplemental Security Income from the Social Security Administration on that basis. Tracy's niece, Cantana's daughter, has been diagnosed with an autism spectrum disorder as well as developmental disabilities. Taken together, this constellation of family mental illness represents a potential genetic risk to Tracy's healthy development as a child and young adult.

69. Tracy's family history of drug and alcohol abuse is also significant. Tracy's mother was a drinker and heroin user. Tracy's oldest half-brother, Collins Blair, Jr. was awarded Supplemental Security Income from the Social Security Administration on the basis of his addiction to alcohol. He died of a drug overdose when he was 35 years old. Mack Arthur Collins, Tracy's half-brother, was a drug user as an adolescent and young adult. He has spent nearly his entire adult life in custody. Tracy's brothers, Danny and Val, have both been arrested on charges of drug possession and use. The risk factors facing Tracy around substance abuse are the environment created within his family of using drugs, Tracy's own negative life circumstances, and a probable genetic predisposition given the high incidence of alcohol and drug abuse in his immediate family.

70. Tracy constructed a myth as the foundation in his life. His presentation regarding himself and his family has always been that all is well, that his family life was fine, that no one else in his family had criminal histories, that he had a good relationship with his stepmother, that he did well in school and that any problems he had were his fault and his alone. On the one hand that sounds like an admirable taking of personal responsibility, but it may also reflect a deep-seated denial of the upheaval, neglect and trauma that defined his life.

71. In summary, from an early age, Tracy was exposed to a confluence of negative childhood indicators that dramatically increased his risk for poor psychosocial functioning. Longitudinal research from the past 50 years suggests two important things that can inform an understanding of Tracy's level of risk. First, most risks discussed earlier are robust and consistent predictors of later criminal behavior. Second, the effects of these risks are *cumulative*, with the likelihood of conviction for violent offense increasing appreciably with the number of risk factors.

72. Many of these risks simply reflected the troubled family environment into which Tracy was born. Abusive/neglectful parenting, criminal behavior in parents (mother and step-mother in Tracy's case), family/marital discord, and sibling delinquency, are all robust predictors of negative outcomes and were characteristic

of Tracy's early family life. Tracy had no control over these risks, as children obviously cannot choose their families. Other risks Tracy directly participated in – the drug use and abuse, early criminal behavior, and poor school performance, for example. However, even these factors cannot be divorced from Tracy's other significant vulnerability factors. For example, Tracy's drug abuse reflected not simply his individual choice to use drugs, but also modeling by multiple family members, negative peer influences, chronic life stressors that were not readily remediated, as well as a probable genetic diathesis.

73. Obviously high risk youth are not predestined to a life of crime. Some highly vulnerable youth do manage to avoid criminal involvement, particularly resilient youth who possess qualities or resources that allow them to make appropriate choices in the presence of multiple risks. Resilience factors include cognitive characteristics such as high intelligence; access to social resources such as attachments to caring, positive adults; regular and meaningful participation in pro-social routines (e.g., regular church involvement, organized sports); and positive personality traits and an ability to think critically and reflectively. A thorough examination of Tracy's childhood history shows that he had access to few, if any, of these internal or external resources. In other words, the psychological "hardiness"

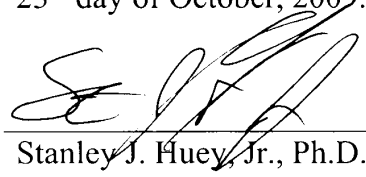
that some vulnerable youth possess eluded Tracy.

74. Despite multiple risks and the absence of resilience factors, research shows that the right interventions at the right developmental periods can still mitigate risk in vulnerable children. Had Tracy received appropriate medical treatment following any or all of his head traumas, improved executive functioning might have allowed Tracy to exercise better judgment and impulse control. Youth programs that provided access to positive adult supervision and mentoring during Tracy's early adolescence might have provided him with appropriate models for conflict resolution and problem solving. Enrollment in highly structured, intensive school placements that effectively remediated some of Tracy's academic deficiencies could have offered Tracy a future beyond that involving day laboring, chronic drug use, and petty crime. None of these resources were available to the young Tracy Cain when they were most needed.

75. Without family support, appropriate school support, medical and psychological care and extended community care after his juvenile placements, Tracy had few opportunities to follow a different life trajectory.

I declare under the penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Signed this

23rd day of October, 2009.



Stanley J. Huey, Jr., Ph.D.

HUEY'S

EXHIBIT 1

STANLEY J. HUEY, JR.

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1919 S. Harvard Blvd.
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ACADEMIC TRAINING

University of California, Los Angeles
Ph.D. June 1998
M.A. June 1994
Major: Clinical Psychology
Minors: Quantitative and Developmental Psychology

University of California, Berkeley
B.A. (1985-1990)
Majors: Psychology and Anthropology

ACADEMIC APPOINTMENTS

2006-present **Associate Professor**
Department of Psychology; Joint appointment with Program in American Studies
University of Southern California

2000-2006 **Assistant Professor**
Department of Psychology; Joint appointment with Program in American Studies
University of Southern California

1998-2000 **Research Assistant Professor**
Family Services Research Center
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina

PUBLICATIONS AND PRESENTATIONS:

Published Papers

Huey, S. J., Jr., & Polo, A. (in press). Assessing the effects of evidence-based psychotherapies with ethnic minority youths. In J.R. Weisz and A.E. Kazdin (Eds.) Evidence-Based Psychotherapies for Children and Adolescents (2nd Ed.). New York, NY: Guilford.

Huey, S. J., Jr., & Polo, A. (2008). Evidence-based psychosocial treatments for ethnic minority youth. Journal of Clinical Child and Adolescent Psychology, 37(1), 262-301.

Cespedes, Y. M., & Huey, S. J., Jr. (2008). Depression in adolescent Latinos: A cultural discrepancy perspective. Cultural Diversity and Ethnic Minority Psychology, 14(2), 168-172.

Huey, S. J., Jr., & Pan, D. (2006). Culture-responsive one-session therapy for phobic Asian Americans: A pilot study. Psychotherapy: Theory, Research, Practice, and Training, 43(4), 549-554.

Huey, S. J., Jr., Henggeler, S. W., Rowland, M. D., Halliday-Boykins, C. A., Cunningham, P. B., & Pickrel, S. G. (2005). Predictors of treatment response for suicidal youth referred for emergency psychiatric hospitalization. Journal of Clinical Child and Adolescent Psychology, 34, 582-589.

Borders, A., Earleywine, M., & Huey, S. J. (2004). Predicting problem behaviors with multiple expectancies: Expanding expectancy-value theory. Adolescence, 39, 539-550.

Huey, S., J., Jr., Henggeler, S. W., Rowland, M. D., Halliday-Boykins, C., Cunningham, P. B., Edwards, J., & Pickrel, S. G. (2004). Multisystemic Therapy effects on attempted suicide by youths presenting psychiatric emergencies. Journal of the American Academy of Child and Adolescent Psychiatry, 43(2), 183-190.

Huey, S.J., Jr., & Henggeler, S.W. (2001). Effective community-based interventions for antisocial and delinquent adolescents. In Hughes, J., Conoley, J.C., & La Greca, A. (Eds.) Handbook of psychological services for children and adolescents (pp. 301-322). Oxford, UK: Oxford University Press.

Huey, S. J., Jr., Henggeler, S. W., Brondino, M. J., & Pickrel, S. G. (2000). Mechanisms of change in Multisystemic Therapy: Reducing delinquent behavior through therapist adherence, and improved family and peer functioning. Journal of Consulting and Clinical Psychology, 68(3), 451-467.

Huey, S. J., Jr., Henggeler, S. W., & Brondino, M. J. (2000). Mechanisms of change in Multisystemic Therapy with delinquent youth. In C. Liberton, C. Newman, K. Kutash, & R. Friedman (Eds.), The 12th Annual Research Conference Proceedings, A System of Care for Children's Mental Health: Expanding the Research Base (pp. 187-190). Tampa, FL: University of South Florida, The Louis de la Parte Florida Mental Health Institute, Research and Training Center for Children's Mental Health.

Weisz, J.R., Huey, S.J., & Weersing, V. R. (1998). Psychotherapy with children and adolescents: The state of the art. Advances in Clinical Child Psychology, 20, 49 - 91.

Huey, S. J., Jr., & Weisz, J. R. (1997). Ego control, Ego resiliency, and the Five-Factor Model of personality as predictors of behavior problems in clinic-referred children. Journal of Abnormal Psychology, 106(3), 404-415.

Manuscripts Submitted for Publication

Huey, S.J., Jr., Lichtenstein, D., & Pan, D. (2009). Norm conformity as mediator of ethnic differences in phobic anxiety. Manuscript submitted for publication.

Huey, S. J., Jr., & Pan, D. (2009). Adapting brief exposure treatment for phobic Asian Americans. Manuscript submitted for publication.

Conference Presentations

2009

Huey, S.J. Jr. (2009, August). What we know (and don't know) about evidence-based treatments for ethnic minorities. Paper to be presented at the 117th Annual Meeting of the American Psychological Association, Toronto, Canada.

Huey, S.J. Jr. (2009, August). The Behavioral Employment Program for minority gang youth: Adaptations, challenges. Paper to be presented at the 117th Annual Meeting of the American Psychological Association, Toronto, Canada.

2008

Huey, S.J., & Polo, A. (2008, August). Culture-responsive treatments for ethnic minority youth: Results from a meta-analysis. Paper presented at the 116th Annual Meeting of the American Psychological Association, Boston, MA.

2007

Huey, S.J., & Pan, D. (2007, January). Culture-adapted one-session treatment for specific phobias with Asian Americans. Paper presented at the 8th Annual National Multicultural Conference and Summit, Seattle, WA.

2006

Alleyne, A. R., & Huey, S. J. (2006, August). Evaluating a parenting workshop for parents of externalizing African American youth. Paper presented at the 114th Annual Meeting of the American Psychological Association, New Orleans, Louisiana.

Cespedes, Y., & Huey, S.J. (2006, August). Evaluating a cultural process model of depression for adolescent Latinos. Poster presented at the 114th Annual Meeting of the American Psychological Association, New Orleans, Louisiana.

Huey, Jr., S.J. (2006, August). Empirically-supported treatments for ethnic minority youth: Review and meta-analysis. Paper presented at the 114th Annual Meeting of the American Psychological Association, New Orleans, LA.

McDaniel, D., Huey, S.J., & Hall, B. (2006, August). Ethnicity and therapy process in Multisystemic Therapy. Paper presented at the 114th Annual Meeting of the American Psychological Association, New Orleans, LA.

Pan, D., & Huey, S.J. (2006, August). One-session treatment for specific phobias with late adolescent Asian Americans. Paper presented at the 114th annual meeting of the American Psychological Association, New Orleans, LA.

2005

Huey, S. J., Jr., & Henggeler, S. W. (2005, August). Family-therapist collaboration as a mechanism of change in Multisystemic Therapy. Paper presented at the 113th Annual Meeting of the American Psychological Association, Washington, DC.

Rowland, M.D., Huey, S.J., Jr. (2005, October). Multisystemic Therapy as an alternative to hospitalization: Follow-up suicidality outcomes. Paper presented at the 52nd Annual Meeting of the American Academy of Child and Adolescent Psychiatry.

2004

Huey Jr., S. J. (2004, August). Effectiveness of psychotherapy with ethnic minority children: A preliminary meta-analysis. Paper presented at the 112th Annual Meeting of the American Psychological Association, Toronto, Canada.

2003

Huey Jr., S. J., & Henggeler, S. W. (2003, November). Discriminant and predictive validity of the Multisystemic Therapy (MST) Adherence Measure with adolescent drug offenders. Paper presented at the 37th Annual Convention of the Association for the Advancement of Behavior Therapy, Boston, MA.

Huey, S.J., Jr. (2003, August). Multisystemic Therapy with juvenile sexual offenders – Developing an empirical base. Presented at the Annual Meeting of the American Psychological Association, Toronto, Canada. *Discussant.*

1994-2002

Huey, S.J., Jr. (2002, May). Evidence-based treatment and intervention for antisocial and delinquent youth. Paper presented at the 22nd Annual California Mental Health Advocates for Children and Youth Conference, Asilomar, CA.

Huey, S.J., Jr. (2000, November). Effective community-based interventions for delinquent youth: The state of the art. Paper presented at the 6th Annual "A New Beginning for Partnership for Children and Families in Los Angeles County" Conference, Los Angeles, CA.

Huey, S.J., Jr., Cunningham, Phillippe B., & Rowland, Melisa D. (2000, March). MST outcomes for children and adolescents with serious emotional disturbance. Paper presented at the 13th Annual Research Conference, A System of Care for Children's Mental Health, Tampa, Florida.

Huey, S.J., Jr., Henggeler, S.W., & Brondino, M.J. (1999, February). Mechanisms of change in Multisystemic Therapy with delinquent youth. Paper presented at the 12th Annual Research Conference, A System of Care for Children's Mental Health, Tampa, Florida.

Huey, S. J., & Weisz, J. R. (1997, July). The Five-Factor Model, Ego-Control/Ego-Resiliency, and behavior problems in clinic-referred children and adolescents. Poster presented at the eighth annual meeting of the International Society for Research in Child and Adolescent Psychopathology, Paris, France.

Huey, S. J., Weisz, J.R. (1997, April). Teacher reports on the Big Five as predictors of behavior problems in clinic-referred children and adolescents. Paper presented at the bi-annual meeting of the Society for Research in Child Development, Washington, D.C.

Huey, S. J., & Myers, H.F. (1997, April). Family mediators of externalizing problems among Black, inner-city children. Paper presented at the bi-annual meeting of the Society for Research in Child Development, Washington, D.C.

Huey, S., & Weisz, J. R. (1995, April). Personality predictors of delinquent and aggressive behavior problems in clinic-referred children. Poster presented at the bi-annual meeting of the Society for Research in Child Development, Indianapolis, Indiana.

Granger, D. A., Huey, S. J., Weisz, J. R., Ikeda, S., & Kaufman, G. T. (1994, August). Neuroendocrine responsiveness to psychosocial challenge, Ego-resiliency, and Ego-control in clinic-referred children. Poster presented at the annual meeting of the American Psychological Association, Los Angeles, California.

Huey, S. J., & Weisz, J. R. (1994, August). Ego-control, Ego-resiliency, and behavior problems in clinic-referred children. Poster presented at the annual meeting of the American Psychological Association, Los Angeles, California.

INVITED TALKS

September 2008	Substance Abuse Research Consortium, Sacramento, CA
May 2008	UCLA Department of Psychology, Los Angeles, CA
May 2008	Substance Abuse Research Consortium, Los Angeles, CA
November 2007	Harbor-UCLA Medical Center, Los Angeles, CA
May 2007	UCLA Department of Psychology, Los Angeles, CA
January 2007	UC Riverside Department of Psychology, Riverside, CA
January 2007	Fuller Graduate School of Psychology, Pasadena, CA
March 2006	Children's Hospital, Los Angeles, CA

GRANTS & RESEARCH AWARDS

Current Funding

2004 – 2009 National Institute of Mental Health
1K08MH069583-01A1 (PI: Stanley Huey, Ph.D.)
"An intervention for antisocial, gang-affiliated youth"
Role: Principal Investigator
$680,782

2009-2010 University of Southern California, Advancing Scholarship in the Humanities and Social Sciences (ASHSS)
"Pilot test of an employment-based intervention for emancipating foster care youth"
Role: Principal Investigator
$24,700

Past Funding

2004 – 2006 American Foundation for Suicide Prevention
AFSP 04-05 (PI: Stanley Huey, Ph.D.)
"Suicidality and depression among Latino adolescents: The role of acculturation, gender role beliefs, and family functioning"
Role: Principal Investigator
$16,624

2000 – 2004 Agency for Healthcare Research and Quality
5 P01 HS10871-03 (PI: Barbara Tilley, Ph.D.)
"Improving the evaluation of therapist adherence to Multisystemic Therapy with ethnically diverse, adolescent drug offenders"
Role: Pilot Investigator
$230,286

Pending Funding

2009 – 2011 National Institute of Health
"Employment intervention for ex-offender gang youth"
Role: Principal Investigator
$998,042

2009-2012 National Institute of Mental Health
"Culture-responsive exposure treatment for phobic Asian Americans"
Role: Principal Investigator
$733,315

HONORS AND AWARDS

April 2007 USC-Mellon Graduate Mentoring Award

COURSES TAUGHT

American Studies and Ethnicity 365 – **Leadership in the Community**

American Studies and Ethnicity 466 – **The Psychology of African Americans**

Psychology 360 – **Self-Directed Behavior Change**

Psychology 462 – **Minority Mental Health**

Psychology 514 – **Psychopathology**

Psychology 660 – **Behavioral Science and Social Change**

Psychology 660 – **Multisystemic Interventions**

CLINICAL AND ASSESSMENT EXPERIENCE:

2001-present **Clinical Supervisor**
Department of Psychology
University of Southern California
Provided clinical supervision in behavior therapy to clinical psychology graduate students.

1998-2000 **Postdoctoral Clinical Training**
National Crime Victims Research Center and Clinic
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
Conducted individual treatment with adult crime victims, and family-based treatment with child and adolescent crime victims. Provided behavioral and cognitive-behavioral treatment to child abuse victims, homicide survivors, rape victims, and maltreating parents.
Clinical Supervisors: Heidi Resnick, Ph.D., and Rochelle Hanson, Ph.D.

1997-1998 **Psychology Intern**
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
APA-approved pre-doctoral internship. Completed rotations conducting Multisystemic Therapy (MST) with delinquent youth, maltreating parents, and oppositional preschoolers, and behavioral and cognitive-behavioral interventions with crime victims.

GRADUATE AND UNDERGRADUATE SERVICE

Doctoral Dissertation Committees

2008 – 2009	Committee Member for Jaymie Lorthridge (Social Work)
2008 – 2009	Committee Member for Cara Ellis (Social Work)
2009	Committee Member for Brynn Kelly
2009	Committee Member for Kelli DuCloux
2008	Committee Member for Emily Fine
2008	Committee Member for Douglas Stenstrom
2008	Chair for David Pan
2008	Chair for Dawn McDaniel
2008	Committee Member for Mylien Duong
2008	Chair for Yolanda Cespedes
2008	Committee Member for Marat Zanov
2008	Committee Member for Mathew Curtis
2008	Committee Member for Tania Abou-ezzeddine
2007	Committee Member for Mary Nwosu

2007 Chair for Alisha Alleyne
2007 Committee Member for Robin Toblin
2007 Committee Member for Yu Yang
2006 Committee Member for Ashley Borders
2006 Committee Member for Debbie Chien
2006 Committee Member for Jed Grodin
2006 Committee Member for David McField
2005 Committee Member for Jung Hyun Kim
2004 Committee Member for Andrei Sachs
2004 Committee Member for Michelle Rosemond
2003 Committee Member for Miae Chun
2003 Committee Member for Crystal Flynn
2002 Committee Member for Gia Robinson

Masters Thesis Committees

2008 Chair for Lauren Ng
2008 Committee Member for Charisse Corsbie-Massay
2008 Committee Member for Nicole Sintov
2007 Chair for Lauren Ng
2007 Committee Member for Lina D'Orazio
2006 Chair for Dawn McDaniel
2006 Chair for David Pan
2006 Committee Member for Molly Swanston
2003 Chair for Yolanda Cespedes
2002 Chair for Cathryn Borders
2002 Chair for Alisha Alleyne

Undergraduate Mentoring

2009 – present Honors Thesis Advisor for Esther Lo
2009 – present Honors Thesis Advisor for Danielle Stevenson
2008 - present McNair Scholar Advisor for Marni Sullivan
2008 - 2009 McNair Scholar Advisor for Abisola Oseni
2007 – 2008 Honors Thesis Advisor for Karoline Brandt
2006 – 2008 Honors Thesis Advisor for Dominica Hernandez
2006 – 2007 McNair Scholar Advisor for Chase King
2006 – 2007 McNair Scholar Advisor for Giulia Soro
2005 – 2006 Honors Thesis Advisor for Matthew Borba
2005 – 2006 Honors Thesis Advisor for Kimberly Lowenthal
2004 – 2006 McNair Scholar Advisor for Sophia Thompson
2004 – 2005 Honors Thesis Advisor for Brittany Hall
2004 – 2005 Honors Thesis Advisor for Daniel Ballon
2002 – 2003 Honors Thesis Advisor for Grace Lee
2002 – 2003 Honors Thesis Advisor for Maria Tovar
2002 – 2003 Honors Thesis Advisor for Natasha Pendergast-Hughes

PROFESSIONAL ORGANIZATIONS AND COMMITTEE MEMBERSHIP

American Psychological Association
American Psychological Society
Association for Behavioral and Cognitive Therapies
Society for Research in Child Development

JOURNAL REVIEWER:

Child Development
Cultural Diversity and Ethnic Minority Psychology
Journal of Consulting and Clinical Psychology
Journal of Personality and Social Psychology
Professional Psychology: Research and Practice
Psychiatric Services

DOCUMENT PREPARED FOR DR. STANLEY HUEY, JR.
Tracy D. Cain

Sent June 19, 2009		
Tab No.	**Description**	**Bates No(s)**
1.	*People v. Tracy Dearl Cain*, CSC No. S006544	SH 1 - 78
2.	Declaration of Dr. Ruth Zinter, Psy.D.	SH 79 - 145

HUEY'S

EXHIBIT 2

DOCUMENT PREPARED FOR DR. STANLEY HUEY, JR.
Tracy D. Cain

Sent June 19, 2009 VOLUME 1		
Tab No.	**Description**	**Bates No(s)**
1.	*People v. Tracy Dearl Cain*, CSC No. S006544	SH 1 - 78
2.	Declaration of Dr. Ruth Zinter, Psy.D.	79 - 145
Sent July 22, 2009 **VOLUME 2**		
3.	Declaration of Mack Arthur Blair, signed 09/10/1997	146-151
4.	Declaration of Aron Bush, signed 06/05/1997	152-155
5.	Declaration of Brunell Cain, signed 03/10/1993	156-157
6.	Declaration o f Danny Cain, signed 04/01/1997	158-160
7.	Declaration of Valender Cain, signed 03/10/1997	161-167
8.	Declaration of David Cerda, signed 03/21/1997	168-172
9.	Declaration of Richard Clayton, signed 07/22/1997	173-178
10.	Declaration of Floyd Clements, signed 03/11/1997	179-182
11.	Declaration of Brenda Cain-Johnson, signed 03/1997	183-190
12.	Declaration of Janice Cain-Fortune, signed 03/10/1997	191-196
13.	Declaration of Ida Mae McDonald, signed 03/14/1997	197-202
14.	Declaration of Clarence Wade, signed 09/10/1997	203-205
15.	Declaration of Theodore Donaldson, Ph.D., signed 01/07/1998	206-212
16.	Declaration of Majil Fausel signed 05/15/1997	213-218
17.	Declaration of Karen Froming, Ph.D., signed 09/10/1997	219-239
18.	Declaration of Jay M. Jackman, M.D., signed 10/1997	240-266

Tab No.	Description	Bates No(s)
19.	Tracy Cain's Adobe Mountain School Records	267-435
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20.	Tracy Cain's San Quentin Medical Records	436-619
21.	Dr. Efrain A. Beliz, Jr. Ph.D. 06/24/2006 Comprehensive Assessment and Evaluation of Tracy Dearl Cain	620-663
22.	Excerpts of Motion for Evidentiary Hearing, pages 109-148 filed 03/18/2003	664-704
	Additional Documents Prepared for Dr. Stanley Huey, Jr. Sent 10/21/2009 VOLUME 4	
23.	Blair, Collins, Jr., Death Certificate (Habeas Petition Exhibit 1)	705
24.	Blair, Mack Arthur, Birth Certificate (Habeas Petition Exhibit 3)	706
25.	Blair, Mack Arthur, Mississippi v. Blair, Case No. 5826 and 5827 (Habeas Petition Exhibit 4)	707-735
26.	Blair, Mack Arthur, State of Arizona v. Mack Blair, Robert Ross and Tracy Cain, Case No.10921 (Habeas Petition Exhibit 5)	736-910
27.	Blair, Mack Arthur, State of Arizona v. Mack Blair, Case No. 158170B (Habeas Petition Exhibit 6)	911-917
28.	Blair, Mack Arthur, State of Arizona v. Mack Blair, Case No. 131123 (Habeas Petition Exhibit 7)	918-927
29.	Blair, Mack Arthur, State of Arizona v. Mack Blair, Case No. 88-07434, 103142 (Habeas Petition Exhibit 8)	928-932
30.	Cain, Brunell McBride, Marriage Certificate to Percy Cain, Jr. (Habeas Petition Exhibit 11)	933
31.	Cain, Candice Nicole, Birth Certificate (Habeas Petition Exhibit 12)	934
32.	Cain, Cantana Yvette, Birth Certificate (Habeas Petition Exhibit 13)	935

Tab No.	Description	Bates No(s)
33.	Cain, Durez Onashe, Birth Certificate (Habeas Petition Exhibit 14)	936
34.	Cain, Janice, Birth Certificate (Habeas Petition Exhibit 16)	937
35.	Cain, Larry Darnell "Danny", Birth Certificate (Habeas Petition Exhibit 19)	938
36.	Cain, Larry Darnell, Arizona Department of Corrections File (Habeas Petition Exhibit 21)	939-1040
37.	Cain, Larry Darnell, State of Arizona v. Darnell Cain, Case No. CR 94074938 (Habeas Petition Exhibit 22)	1041-1068
38.	Cain, Larry Darnell, State of Arizona v. Darnell Cain and Mac Bunn, Case No. 8634 (Habeas Petition Exhibit 23)	1069-1160
39.	Cain, Larry Darnell, State of Arizona v. Darnell Cain, Case No. 8935 (Habeas Petition Exhibit 24)	1161-1274
40.	Cain, Larry Darnell, State of Arizona v. Darnell Cain, Case No. 9292 (Habeas Petition Exhibit 25)	1275-1306
41.	Cain, Larry Darnell, State of Arizona v. Darnell Cain, Case No. 9316 (Habeas Petition Exhibit 26)	1307-1351
42.	Cain, Percy Jr., Application for and Marriage Certificate with Ruthie Mae Quinn (Habeas Petition Exhibit 31)	1352-1353
43.	Cain, Percy Jr., Marriage Certificate with Wilma Jean Taylor (Habeas Petition Exhibit 32)	1354
44.	Cain, Percy Jr. Case No. D 712 902, Dissolution of Marriage documents of Percy and Ruthie Mae Cain (Habeas Petition Exhibit 33)	1355-1389
45.	Cain, Percy Jr., Case No. D 134 010, Dissolution of Marriage documents of Percy and Wilma Jean Taylor Cain (Habeas Petition Exhibit 34)	1390-1409
46.	Cain, Percy "Kato" III, Birth Certificate (Habeas Petition Exhibit 36)	1410

Tab No.	Description	Bates No(s)
47.	Quinn, [Blair/Cain] Ruthie Mae, Marriage Certificate of Rutie Mae and Collins Blair (Habeas Petition Exhibit 37)	1411-1412
48.	Cain, Ruthie Mae Quinn, Report of Death of an American Citizen Abroad (Habeas Petition Exhibit 38)	1413
49.	Cain, Ruthie Mae, People v. Ruthie Mae Cain, Case No. A177571 (Habeas Petition Exhibit 39)	1414-1477
50.	Cain, Ruthie Mae, Rap Sheet from California Department of Justice (Habeas Petition Exhibit 40)	1478-1499
51.	Cain, Tracy, Birth Certificate (Habeas Petition Exhibit 41)	1500
52.	Cain, Tracy, Work Records (Habeas Petition Exhibit 42)	1501-1514
53.	Cain, Tracy, School Records (Habeas Petition Exhibit 43)	1515-1553
54.	Cain, Valendar "Val", Birth Certificate (Habeas Petition Exhibit 52)	1554
55.	Cain, Valendar, Medical Records from Paradise Medical Center (Habeas Petition Exhibit 58)	1555-1727
56.	Cain, Wilma, State of Arizona v. Wilma Cain, Case No. C10540 (Habeas Petition Exhibit 60)	1728-1900
57.	Williams, Arthur Ree, People v. Williams, Case No. A072744 (Habeas Petition Exhibit 83)	1901-1991
58.	Williams, Arthur Ree, People v. Williams, Case No. A238473 (Habeas Petition Exhibit 84)	1992-2059
59.	Williams, Arthur Ree, People v. Williams, Case No. A255753 (Habeas Petition Exhibit 85)	2060-2080
60.	Excerpts from Murder Book - Oxnard Police Department Interview with Teodorico Albisdated 10/23/1986; Oxnard Police Department Interview with Mark Pina dated 10/24/1986 (Habeas Petition Exhibit 103)	2081-2085

DECLARATION OF THEODORE S. DONALDSON, Ph.D

I, Theodore S. Donaldson, Ph.D., declare:

1. Except as specifically noted, I have personal knowledge of the facts stated herein, and can testify competently thereto. I testify to certain facts on information and belief; in those instances I believe those facts to be true.

2. I am a licensed clinical psychologist in private practice in Morro Bay, California since 1985. Prior to that I was in private practice in Los Angeles and Ventura, California. I have experience in group and individual psychotherapy and psychodiagnostic evaluations of juveniles and adults relating to criminal and civil issues, including competency to stand trial, criminal intent, child custody, workers' compensation, and others. I have appeared as an expert witness in Ventura, Kern, Los Angeles, Santa Barbara, Alameda, Santa Cruz, and San Luis Obispo Counties. Additionally, I have extensive experience in evaluation of sex offenders and mentally disordered offenders, specifically treatment amenability of child molesters (PC 288.1), and Sexually Violent Predators (WIC 6600). Beginning in 1990, I conducted Mentally Disordered Offender (MDO) (PC 2962) evaluations for the California Board of Prison Terms.

3. I received a Bachelor of Science degree in Physics and Mathematics from Western Michigan University in 1953, a Master of Science in Physics, with a minor in mathematics from the University of Arkansas in 1956 and a Ph.D in Clinical Psychology, with minors in Experimental Psychology and

Mathematical Statistics from Purdue University in 1962. A true and correct copy of my curriculum vitae is attached hereto.

4. In February of 1987, I was retained by Willard Wiksell of Conflict Defense Associates ("CDA") to evaluate Tracy D. Cain. At the request of current counsel for Mr. Cain, I have reviewed the report that I prepared for CDA following my evaluation of Mr. Cain. In addition, current counsel provided me with, and I have reviewed the declarations of Dr. Karen B. Froming, Dr. Jay Jackman and Dr. Ruth Zitner.

5. My report dated February 26, 1987 indicates that I interviewed Mr. Cain while he was incarcerated in the Ventura County Jail. He was interviewed and administered the Minnesota Multiphasic Personality Inventory, the Rorschach Personality test, The Bender Visual Motor Gestalt Test, and Projective Drawings. In preparation for the report, I reviewed his case file, including police crime reports and numerous reports by Mr. Stone, investigator for the District Attorney's office who interviewed a number of witnesses to the crime and people who knew Mr. Cain. In addition, at the request of Attorney John Brown, I interviewed and evaluated David Cerda, Mr. Cain's co-defendant on November 26, 1986.

6. Although it is not unusual for me to consult with respect to both the guilt and penalty phases of a death penalty trial, it appears from my report that the existence of any mental state defenses at the guilt phase of Mr. Cain's trial was the scope of the referral question to me. I would have

closely followed the referral question given to me in conducting my interview with Mr. Cain.

7. I have no recollection as to why I was not called to testify on behalf of Mr. Cain. I conducted my interview with Mr. Cain in February, 1987 and presumably discussed the case with Mr. Wiksell at about the same time. I recall advising Mr. Wiksell that he might want to have Mr. Cain examined by a neuropsychologist. However, I believe that I was not informed at the time, nor was I aware until meeting present counsel, that Mr. Cain had been capitally charged. This certainly is the kind of information that I believe to be relevant and important, and I would have recommended a more in-depth evaluation for sentencing.

8. At the request of current counsel for Mr. Cain, I have also reviewed an extensive and detailed social history of Mr. Cain prepared by Dr. Ruth Zitner, as well as other declarations from mental health professionals. A social history of this kind would have been extremely helpful to me in evaluating and interviewing Mr. Cain. A social history of this kind should have been provided to me at the time of my evaluation of Mr. Cain in order for me to render a complete and accurate professional opinion concerning sentencing issues.

9. Further, had I been provided with this social history at the time of Mr. Cain's trial, I would certainly have attempted to translate to Mr. Wiksell the psychological importance that the history reflected. I would have discussed the legal significance reflected in the social history and tried

to assist Mr. Wiksell in understanding how psychological testimony could assist in Mr. Cain's defense at the penalty trial given that history.

10. I believe that I did not discuss the subject of my report with Mr. Wiksell in detail. Mr. Wiksell never had the opportunity to tell me precisely what he hoped to establish through my report, or how my report fit into his overall strategy. Based on my experience in other major felony trials, Mr. Wiksell probably spent less than the average amount of time in preparing me for assisting in the case.

11. I do not recall whether or not Mr. Wiksell told me what statutory mitigating factors the jury would be instructed to consider in deciding whether to impose the death penalty. However, I believe that he did not do so, and I have three reasons for that belief. First, I did not discuss these factors in my report. Second, I did not use the terms contained in the relevant statute in my report, that is, my report was not couched in the terms used in the statute. Third, as I previously stated, I believe that I was not aware until present counsel so informed me, that Mr. Cain had been capitally charged.

12. I have now been informed that one factor which the jury was required to consider in deciding whether to impose the death penalty was "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." If Mr. Wiksell has asked me whether or not Mr. Cain's offenses were committed while Mr. Cain was under

the influence of extreme mental or emotional disturbance, I would have testified that, in my professional opinion, Mr. Cain had chronic and significant mental disturbance, which was almost certainly present throughout his adult life, including at the time of the offense. If I had known the contents of the declarations presented to me by present counsel at the time of trial, then I would have had an additional understanding of this, and an opportunity to follow up some of the inferences raised by those materials, and could have testified, if asked, in more detail about this, as discussed below.

13. I have now been informed that another factor which the jury was required to consider in deciding whether to impose the death penalty was "any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime." If Mr. Wiksell had asked me whether I could think of any other circumstance which extenuated the gravity of the crime, I could have reported that the extraordinary environment in which Mr. Cain developed as a small child and a young adolescent almost certainly limited his adult social and psychological potential, based on what I knew about Mr. Cain at the time of my report. If I had known the contents of the declarations provided by current counsel at the time of trial, then I would have had an additional understanding of this, and an opportunity to follow up some of the inferences raised by those materials, and could have reported, if asked, in more detail about this.

14. I had consulted and testified on death penalty

trials previous to being contacted by Mr. Wiksell and was therefore familiar with the legal criteria for mitigating evidence. In my opinion, if I had been aware at trial of the information regarding Mr. Cain's family and medical history and upbringing which have recently been provided to me, my report would have focused in more detail on the probable severity of the abuse and neglect he suffered as a child, and the likelihood that the trauma caused by that neglect and abuse contributed greatly to the social and psychological development that characterized his adult mental disturbance.

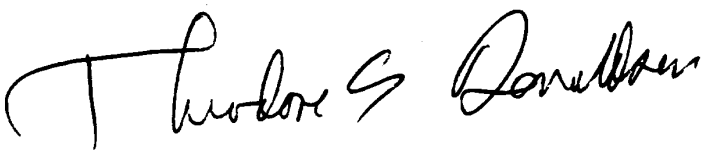
15. In my experience working as an expert witness in other serious felony cases around the time of Mr. Cain's trial, I would have expected defense counsel to provide me with substantial information regarding a client's life history. If I had been given such information, it would have allowed me to corroborate and expand upon the information I did have and perhaps to provide a more meaningful and accurate evaluation of Mr. Cain. If I had been given this recently-obtained set of statements by family members, or the comments and allegations they contain, I believe I would have recommended to the defense that I interview several of the persons who provided statements.

16. I have reviewed the declaration of Jay Jackman, M.D.. I agree with the conclusions contained in the declaration. The psychological evaluation prepared by me at the time of trial did not address several basic factors that should have been included in any mental health assessment of Mr. Cain.

Specifically, the two most important known factors that influenced Mr. Cain's life are his cognitive impairments and the overall impoverishment of his childhood years. Neither is mentioned in my report because Mr. Wiksell failed to provide the information to me. What I was given was scant, and according to my report, based wholly on police reports and the investigation conducted by the Ventura County District Attorney's Office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 7 day of January, 1998, at Morro Bay, California.



Tri-County Investigations

5755 Valentine Road
Suite 211
Ventura, California 93003

State License AA011965

(805) 658-8544 / 658-8545

DATE: November 17, 1987

CLIENT: Tracy Cain

ATTORNEY: Willard Wiksell

INVESTIGATOR: Mike Jarosz

MILEAGE: None

TIME: 8:00 a.m. - 1:00 p.m. TOTAL: 5 HOURS

EXPENSES: Meals - $16.03

On this date, Mr. Wiksell and I went to the Ventura County Jail and spoke to Tracy Cain at length about an offer that had been made by Richard Holmes of the District Attorney's Office. Holmes had offered to let Cain please guilty and get life without the possibility of parole and drop the death penalty. We had informed Cain of this offer approximately two weeks earlier at which time he became hostile towards us and said no to the deal. Last week we spoke to Percy Cain and Bennell Cain explaining the offer by the District Attorney's Office and why we thought Tracy should accept it. On today's date, Tracy again rejected the offer and elected to go to trial.

WILLARD P. NORBERG, Esq.
Cooper, White & Cooper
201 California Street, 17th floor
San Francisco, CA 94111

(415) 433-1900

Attorneys for Petitioner
TRACY DEARL CAIN

SUPREME COURT

OF THE STATE OF CALIFORNIA

In re TRACY DEARL CAIN, On Habeas Corpus.	No. (Automatic Appeal Pending in Crim. No. S006544) (Ventura County Superior Court, Case No. CR 22297)

DECLARATION OF BRUNELL CAIN

I, BRUNELL CAIN, declare as follows:

1. I am the widow of Percy Cain, recently deceased, and the step-mother of TRACY CAIN.

2. In early November, 1987, my husband, Percy Cain, and I were informed by Tracy's attorney, Willard Wiksell, that the District Attorney had offered to let Tracy plead guilty and get life imprisonment without possibility of parole; the death penalty demand would be dropped. Mr. Wiksell and his investigator, Mike Jarosz, said that they thought Tracy should accept the offer. We agreed to talk to Tracy about the offer which he had previously declined, according to Mr. Wiksell.

3. When Mr. Cain and I talked to Tracy about the offer, he said he didn't want to plead guilty as he hadn't killed anyone. We told him that the decision was one that he would have to make.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Ventura, California, this 10th day of MARCH, 1993.

Brunell Cain

Brunell Cain

A0003223.DOC/PC-32/030193

COOPER, WHITE
& COOPER
ATTORNEYS AT LAW
201 CALIFORNIA STREET
SAN FRANCISCO 94111

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent,	)	
vs.	)	No. _____
TRACY D. CAIN, Defendant-Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE BRUCE A. THOMPSON, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff-Respondent: JOHN VAN DE KAMP
State Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

For the Defendant-Appellant: In Propria Persona

TERI T. CAIN, CSR 4062
CHRISTIE MONTGOMERY, CSR 4921
Official Reporters
800 South Victoria Avenue
Ventura, California 93009

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Pages 5092-5344

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 47 HON. BRUCE A. THOMPSON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. TRACY D. CAIN, Defendant.	No. CR 22297

REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

Thursday, March 31, 1988

APPEARANCES:

For the People:
MICHAEL D. BRADBURY
District Attorney
BY: RICHARD E. HOLMES
Deputy District Attorney
800 South Victoria Avenue
Ventura, California 93009

For the Defendant:
CONFLICT DEFENSE ASSOCIATES
By: WILLARD P. WIKSELL
Attorney at Law
674 County Square Drive
Suite 301
Ventura, California 93003

TERI T. CAIN, CSR 4062
CHRISTIE MONTGOMERY, CSR 4921
Official Reporters
800 South Victoria Avenue
Ventura, California 93009

The hairs aren't distinctive as fingerprints, but they can eliminate people, and they eliminate everybody, but they don't eliminate the defendant.

What this case boils down to is a physically powerful man sneaked into his neighbors' garage, blasted a door out of its frame and went into a house in the dead of night right around midnight, and he kills Mr. Galloway because Mr. Galloway knew him.

It wasn't like a stranger who could turn when confronted by a homeowner and run away. Tracy Cain isn't easily mistaken for anyone else. He's a unique-looking man and they knew him.

The defendant then went on to kill Mrs. Galloway and rape her and Mrs. Galloway spent her last moments on this earth in terror lying on her bed kicking at him, breaking off hairs into her slipper socks while he raped her.

At the end of this case in the guilt phase after you hear the evidence and the defendant's cover-up attempts, and the brutality of crimes are so extensive that there will be no reasonable doubt in your mind that the defendant should be found guilty of all the charges.

THE COURT: Mr. Wiksell, do you wish to make an opening statement at this time?

MR. WIKSELL: Yes.

THE COURT: All right.

MR. WIKSELL: Your Honor, Counsel --

THE COURT: Mr. Wiksell -- ladies and gentlemen, I hate to interrupt an attorney's opening statement in midstream. I note we have only half hour till lunch.

Mr. Wiksell, if it takes longer than that to finish, please -- will the statement take any longer than an hour?

MR. WIKSELL: My comments to the jury this morning will be very brief. Probably five minutes.

THE COURT: Oh, all right. Then I guess I jumped the gun. Go ahead.

MR. WIKSELL: Again, Counsel, ladies and gentlemen of the jury.

This is my opportunity to give you what I submit the evidence and the witnesses will testify to and also what the evidence will not show. The evidence will be that in October of 1986, there was a party, just as Mr. Holmes tells you, at the Cain household.

There was drug use. There was alcohol use. My client, Mr. Cain, along with others, committed a crime. They went next door to their neighbors' and they broke in and Mr. Cain went there to steal property with others, and the evidence will show that without a doubt.

And it's wrong and it's inexcusable and it's criminal, but the evidence will not show that Mr. Cain inflicted any blows on those people. Because he did not inflict blows on Mr. Galloway or Mrs. Galloway.

He went there to steal property and that's what he did and he took property and he should be found

guilty of that, but he should not be found guilty of the intentional murder and the special circumstance should not be found to be true because he didn't kill anybody. Other people -- and the evidence will show that -- killed those people.

Now, as to the rape allegation, the evidence will show that Mrs. Galloway was found in a suggestive position, and the autopsy surgeon -- who's a forensic pathologist and that means he is an expert -- he looked at the scene for evidence of sexual assault and he's trained to do that.

And he was specifically looking for sexual assault and back at the autopsy lab, he went and he conducted tests to find if there was presence of seman, seminal fluid and things of that nature and he found none.

He removed the vagina and he inverted it, looking specifically for sexual assault, and he tore it and he will testify that he tore it by looking at it.

What you'll have, you'll have somebody else who will come in and testify that he looked at photographs. Because of that tear, which the autopsy physician says that he did himself, he will say that's a classic position of rape, but there is no semen, no seminal fluid, no trauma except the tear that the autopsy physician himself did and that is the only evidence of rape.

What my client did was wrong and I think the

jury will arrive at a just verdict, but he did not intentionally kill anybody.

And with that, your Honor, I'm prepared to conclude my remarks. Thank you.

THE COURT: All right. Mr. Holmes, are you prepared to call your first witness?

MR. HOLMES: I am, your Honor. Just be a moment, your Honor. I'll use that diagram on the sheet, the evidence sheet -- what number is it? 74 or 75, something like that.

Please come forward to be sworn.

WILLIAM JAMES GALLOWAY,
called as a witness on behalf of the People,
having been first duly sworn, was examined
and testified as follows:

THE CLERK: Thank you. Please be seated at the witness stand.

DIRECT EXAMINATION

BY MR. HOLMES:

Q. Are you son of Modena Shores Galloway and William Jefferson Galloway?

A. Yes, I am.

Q. Did your parents live in Oxnard in October of 1986?

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, TERI T. CAIN, CSR 4062, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 1-36, 66-92, 121-131, 170-187, 214-241, 286-322, 361-374, 402-439, 476-491, 492-519, 556-564, 597-637, 685-729, 770-789, 790-818, 855-874, 900-906, 936-962, 976-1007, 1045-1079, 1119-1155, 1202-1228, 1269-1300, 1336-1371, 1410-1443, 1476-1489, 1490-1521, 1558-1590, 1631-1667, 1707-1736, 1793-1828, 1866-1975, 1976-2006, 2045-2077, 2120-2158, 2233-2272, 2312-2348, 2375-2403, 2404-2436, 2474-2509, 2546-2580, 2652-2693, 2737-2774, 2775-2808, 2849-2886, 2929-2965, 3024-3061, 3100-3135, 3172-3212, 3257-3263, 3264-3309, 3351-3384, 3418-3459, 3509-3538, 3560-3580, 3596-3607, 3644-3683, 3721-3753, 3787-3801, 3802-3840, 3876-3908, 3949-3984, 4035-4066, 4105-4143, 4177-4213, 4236-4241, 4242-4272, 4315-4350, 4384-4425, 4519-4576, 4614-4649, 4666-4696, 4734-4769, 4805-4833, 4879-4894, 4895-4931, 4972-5013, 5060-5079, 5119-5144,

5145-5176, 5213-5258, 5302-5330, 5384-5423, 5465-5511, 5580-5613, 5649-5671, 5702-5731, 5862-5892, 5922-5946, 5977-6000, 6001-6035, 6070-6102, 6137-6169, 6220-6254, 6274-6293, 6294-6319, 6350-6405, 6436-6469, 6492-6512, 6513-6550, 6593-6622, 6655-6683, 6705-6757, 6790-6820, 6851-6880, 6881-6896, 6897-6938, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20, 26, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 14, 19, 20, 21, 22, and 26, 1988; May 2, 11, 12, 13, 18, and 20, 1988; July 12, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Teri T. Cain

TERI T. CAIN, CSR 4062
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, CHRISTIE MONTGOMERY, CSR 4921, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 132-169, 188-213, 242-285, 323-360, 375-401, 440-475, 520-555, 565-596, 638-684, 730-769, 819-854, 875-899, 907-935, 963-975, 1008-1044, 1080-1118, 1156-1201, 1229-1231, 1232-1268, 1301-1335, 1372-1409, 1444-1475, 1522-1557, 1591-1630, 1668-1706, 1737-1755, 1756-1792, 1829-1865, 2007-2044, 2078-2119, 2159-2195, 2196-2232, 2273-2311, 2349-2374, 2437-2473, 2510-2545, 2581-2617, 2618-2651, 2694-2736, 2809-2848, 2887-2928, 2966-2990, 2991-3023, 3062-3099, 3136-3171, 3213-3256, 3310-3350, 3385-3417, 3460-3474, 3475-3508, 3539-3559, 3581-3595, 3608-3610, 3611-3643, 3684-3720, 3754-3786, 3841-3875, 3909-3948, 3985-4002, 4003-4034, 4067-4104, 4144-4176, 4214-4235, 4273-4314, 4351-4383, 4426-4450, 4451-4518, 4577-4613, 4650-4665, 4697-4733, 4770-4804, 4834-4855, 4856-4878, 4932-4971, 5014-5059, 5080-5091, 5092-5118, 5177-5212, 5259-5301, 5331-5344, 5345-5383,

5424-5464, 5512-5544, 5545-5579, 5614-5648, 5672-5701, 5732-5776, 5834-5861, 5893-5921, 5947-5976, 6036-6069, 6103-6136, 6170-6190, 6191-6219, 6255-6273, 6320-6349, 6406-6435, 6470-6491, 6551-6592, 6623-6654, 6684-6704, 6758-6789, 6821-6850, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 26, 27, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 13, 14, 19, 20, 21, and 27, 1988; May 11, 12, and 18, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Christie Montgomery

CHRISTIE MONTGOMERY, CSR 4921
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, DAVID O'GRADY, CSR 3146, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 37-65, 93-120, 5777-5833, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20 and 26, 1988; April 13, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

DAVID O'GRADY, CSR 3146
Official Reporter

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, vs. TRACY D. CAIN, Defendant-Appellant.	)	No. _____

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

HONORABLE BRUCE A. THOMPSON, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff-Respondent: JOHN VAN DE KAMP
State Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

For the Defendant-Appellant: In Propria Persona

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CHRISTIE MONTGOMERY, CSR 4921
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Ventura, California 93009

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

COURTROOM 47 HON. BRUCE A. THOMPSON, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)	
vs.	)	No. CR 22297
TRACY D. CAIN, Defendant.	)	

REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

Wednesday, April 20, 1988

APPEARANCES:

For the People:
MICHAEL D. BRADBURY
District Attorney
BY: RICHARD E. HOLMES
Deputy District Attorney
800 South Victoria Avenue
Ventura, California 93009

For the Defendant:
CONFLICT DEFENSE ASSOCIATES
By: WILLARD P. WIKSELL
Attorney at Law
674 County Square Drive
Suite 301
Ventura, California 93003

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CHRISTIE MONTGOMERY, CSR 4921
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(The following proceedings were held inside the hearing and presence of the jury:)

THE COURT: All right. Everybody is back.

Mr. Wiksell, you want to proceed?

MR. WIKSELL: Thank you, your Honor.

Counsel, ladies and gentlemen of the jury.

This is my opportunity to give you what I submit the evidence has proven and what the evidence has failed to prove.

As Judge Thompson has told you, this is the only time that I will talk to you concerning my impressions of the evidence and what it is proven.

After I finish, Mr. Holmes has an opportunity to rebut what I tell you; and I don't have an opportunity to rebut him. He has the final say-so about that.

What I would like to do is, first of all, tell you that my task as I see it is to defend Tracy Cain vigorously.

I don't see my task as disputing every piece of evidence that comes in or cross-examining every witness that comes in. I don't think that that's a lawyer's task.

And if you recall, most of the witnesses that came in here, I asked either very little questions or no questions at all. Simply: If there's not an issue in dispute, I'm not going to dispute it.

What I would like to do is to take an objective look at the evidence, not colored by emotion, not colored by what we think might have happened but what did the evidence prove.

And as Mr. Holmes alluded, there are going to be a number of instructions. Judge Thompson says he's going to read them. They are quite lengthy.

I'm going to give you, as Mr. Holmes did, some of the instructions. I don't mean to take them out of context or to highlight them because you'll be told to consider all of the instructions as a whole.

But in determining the evidence, Judge Thompson is going to tell you that you must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling.

Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case. And you will reach a just verdict regardless of what the consequences of such verdict may be.

So that instruction tells you you're not going to guess, you're not going to speculate, and you're not going to use conjecture.

So what did the evidence prove?

Now I scribbled out here on the board the basic charges. And I'd just like to go over them in logical fashion, right down the list. And let's examine together what has been proven.

First of all, burglary.

Did Mr. Cain go in the Galloway home to steal?

Yeah, he did. I said so in my opening statement, but that wasn't evidence. The evidence was from his own lips to the police. He stole.

I didn't dispute that with the police officers. I didn't present evidence to the contrary. I submit to you he went in there to steal.

I also told you in my opening statement it was wrong. It's inexcusable. I'm not going to stand up here and say that what he did was okay because it wasn't.

But he's guilty of it, and I'm not going to dispute that. So I'm just going to just write right next to it, yes, he's guilty.

Without question. I submit that he's guilty. The evidence has proven it.

What about robbery?

And it's important in our -- in our understanding to know what -- what a robbery is because many times people use the wrong terms. They intermingle burglary and robbery.

I hear all the time: I was at work, and my house was robbed. A house doesn't get robbed. Only a person is capable of being robbed.

Robbery, of course, you will be told, is the taking of personal property in the possession of another from his person or immediate presence and against his

will, accomplished by means of force or fear and with the specific intent permanently to deprive such person of the property.

In order to prove the commission of the crime of robbery, each of the the following elements must be proved. And each of those elements have to be proven beyond a reasonable doubt.

That the person had possession of property of some value, however slight.

The Galloways had property, and that property was taken.

The second element -- that element I submit has been proven.

The second element, that such property was taken from such person or his immediate presence.

That's what I wish to discuss with you and examine the evidence.

The third element, that such property was taken against the will of such person.

Well, obviously nobody is going to dispute that the Galloways didn't give away their money and the VCR.

That the taking was accomplished by either force or violence or fear of intimidation or both and that there was the specific intent permanently to derive such person of the property. Unless such element has been proven beyond a reasonable doubt, you can't find a robbery.

The key issue here is: Was the property taken from his person or immediate presence?

What was the property that was taken?

The property that was taken was money. And again, he stole this money.

Where was the money?

The only evidence of the money that was missing was the money in the brown wallet that was kept in another room.

Now Mr. Galloway had money on his person.

We know the VCR was taken from a room, but was that -- was that property taken from him or his immediate presence?

What's the evidence?

I mean, you can't just slop over a robbery and say: Well, he's guilty of burglary. Therefore he's guilty of everything else. That's not what this system is about.

When we asked you questions in selecting this jury, we made it clear there are a number of charges. Each charge independently of each other must be proved beyond a reasonable doubt.

I didn't hear Mr. Holmes address the robbery in the sense of proof. If that pouch would have been ripped off and turned inside out, then I think a fair assumption can be made. But we know the VCR was taken from a room, not from the Galloways. We know a wallet was taken that was -- the money and the jewelry.

Now all the other elements -- and it's wrong to take property. I can't stress that enough. But the crime of robbery has that be proven.

We know he had money on him. He had money on his person that night. I'm going to put up a question mark on that, and maybe I'll come back to that.

I submit to you, ladies and gentlemen, that there is -- that there's a probability, a maybe. But is it proof beyond a reasonable doubt? That's the standard we're dealing with.

Again, it's not my burden. I don't have to shoulder that responsibility of proving to you a robbery did not take place. It's the contrary. Mr. Holmes has to prove to you a robbery did take place. And again, he's certainly proven the burglary.

What about murder? Is the defendant guilty of murder?

Well, this may surprise you; but in my understanding of the law, yes, he is. He's guilty of murder.

You may think: Wow, defense lawyer up there and he's giving away the store. He's not doing his job. He's not representing Mr. Cain.

Well, I disagree with that. I think I am representing him, but I'm also not going to dispute facts that are not in dispute.

Mr. Holmes is correct. If he's engaged in a felony inherently dangerous to human life and somebody

dies, each participant is guilty of murder.

For example, if I'm driving a getaway car in a robbery and my partner goes in and kills the attendant, I'm guilty of murder.

I'm not saying and I won't say that the evidence is Tracy Cain killed anybody. My goodness. That's a big difference, and I tend to stress that this afternoon.

I submit the evidence is not Tracy Cain personally killed anybody; but I also submit, ladies and gentlemen, that you don't even get to that part when you're talking about the murder. That's the special circumstance, but the murder --

Is he guilty of murder?

The law is clear. He did something wrong, and that's burglary. That's a given. And somebody died during that. So it's a given. He's guilty. And he's guilty of murder.

What about rape?

What is rape?

Again, just like robbery, we have to define them for you because they have different legal terms, legal terminology.

The crime of rape is charged against the defendant in this case.

An act of sexual intercourse with a person who is not the spouse of the perpetrator, accomplished against such person's will by means of force, violence,

or fear of immediate and unlawful bodily injury to such person.

It's an unconsented to because of fear or threats sexual intercourse. That's what rape is. That's pretty obvious. I want to go over that because there may be some misconception about that.

Well, how do you prove rape?

The D.A. I submit relies solely on Dr. Woodling to prove rape, but remember the first instruction I read you. You're not to decide this case on conjecture. You're not supposed to speculate.

Let's not guess what happened.

What is the evidence?

Again, think back what's been proven.

First of all, Dr. O'Halloran comes to the scene. Now he is a forensic pathologist. He is at the scene. He's called out once the bodies have been discovered. Nothing has been disturbed. The crime scene is secured.

And from the coroner's office a forensic pathologist goes out there, and immediately his suspicion is aroused. There may be sexual assault. And he is a trained professional dealing with that type of crime. So he's looking for it.

And my goodness. Dr. O'Halloran is not a friend of Tracy Cain. He testifies predominantly if not exclusively for the prosecution in this county. When he does autopsies and there's questions about cause of

death, it's the prosecution that brings in Dr. Lovell and Dr. O'Halloran and all of them.

But he's calling it like he sees it. He's looking -- I think that's important to consider. He's looking for sexual abuse and those kinds of signs. That's why he kept the specimen.

My goodness. That was in '86, and the specimen is still preserved. The doctor was amazed at the condition it was in. I mean, he was a meticulous surgeon.

Well, what did Dr. O'Halloran say?

He said, first of all: I'm looking because I want to determine -- it's suspicious. There's no sperm. There's no seminal fluid. There's no bleeding associated with the -- with the vaginal area.

Even though there's a photograph, that photograph with the fluid is post mortem artifact. It's decompositional fluid.

That's what Dr. O'Halloran testified it was, and his final conclusion was there was no injury because he did the injury. He tore it.

Now what's his motive in coming in here and telling you that he tore it? What does he get out of it?

He gets -- his reputation is what he gets because he's an honest man. I submit to you that to Dr. O'Halloran his reputation is worth more than Tracy Cain.

But he tore it. He knows what's at stake

here. He knows what he did.

How easy would it be to go: Geeze, maybe I didn't. Maybe I did tear it, but nobody knows. Maybe I'll just write it that I found it this way. Nice time we'd have here. But he didn't do it that way because he tore it and he's honest.

What's the proof?

The proof is there's no sperm. There's no seminal fluid, no injury.

Well, then what?

Then rape is just conjecture, isn't it? It's just a maybe.

And that's something from the very first instruction, one of the first, that Judge Thompson will tell you is no conjecture. You must not decide this case on conjecture.

But Mr. Holmes is -- he's creative, and he said that Mr. Cain wanted to be with a girl at the party. That doesn't equal -- equal a rape. That's -- that's clever. It's shows signs that he's thinking, but it's certainly not rape.

But there's Dr. Woodling. And I think it's important at this point to tell you that I'm not suggesting that Dr. Woodling is coming in here and lying.

I'm not suggesting for a moment that he's a friend of the Galloways or he is hateful of me or the defense bar or of Tracy Cain. He doesn't know Tracy Cain from anybody.

What I'm saying and what I'm suggesting is that the evidence is clear that he's simply not qualified to render that kind of an opinion on a deceased person in determining this injury.

You don't get glasses from an orthopedic surgeon. He's a general practitioner. He might be fine when it comes to colds and flues and broken bones, but do you really think he's qualified?

We know he hasn't been to an autopsy in three years in this county. Is he qual -- this is a speciality. You don't learn it in medical school.

You know, I've been a lawyer for quite some time; and I don't do any tax work. I get questions every once in a while about taxes.

I don't know.

Well, you're a lawyer.

So what? I don't know.

I mean, that's part of it

How many times have you taken a car to a garage and you hear a funny noise and you get a mechanic in there with a couple of stripes on his sleeve and he says: Yeah, I think it's a transmission. I think it's a transmission. He took a good guess.

His suspicions were aroused and he looked at the slides and he said that he thinks that this was an injury that Dr. Woodling couldn't have performed because -- couldn't have caused.

He thinks it was -- the tear -- the tear was

caused by -- by rape. Blunt force trauma consistent with a penis, which is another word for forceable rape.

But Dr. Woodling -- and I stood right about here, and I asked him: Well, what about associating the lack of blood around this tear? What does that mean to you?

And Dr. Woodling, whose vocabulary is impeccable, whose mannerisms on the stand are I think exceptional - I think he looks believable - said that's not important. There are places in the body that -- that you would be cut and not bleed.

I said: Where is that, Doctor?

He said in your rectum, the inside of your mouth.

Well, that's wrong. That's basic.

Dr. Spitz said if a first-year pathology student said something like that, he'd think the kid didn't know what he was talking about.

There's only three places in the body. That's -- all Mr. Holmes has to do is pick up the phone and bring in another pathologist if Mr. Spitz is wrong.

There's only three places in the body that bleed -- that won't bleed if you're cut -- your hair, your fingernails, and if you have an exceptionally large callus on your foot. And that's it.

It wasn't just a visual inspection. It was a microscopic inspection. And you can tell if that injury happened when she was alive.

Now why is that important?

Because at the time you remove the vagina she's dead. If you tore it, there's not going to be any bleeding because she's dead. If that was torn during a forceable rape scene, there would be bleeding associated. That bleeding would be seen easily on the slides.

So we know that Dr. Woodling is just wrong. He's just -- he couldn't be any farther wrong when it comes to the bleeding.

He said something that I was -- I'm not a doctor. I learn things just on every case I do. I ask experts questions. I say educate me a little bit.

He said something that I thought was very interesting. He said the direction of the tear leads me -- in the vagina, leads me to believe that Dr. O'Halloran couldn't have done it.

Because if Dr. O'Hallaron would have torn it, it would have been crosswise and this tear was lengthwise. I may have that backwards, but it was the opposite.

And he said: Therefore, since it was lengthwise, that's consistent with a penis. And if Dr. O'Hallaron would have torn it, it would have been the other way around.

That sounded pretty good. I mean that's -- that's good. So I called up Dr. O'Halloran again, and I said: What about that? I don't know. You tell me. Does that make any sense to you?

Put him back on the stand, and he says: That doesn't make any sense at all. That's not how it's done. I tore it. That's how I tore it. That's what you would have seen. It wouldn't have been crosswise if I would have torn it. That's nonsense.

Who's better trained to know these things?

Common sense tells us. It's Dr. O'Hallaron's speciality. He's a certified forensic pathologist. Dr. Woodling is a family law doctor -- family law -- family practice doctor.

So I don't dispute things that have been proven beyond a reasonable doubt. Mr. Holmes I think stubbornly insists there was a rape. He brings out a picture. This picture is worth a thousand words. That is a rape scene.

Well, in my life's experience -- how many of you have seen a rape scene? Does that picture prove a rape scene? Is that what that is?

Why have a trial?

Blow up a picture, put it on if wall, and just hall him away. That picture is a rape scene.

You know, it reminds me of a cartoon I saw a few years back in the L.A. Times. Very high bench and kind of a disfigured judge sitting up there and looking down at a very grim-looking individual.

And the caption said: The jury found you not guilty, but we're going to give you five years to be on the safe side.

I think there's what we're doing here. There's no evidence of rape, but we have a picture here that's suggestive. We have no evidence of rape. We have a family doctor who says there might be. So let's just convict him of rape. What the heck. Why not.

Well, all that is circumstantial evidence.

What is circumstantial evidence?

Well, you'll be instructed that a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime but, two, cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish guilt may be found to have been proved beyond a reason doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to

his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and reject the unreasonable.

But this is an instruction -- this is the law that the judge gives you. If you have two reasonable interpretations, one is innocence and one is guilty, you don't have a choice. You must adopt -- you must adopt that interpretation which points to his innocence. You have to. That's your sworn duty as a juror.

The circumstantial evidence here I don't think is close, but I submit that there's reasonable interpretations -- the fact that there's no injury and no sperm and we have some hairs.

Well, we don't have any evidence that Mrs. Galloway's body was not sponged. We have Mr. Holmes saying that: Well, we can tell from this picture that she hasn't been sponged.

I don't have -- I didn't hear anybody say that Mrs. Galloway was not sponged prior to autopsy. This is when she was on an autopsy table.

But when you consult -- and like I say, Dr. Spitz goes all over the country for the prosecution as well as for the defense.

And there are other people that can do that. You can find experts in footprints, as we've had here.

You can find blood experts. You can find fingerprint experts.

Mr. Holmes is not limited to Ventura County. Certainly if he wanted somebody competent in this area, he could have called a pathologist, just any pathologist to review this, not just a local doctor.

Again, I submit that Dr. O'Halloran is much more qualified on this than Dr. Woodling.

But who's much more qualified just on credentials? Dr. Spitz or Dr. Woodling?

And again, he's the chief medical -- chief medical doctor for Wayne County, which is in Detroit. He testifies exclusively for the prosecution there. He doesn't know Tracy Cain. He's not going to come in here and make something up for me or for Tracy Cain.

And look at the data he reviewed. He had everything. He looked at the slides. He wanted them. He insisted on the slides. He looked at the specimen, read the reports, read the testimony.

And how do you evaluate expert testimony?

In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of the other.

In doing this you should consider the relative qualifications and credibility of the expert witnesses as well as the reasons for each opinion and the facts and other matters upon which it is based.

You know, Dr. Spitz may have some -- some

mannerisms which some of you might find a little pushy; but certainly his opinion is beyond question. And that is that there's no injury here. This injury is post mortem, which means it's after death.

He wouldn't call it a sexual assault not because, as Mr. Holmes tried to get him to say -- well, you're a conservative bunch. Before you call it a rape, you'd want -- you'd want to be sure.

No, that's not true. That's not my job. My job is -- I'll call it like it is. I write an opinion, and I write a detailed opinion with reasons. And there's no reasons here.

There's a maybe. Sure, I'll say there's a maybe. There's no -- there is no evidence.

And I've talked about beyond a reasonable doubt. I've got a chart here that I have that's -- it's got different -- different categories of proof. And this is -- this is just an illustration, just illustrative.

I don't -- just as a qualifier, I'm not suggesting that each little thing has a specific like numerical distance; but these are -- these are categories that we -- that we can use. Some are common sense, and some have legal significance.

For example -- for example, under -- under suspicion -- suspicion, if you have a strong suspicion that a felony was committed and one is likely to have committed it, that's enough to hold you to answer after preliminary hearing.

So obviously might be or maybe, that's not -- that's not guilt.

Possibly could be, that's not guilty.

Suspicion get you held to answer. That's the legal term for going to a prelim.

Likely, probably, strong suspicions.

Clear and convincing is an interesting one. You may not have heard of that one. That's a -- that has a legal definition.

Clear and convincing has been defined -- the phrase clear and convincing evidence has been defined as clear, explicit, and unequivocal. So clear as to leave no substantial doubt and sufficiently strong to demand the unhesitating assent of every reasonable mind.

And that's still not beyond a reasonable doubt. Now, this is clear. Beyond a reasonable doubt is not all possible doubt, as Mr. Holmes correctly pointed out.

But in order to find somebody guilty of this crime, there must be proof beyond a reasonable doubt. Not maybe's, not guesses, not a picture that's worth a thousand words.

I submit none of you have ever seen anything like that, except perhaps in a textbook at some school.

No, ladies and gentlemen. There has not been a rape.

Now Mr. Holmes, again, he's creative. He pulls out the tape recording and he says: Well, look.

There's almost an admission or confession. Tracy Cain said, "I don't know who raped her."

Well, that's a little misleading because right before that the police officers are saying: Come on. Tell us who raped her.

Keep in mind that, education-wise, Tracy Cain is not on a category with Mr. Holmes. Now he doesn't have Mr. Holmes' vocabulary, certainly doesn't have his grammar.

Are we going to convict a guy because he doesn't think through his commas? Is that what we're going to do?

This is what we're reduced to. He didn't say: I saw nobody rape her. He said: I don't know. But that's in direct response to a challenge. I didn't rape her. That's not conceding that there was a rape. Mr. Holmes might suggest that, but I think that's a bit misleading.

What is the evidence?

No sperm, no seminal fluid, and no injury. My goodness. There is no injury.

You've got the poor lady -- and she was. You can't get around that. The poor lady, somebody clobbered her. She's laying on the bed, and any reasonable person would look for sexual assault. There just wasn't any there.

Is he guilty of burglary?

You bet he is.

Is he guilty of robbery?

I don't -- I wonder. I think that there's a probability because, I submit, that the one element of taking it from the person or immediate presence hasn't been shown. But that's -- that's in your province now.

Murder?

You bet.

Rape?

There's no evidence of rape.

What about the special circumstance?

Well, as we found out during our long jury selection, it has a meaning all its own. Special circumstances. And I'd like to --

There are four. There's robbery, rape, burglary, and multiple murder. But I'm going to give you the instruction -- just introductory instruction that you'll get about special circumstances.

Before you get to the special circumstance you have to find the defendant guilty of murder, but I concede that. So you're going to, I submit, get to it and discuss it.

And it starts out: If you find the defendant in this case guilty of murder of the first degree, you must then determine if murder was committed under one or more of the following special circumstances, robbery, rape, burglary, or multiple murder.

A special circumstance must be proved beyond a reasonable doubt. If you have a reasonable doubt as to

whether a special circumstance is true, it is your duty to find that it is not true.

If the defendant, Tracy Cain, was the actual killer, it must be proved beyond a reasonable doubt that he intended to kill.

If Tracy Cain -- if Defendant Tracy Cain was an accomplice or aider and abettor but not the actual killer, it must be proved beyond a reasonable doubt that he intended to aid in the killing of a human being before you are permitted to find the alleged special circumstance of the first-degree murder to be true as to Defendant Tracy Cain.

You must decide separately as to each special circumstance charged in this case.

If you cannot agree upon your finding as to all of the special circumstances but you can agree as to one or more of them, you must make your finding as to the one or more on which you agree.

In order to find any special circumstance charged in this case to be true or untrue, you must agree unanimously.

It says you will have a verdict.

I submit, ladies and gentlemen, that the key words that I would hope that you would zero in on is that if he was the actual killer, he must have intended to kill.

If he did not actually kill but was an accomplice, he still must have the mental state, the

intent to kill, for th pecial circumstance to be true.

Go back to my example of the getaway driver.

If the getaway driver -- if I'm the getaway driver and I go: Okay, here's a gun. I don't want any witnesses. Kill the attendant. The guy goes in and even personally shoots the attendant. I didn't kill the guy, but I am guilty.

The special circumstance of murder during a robbery is now true because I intended to kill. I aided. I handed him the gun. I aided. I was the getaway driver. I intended to kill. I gave him the gun, and I clearly expressed that.

But let's say -- let's go opposite of that. I'm a getaway driver. Get the money. Sneak in there and get the money and don't -- you know, don't hurt anybody. And the guy goes in there and kills somebody and comes out.

Now I'm guilty of murder, but I'm not guilty of the special circumstance because I didn't intend to kill anybody.

I didn't kill anybody, and I didn't intend to kill anybody. I'm guilty of murder, but I'm not guilty of the special circumstance -- or the special circumstance is not true.

That's what you have to fight with here.

So what is the evidence of the intent to kill?

Well, first of all, no weapons were taken

into the house. And since no weapons were taken into the house, I think one can say that before entry into the house, whoever went into the house didn't intend to kill these people.

This was a theft crime. People wanted some money for dope. I think that's clear. I don't think that takes a whole lot of imagination to figure that out.

Well, there were no statements attributed to Mr. Cain or anyone else that let's not leave any witnesses. Let's kill them. So I submit to you there was no intent to kill before entry by anybody.

Again we have this tape of Mr. Cain. And Mr. Holmes got quite excited when Mr. Cain was very flustered and he said: You, you, you -- you mean, I'm the only one that's going to be charged?

What that means is, yeah, Mr. Cain was there, just like I said; but he's taking the fall for other people. And I think that's clear too.

And I submit there's no evidence -- and that's what we have to go on is evidence. There's know evidence that he killed anyone, and there's certainly no evidence that he intended to kill someone.

Now the D.A., Mr. Holmes, has harped continually on this. He's the only one who has a motive to kill because he's known to the Galloways.

Well, first of all, that's -- you know, that's guesswork. I don't think that burglars necessarily kill all their victims of the burglary.

But it's a small neighborhood over there. I mean, Mr. Cerda's over there all the time. Mr. Mendoza's over there.

This idea that the only one that has a motive to kill and that's so that he won't be detected is Mr. Cain is just not true. Absolutely not true.

And then he says: Well, he's the leader because of the age.

Well, come on. That's not evidence. This is -- these guys are all not the kind of people we want our kids to grow up to be.

That doesn't make him, because of the fact he's a few years older, the ringleader.

What about his size?

Well, I think that what you're doing if you're getting into that kind of thing, you're saying let's just look at him and convict him.

My goodness. Look at this picture. He's a strong man.

Gee, Tracy. If you were a little skinnier maybe he wouldn't have said that.

That's not evidence of leadership, is it? That's not evidence that you're the ringleader. I mean it really isn't, if you think about it.

And you saw the witnesses that came trooping into court here. These weren't Tracy Cain's life-long buddies. Tracy Cain's been in the area about a year. He was down in L.A. part of that time. Tracy Cain is not a

powerful man who has people do at his beck and call.

You know, we're not supposed to convict people on their looks because he's got -- because he's got big shoulders and because he's a powerfully built man. I think that goes to your passion and not to your -- not to your common sense, ladies and gentlemen.

But coming right to the heart of the issue, to convict Mr. Cain you have to believe Mr. Mendoza because all the statements that are attributed to Mr. Cain come from Mr. Mendoza. They don't come from anybody else. You have to believe him.

If you believe him, you can -- you know, convict him. Sure. That's your province. You're the jury now. It's not me.

I can try to point things out and maybe nudge you in a direction that I see the evidence flowing; but if you believe Mr. Mendoza, that's fine.

But first of all, you know, he lied. He said he was never in the house.

Well, Trish Green - the prosecutor's made fun of her a little bit - what did she say?

She said --

"Q. Did Mr. Mendoza tell you that he was in the Galloway home?

"A. Yes, he was there.

"Q. Did he tell you he took some property?

"A. Yes, he did.

"Q. What property did he tell you he took?

"A. VCR.

"Q. Did he tell you what he did with that property?

"A. Said he dumped it in the reservoir."

Well, one of the things that Mr. Holmes mentioned -- also something else he said, and I'd like to go on.

Are you telling us that this conversation you had with Mr. Mendoza was before you read about the bodies being found?

Yes.

Did Mr. Mendoza tell you that he saw Mrs. Galloway on the bed?

Answer: Yes, he did.

Did he tell you that there was -- what did he tell you about seeing her on the bed?

He said her face was covered with a pillow.

Question: With a what?

Answer: Pillow.

--cm--

Now, on that Sunday morning, Mr. Mendoza appeared to be wearing new garments.

What appeared to be new? His jacket, shirt and hat.

Well, if you remember, then I asked her -- Mr. Holmes said, Why didn't you tell the police about that then?

I said, well, our investigators talked to you. When was that? That was January '87.

Now, these details about the pillow, they weren't out of the paper.

When she talked in January of '87 to our investigators, she had to get that from somewhere. She got that from Mr. Mendoza.

Do you think she came in here to lie to help Mr. Cain? What is Mr. Cain to her?

I mean, that is creative on the part of the prosecutor that there's this code of silence out there in Oxnard. I imagine in some groups, maybe some gangs, that might well be true. I read about it in the Mafia, I think. In this stupid, silly, senseless, horrible little crime, there's no code of silence by these people.

She came in here because she was subpoenaed and because she was interrogated by defense investigators and she had information that proved right there that Mr. Mendoza lied when he told you under oath, I never been in that house.

Well -- and in evaluating Mr. Mendoza,

you'll be told this. A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars.

However, discrepancies in a witness's testimony or between his testimony and that of others, if there were any, does not necessarily mean that the witnesses should be discredited.

Failure of recollection is a common experience and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an accident or transaction also will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

Material point. Did you go in the house? Did you take property? No, I didn't. Did you take jewelry? No, I didn't. Did you take the VCR? No, I didn't.

He lied. And if he's lied in one material part, he's to be distrusted in others.

Okay. What about -- well, as far as Trish Greene goes, Mr. Holmes says, Well, okay, that relates back to the Saturday. That's after the killing. Maybe he lied to me about that.

I mean, I think he's kind of conceded he's lying about that, but that's afterwards. You see, he went back in there after they were dead and maybe took some property. I submit that's not what happened.

He's clever enough. You saw his demeanor. He's clever enough that he's not going to boast about actually murdering somebody. Now, he knows the ropes. He knows the ropes well enough to go to the cops to save his own skin and to dump it on somebody else.

No, he knows the ropes and he's not going to -- he lets something slip to Trish Greene. She might have missed it on the date, but she's not going to make up a lie in January '87 to help somebody she doesn't even know when she said, Hey, I thought Tracy was a female.

We are not playing games here. Like he said, I straightened that out. Well, come on. He went in the house with Tracy. That's Tracy Cain, I know it. You might have confused it with somebody else because he didn't know Tracy at that time. She is not a friend of Tracy Cain. She is not lying.

Then there was Mr. Clements. What he said about Mr. Mendoza. The prosecutor didn't like Mr. Clements' testimony, but that didn't stop him from calling him to the witness stand, by the way.

It said:

Question. Mr. Mendoza told you some things about it, didn't he? For example, didn't Mr. Mendoza tell you that the lady had a pillow over

her face and she was on a bed and there was blood all over the place?

Answer. Yeah.

Question. Didn't Mr. Mendoza tell you that this old man was lying on the floor with holes in his head and he was all bloody?

Answer. Yeah.

Well, I had to pull that out of him. He didn't volunteer that. If you think of it, my questioning got that out of him. He didn't come in here to dirty up Mr. Mendoza. He didn't want to be here.

As a matter of fact, the next question I asked him, I concede you would rather be someplace other than sitting on that witness stand; is that correct? Of course, it is.

The prosecutor called him -- the prosecutor found out he didn't like the answers he was giving so he has to do something. He has to tell you that the guy was part of this mythical code of silence that belongs in Oxnard someplace.

What about Mr. Sampson? Again, Mr. Sampson testified about jewelry.

What kind of jewelry was Mr. Mendoza trying to sell?

Couple necklaces, couple of rings.

Would you describe the rings?

No, I can't.

Question. Did they look like rings a man

would wear or woman would wear?

They were ladies rings.

We had Mr. Gifford. Again, these people aren't businessmen, but they're people in the neighborhood. They were people who were there.

What did he say just this morning? Yeah, Ulie had a VCR that he was selling. It was in his blue Nova. He had some jewelry in a box with some carving on it, which is just the type of box that was taken in a robbery of a house.

He got the words backwards. Like I explained to you, you shouldn't do, but more importantly, he and Cerda -- and he said I have to go back and wipe off some fingerprints. A few minutes after that, he and Cerda left.

Mr. Holmes said, why didn't you tell us that? I think his answer was very reasonable. Well, I tried to hint to that. I was with my mother. I didn't want to tell her I was involved.

People don't want to get involved. He didn't ask the right questions. We did. Mr. Gifford is not a friend of Tracy Cain.

And look at Mr. Willis, who is another witness the prosecutor called. This one I think is particularly important. Because Mr. Willis said and I said:

Question. So in summary -- you correct me if I'm wrong -- you met Mr. Cain at the 7-Eleven,

drove him to your girlfriends house, to Cain's house, to your girlfriend's house, to Cain's house, and that was repeated one more time to your girlfriend's house back to Mr. Cain's house with no stops in between; is that correct?

Answer. Yes.

Question. All right. You never went back to the 7-Eleven store, I take it?

Answer. No, not until the next day.

Okay. All right. You never saw Mr. Mendoza at the 7-Eleven store that evening?

Answer. No. I only saw him when he came out of Mr. Cain's house.

The significance of that is this. Mr. Mendoza sat up there and he testified that he walked to the 7-Eleven with Mr. Cain. And as they're walking by the Galloway house, Mr. Cain says, Let's rob that house.

Once they got to the 7-Eleven, they ran into Mr. Willis, they got in Mr. Willis' car, they ran around trying to buy some dope, but that's not what happened because Willis never saw Mr. Mendoza at the 7-Eleven because Mendoza didn't walk with Tracy Cain past the Galloway house to get to the 7-Eleven.

The only time he saw, that is Willis saw Mr. Cain -- saw Mr. Mendoza says no, I only saw him when he came out of Mr. Cain's house, and that's when they got in the car. That's when they went around. That's the part about the strangling motion, he let me out -- but why lie

on that, and that's the significance of that lie.

Well, because Mr. Mendoza has to sell the burglary on Mr. Cain. He's got to dump it on him. He's got to flower it up a little bit so he's got them walking by the house.

Of course, it's Mr. Cain that plants this idea. He's the mover, I guess, but that whole thing didn't happen. It didn't happen at all and the proof is the independent witness called by the prosecutor, Mr. Willis, who testified Cain was alone. I picked him up at the 7-Eleven.

You met Mr. Cain at the 7-Eleven, drove your girlfriend back and forth, back and forth, then he saw Mendoza.

Five separate people; Sampson, Willis, Clements, Trish Greene and Gifford. Five separate people independent of each other. None of them are relatives. None of them are neighbors. None of them are close friends. None of them are schoolmates.

Are they going to come in here and lie for that poor man over there? No. Are they going to come in here and lie to protect this mythical code of silence that nobody heard anything about until today? No. Mr. Mendoza is lying.

Well, we know -- number one, we know that Mr. Cain was in the house. I conceded that, but we also know somebody else was in the house. We know that from our expert who analyzed this bloody footprint. And you

heard all about that. It's not Cain's.

He says it's not Mendoza's. We know it's somebody else's.

Now, Mr. Holmes has to concoct a set of circumstances to lead you to believe that this happened at a time other than the murders took place. So he wants you to believe that somebody, we don't know who, but somebody came back later and put the blood there.

But what did the blood splatter expert testify? He testified this is obviously fresh in there, would be pooling, somebody came on in the house later, you would see a pool disturbed.

There may be crusting. There may be some crusts in and about the footprint. No, this blood was fresh. What does that tell you? That tells you somebody else was in the house.

Mr. Cain told you he was in the house on the tape. It doesn't take a whole lot -- this is worth more, ladies and gentlemen, than somebody taking the stand or some tape recording. This is proof somebody was in the house. This is a bloody sock print. We know it's not Cain's. We know it's not Mendoza, but who is taking the fall for this thing?

And there's other physical evidence, ladies and gentlemen, and I submit to you that there was a blue jacket found next to the body of poor Mr. Galloway that was a size small.

Do you remember Mr. Mendoza testifying --

kind of an important slip-up. David Cerda came back in and got his jacket and left. Well, whose size small jacket -- it doesn't take a whole lot of imagination to figure Mr. Galloway, it wasn't his jacket.

And it was in a hallway full of blood, right next to Mr. Galloway. Well, a size small is not Tracy Cain. I am telling you, don't pick on him because he happens to have some big shoulders, but he doesn't wear a size small.

No. I submit to you that more than likely it was David Cerda's jacket, but the blood was fresh. That was put on there the same time as the killing. So we know other people were in the house. What does that mean? It means somebody else could have killed the Galloways.

Now, could Tracy Cain have killed the Galloways? Of course. Of course, he could have, but I mean he's in the house, he's stealing money, he could have killed the Galloways.

Probably strong suspicion. Well, that's not enough. Where is your proof beyond a reasonable doubt? Because, remember, I don't have to prove he didn't. Mr. Holmes has to prove he did.

Now, did Mr. Cain lie to the police? You bet he did. Sure, he did. I suppose that doesn't come as any great surprise. I heard the tape and he lied to the police, but he's a poor liar and he got caught every time he started out. No, he wasn't in the house. Yeah,

he was. No, I wasn't in the house when they were killed. Yeah, I was.

He can't keep a lie, but he didn't confess to the killings because he didn't. He didn't kill them, but what he was concerned about on the tape reads clear is that, Hey, how come I'm the only one getting stuck on this? I didn't kill them.

Mr. Cain wanted money. Sure. And over and over I heard Mr. Holmes comment about that, how he wanted some money, and he says he knows his exact paycheck, a hundred eleven dollars and some cents.

I don't know. I submit Mr. Holmes has lost more money than Tracy Cain ever had in his life. You bet he's going to know right to the penny how much money he has. A few dollars is important to a man of his economic class, but the fact he knows his paycheck doesn't mean he proved he killed anybody.

Did he steal some property? You bet he did. I said that the moment I stood up here when the bell sounded it was time for me to go. He didn't kill anybody. It hasn't been proven that he's killed anybody.

Now, Mr. Holmes patted the chair -- kind of dramatic -- and said where is Val Cain? Well, number one, I'm not required to call all witnesses. I'm not required to call anybody, but let's assume that I did.

What do you think he would say? He would say, do you think Val Cain, who is the brother of the defendant, is going to sit here -- is he believable? I

mean, that is a good straw man you set up, then knock it down. Val Cain has nothing to offer, in my view.

Albis's letter. Talking about I didn't see you with blood. Obviously, he's been asked by police. That's an obvious question. Hey, did you see Tracy Cain? Did he have any blood on him? I didn't see any blood on him. It didn't take a whole lot to figure in context. If you take it out of context, sure, it might mean something.

We know that Mr. -- we know Mr. Cain got some money. He admitted he got $500. We also know Mr. Mendoza got the jewelry box and he also had control of the VCR until it got too hot. He was trying to sell it to several different people, but we don't know what the other people got.

We know from the testimony of the relatives that he kept a lot of money, over a thousand dollars in the house. Tracy Cain admitted to 500. I think that's creative. Again, Mr. Holmes says he got all the money.

Well, we don't know that. We don't know what he got. We know he got some. He sure didn't get it all. He didn't get the jewelry. He didn't get the VCR. That VCR was in the total, exclusive control of Mendoza. Sampson said so when he tried to sell it. So did Mr. Gifford.

Now, I think there's one other thing that I'd like to point out, and that is that you are going to get an instruction on intoxication. I'm not going to

dwell on it, but I think it's something you should consider, just in your final analysis.

That is, that in the crime of murder in which the defendant is accused in Counts 1 and 2 of the information, a necessary element is the existence in the mind of a defendant of the specific intent to kill.

If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if the defendant had such specific intent.

If from all the evidence you have a reasonable doubt whether the defendant formed such specific intent, you must give the defendant the benefit of the doubt and find that he did not have such specific intent.

Again, I'm not going to belabor the point, except to note that on Mr. Galloway, there was one fatal blow. He received a number of blows, but one fatal blow. There was no preplanning to kill. There was no reason to kill. There was no weapon taken into the house, and he was obviously under the influence of alcohol and drugs.

But, again, I'm going to leave that in your wisdom. So I would have to say, ladies and gentlemen, the burglary, yeah. The robbery. You deliberate, see if there's evidence that the property was taken from the personal presence -- from the person or the personal presence.

If it was, okay; but, again, not maybe.

Don't guess. Don't use conjecture. It's got to be firm evidence. It's got to be something that came from the witness stand that convinces.

I'm going to leave that question clear -- because I think that that's -- I think it's an open question, but I think if my chart is somewhat accurate, question clear and convincing, strong suspicion.

Oh, there is suspicion, you bet there is, but robbery is a technical crime.

Murder, yeah. Um-hum.

The special circumstance, maybe.

Somebody killed them. And it was a senseless, terrible crime, but did Tracy Cain do it? I submit to you that beyond a reasonable doubt there's a suspicion, yeah, but not beyond a reasonable doubt.

So I ask you, ladies and gentlemen, that in the analysis -- in the final analysis, the answer that you have to come up -- and nobody likes this type of crime. This crime is horrible to any reasonable person.

But you can't convict him because it's a bad crime or the pictures look bad. It has to be on evidence and the special circumstance that he -- either was the actual killer or he intended to kill. If he didn't kill, it simply has not been proven. It's a good maybe, but that's not enough.

I hope you don't fall into the trap -- I suppose -- I suppose it's a tempting trap to let it slop over. Yeah, he's a bad guy. He did something wrong.

He's guilty of burglary. He's guilty of felony murder.

What this -- you know, it's close, but let's convict him, convict him for what he did. That's what we ask. I concur with Mr. Holmes. Render a true verdict. That's where the courage is going to be in this case.

Don't convict him, ladies and gentlemen, of something where the evidence is not there. Convict him for what he did, not for what you think he might have done.

Thank you very much. Thank you, your Honor.

THE COURT: All right, folks. We'll take another ten-minute stretch break. Don't talk about the case. Don't come to any conclusions yet. Please return in ten minutes.

(The following proceedings were held out of the presence and hearing of the jury:)

THE COURT: The jury is gone, counsel. I think it's pretty clear we're not going to have time to conclude argument --

MR. HOLMES: Oh, we will, your Honor.

THE COURT: No. What I'm saying, we have to be ready for a motion at 4 o'clock in order to get the attorney from the other courtroom to be with us since she's leaving on vacation. I don't think we're going to be able to instruct tonight.

MR. WIKSELL: No. I agree with that.

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, TERI T. CAIN, CSR 4062, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 1-36, 66-92, 121-131, 170-187, 214-241, 286-322, 361-374, 402-439, 476-491, 492-519, 556-564, 597-637, 685-729, 770-789, 790-818, 855-874, 900-906, 936-962, 976-1007, 1045-1079, 1119-1155, 1202-1228, 1269-1300, 1336-1371, 1410-1443, 1476-1489, 1490-1521, 1558-1590, 1631-1667, 1707-1736, 1793-1828, 1866-1975, 1976-2006, 2045-2077, 2120-2158, 2233-2272, 2312-2348, 2375-2403, 2404-2436, 2474-2509, 2546-2580, 2652-2693, 2737-2774, 2775-2808, 2849-2886, 2929-2965, 3024-3061, 3100-3135, 3172-3212, 3257-3263, 3264-3309, 3351-3384, 3418-3459, 3509-3538, 3560-3580, 3596-3607, 3644-3683, 3721-3753, 3787-3801, 3802-3840, 3876-3908, 3949-3984, 4035-4066, 4105-4143, 4177-4213, 4236-4241, 4242-4272, 4315-4350, 4384-4425, 4519-4576, 4614-4649, 4666-4696, 4734-4769, 4805-4833, 4879-4894, 4895-4931, 4972-5013, 5060-5079, 5119-5144,

5145-5176, 5213-5258, 5302-5330, 5384-5423, 5465-5511, 5580-5613, 5649-5671, 5702-5731, 5862-5892, 5922-5946, 5977-6000, 6001-6035, 6070-6102, 6137-6169, 6220-6254, 6274-6293, 6294-6319, 6350-6405, 6436-6469, 6492-6512, 6513-6550, 6593-6622, 6655-6683, 6705-6757, 6790-6820, 6851-6880, 6881-6896, 6897-6938, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20, 26, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 14, 19, 20, 21, 22, and 26, 1988; May 2, 11, 12, 13, 18, and 20, 1988; July 12, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Teri T. Cain

TERI T. CAIN, CSR 4062
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, CHRISTIE MONTGOMERY, CSR 4921, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 132-169, 188-213, 242-285, 323-360, 375-401, 440-475, 520-555, 565-596, 638-684, 730-769, 819-854, 875-899, 907-935, 963-975, 1008-1044, 1080-1118, 1156-1201, 1229-1231, 1232-1268, 1301-1335, 1372-1409, 1444-1475, 1522-1557, 1591-1630, 1668-1706, 1737-1755, 1756-1792, 1829-1865, 2007-2044, 2078-2119, 2159-2195, 2196-2232, 2273-2311, 2349-2374, 2437-2473, 2510-2545, 2581-2617, 2618-2651, 2694-2736, 2809-2848, 2887-2928, 2966-2990, 2991-3023, 3062-3099, 3136-3171, 3213-3256, 3310-3350, 3385-3417, 3460-3474, 3475-3508, 3539-3559, 3581-3595, 3608-3610, 3611-3643, 3684-3720, 3754-3786, 3841-3875, 3909-3948, 3985-4002, 4003-4034, 4067-4104, 4144-4176, 4214-4235, 4273-4314, 4351-4383, 4426-4450, 4451-4518, 4577-4613, 4650-4665, 4697-4733, 4770-4804, 4834-4855, 4856-4878, 4932-4971, 5014-5059, 5080-5091, 5092-5118, 5177-5212, 5259-5301, 5331-5344, 5345-5383,

5424-5464, 5512-5544, 5545-5579, 5614-5648, 5672-5701, 5732-5776, 5834-5861, 5893-5921, 5947-5976, 6036-6069, 6103-6136, 6170-6190, 6191-6219, 6255-6273, 6320-6349, 6406-6435, 6470-6491, 6551-6592, 6623-6654, 6684-6704, 6758-6789, 6821-6850, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 26, 27, 28, and 29, 1988; February 2, 3, 4, 5, 9, 10, 11, 18, 23, 24, 25, and 26, 1988; March 1, 2, 3, 4, 11, 15, 16, 17, 18, 22, 23, 24, 29, and 31, 1988; April 5, 6, 7, 8, 13, 14, 19, 20, 21, and 27, 1988; May 11, 12, and 18, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

Christie Montgomery

CHRISTIE MONTGOMERY, CSR 4921
Official Reporter

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, DAVID O'GRADY, CSR 3146, Official Reporter of the State of California, for the County of Ventura, do hereby certify that the foregoing pages numbered 37-65, 93-120, 5777-5833, inclusive, comprise a true and correct transcript of the testimony given and of the proceedings held on January 20 and 26, 1988; April 13, 1988, in the matter of the above-entitled cause.

Dated at Ventura, California, this 27th day of July, 1988.

DAVID O'GRADY, CSR 3146
Official Reporter

No. _____

IN THE

Supreme Court of the United States

TRACY CAIN, *Petitioner,*

v.

RON DAVIS, *Respondent*

Respondent.

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

CERTIFICATE OF SERVICE

I, Jonathan C. Aminoff, do swear or declare that on this date, May 25, 2018, as required by Supreme Court Rule 29, I have served the enclosed Appendix to Petition for Writ of Certiorari, on each party to the above proceeding required to be served, or that party's counsel, by depositing an envelope containing the above documents in the United Sates mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Kim Aarons, Deputy Assistant Attorney General Counsel for Respondent
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(213) 897-2270

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 25, 2018 at Los Angeles, California.

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF*
Deputy Federal Public Defender

Attorneys for Petitioner
Tracy Cain
**Counsel of Record*