IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**Calif. Supreme Court No. S112442**
Plaintiff and Respondent,	**Shasta Co. Super. Ct. No. 98F26452**
	AUTOMATIC APPEAL
PAUL GORDON SMITH, JR.,	
Defendant and Appellant.	

APPELLANT'S OPENING BRIEF
VOLUME I (pages 1-197)

Automatic Appeal From the Judgment of the Superior Court of the State of California, County of Shasta
The Honorable James Ruggiero, Judge Presiding

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TREATISES AND ARTICLES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PAUL GORDON SMITH, JR., Defendant and Appellant.	)	Automatic Appeal No. S112442 [Shasta Co. Super. Ct. No. 98 2652]

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Information Number 98 2652 was filed on July 16, 1998, charging appellant and former co-defendants Lori Smith and Francisco ["Eric"] Rubio[1] in count one with the premeditated and deliberate murder of Lora Sinner between March 25 and April 10, 1998, in violation of Penal Code[2]

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1 The fourth co-defendant, Amy Stephens, was prosecuted as a juvenile. (26RT 7258.) Lori Smith and Francisco Rubio both pled guilty. All three accomplices testified against appellant. (29RT 8145, 30RT 8335.) On August 10, 1998, the prosecutor stated he would not seek the death penalty against either Lori Smith or Rubio. (2CT 258.)

2 All further statutory references are to the Penal Code unless specifically stated otherwise.

section 187; in count two with conspiracy to commit murder, in violation of section 182, subd.(a)(1); and in count three with false imprisonment of Sinner by violence in violation of section 236. Lying-in-wait and torture special circumstance allegations (§§ 190.2, subd.(2)(a)(15) and (a)(18)) were attached to count one; weapon and great bodily injury enhancements (§§ 12022, subd.(b) and 1203.075, respectively) were also alleged. (2CT 111-114.)

On October 19, 2001, appellant filed a change of venue motion. The trial court deferred the ruling until after jury selection.[3] (6RT 1315-23.) Jury selection began on May 8, 2002. (17CT 3389.) On June 22, 2002, when jury selection procedures were still ongoing, appellant was involved in a highly publicized escape attempt and assault on a deputy at the county jail. Appellant moved to disqualify the entire jury panel, renewed his change of venue motion, and in the alternative, requested voir dire of all prospective jurors (even those who had already been questioned) regarding exposure to media reports about the jail escape incident. (17CT 3803; 20RT 5433-34, 5505-08.) He also posted a blanket cause challenge to all jurors which the trial court denied. (18CT 3825, 3827, 3835; 21RT 5955,

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3 Appellant filed a writ of mandate arguing that the trial court abused its discretion by deferring ruling on the motion. (11CT 1632 et seq.) The writ was denied on July 15, 200. (22CT 5128.)

23RT 6385-87.) Appellant requested a new panel or a new survey for the change of venue motion. (22RT 6072-79.)

On July 5, 2002, appellant filed another change of venue motion and a motion to continue, based on the jailhouse incident, which the trial court denied. (19CT 3837, 4102.) Meanwhile, jury selection continued. On July 16, the trial court denied appellant's motion to disqualify jurors and to reopen voir dire. The jury was empaneled. (22CT 5130.)

Guilt phase testimony began on July 16, 2002 and continued through August 20. (22CT 5132, 5162-63.) On August 28, the jury returned a verdict of guilt of first degree murder, with a true finding on the torture special circumstance allegation. The lying-in-wait allegation was found not true. The jury found appellant guilty on counts two and three (conspiracy and false imprisonment), and found the weapon and great bodily injury allegations true. (25CT 5905-06; 6012-24.) Presentation of penalty phase evidence began on September 5 and continued through October 22. (26CT 6057, 6295-96.)

On October 15, 2002, a hearing was held regarding allegations that the trial judge had made negative facial expressions and gestures during the testimony of a defense expert. The trial judge refused to permit another judge to hear this motion, and after testimony by various witnesses, decided

on October 16 that he had not committed judicial misconduct. (26CT 6286, 6289, 6292.)

Penalty phase deliberations began on October 24, 2002. (26CT 6306-08.) On October 30, the jurors indicated they had reached a verdict. Before the verdict was read, the jury coordinator reported that two of the jurors had approached asking what would happen to their notebooks; one juror stated she had written in the notebook that appellant was a "prick." After inquiry, this juror was excused (although the trial court rejected the defense challenge to the second juror); an alternate was substituted in and the jury was instructed to begin deliberations anew. (88RT 14330-68.) Deliberations continued for two more days, and on the morning of November 5, 2002, the jury returned a verdict of death. (27CT 6548.)

On November 25, 2002, appellant filed a motion for new trial. (27CT 6557.) On December 6, the trial court denied the new trial motion, held a hearing pursuant to section 190.4, subd.(e), and imposed the judgment of death. (28CT 6635, 6639-47; 6551; 51RT 14404-68.)

This appeal follows automatically from the judgment of death.

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STATEMENT OF FACTS

GUILT PHASE EVIDENCE

A. Evidence Adduced by the Prosecution.

1. Accomplice testimony.

Although the three accomplices, Amy Stephens, Lori Smith and Eric Rubio,[4] disagreed as to numerous particulars of the offenses (and had made many conflicting statements), they testified in agreement to the general circumstances, as follows:

At the beginning of 1998, 21-year-old appellant first met his 18-year-old sister Lori Smith when she came down from Washington state. Around this time appellant also met 14-year-old[5] Amy Stephens shortly after she attempted suicide.[6] Amy told appellant she was being sexually abused (which was not true) and he found her a place to stay at Cody Cannady's,

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4 For ease of reference and because Lori Smith shares the same last name with appellant (and other witnesses) and has a similar first name to the victim Lora Sinner, appellant refers in the guilt phase summary of facts to the victim as Sinner, and to the accomplices and their friends by their first names.

5 Amy was tried as a juvenile. Her first possible release date was July of 2006, when she was 22 years old. She was 18 at the time of trial. (27RT 7511.)

6 She was depressed because her boyfriend Clayton Christman had broken up with her. Amy dressed and acted older than 14 and didn't tell appellant how old she was when she met him. (27RT 7527-31.)

where appellant was also staying. (26RT 7259-62; 28RT 7815, 7823-25; 30RT 8339-41.) A month or so later, Lora Sinner arrived from Oregon with appellant's brother and her boyfriend Tim Smith. After a fall-out with Tim, Sinner started hanging out with Amy, appellant, Lori and her boyfriend Eric Rubio. The five of them, in Sinner's red Honda,[7] went up to a campsite at Ono on land belonging to Eric's stepmother's boyfriend. They had one big tent where they all slept for a couple of weeks. (26RT 7265-70; 28RT 7827-30, 30RT 8341-44.) Later they had a second tent for food and clothes and tarps for the rain. (26RT 7274, 7277.)

Sinner was the odd one out, as appellant and Amy, and Lori and Eric, were couples. When the second tent was set up, Sinner started sleeping there. Amy was angered by Sinner because she flirted with and touched appellant. (26RT 2793-97, 7310; 30RT 8358-59.) None of them had a job but appellant got money for food and supplies by breaking into cars. Sinner never left the camp alone. Appellant usually went with her and drove her car. (28RT 7833, 7838-39; (30RT 8351.)

About five days before Sinner's death, the group went to the Rite-Aid

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7 Although Sinner's father testified that he bought Sinner the red Honda as a high school graduation gift in 1995, in fact the Honda was part of his divorce settlement with Sinner's mother as payment of back child support. (33RT 9251-52, 9263-64.)

in town and bought food and drinks and hair dye. At appellant's or the group's request, Sinner wrote out a check to pay for these items, although she had no money in her bank account. (28RT 7840-41; 29RT 8197; 30RT 8355-56.) At some point appellant also purchased a dent puller. (28RT 7842; 30RT 8363-65.)

Around the third week at the camp, a conflict arose between Sinner on the one hand, and Amy and Lori on the other. (30RT 8345.) Appellant and Sinner also had arguments when she wouldn't let him drive the car and when she was angry about how he treated the car.[8] (30RT 8347.)

(a) Amy's version of events

Around dusk the day of the murder, Eric and Lori told Amy that Sinner had been rubbing appellant's back the night before, which irritated Amy to the point of fighting Sinner. (26RT 7312-16; 27RT 7574-75.)

Sinner was in the little tent and the other four were in the big tent. Lori, seeing that Amy was angry, left the tent saying she was going "to beat [Sinner's] ass." Amy followed her. (26RT 7320-21.) Lori

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[8] There was conflicting testimony as to whether appellant had damaged Sinner's car or whether the car was already damaged when Sinner and Tim Smith arrived from Oregon. (4CT 580; 13CT 2390; 41CT 10217; 29RT 8014; 30RT 8302, 8222; 34RT 9684; 35RT 9714-17.) Eric denied that appellant ever wanted Sinner's car. (31RT 8677.)

approached Sinner and told her to drink water from a jug and then Amy punched Sinner (who was 100 pounds heavier than Amy, and 40 pounds heavier than Lori) and they started fighting. Amy and Lori hit Sinner with the plastic water jug, then Amy went to get something else to hit her with. At this time, Lori was hitting Sinner; she also held her by the hair and slammed her head into a tree five times. Amy got a 12-inch can of chili and hit Sinner in the head with it five or six times, hard enough to dent the can beyond usefulness as a weapon. (26RT 7322-27.)

Lori then slammed Sinner's head onto a big rock on the ground and Amy went to get a dent puller,[9] which consisted of a 14-inch long metal bar and a dumbbell-shaped metal piece. Amy needed a weapon because Sinner was much bigger. (26RT 7329-31.) She hit Sinner with the dumbbell piece until it was heavy and bloody. (27RT 7600-01.) Lori used the metal bar and seemed to be hitting Sinner as hard as she could. They switched weapons and hit Sinner some more before appellant came out. (27RT 7602.) Both Amy and Lori were both inflicting extreme pain and punishment on Sinner. (27RT 7604.) Amy just blew up and took out all her frustrations on Sinner (including things about her childhood such as

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[9] A dent puller is a tool used to pull dents out of auto bodies.

being molested and abused and witnessing the abuse of her mother; the fact that her parents were in prison and her siblings in foster care; and that she had recently tried to kill herself and been kicked out of school). (27RT 7575-79.) Amy was enraged and Lori looked the same. (27RT 7592, 7599.)

Amy hit Sinner "everywhere" with the dent puller; Lori was also hitting her with the metal bar on her head, neck and face and chest. Between blows they taunted Sinner, who just cried. (26RT 7329-31; 27RT 7332-38.) After some time, appellant came out of the tent and told them to stop; but Amy and Lori continued the beating for another 10 seconds. They had then been beating Sinner for about an hour, continuously, except for when they stopped and taunted her. (27RT 7340-42.) Appellant wanted to clean Sinner up. Finally Lori and Amy threw down the pieces of the dent puller and Lori helped Sinner down the hill to the creek where she made her wash the blood off her head in the cold creek water. Appellant and Eric were also at the creek. (27RT 7338, 7343-48.) Amy thought at this point that Sinner was going to die because she was bleeding so much from her head. (27RT 7501.)

When Amy got back to the tent, Sinner was lying on a mat outside the tent, tied hands and feet, with a noose around her neck; she was crying.

Amy had been changing clothes inside the tent and didn't see who tied Sinner but Eric said he had made the noose. Appellant untied her. (27RT 7350-54, 7360.) Appellant was squatting next to Sinner and talking to her. (27RT 7375.) The other three were sitting inside the tent with the flap open, just inches away from Sinner. Appellant handed Sinner a Black Velvet whiskey bottle. Sinner drank quite a bit of it over a five-minute time period. Appellant handed Sinner a disposable razor. Sinner started cutting her wrists but she was drunk and didn't seem to have much energy. Appellant took the razor and cut the top of her hand, then poured whiskey over the cuts. He told Amy and Lori that they had messed her up so bad, that she was going to die anyway, and that since they had started it, they should kill her, and that he didn't want to do anything more. (27RT 7376-90.)

Amy agreed to do it but then Lori came out of the tent and appellant went back into the tent. Lori took the long part of the dent puller and started hitting Sinner and laughing in a devilish cackle for about 40 seconds. She stopped because she was getting blood all over herself. She said, "This bitch won't die." Lori came into the tent and appellant went out. (27RT 7390-94, 7628.) Although Amy turned away, she saw appellant cover Sinner's head with bags. She heard two loud cracking

sounds, and then it was quiet, although Sinner seemed to still be breathing[10] soundlessly. Eric went out of the tent on his own (she did not hear appellant tell him to come out and help) and Amy then heard them digging. (27RT 7397-7401.) Twenty minutes later they came back. Appellant said "what happened on the mountain" and Lori said "stayed on the mountain." (27RT 7403.) The next day Amy saw fresh dirt and branches over a burial mound. They burned Sinner's clothes and later threw some of her things off a bridge, but they didn't talk about the killing. A day or two later the group got a ride into town. (27RT 7405, 7420-21.)

Amy had lied to the police and her lawyer in the past but was now testifying truthfully because she had never before taken responsibility for what she had done. (28RT 7645.) Amy had decided to come forward at trial with the truth because of her sessions with her psychologist. (28RT 7680.) At trial, Amy denied various statements she had previously made to the police, e.g., that Sinner was begging appellant not to hurt her, that appellant kicked Sinner and cut her wrist more deeply, that he poured alcohol over her wounds and put her hands over the fire to drip blood, that he'd kick or hit her if she didn't obey him fast enough, and that he

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[10] Amy also testified that she did not know if Sinner was alive or dead when appellant hit her. (28RT 36.)

demanded they watch as he placed bag over her head, and that appellant told Sinner he had to kill her because she knew too much. (27RT 7492-7500.)

Amy also testified that none of them had ever talked about killing Sinner or getting rid of her; if she said that to the police, it was a lie. (27RT 7504-04.) Amy did remember saying that she was going to fight Sinner if she didn't stop flirting with appellant. (27RT 7589.)

Tape recordings of Amy's prior statements to the police were played. (33RT 9280-81, 9294, 9298.) On April 18, 1998, Amy told the police that appellant burned out the clutch in Sinner's Honda, that he stole stuff from a truck including an ATM card and $1000, that appellant got drugs and Black Velvet whiskey and beer and they all got drunk while appellant beat Sinner with the dent puller and cut her wrists and poured whiskey on her and made her drink, then put a bag over her face and broke her neck and buried her while she was still breathing. In this statement, Amy said that appellant did everything and told them to watch while he tortured her. (43CT 10834-47 [Exh. T-81A].)[11]

On April 19, Amy changed her statement to the police. She said

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[11] Exhibits T-81(A) through T-84(A) are the transcripts of videotapes Exhibits T-81 to T-84.

that she and Lori beat Sinner with the dent puller; that when Sinner came back from the creek appellant tied her up and said she had to cut her own wrists; that appellant said Sinner knew too much which is why he wanted to kill her; that appellant poured alcohol over her and kicked her; that Lori then tried to finish her off (Lori hit Sinner 20 to 30 times with the dent puller, saying "that was fun," and giving an evil laugh); and that appellant then hit her two more times and broke her neck, and told Eric to help him dig a hole. Amy said this was the night after they had gotten drunk and that there was only a little of the Black Velvet whiskey left the night they killed Sinner. Appellant said none of them could tell or the other three would go after that person and kill him or her. Amy said appellant was a "fucking prick", that he was "white pride," and that he needed mental attention; that he hit Lori a lot, and that he told her he put a BB gun to his wife Jessica's head and clicked it but it didn't go off. (43CT 10864-68; 10878-81; 10966-67; 10970-71 [Exh.T-82A, T-83A].)

On April 21, Amy told the police that before Sinner died appellant sold her Honda to Kathy Corey for $100 (although Amy wasn't present at the transaction). Amy said that Lori and appellant had previously discussed killing Sinner because she annoyed them. Amy said appellant told her he got $1000 out of the ATM card he stole from a car. Amy also

said that Sinner wrote a "hot check" for $200 at the Rite-Aid, where they bought hair dye and other things. Appellant had money because he stole from cars. (43CT 10986; 10993; 11001; ; 11010-11 [Exh T-84A].)

(b) Lori Smith's version.

Lori testified pursuant to a plea bargain. Her understanding was that if the judge and the prosecutor decided she was testifying truthfully, she would be sentenced to life with parole; otherwise to life without possibility of parole. (28RT 7818-19.) She did not recall telling her social worker Diane Phillips (who had visited her over a 100 times in jail) whether she would get out of jail in three to five years; Lori thought she probably told Phillips she would get out in 10 to 15 years. (29RT 8018-20.)

Lori's testimony was as follows. After about a week at the campsite Amy's jealousy reached the point where she wanted to beat Sinner up. (28RT 7847.) A few days before her death, and after Amy and Lori had talked about beating Sinner up, appellant said that Sinner should be killed. However, this was taken as a joke. (28RT 7849.) Other times, including once at Roni Smith's house, Amy and Lori talked about beating Sinner up because she made Amy jealous, but appellant was the only one who ever said anything about killing her. (28RT 7851.)

On the afternoon before Sinner was killed, appellant joked about Amy and Lori fighting Sinner but said nothing about getting rid of her. (28RT 7852-55.) That night Amy and Lori were outside the tent. Amy threw the first punch (no water jugs were involved) and Sinner tried to fight back. Lori got involved because she was afraid for the much-smaller Amy. After Lori hit Sinner, Sinner covered her face and quit fighting back. After several punches from both Amy and Lori, one of them got the dent puller. Sinner was curled up on the ground for protection. (28RT 7860-61.) Lori did not recall slamming Sinner's head into a rock or a tree. (28RT 2862.) She and Amy both hit Sinner with the chili can. After that Lori got the long bar of the dent puller from the tent and hit Sinner with all her might; and Amy then hit Sinner with the dumbbell or barbell part of the dent puller. (28RT 7862-68.) Lori admitted that she was taking out all her anger on Sinner, who was screaming as Lori swung the dent puller at her. (29RT 8088.) Lori did not remember taunting Sinner. (28RT 7926.)

After five minutes Lori stopped because she felt blood on her hands; she told Sinner she would take her to the creek to wash her up. (28RT 7869-71.) Appellant and Eric came down afterwards. From the side of the creek Lori scooped up water to get blood out of Sinner's hair. The water was cold but they were not in the creek. It was still light, maybe

3:00 p.m., and 45 minutes from the time the fight started. Eric came down to the creek too. Appellant had an axe and asked Lori to "finish her off," meaning to kill Sinner, but Lori said she didn't want to; she was scared. (28RT 7873-78.) Despite her head injuries, Sinner did not appear to Lori to be in danger of dying at this time. (29RT 7934.)

When they went back up to the tent it was dusk. Everyone drank some whiskey which appellant brought from the other tent. (28RT 7890-94.) Appellant told Sinner the whiskey would help her pain and at first she drank willingly. Appellant then tied up her arms and legs and Eric put a noose around her neck at appellant's order. (28RT 7895-96.) Appellant told Sinner, who was now lying on the mat and crying, that she might as well kill herself and go join her mother (who had recently died). (28RT 7899-7902.) Appellant had a plastic razor in his hand and said it was going to look like suicide; he untied Sinner's hands and told her to cut her wrists. Sinner didn't want to but did cut herself once. Appellant got mad and told her it wasn't deep enough and showed her how and told her to do it again. Again it was not deep enough so appellant cut her wrists more than three times, hitting her with the dent puller bar or kicking her for not keeping her hand where he wanted it. (28RT 7903-08, 7919.) Appellant poured more alcohol on her wrists and made Sinner take a couple more

drinks of whiskey, holding the bottle to her lips and pouring it into her mouth. (28RT 7910-11.) Appellant poured about a quarter of the bottle over her wrists and made her drink almost another quarter. (28RT 7915.) After that, they or appellant[12] put a garbage bag over her head so no one would hear Sinner scream. (28RT 7918-20.)

Appellant asked Lori to come out of the tent and asked if anyone wanted to hit Sinner. Lori was scared but agreed; she wanted to prove her love for her brother and prove that she wasn't afraid of hurting someone. She hit Sinner two or three times in the head and neck with the dent puller; Lori then said Sinner was "hard to kill" because she was still crying. (28RT 7921-24, 29RT 7931.) Lori denied laughing while beating Sinner. (RT 8179-80.) Appellant snatched the bar from Lori's hands and hit Sinner three more times; Lori heard a crack. (28RT 7925-26.) Lori didn't know if Sinner was dead or not; appellant didn't check her pulse or respiration. (28RT 7926.) It was then about 8:00 p.m., some four or five hours after the beating began. (28RT 7926.)

After 45 minutes, Eric and appellant returned to the tent, saying they had buried Sinner. Appellant said if anyone said anything they would be

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[12] Lori first testified that "we" put the bag over her head and then corrected it to ascribe the act to appellant.

the next to die; he said they should say that Sinner took the bus back to Oregon. (29RT 7927.) The next day they burned her clothing and things. (29RT 7931-32.) Afterwards, appellant said Sinner knew too much and was afraid she would talk to the police, referring to appellant "stealing cars or stealing purses out of cars." (28RT 7927.)

When Lori first talked to police on April 18 she was on methamphetamine which affected her memory. Lori testified that many of the statements she made to the police were lies, i.e., that appellant held her hostage, that he forced her to drink alcohol, that the marijuana she smoked was laced with crack, heroin and PCP, that appellant suggested beating up Sinner for no reason, that they were all drunk at the time Sinner was killed, that Sinner was calling out Lori's name for help. (29RT 8037-43.)[13]

In March of 2002, more than two years after Lori entered her plea agreement, Lori told the prosecutor and her attorney that everything she had said in the past was God's honest truth. However, this was also a lie. Lori invoked God's name to persuade her listeners of the truth of her lies. (29RT 8138-39, 8182.)

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[13] Lori admitted to at least 13 specific lies in her statements to the police (29RT 8097-8139) and described the statement she dictated to Jessica Smith as "mostly lies" (29RT 8134).

The "truth" about the dent puller is that appellant gave it to her (Lori also testified that she got it herself). (29RT 8183; **RT 7862, compare 29RT 8086 and 8087.) Lori testified that she helped kill Sinner. Sinner was still alive when Lori last hit her. Appellant was the last one to hit her; yet Lori didn't think Sinner was still alive at "the last hit." (29RT 8188.)

The prosecutor told Lori that he would be there when she went before the parole board. (29RT 8174.) [but she didn't take that to mean he'd put in good word, just that he'd be there and she doesn't think her testimony has anything to do with him putting in good word.)

Appellant told her she should blame the murder on him and that he would take the rap, but he also told her she shouldn't tell. (29RT 8176-77.)

(c) Eric Rubio's version.

Eric pled guilty in exchange for an agreement that he would be sentenced to life with possibility of parole. (30RT 8336.) Eric denied any involvement in killing Sinner or in any plans or discussions about killing her; he testified that he pled guilty to a murder he didn't commit because the law stated that there was "no way out" for him because he was present. (30RT 8452-53.)

On the day of Sinner's death the group went into town in the morning. The had partied the night before drinking and smoking marijuana, and both Eric and appellant were pretty drunk. They drank half the bottle of Black Velvet whiskey and a 12-pack of beer. (30RT 8368-72.) They returned to camp around 3:00 p.m. and the girls had an argument. Appellant told Eric that the girls wanted to fight Sinner and he didn't know what he was going to do about it. (30RT 8373-74.) Appellant did not appear intoxicated from drugs or alcohol that day; Eric had seen appellant with Soma pills but not that night. (30RT 8370, 8375.)[14]

Eric and appellant were in the tent when he heard Amy and Lori cussing; one was saying "why are you hitting on my man?" referring to appellant, because the night before Sinner had been hanging on appellant.[15] (30RT 8378-79.) Eric then heard scuffling and grunts and screams in anger. Appellant said, "Just let them fight." Amy came into the tent and grabbed the small bar bell part of the dent puller and Eric heard someone

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14 Karol King testified that appellant a couple of weeks before Sinner's death, appellant had a half-full prescription bottle (made out to his father) of Soma pills. (34RT 9677-78.)

15 Appellant did not encourage Sinner; he sometimes showed her affection, sometimes dislike. Appellant was in charge of the group and set the agenda for the day. The girls did what he told them. (30RT 8380-81.)

get hit with it. Lori came and got the long part of the dent puller. After Eric heard more hitting, appellant stepped out and told them to quit; Sinner was cradling her head. (30RT 8385-87.) Appellant picked up the dent puller and placed it back in the tent and then asked all three girls what had happened. A few seconds later, appellant, Lori and Amy all helped Sinner to the creek. Eric walked to the top of the hill and saw Sinner kneeling next to the creek; someone was pouring water over her head. (30RT 8393-96.)

When appellant and Sinner came up the hill, Sinner had blood on the back of her head but appeared okay. Appellant said she had a cracked skull, that her head was mushy, and that she wouldn't survive the night. No one suggested going for help although there were houses in each direction about 20 minutes distant.[16] (30RT 8403-08.) Appellant sat at the tent door talking to Sinner who was lying on the mat. Appellant said she was going to die anyway so the girls should finish what they started. He handed the whiskey to Sinner who gulped some down then

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[16] The campsite was 5 to 10 miles away from a house on the road. Another house up on the hill was a mile or so away although Amy never saw anyone there. (27RT 7550-51.) This was apparently the house of Debra Patterson, who said her house was less than two miles from the campsite. (28RT 7802, 7806.)

said she didn't want anymore. Appellant put the bottle to her mouth, making her drink more. (30RT 8408-13.) Appellant asked her if she wanted to die and she said no; he said she was going to die anyway and asked if she wanted to be with her mom. He gave her a razor and told her to cut her wrists which she did, but said she didn't want to die. She asked for help. (30RT 8414-16.)

Appellant told Eric to get a rope and make a noose to hogtie her, which they did. (30RT 8417-22.) Appellant cut each of her wrists twice and poured alcohol on the cuts; he also kicked her in the head because she didn't keep her arms outstretched when he told her to. (30RT 8423-25.) She was then untied except for her feet. Appellant told Lori to get the dent puller bar and finish her off. Lori hit Sinner four to five times in the neck "hard enough" and Sinner was crying out, asking why she was doing this. Lori said, "This bitch is hard to kill." Appellant said to give him the bar and he went out and hit her four to six times, once making a cracking sound, then put her head in a plastic bag, saying she would suffocate and die quicker. Eric could hear her mumbling and saw the bag moving from her breath. (30RT 8423-28.) Appellant held the bag around her head for a minute then sat down and asked Eric what they should do. Appellant said they had to get rid of the body and told Eric he

had better help or he'd end up like her. Eric was afraid. (30RT 8430-31.)[17]

Appellant told Eric to come out of the tent and they dug a hole, stripped Sinner and dragged her to the hole and buried her. (30RT 8432-33.) Appellant said to say nothing except that Sinner had returned to Washington or they would all end up like her. (30RT 8434.) The next morning they burned Sinner's clothes in a fire on top of the grave. Eric threw away some other of her belongings along Happy Valley Road. (30RT 8435-36.)

A few days before, the clutch had burned out on Sinner's car and they had it towed to Kathy Corey's house. Later appellant showed up in a Jeep and after burning everything the group went into town in the Jeep. (30RT 8436-39.) Eric also testified to an alternate version: he and appellant walked out of the campsite together and got a ride into town; then came back with Corey and collected their things and appellant went back into town and returned in the Jeep. (30RT 8440-41.) Eric thought he and appellant were arrested the day after the murder (although Amy

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[17] Lori testified the whole incident took place over five hours; Eric condensed it to 30 minutes. (30RT 8429.) Eric repeatedly minimized his involvement, claiming he was afraid and acted only because appellant told him to and threatened him. (30RT 8418, 8429, 8430, 8431.)

and Lori thought it was several days to several weeks later). (30RT 8443.)

When Eric first was interrogated by the police, he first denied any knowledge, then admitted that Sinner was murdered and said appellant did it. He told the "truth" but omitted Amy's and Lori's participation. The next day Eric told the police Amy and Lori were there and told them about the fight. (30RT 8444-45.) Eric admitted that he "could have" told reporter Hart that he was worried about getting the death penalty; that the beating started because of the girls; and that he they were all five drunk that day and that he had used muscle relaxants and marijuana as well. (31RT 8648-51.) Eric denied that appellant wanted Sinner's car. (31RT 8677.) Eric also agreed that he "could have" told the police on February 22, 2001 that he never heard appellant say he was going to kill Sinner. (31RT 8695-96.)

(d) Accomplice testimony: back in town.

A few days after Sinner was killed, appellant, Eric, Lori and Amy went back to town and Eric and appellant were arrested (on an unrelated charge).[18] Amy then stayed with her friend Tachahea Christman and told

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[18] Lori testified that while in town appellant traded the dent puller to Don Vaillencourt for drugs (29RT 7957-58) and that Sinner's car was sold to Kathy Corey (29RT 7937). Lori tried to get the dent puller back from Vaillencourt after appellant called her from jail saying Vaillencourt

her that she and Lori got into a fight with Sinner who "ended up being killed." Later Amy told Tachahea more details. Amy then told Tachahea's father Cecil Christman that appellant "did everything and that he got [them] drunk," which was what she thought Lori was saying. Amy didn't tell anyone the truth because she was scared, and she tried hard not to think about it. (27RT 7407-10, 74067-70.)

Lori said that during the two-week period when they were back in town, she told no one about the murder, because appellant told them to say nothing or he would kill them; he also said that if anyone was arrested, he would take the fall, because he didn't want to see Lori in trouble. (29RT 7938-39.) After appellant's arrest, Lori used methamphetamine every day and couldn't sleep. Eric called her from jail and told her to talk to Cecil Christman. A week later, Lori told Cecil what happened and appellant's wife Jessica Smith put it in writing – although Lori testified that this document was "mostly lies." (29RT 7941-45, 7967-69, 8134.)

Cecil Christman called the police. Amy spent from midnight until morning giving a statement to Detective Clemens, and talked to the police again around 2:00 p.m. that afternoon, and she lied in these interviews. Her

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hadn't fully paid for it. (29RT 7957-58.)

third police interview was on April 21 and again she lied, although parts of what she said were true. Amy blamed a lot of things on appellant and tried to protect Eric who was like a brother to her. (27RT 7473-77, 7481.) The police kept coming up with more information which Amy didn't know they were getting from Lori; she thought she and Lori were still "on the same story" so she continued to go along with what Lori said at the Christman home, because Lori was "really aggressive" and Amy thought she'd be in trouble if she didn't go along with her.[19] (27RT 7481-83, 7559-61.)

Lori also lied in her first statement to the police, giving the same sequence of events but said that it was all appellant's doing. She said this because "that was the plan" and she "didn't want to get in trouble." (29RT 7947, 7951.) The next day Lori made another statement and again lied, saying that appellant did everything. Three or four days later, she made yet another statement, again casting all blame on appellant, but finally saying, "It wasn't just him." (29RT 7950-51.) Lori finally admitted getting into a fight with Sinner and said that in the end appellant asked her to help him hit

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[19] Lori admitted calling Amy "two or three times" at Cecil's during this time, to remind her that they couldn't say anything but denied being upset during these phone calls or having any confrontation with Amy. (29RT 7955.) Cecil Christman's wife later testified that Lori called Amy up to 10 times a day over a period of several days. (34RT 9548-51.)

her. (29RT 7951.)

At trial, Lori didn't really remember everything she told the police. Lori would black out and lose control when she got angry. She had a memory of only half of the Sinner attack. (29RT 7952-54; RT 7997-8002.)

2. Appellant's statements.

Appellant made statements to the police on April 18 and April 19, 1998, and recordings of these statements were played for the jury. (**RT 9330, 9343; Exh. T-62A at 42CT 10657-10717, T-63A at 42CT 10719-10745.)

In the April 18 interview, appellant first denied hitting or harming Sinner or making her drink whiskey. Then he said he would take the blame because he was the only one of the four who would be able to do prison time. He said Sinner either died of a head wound/broken neck, or she was asphyxiated. He said she had been kicked and hit with a metal pipe and had a piece of plastic around her face and seemed already dead. He buried her. He said that the others killed her and he watched, but then said he was responsible and that he did everything, that he killed her even though he had no motive (she was innocent) and that he would plead guilty.

In the April 19 interview, appellant insisted that the girls were innocent and that he had killed Sinner alone. Finally, appellant said

(thinking the tape was turned off) that he had taken four Soma muscle relaxants and smoked marijuana, that he was in the tent with Eric, when the girls started attacking Sinner with a dent puller. Sinner was screaming but appellant couldn't move because of the Somas. When he finally went down to the creek, Sinner's head was mushy and he led her back to the tent and gave her some whiskey. He didn't want to see her suffer. Eric wanted to watch her being tortured and tied her up. Appellant untied her and told her she was going to see her (dead) mother. He tried to cut her wrists but couldn't so he made her drink more whiskey to number her pain. Then Lori got the dent puller and he hit her twice breaking her neck. He and Eric buried her and the next day they burned her clothes. Appellant said he knew she was going to die and he felt sorry for her.[20]

Newspaper reporter Anne Hart interviewed appellant at the jail on April 22 and 23, 1998. Recordings of the interviews were played to the jury. (30RT 8475-79; 32RT 9052-55.)[21]

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[20] Deputy Thomas O'Connor testified that he was sitting two feet away from appellant, and when appellant appeared emotional and as if he was crying near the end of the April 19 tape, O'Connor saw no tears or red or swollen eyes, although he wrote no report about this fact. (33RT 9346-47).

[21] The transcripts of these videotaped recordings are at 42CT 10770-A to 43CT 10791A [Exh. 75A] and 43CT 10794-10801A [Exh. 76-A].

On April 22, appellant said Sinner was his friend and after her head was crushed in, he killed her so she would feel no more pain. (42CT 10772.) He said he had taken four 200-mg. Somas as well as alcohol and marijuana, and that if he had been sober, he could have stopped the beating. He said everyone participated a little but that he was not going to let the others go down for their stupid mistake. (42CT 10774.) He said he killed her by breaking her neck after first wrapping her head in plastic. He said Sinner wanted to cut her wrists but couldn't and he told her he was going to make it quick so she wouldn't feel anything. (42CT 10779, 10783.) He said that he would plead guilty if the prosecutor dropped the charges on his sister Lori and Amy. (42CT 10787.) However, appellant said if Hart wrote about the mercy killing in the newspaper, he would deny it. (43CT 10790.) Hart testified that in the first interview appellant said he felt sorry for Sinner because her mother had died and he talked about her warmly. (30RT 8492.) He said he was going to take the fall and claim 100% responsibility, even though the girls had initiated the fight. (30RT 8492-94.) Appellant said he thought he did the only thing possible to end her life. (30RT 8496.)

On April 23, appellant said he thought his earlier interview with Hart was off the record, and thought Hart was trying to manipulate him. (43CT 10796.) Hart testified that during this interview, appellant appeared

nervous and seemed not to remember much of what he had said in the first interview. (30RT 8501-02.)

Detective Chris Thompson testified that on April 20, 1998, Cody Cannady said that appellant told him that he was going to kill the victim, that he "didn't like the fucking bitch," that he was going to take her car and send her back to Oregon, and that she was up at the camp and they were going to kill her. Later appellant bragged about killing her, saying there was a lot of blood and that he used either a crowbar or a dent puller. (30RT 8310-12, 8317-19.)

Cody Cannady[22] testified that he lied in the statement he made to Detective Thompson, that he was just running his mouth and told Thompson what people were trying to tell him in order to help other people. (30RT 8231-33.) After appellant was arrested, Cody became Amy's boyfriend and she told him things about the camp, so what he told the police came from her. Cody was trying to protect and help Amy and also trying to help Eric, who was his friend and fellow gang member, whereas Cody did not know well or care about appellant. (30RT 8241-45.) When Cody talked to the police he was doing a lot of methamphetamine and other

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22 At the time of trial, Cody was in custody in the Youth Authority for burglary and battery. (30RT 8240.)

drugs, but he was not confused: he was just lying. (30RT 8250-51.) In fact, Cannady never heard appellant say he was going to kill Sinner. (30RT 8252.) He told the police what they wanted to hear to get out of there. (30RT 8256.)[23]

Cynthia Lawson[24] testified that she overheard appellant and Eric talking when she went to ask for a cigarette. (33RT 9210-12.) She testified that appellant said something like "we ought to take her out to the woods and kill her so we can keep her car," and they laughed like it was a joke. (33RT 9313.) However, in Lawson's taped statement to the police, she said it was Eric and not appellant who made the statement. (33RT 9314.)2local

Jail informant John Hornday wrote to the prosecutor in September of 1998, stating he had received information from appellant while in a lockdown pod in Shasta County jail. (32RT 8819-24.) Hornday testified that appellant claimed to be the mastermind of the group, that he gave

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23 Sergeant Ron Clemens testified that two days prior to Cody's testimony, Cody admitted that his police statement in 1998 was true, but said he did not want to testify and was concerned about his housing with rival gang members and feared retaliation if he testified. (30RT 8273-75, 8288-89.)

24 Lawson was in custody at the time of trial for petty theft with a prior. She admitted to having a drug problem, doing up to 1/8 ounce of methamphetamine a day. (33RT 9310, 9321.)

Sinner "the last blow," and that "she was begging for her life." (32RT 8827, 8830.) In the letter, however, Hornday mentioned nothing about Sinner begging for her life; he wrote that appellant said he "threw the final punches" or "final blows to put her out of her misery." (32RT 8835-39.)

3. Forensic testimony.

Catalina Sundita, forensic toxicologist, analyzed the blood sample taken from Sinner's heart during the autopsy, getting the unusually high BAC [blood alcohol content] results of .88% and .78 % (32RT 8969-72, 8987, 8977-80, 8985-86.) Sundita testified that the tube in which the sample was stored contained a preservative and that the sample was destroyed after testing (although other testimony established that the sample did not have a preservative and was not destroyed; see p. 46, below). (32RT 8973, 8977-80, 8983-86.)

Freelance pathologist Dr. Susan Comfort testified based on the autopsy performed by Dr. Harold Harrison and the report he filed. (RT 9144, 9152.) Sinner's left wrist and hand showed several very superficial and non-life-threatening wounds which would have been painful if exposed to alcohol. (33RT 9153-54, 9188.) The body X-rays showed no obvious fractures but there were scattered bruises concentrated on the back of the neck and head. (33RT 9162, 9168.) The back of the head showed blunt

force trauma with extensive pockets of blood under the scalp, not fatal in themselves, but consistent with a description of "mushy," and which could have been caused from slamming the head into a tree or a rock, or being hit in the head with a dent puller or other object. (33RT 9161-64, 9228) The head had been wrapped with two sheets of plastic but there was no indication of asphyxia. (33RT 9167-68, 9172.)

The stomach fluid smelled of alcohol. (33RT 9178.) A BAC of .78% could cause death, within minutes, depending on how fast it was absorbed into the blood stream. (33RT 9180-81.) Dr. Comfort could not state with any reasonable medical certainty that alcohol contributed to the cause of death, nothing that this was a difficult and atypical case. (33RT 9242, 9245.) Post-mortem leakage could contaminate blood samples resulting in artificially elevated BAC levels, particularly where decomposition has begun. Photographs of Sinner's body showed sufficient decomposition to distort the BAC in this case, which Dr. Comfort described as unusual and very high. (33RT 9203, 9209-10, 9214-15.)

Dr. Comfort's opinion was that death was caused by blunt force injuries with asphyxiation as a contributory cause, and if the .78% BAC was accurate, that itself could have killed her. (33RT 9189.) By contrast, Dr. Harrison concluded that blunt force injury was the cause of death and said

there was no asphyxiation. Dr. Comfort stated that all the blows cumulatively caused death and it was impossible to know which blow was fatal, although she agreed that Sinner received "in excess" of the number of blows necessary to cause death without medical treatment. (33RT 9190-94, 9217.)[25]

B. Evidence Presented by the Defense.

1. Cause of death testimony.

A video tape of Dr. Harold Harrison's deposition testimony was played for the jury. (33RT 9368; 40CT 10033-85; Exh. T-LA.) Sinner's body showed bruising and lacerations on her head, back, neck and arms, with superficial wounds to her wrist. There was evidence of post-mortem burning. The wounds were consistent with having been inflicted with the two parts of a dent puller. Dr. Harrison could not ascribe the death to a particular blow, but a blow from either piece of the dent puller could have caused death. After a certain number of blows, Sinner reached a state where she was certain to die, but Dr. Harrison could not specify how much damage was inflicted on her in addition to that state. She had been injured

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[25] In another case, Dr. Comfort once gave cause of death as gunshot wound and changed it to blunt force trauma after the evidence was re-examined. (33RT 9198-99.)

in excess of the injuries that would have caused her death. Her skull was not fractured and there was no evidence of asphyxiation. He did not believe that her BAC level was a primary cause of death. (14CT 2679-2732.)

2. Testimony impeaching Lori Smith and the prosecutor's theory of appellant as the mastermind.

Defense witnesses testified that both Lori Smith and Amy Stephens were strong-willed and not easily manipulated.

Numerous witnesses testified that Lori was both violent and deceptive. Beth Ann Livney worked in a group home where Lori Smith lived; Lori was later a foster child in Livney's own home. (34RT 9436.) Lori lied regularly from the first time Livney met her. She would deny hitting some girl even when Livney observed her doing it; she lied about smoking marijuana; and lied about everything. (34RT 9440-41.) Lori lied so often and so convincingly that she believed her own lies. (34RT 9479, 9481.) Lori tried to fit in with gang-related girls by acting tough; she picked on mentally challenged and smaller girls and was often in trouble for fighting and being abusive to mentally challenged and smaller girls. (34RT 9438-39; 9442-45, 9453-54)

Livney cared for Lori but believed she had difficulty controlling her anger and violence. (34RT 9447-48.) Lori seldom did what she was told

by anyone. (34RT 9450.) Livney terminated Lori from her home for refusing to follow rules and being out of control; she was belligerent and became more manipulative as she got older. (34RT 9457-59.)

Lori called Livney from the jail. At first Lori said she didn't do anything wrong and didn't understand why she was in jail. When Livney confronted her with the information from the news, Lori said, "I really killed her, huh?" (34RT 9462-64.) Lori finally realized at that point that she had killed Sinner. (34RT 9480.) Lori once told Livney she'd be out of jail in three to four years, another time said she'd be out in close to 25 years, and once said that if she testified correctly, she wouldn't have to serve any more time at all. (34RT 9469.)

Diane Phillips had known Lori since Lori was 14 years old and continued to see and talk to her after her arrest.[26] (34RT 9492.) A few months earlier, Lori told her that according to her attorney, she would only have to serve some three to five years in prison. (34RT 9494.) Lori made things up to make herself feel good. (34RT 9494.)

Linda Christman Dexter[27] was previously married to Cecil

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26 Lori called both Phillips and Livney "mom." (RT 9493.)

27 Dexter also testified that Cecil lied all the time to have the spotlight but also had memory problems since the time he overdosed and tried to kill himself. (34RT 9547, 9553-54.) The night in April when Lori, Jessica

Christman. Amy was at the Christman house in April of 1998 and received up to 10 calls a day over a few days; she said the calls were from Lori who was threatening that "they" were going to kill her (34RT 9548-51.)

John Wheel was director of the group home where Lori lived when she was 14 to 15. Lori told quite a few lies and even when caught red-handed arguing or slapping another kid, she would deny involvement. She was manipulative, never backed down from a fight, got involved in altercations at school, and was involved in thefts. (34RT 9650-56.) She was more aggressive when using meth. She had a volatile and uncontrollable temper and he had to use physical restraint on her many times; her aggression was such that the female staff could not handle her – a male had to be on staff at all times. She had once hit and kicked a victim on the ground and wouldn't quit even after she had won the fight. (34RT 9657-63.)

Megan Miller suffered learning and emotional disabilities. She met Lori in foster care in 1995; they didn't get along because Lori was jealous. Lori lied to her all the time and made up stories to get attention; she was sometimes believable. (34RT 9505-08.) A few years Megan was told to

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and Amy wrote out statements about the homicide, Cecil informed that "all four of them" "had murdered someone." (34RT 9548, 9556.)

meet Lori at a park. Lori accused her of sleeping with someone and then with a friend kicked and beat Megan up. (34RT 9510-13.) Lori had a violent temper, picked on other girls, was verbally abusive and stole and lied, always trying to turn the story around to make it look like she wasn't wrong. (34RT 9516-18, 9521.) Pattye Galba had been in the same cell and same classroom as Lori and knew her to be a liar. (34RT 9612-14.)

Jessica Smith testified that Lori learned people's weaknesses and vulnerabilities and then used them to her advantage. (34RT 9680.) Jessica confirmed that Lori told so many lies she believed her own lies. For example she said Jessica's child belonged to her, that she was raped in Washington, etc. (34RT 9692.) Karol King lived in the same house as Lori from November of 1997 to mid-February of 1998. Lori was controlling and manipulative and not easy to push around. She manipulated people by pitting them against each other and was especially pushy with younger kids. (35RT 9752-53.) For example, Lori lied about being pregnant from a gang rape and made up stories about getting married. (35RT 9754.) She was jealous of Sinner especially when appellant showed attention to her. (35RT 9755.) During January and February of 1998, she appeared to be under the influence of methamphetamine. (35RT 9756.)

As a foster parent to Amy Stephens in March of 1998, Garrett Auld

testified that she was manipulative, and passive/aggressive in getting what she wanted. She pushed to get her own way. (34RT 9416, 9420-22.) It was not easy to tell her what to do; she was demanding and strong willed. (34RT 9425.)

3. Police testimony regarding inconsistent statements by Lori, Eric and Cynthia Lawson.

Detective Thomas O'Connor interviewed Lori on April 18, April 19 and April 21, 1998. (34RT 9559-61.) In her first version of events, Lori, she placed all the blame on appellant although O'Connor was suspicious because she also said "I" when talking about what had been done. (34RT 9572, 9574.) Lori then admitted that "we beat" Sinner, but said she had not actually killed her; "in her mind," appellant had done it. (34RT 9584-85.) Nonetheless, O'Connor released Lori without restrictions because she and Amy had come to the police on their own. (34RT 9576-77.) After being interviewed the next day too, O'Connor again released Lori, even though he didn't believe parts of her story, because he didn't consider her a flight risk or a threat to kill anyone else. (34RT 9580-85.) O'Connor denied that the police had already decided appellant was guilty, and that he saw Lori as "just a witness." (34RT 9589.) Officer Terrisa Clemens testified that Lori was very nervous and jumping around. (33RT 9371-73.)

Tape recordings of Lori's prior statements to the police were played. On April 18, Lori said appellant killed Sinner. She said appellant had threatened to kill her, that she was going crazy and went to Cecil Christman's and told him everything. She had blacked things out but everything just came to her all at once today. They went camping; and appellant would use Sinner's car to go to town and steal cars and a lot of stuff; Lori wanted nothing to do with "gang and stealing stuff and using drugs." One night, appellant got them all drunk and stoned with weed "laced with crank, heroin, [] and PCP," and then he came up behind Sinner and started beating her to death with the dent puller. Appellant put a bag over her head and slit her wrists and snapped her neck with the dent puller and killed her as she was lying down, while holding Lori and the other "hostages" and making them watch. Lori was throwing up and hid under a blanket. Appellant told Eric to help bury the body or he would kill him too. Afterwards appellant said if they told about the murder and burglaries and robberies he would kill them and their friends. Earlier that day appellant had accused Sinner and the others of stealing money and was screaming at everyone. He had totaled and wrecked her car by driving off-road. (33RT 9377-78.; Exh. T-MC [transcript of Exh. T-M, T-MA & T-MB at 40CT 10086-10136].)

On April 19, Lori repeated that the version she had given the day before. Upon questioning she admitted that before appellant started beating Sinner, Lori had an "argument" with her. She then said that appellant and Amy and she beat Sinner up first because Amy was jealous of Sinner flirting with appellant. Lori said she was triggered because she was on drugs and appellant "made" her beat Sinner up. She said appellant wanted her and Amy to kill Sinner because "she knew too much," i.e., that he tried to steal a truck, and stole someone's wallet and ATM card. She and Amy hit Sinner with a can of chili, and then, when Lori had told Amy to get something heavy to hit her in the head with, the dent puller. Lori said Amy threw the first punch, and when Sinner hit Amy back, Lori was "triggered" and they threw Sinner to the ground and beat her with the dent puller and kicked and punched her. Lori was hitting her as hard as she could, taking out all her anger on her, and finally stopped when she saw too much blood.

Lori took Sinner to the creek to wash the blood out of her hair. appellant came down and said he wanted Lori to kill her. Lori said she couldn't; Amy didn't want to either. Appellant took Sinner back to the tent where he and Eric tied her up. Appellant untied her hands and tried to make her slit her own wrists. He made her drink whiskey and she appeared drunk. He cut her wrists and poured alcohol on them, saying he liked to

torture. Then he broke her neck with the dent puller. He put plastic bags over her head and hit her in the back of the neck 15 to 20 times and they could hear the bones crush. On prompting, Lori admitted that back at the tent, she started hitting Lori in the back of the neck but she couldn't hit her hard enough to break the bones and told them "this bitch ain't dying." While Lori got under the covers in the tent, appellant hit Sinner and crushed her bones. She did not know if Sinner was still breathing when they took her to bury her.

Lori said that appellant had been discussing killing Sinner with all of them. She remembered wanting to kill Sinner when she was flirting with appellant. Lori said everyone wanted her dead, and that she "did want to kill her, but [] didn't kill her." There was no plan to kill her, they just "beat her up." Lori said that several days earlier all four of them had talked about planning it, but didn't know when they were going to do it. Sinner not only flirted with appellant, but she ignored Lori, and was rude to all of them. While Lori was hitting Sinner she thought she was killing her, but quit when she saw all the blood; she wanted to kill her but couldn't. Afterwards, she and Amy decided to talk to the police but left out the part about them beating Sinner up. (33RT 9390-98; Exh. T-N-A, T-N-B, & T-N-C [Exh. T-N-D [transcript at 40CT 10140-92.)

The tape recording of Eric's April 18 police statement was played for the jury. Eric said at first that Sinner just got annoying and appellant killed her after she mouthed off to him; he hogtied her, made her drink a big bottle of whiskey, and made her cut her wrists, then cut her wrists for her and poured alcohol on them, and finally used a dent puller to kill her, then suffocated her with a plastic bag over her head. Appellant then forced Eric to help him dig a grave and bury her. Later Eric admitted that he helped tie Sinner up, saying that appellant forced him to. He said he was not involved in beating or killing Sinner, and did nothing to help her because he was afraid of appellant and in fear for his life. Towards the end of the interview, Eric said that Amy and Lori had been in a fight with Sinner a few hours earlier, then the three girls came into the tent and were laughing and Amy and Lori said they had beat Sinner up. Eric said they had been drinking the previous night, but no one was drinking or taking drugs the night Sinner was killed. (34RT 9400; Exh. T-O; see Exh. T-O-A [transcript at 41CT 10233-10316.)

A tape recording of Eric's statement the next day was also played to the jury. On April 19, Eric told the police that Amy and Lori had hit Sinner with a can of chili and Lori had hit Sinner in the back of the neck a couple times with the dent puller bar before appellant got involved. Although he

had denied it the day before, Eric said that the fight started because Sinner said Eric had asked her to give him a blow job, and then Amy got involved because Sinner had been rubbing appellant's back, and so Amy and Lori hit her with the can of chili and the dent puller. After that, when they returned from the creek, appellant got involved, tying her up, slitting her wrists, and hitting her. Eric admitted making the noose for tying Sinner up. After that Lori hit Sinner several times about the head and neck and said "this bitch won't die." Appellant then swung at her four or five times with the dent puller. They heard a big crack, like her neck was broken. Then appellant told Eric to give him a plastic bag from the tent, which Eric did. Appellant covered her head with the bag and suffocated her. Eric said that after Amy and Lori fought with Sinner, they talked about killing her. It seemed they wanted to kill her but were "too chicken shit" to do it. Afterwards they talked about what they would tell the police: that her father sent her money and she took a bus home. Eric said Sinner sold her car to his stepmother Kathy Corey before she was killed; but the money was never paid. After Sinner was killed, Corey had the car towed to her house. (34RT 9410; Exh. T-P; see Exh. T-P-A [transcript at 41CT 10319-68.)

Sergeant O'Connor testified that Eric was at first very reluctant to talk and was upset that he did what he did out of fear of appellant. (34RT

9598.) He had a lot of discrepancies between his first and second stories. (34RT 9600.) Detective Clemens met with Eric, his attorney, and the prosecutor on February 22, 2001, at which time Eric said he never heard appellant say he was going to kill Sinner. (36RT 10047-48.) The prosecutor told Eric he had the possibility of getting out of prison in 15 years. The prosecutor also told Eric that when a person is helpful that information is passed on to the Parole Board. (34RT 9626-28.)

Cynthia Parrish Lawson told the police in a taped interview that it was Eric (and not appellant) who made the statement that "we ought to just take her up to the woods and kill her so that we can have the car." (34RT 9624.)

4. Forensic testimony.

William Giguiere testified as the clinical director of a licensed forensic alcohol testing laboratory. (35RT 9767-69.) After reviewing of the autopsy reports and the expert forensic testimony, he questioned the validity of the "phenomenally high" .78% BAC result from Sinner's blood samples. (35RT 9780-83.) He was of the opinion that such a high BAC was not achievable in a young woman, as it is near the world's record and those who reach a higher than .30% BAC are usually chronic alcoholics. (35RT 9784.) The highest BAC he had ever seen on someone semi-ambulatory

was .50; someone Sinner's size would have to drink 45 ounces of 80-proof alcohol to achieve a .78% BAC (and a full bottle of Black Velvet only has 58.5 ounces in it). Moreover, the person would throw up, even if forced to drink that much alcohol. (35RT 9785-89.)

Giguiere had further concerns about the sample because it was taken from the heart instead of the femoral artery or vitreous humor and was thus more susceptible to contamination from the stomach. Also the sample had no preservative which would allow indigenous production of alcohol from yeast and bacteria from the glucose in the body. In his opinion the most likely explanation for the high reading in this case was contamination from alcohol in the stomach or esophagus. (35RT 9790-92.)

The Central Valley Toxicology report showed that there was no preservative put into the sample (they buy tubes containing preservative and anticoagulants) so that alcohol could have grown in the sample, given that the glucose level in the body could have been elevated (common in cases of trauma) and the glucose can convert into alcohol. (35RT 9796-97.) A person with a BAC in the high .20% range would feel not feel pain. (35RT 9843.)

5. Expert testimony regarding intoxication.

Dr. Douglas Tucker , a psychiatrist specializing in addiction, and a

professor at the University of San Francisco, explained that taking Soma (marketed as a muscle relaxant) in addition to alcohol and marijuana would impair one's cognitive ability to focus and concentrate; taking four 350 mg. tables of Soma could knock someone out and with marijuana would affect one's ability to move. The combination of the three substances would cause a person to be close to a hypnotic state, cut off from the reality around him, with dramatically slowed reaction time and confused cognition. (35RT 9908-15.) The peak reaction would occur from one to four hours after taking the drugs. (35RT 9917-18.)

Dr. Tucker also testified regarding the effects of methamphetamine. It is a stimulant and long term use causes the user to develop anxiety, agitation and even paranoia and psychosis, but it does not affect one's attention and memory as severely as depressants. Memory is not affected until the user reaches the stage of paranoia. (35RT 9920-22.) A person using two grams of day would not sleep or eat and would eventually become paranoid and psychotic.. (35RT 9924-27.) A person taking 1/8 ounce (an "eight ball") or 3.5 grams a day could have difficulty recalling an event witnessed months earlier; or remembering accurately. (35RT 9928-30.)

Arthur Wooden attended Dr. Harrison's testimony for the

prosecution in Amy Stephens' juvenile trial. (35RT 9942-43.) Dr. Harrison made a drawing on a piece of butcher paper which, it was stipulated, later disappeared. (35RT 9944.) Using notes he made while Dr. Harrison testified, Wooden recreated the diagram. It showed a line from zero (no injury to Sinner) to the greatest injury or damage; and marked a point on that line where Sinner had incurred injury sufficient so that she would have died anyway. Dr. Harrison testified that Sinner was further injured after she reached that point. (35RT 9945-47; see Exh. T-W.)

6. Sinner's red Honda was damaged before she met appellant.

Timothy Smith[28] was engaged to Lora Sinner when he was in Washington. They camped out together and she had a car which she let him drive. (35RT 9708-13.) He rolled the car on a dirt road once to avoid an accident and dented the rear quarter panel; he fixed it himself by trying to pop out the dents. The car was in this condition when they drove it to California. (35RT 9714-17.) In addition, the transmission was not working properly and the bearings in second gear were going out. (35RT 9718.) Jessica Smith also testified that Tim referred to the Honda as having

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[28] Tim had a burglary conviction and was on probation in Washington. (35RT 9734.) He stole a blanket from a hay and feed store when he was cold. Other than that, he had no other convictions. (35RT 9739.)

something wrong with the clutch plate. (34RT 9682-83.)

7. Miscellaneous.

Tim Smith saw Somas in his father's medicine cabinet; appellant was at the house then too. (35RT 9719.) Tim had no desire to help appellant. To the contrary, he wanted him to get the penalty he was facing. (35RT 9738.)

Jessica Smith confirmed that she typed a statement based on information she got from Lori. Jessica did not change anything, but Lori would contradict herself, and when she did, Jessica rewrote the change and typed it up on April 18, 1998. (34RT 9667-70.) Lori did not say at that time that she had killed Sinner. Jessica heard many different stories but she wrote what Lori told her and did not leave things out or put in things in an attempt to protect appellant (in fact, she was angry at appellant at the time). (34RT 9675, 9685.) Lori was nervous and edgy, blinking and drinking a lot of water; she could have been under the influence of meth but Jessica did not see her taking it. (34RT 9674.)

Lori talked about methamphetamine and came home in January and February at times apparently having done methamphetamine. (34RT 9678.) At this time, Jessica and appellant were married, and he was looking for a job. (34RT 9679.) However, once Lori came, appellant wanted to spend

time with his sister and the more time he spent with her the less he looked for a job, because he did what she wanted to do. (34RT 9679-80.)

C. Evidence Presented by the Prosecution in Rebuttal.

Dr. Harrison testified at Amy Stephens' trial that he could not ascribe her death to a specific blow; and couldn't trace her death to the last or last two times she was hit. (35RT 9969.) She died from an accumulation of blunt force trauma, which together with .78% BAC was in excess of what would have killed her. Although there was a point at which she was injured severely enough to kill her, he could not say exactly when that point was. (35RT 9969-72.) He thought the BAC could have been a contributing factor in her death but he did not think it was a large factor. (35RT 9972.)

Alan Barbour, forensic toxicologist at Central Valley Toxicology performed tests on Sinner's blood sample. The tube had no preservative in it but the glucose was at a normal range and no yeasts were present, although common bacteria were found. (36RT 10062-67.) He agreed that ingested alcohol can diffuse from the stomach to the heart because of the proximity, and redistribution of bodily fluids after death. A body buried for two weeks can harbor fermentation. (36RT 10077-78.)

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PENALTY PHASE EVIDENCE

A. Aggravating Evidence.

1. Impact on family members.

Kenneth Sinner, Lora Sinner's father, testified that after an accident when she was young, Lora[29] had some speech problems and was a bit slow, although very intelligent. She was happy and loving. After her parents divorced Lora lived with her mother in Washington (Kenneth lived in Oregon), then after her mother died, she lived with him in Oregon for three months before she left for Redding. (38RT 10618-20, 10623, 10626.) Kenneth stated that he became unsociable and paranoid after Lora's death. (38RT 10625.)

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[29] In the guilt phase summary of facts, appellant referred to the decedent Lora Sinner by her surname, to avoid confusion with accomplice Lori Smith. In the penalty phase summary of facts, because of other witnesses surnamed Sinner, appellant will refer to her as Lora, and to her relatives with the last name of Sinner by their first names, after the first reference.

Kenneth's sister, Sylvia Grossman, testified that she spent a lot of time with Lora when she was growing up, then lost contact after Lora's parents divorced, although she re-established contact in 1998 after Lora's mother died. (38RT 10630-32.) Grossman testified that Lora needed extra care and more comforting than most. She was a gentle and sweet spirit. (38RT 10633-34.) Lora's death made Grossman feel cheated and as if she had failed in some way. Before she was independent and was now afraid to leave the house alone. (38RT 10636-37.)

Ryan Sinner was Lora's older brother and best friend. (38RT 10643-45.) Lora was great with his kids and was always there for him. (38RT 10646-48.) After her death Ryan was terrified for his own daughters and worried about going camping. (38RT 10648.)

2. Impact on the community.

Minister Rudy Bauder, Jr. knew Lora Sinner and her mother as participants in the church until 1995, when Lora's attendance fell off. Lora attended church activities and helped in the church nursery. Her younger stepbrother (her mother had remarried) was in a wheelchair and Lora helped to care for him. (38RT 10925-28, 10935.)

Gloria Callaghan supervised a program for developmentally disabled

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adults, and Lora worked there. (39RT 10942-44.) Lora was patient and caring. She also helped care for her disabled brother. (39RT 10945-48.) Shortly after Lora's mother died, Lora quit working at the program (and dyed her hair pink/purple). (39RT 10950-51.)

High school counselor Mary Anderson met Lora when she was a sophomore and struggling with school. Anderson discovered that Lora had a learning/reading disability. (39RT 10954, 10958.) Lora received a scholarship for her character and work she had done as an aide to the severely disabled. (39RT 10956, 10961.)

3. Aggravating evidence: group home violence.

March 1990 Incident: In March of 1990, Carl Lubsen managed the Shasta County South 50 group home where appellant resided. Even though appellant was a "300" he was placed with "602" wards.[30] (39RT 10973-74.) After an incident with a staff counselor, the police removed appellant for a mental health evaluation. (39RT 10963-67.) The South 50 group home did not have in-house psychologists but Dr. Robert Buley did come on request as needed. (39RT 10969.) Lubsen believed that appellant needed

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30 Welfare and Institutions Code section 300 provides that minors who suffer or are at risk of suffering serious physical harm by their parents or guardians; section 602 provides for juvenile court jurisdiction over minors who have committed a criminal act.

treatment by a trained mental health professional; at the ranch only a low level of treatment was available. (39RT 1097-79.) .

Jody Sanford described the incident. Sanford was supervising boys on a work project when appellant ran off to the top of a hill. Sanford asked appellant to report to the office and appellant responded "fuck you" and took a step toward Sanford and swung at him with a broken glass bottle top. Fearing for his safety, Sanford grabbed appellant by the wrist and held him on the ground. Appellant was kicking and screaming but he was so small it didn't take much to hold him down. (39RT 11005-09, 11014, 11045.)

Appellant was trying to cut himself. Sanford was 19 years old at the time and had no special training in dealing with emotionally disturbed children. (39RT 11018-19.) Former deputy sheriff Doug Carney took appellant into custody and transported him to the Shasta County mental health. Appellant said he wanted to die; he had tried to cut himself with a bottle. (39RT 11047-50.)

June 1990 Incident: Christopher Hill, 24 years old at the time of trial, at the age of 12 had lived in the Helping Hands group home with appellant, then also 12 years old. (38RT 10653, 10678.) One evening, appellant forced him to orally copulate another boy saying he would beat him up if he didn't do it. Staff member Justin Burger then came in and

moved everyone away. (38RT 10656-59.) Another time in a circle counseling session, appellant kicked him in the head. Another time appellant hit Hill on the face. (38RT 10660-61.) Hill denied knowing that appellant had been sexually molested as a child and teasing appellant about it. (38RT 10677.) At trial, the prosecution found Hill a place to live, paid his rent and gave him money for food. (38RT 10678-80.)

Justin Burger testified that he had written a report stating that "seemingly there was forced copulation," although all the children[31] were fully clothed. (38RT 10691, 10720, 10724, 10734.) At trial Burger had no recollection of the incident. (38RT 10707.) Burger testified that victims of sexual abuse frequently "acted out" sexually. (38RT 10710.) Burger remembered appellant as a "real sad child" who cried a lot. He did not characterize appellant as violent, but as a child whose "acting out" could sometimes be violent. (38RT 10718.)

William Sweeney, administrator of the Helping Hands group home in 1990, terminated appellant from the group home after the kicking incident on June 18, 1990. Sweeney could not explain why the supposed forced oral copulation was not reported to the police as sexual abuse is

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[31] Both boys were small. Appellant was 4'10" and 84 pounds. (38RT 10769.)

required by law to be reported. (38RT 10726, 10729.) Nor was anyone referred to mental health services as a result. (38RT 10732.) Hill had a swollen eye but required no medical attention after kicking incident. (38RT 10768-70.)

November 1991 Incident: Jerry Holloway was house manager of the Excel group home in Turlock in November, 1991. Five or six resident children were watching television with two staff members. Twelve-year-old appellant was seated on the floor to Holloway's right. When Holloway moved his foot, appellant told him to get his foot out of his face and hit him in the shin. Holloway, who was 23 or 24, had a volatile reaction, grabbing appellant by his arm saying "don't ever fucking hit me again." Appellant responded that his dad would kick Holloway's ass. Holloway called the house counselor and they had an altercation the deck and appellant was ultimately restrained the police arrived. (39RT 11053-64.) Holloway testified that the group home was not a nurturing environment and although he was a house supervisor he felt like a warden. (39RT 11065.)

Craig Jones was a supervisor and was called down to assist Holloway. Appellant was agitated and flailing and using profanities. Jones took appellant outside and tried to hold him down on the deck. Appellant got an ink pen and stabbed Jones with it in the wrist and ribs and also bit

him on the arm. Finally five staff members held appellant down and the sheriff arrested him. (39RT 11123-26.) Appellant was discharged from the program and admitted to a psychiatric ward. Jones did not believe appellant was an appropriate fit for Excel Center because they didn't offer the level of psychiatric services appellant required as appellant was a pretty "damaged" child. (39RT 11129-31, 11136.) Although Jones described appellant as "manipulative," he said this was common in group home settings, where children learn to be manipulative; he rated appellant as a 1.5 on a manipulation scale of one to five, five being the most manipulative. (39RT 11139-41.)

Stanislaus County deputy Brian Grimm arrested appellant (then 5'1" tall and 103 pounds) and took appellant to juvenile hall. Appellant said he hit Holloway because the latter put his feet near appellant's face which made him angry. Jones then tried to pick appellant up and drag him outside where appellant didn't want to go and so he tried to stab him with a pen. (39RT 11142-44.) Jones told the deputy he had some insignificant red marks on his skin. (39RT 11145.)

October 1992 Incident: Gilbert Parrish Parker was on his way to dinner and about to get his plate when he was hit in the jaw from the side. He didn't know why the attack occurred but the kid who hit him went to

jail. (39RT 11167-70.) Officer Matthew Wimple arrested appellant at the group home. (39RT 11174-75.) Parker told the officer that appellant got mad at him for cussing in from of some women counselors and that appellant told Parker to shut up, to which Parker responded that appellant should "shut the fuck up," angering appellant who punched Parker in the mouth. (39RT 11178-79.)

November 1994 Incident: In 1994-95, Rhonda Schuchart was a supervising counselor in Shasta County Juvenile Hall, where appellant was in the behavior modification unit at least part of the time each year. (39RT 11071-72.) He once tapped on the cell door to get her attention and slid a flattened Pepsi can, possibly in the shape of makeshift knife, under the door to show her. (39RT 11075.) He did not threaten her with it and she didn't consider the can to be as a weapon. (39RT 11077-78.)

James Masterson described the flattened soda can as a "knife" which was rectangular at the top coming to a jagged edge below. (39RT 11084-86.) Masterson did not remember the dimensions but made a drawing of it. (39RT 11085, 11089.) Masterson testified that he was aware that appellant had been sexually molested by his father and that it was common for kids in custody to act out. (39RT 11091-92.)

February 1995 Incident: Jim Gibson supervised the California

Youth Authority Crystal Creek camp. Manzy Williams and a group were walking around the basketball game appellant was playing. Appellant issued a racial epithet at Williams and struck him in lower lip. Gibson intervened. (39RT 11156-59.) Williams testified that he was playing basketball when appellant punched him. Williams opinion was that appellant did this because he was prejudiced. (39RT 11151-53.) Williams had flipped appellant off a few nights before when he was throwing white powder at him. (39RT 11154.)

December 1997 Arson Incident: Margaret King (appellant's stepmother and also his mother-in-law) testified that she accompanied appellant and his father Paul Smith, Sr. to Stockton in late 1997, when appellant had been recently reunited with his father. They intended to retrieve some property from the group home of Ralph White, where appellant had lived. They went to several locations until finally father and son both got out of the car. Appellant came back after 30 or 45 minutes and said he tried to set the door of the house on fire. (39RT 11146-49.)

Ralph White testified that appellant was a ward in his group home in 1993-94 and sometime in 1994 some of laquer on the front door was charred or burned. (39RT 11194-96.)

February 1998 Assault on Prostitute: Michael Murchison[32] testified that he accompanied appellant to buy a gun in Stockton. The gun was for Mary Shelton, Murchison's then mother-in-law, who put up the cash for the purchase. (41RT 11529-31.) On the way back to the motel where they were staying (because on the way back from Reno where appellant and Jessica had just gotten married) he and appellant discussed robbing a convenience store because they needed money to get home. Appellant said when he got back there would be one bullet missing from the gun. Meanwhile, they were stopped by the police and appellant got a citation.[33] The two young men then decided it would be easier to rob a prostitute and they picked one up. (41RT 11535-38.) They drove to an industrial park where appellant and the woman had sex in the back seat. Then appellant got out and grabbed the gun from Murchison and raised it. The woman screamed and appellant popped a shot at her (it hit the ground) as she turned to run, leaving her (moneyless) purse in the car. (41RT 11539-40, 11560.) They took off in the car but appellant realized he had

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32 Murchison had a conviction for larceny and for domestic violence. (41RT 11542.)

33 Sergeant Charles Arellano stopped appellant in Stockton at 7:40 p.m. on February 22, 1998 and issued him traffic citations. Appellant was with another white male; Arellano did not see a square black case in the car. (41RT 11503-06.)

dropped his wallet. They parked near a store and walked back towards the place they had been parked. There were two police cars there and the woman. Both appellant and Murchison were arrested. Murchison told the police he had nothing to do with the incident and showed the police where the gun was hidden.[34] (41RT 11541-44.)

Glenda Jones was a prostitute in Stockton. On February 22, 1998, she got in the back seat of appellant's car and went to her usual place in an industrial area, where she and appellant had sex in the back seat. (41RT 11598-601.) They both got out of the car and appellant went up to the front seat where his companion was. Jones heard someone say "hand me something" and then heard a bang and took off running. She saw something black in appellant's hands and heard one or two shots. She saw appellant drive off with her purse in his car and then saw his wallet with his identification on the ground. She walked to Main Street and told the police what happened. When appellant and his companion walked by, she pointed out appellant. (RT 11603-08, 11610.) Jones has been receiving money for rent and incidentals from the prosecution over the last year and a half -- approximately $10,000. (41RT 11613-15.)

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[34] Officer Steven Thomas testified that Murchison led him to a bush on the corner where he found a gun case, a Ruger mini 14 rifle with a sawed off barrel and a plastic magazine and loose rounds. (41RT 11511-16.)

August 1999 Possession of Shanks in Jail: Deputy Wes Collette worked level three at the Shasta County Jail on August 1, 1999. That evening he and Deputy Tumelson searched cell C-11, occupied by appellant and inmate Haakinson. Tumelson found a six-inch steel shank inside the top bunk mattress (appellant's bunk) and Collette found a corner section of a metal tray. (38RT 10829-31, 10861.) Stabbing and jabbing instruments (i.e., shanks) are found daily at the jail. (38RT 10867.) Collette asked appellant if he would talk and appellant said the shanks were his,[35] that they had been in his cell for over a year, that he was going to use them on an inmate, and that there was a third shank the deputies did not find. (39RT 10920-21.)

1999 First jail escape attempt:

In April of 1999, Jessica Smith received a letter from appellant in jail, in which he talked about an escape and asked her to take photographs of the outside of the jail. Prior to that, appellant had told her he wouldn't die in jail but would got down in a blaze of glory. (39RT 11102-03.) She talked to appellant on the phone and told him that her friend Misty Slettum would help him. However, she brought the letter to law enforcement.

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[35] Collette was not aware that the other inmate Haakinson had pled guilty to possessing the sharpened shank. (39RT 10922.)

(39RT 11104-05.) Detective Clemens then relayed personal data obtained from Misty Slettum to a California Department of Justice so that she could pretend to be Slettum. (39RT 11110-14.) The agent tape recorded the telephone conversation she had with appellant and the recording was played for the jury. (39RT 11115; see Exh. 108A at 44CT 11095-11109.) Appellant asked if Jessica told her that he wanted photographs taken. (44CT 11099.) He said not to mail them and that there would be a way to get them to him which he would explain later in a letter. (44CT 11106-07.)

February 2001 Jail Incident

Deputy William Gardner worked the third level of the Shasta County Jail on February 25, 2001, where appellant was housed alone in cell C-6 on the upper tier. Around 2:00 p.m. Gardner noticed water dripping down the stairwell which he believed came from appellant's cell. (38RT 10777-82.) When Gardner and Deputy Seal returned to the third level Gardner noticed the water had been mopped up. Deputy Seal asked appellant to step back from the door of his cell and he refused. The deputies shut off the water to appellant's cell. Appellant kicked the door and yelled obscenities through the window, saying he would "knock [his] ass out." (38RT 10784-87.) The deputies decided to move appellant to another cell. By then appellant had covered the window in his cell. They opened the door and sprayed pepper

spray. Appellant was bare-chested with a t-shirt wrapped around his head and a baggie covering his eyes. (38RT 10787-88.) The deputies notified the watch commander who authorized a cell extraction response team ("CERT"). Appellant kept kicking the door, saying he was ready to go back to prison, "go ahead, take me." (38RT 10790.)

Deputy Jon Ruiz was one of the four CERT members. He authenticated the cell extraction tape recording and the transcript as accurate.[36] (38RT 10795-97.) The recording was played for the jury. (38RT 10799; see transcript at 43CT 11059-64.) Appellant complained that he was being treated badly and said he would "do what I have to." He said that if "you guys want to do it, lets get it on. Lets rock and roll." (43CT 11060.) Later he said he was not going to lay down and "let's get it on." (43CT 11061.) He said he wanted to take out his aggression on the deputies and would not cooperate. (43CT 11062.) Appellant believed the deputies wanted to hurt him. (43CT 11063.)

CERT members wear padded jump suits and hoods and helmets to disguise their appearance. A "flash bang" grenade[37] was rolled into

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36 Exh. T-98 [tape] and T-99 [transcript].

37 The flash bang or sting ball grenade stuns the person: there is big white flash, percussion of airwaves, and the explosion of 32 hard rubber pellets are designed to hit the

appellant's cell and exploded with 32 hard rubber pellets, after which four CERT members extracted appellant from the cell hand and foot and placed him into a contraption called a prostraint chair to immobilize him. (38RT 10800-05.)

Deputy Michael Wilson saw appellant a few days after the CERT cell extraction and they discussed it. Appellant said his ears were still ringing. Wilson said it was probably from the "sting ball" (the flash bang) and appellant said he hadn't expected that; he thought the deputies would use a shotgun[38] and he was going to charge the door and try to get it from them. (38 CT 10869-71.)

Deputy Edwin Bennett searched appellant's cell after the extraction. He found a tightly rolled newspaper one and a half inches in diameter, held together with elastic. It was very dense and hard. (38RT 10896-97.) Bennett took a photo of the newspaper but didn't log it into evidence, so it was not possible to determine how tightly it was wrapped. (38RT 10899.)

May 10, 2002 Jail Escape Attempt

Aaron Cozart, in prison on a probation violation for grand theft, and

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person. Appellant had a 2.5 to 3-inch abrasion on shoulder. (38RT 10876-79.)

38 The CERT team used a shotgun which shot one-inch bean bags. (38RT 10797.)

with three or four prior convictions for drugs and weapon, testified that he was in C pod on May 11, 2002, when appellant and Williams asked for assistance in an escape attempt. Appellant wanted Cozart and his cellmate to cause a distraction and try to hold a hostage in their cell so that while the deputies were conducting a cell extraction, appellant could knock out his window and bring weapons and tools up on a rope and bucket from the outside. Williams had a lighter and intended to heat up the window and knock it out with a metal drain cover appellant had loosened from the floor of his cell. (41RT 11692-94.) This was supposed to happen around May 17 or 19. Cozart had called someone named Tim who had recently been released from jail and Tim was supposed to put some money in appellant's account to let him know the plan was a go and to be ready. Appellant would be able to see Tim's car from his window and he was going to let Cozart know when to cause the distraction. (41RT 11695-96.) However, on May 17 or 18, Tim never showed up and appellant said he'd let him know if it was to happen the next week. Meanwhile, Cozart informed one of the officers and asked to be moved because he didn't want to participate. (41RT 11698.) In exchange for their participation, Cozart and his cellmate were to get money and drugs. (41RT 11706.) However, other than talk, nothing happened. (41RT 11703.) Cozart claimed to have made a couple

of phone calls for appellant but he couldn't remember what he said. (41RT 11702.)

Deputy Brian Jackson investigated this possible escape attempt around May 18, 2002. Cozart had said that money being placed on appellant's account was the sign for the attempt being ready. Cozart searched appellant's commissary records. Tim Yakiatis put money on appellant's account on May 15. (41RT 11709, 11711-14.) Jackson also checked the phone record in the jail and listened to tape Exhibit 135, which was a recording of a phone conversation between appellant and Carol on May 17, 2002. (41RT 11710, 11717.) The tape was played for the jury. (41RT 11736.) Appellant gave Carol some phone numbers and asked her to call Tim and to tell him to go to her house the next day and to wait for appellant to call him. Carol was to tell him that appellant had everything lined up from the inside. (44CT 11238-47 [Exh. T-135B].)

Jackson transferred appellant to a new cell with a window that was plated over except for seven inches at the top, and transferred the other two inmates to another pod. (41RT 11718.) Cozart believed the attempt would be on May 24 and Jackson didn't know if the money deposited on May 15 to appellant's account had anything to do with the escape talk. He had no information that the escape was planned for May 15. (41RT 11719-20.)

June 22, 2002 Escape Attempt and Assault on Deputy Renault:

Deputy Bounpon Kongkeoviman ["Deputy Boun"] worked as a rover deputy at the Shasta County Jail on June 22, 2002. Around 4:00 a.m. he heard loud radio traffic and the word "trol," which sounded like Deputy Renault's stressed voice. Bounpon ran with three other deputies to the elevator to level three, the ad seg disciplinary pod, where any problem would likely be. The slider door to C pod was open (it should be closed if no deputy was there) and Boun used a voice command to open the next door. (40RT 11201-13, 11221.) He heard a scream from near the shower area on the second tier up one level from where he had entered. He ran up the stairs and saw appellant coming around the corner. Appellant looked scared. Boun continued running toward the sound and saw inmate Benjamin Williams (wearing only jail orange briefs)[39] facing Deputy Renault. Boun pinned Williams to the floor with a martial arts move. Williams was cuffed. A shower drain grate wrapped in pieces of sheet[40]

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[39] Renault's uniform would have fit Williams. Boun testified that the control cameras did not provide a clear image, and a deputy viewing them would assume uniform was worn by guard and would open door if the proper code called on radio. (40 RT 11252.)

[40] The drain grate was from Williams' cell. Strips of sheeting were woven through the holes in the grate to make a handle, and rolled up paper and soap were used to convert the grate into a weapon. (40RT 11235-36, 11258-60; 41RT 11650-51.) The inner core of paper revealed Williams'

was nearby on the floor. Renault had head injuries and was taken to the emergency room. (40RT 11225-37.) Renault said that appellant and Williams had jumped him. (40RT 11239.) Williams may have had a weapon in his hand but Boun did not see it. (40RT 11250.)

Deputy Karen Luce went through the door immediately after Boun. She saw appellant walking slowly on the top tier towards cell one. He said "I'm not doing anything." Luce told him to lie down by cell one. Luce went towards cell 10 and saw Renault against the wall struggling with Williams. When Boun took him down, Luce handcuffed Williams; she saw the weapon laying on bench next to the shower. (40RT 11278-80, 11286-87.) In front of cell one, Luce searched appellant's waistband and found a two-foot long strip of torn sheet and a disposable razor with string wrapped around it. (40RT 11282-84, 11289.) Although Luce had blood on her hands when she patted down appellant's waistband she saw no blood on appellant. (40RT 11285.) After appellant was strip searched, she noticed blood spatters on his clothes and shoes, which were collected. (40RT 11291.)

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soap were used to convert the grate into a weapon. (40RT 11235-36, 11258-60; 41RT 11650-51.) The inner core of paper revealed Williams' right palm print and two other latent prints which could not be identified. (41RT 11653-54.)

Deputy Bruce Ogden also heard appellant say "I didn't do anything." (40RT 11301.) Ogden told appellant to get on the floor and he complied, lying face down on the floor by cell one. Ogden handcuffed him. He saw blood on appellant's hands, forearms, and the shoulder area of his shirt, but not very much. (40RT 11302-04.) Deputy Luce had not touched appellant until after Ogden had handcuffed him (and seen blood on him.) (40RT 11305.)

Deputy Timothy Renault testified that he last checked Pod C around 2:00 a.m. and saw a figure lying in the bed in appellant's cell and also in Williams' cell. (40RT 11322-23.) Appellant had last been outside his cell around 11:30 p.m. but was supposed to be back before 1:00 a.m. (40RT 11325.) Renault asked the central control to order appellant back in his cell around 11:50 p.m. and Renault heard the service officer tell appellant over the intercom to lock down. The inmates are supposed to voluntarily go into their cells after central control unlocks the door. Inmates Dietle, Smith and Williams hd all been out of their cells that night. (40RT 11326-27, 11376-77.)

Around 3:50 a.m. Renault made his next check of the pod, starting at the bottom floor with appellant's cell (number 11) and then went upstairs. As he was three-quarters of the way up the stairs he saw inmate Harold

Seems looking at him through the window on his cell door. Seems had put a request slip in his door and told him in a frantic voice to get out of there. (40RT 11328-32.) Renault moved towards the door leading to the catwalk but as he reached for his radio to say "control three" he heard the shower curtain open. He looked back and saw the shirtless Williams crouched down; another figure in dark clothes was in the corner. When Renault reached for the door the two attacked him. He felt that he was being hit by more than one person and saw Williams hit him but never saw the second person. He tried to reach the radio panic button but couldn't find it; he just tried to protect his head from the many blows. He heard the intercom say "code four" meaning he was okay and he yelled, "No, I need help." He heard someone yelling, "Yeah I'm okay." (40RT 11333-37, 11362.) Twenty seconds later the door popped open and he knew everything would be okay. (40RT 11337.)

Dr. James Stone treated Renault for multiple scalp lacerations, and a fractured jaw and cheek bone. He was operated on for an epidural hematoma and plates and screws were inserted to stabilize his bone fractures. (41RT 11668-75.) He had a black eye and a torn rotator cuff but no internal injuries. (40RT 11356.)

Two days earlier appellant had complained that he was not getting

his normal timeouts; later he refused to take a shower at the time it was offered. On June 21, appellant was taken to booking over a disciplinary issue because he had jammed the door shut so the deputies couldn't get in to talk to him. Appellant said that Renault thought he was the baddest guy on the street and if appellant was ever out, he would get him if it was one on one. (40RT 11350-54.) Renault did not know if appellant knew he (Renault) was present when he made these statements; appellant could not see him and was talking to Deputy Nelson at the time. (40RT 11359-60.)

Officer Ben Estill searched appellant's cell the morning after the attack on Renault. Inside the air vent he found several small strings tied together in one 20-inch long ligature with a little hoop on each end. He described the string as a tool that could be used to slip a lock or to strangle someone. (40RT 1138-085.)

Deputy David Heberling collected evidence at the scene, including appellant's clothes, and a tightly rolled paper found in his cell wrapped in elastic. (40RT 11388-89.) This rolled-up paper was destroyed but Heberling testified it could have been used as a weapon. (40RT 11392-93.) From inside the shower, two paper bags (one inside the other) were collected, containing a 12-foot sheet rope, a 49-foot sheet rope, two outgoing pieces of legal mail from Williams to his attorney and various

toiletries and items of clothing. The bags were from the commissary and had appellant's name on them. (40RT 11396-98.) Heberling photographed blood splatters on the right side of appellant's head and an abrasion on his right finger. (40RT 11402.)

Deputy Edmund Bennett assisted Heberling in the search of cells and taking of photographs on June 22, 2002. Appellant's cell door window was 90% covered with paper (which is not allowed); had Bennett noticed this during a check of the cells, he would have addressed it immediately as he trained others, including Renault, to do. (40RT 11425-26.) The rolled-up newspaper "baton" was on appellant's mattress and it was dense and solid; the nightlight was on, shining towards the ceiling, but two envelopes and a cardboard box were covering the light. Bennett also found soap wrappers in appellant's cell. (40RT 11425-28, 11434.)

Inmate Harold Seems had nine felony convictions and at the time of trial was in custody on a probation violation. On June 22, 2002, he was in cell 10 in Pod C of Shasta County Jail, next to the shower. (40RT 11456-58.) When not in custody Seems drank all the time and sometimes heard voices when going through withdrawal. However, by June 22, he was sober, having been in jail for a month. He knew both Williams and appellant by voice. (40RT 11460-61.)

Seems awoke in the early morning hours of June 22 and saw appellant standing behind a pillar, then lost sight of him as he walked toward the shower door. He heard appellant's voice say "do you have it?" and Williams' affirmative response. Appellant said "We're going to have to kill him" and Williams said "real fast" or something like that. (40RT 11466.) Seems told Deputy Breshears that morning that he heard "bits and pieces" of what was being said and figured out from those bits what he thought was going to happen. But he wasn't sure if what he was hearing was real and it didn't seem real. He told Breshears he sometimes heard voices (without qualifying it by saying when drunk or in withdrawal). (40RT 11478.)

Seems wrote a note saying "RUN!" because he assumed the two planned to jump and kill the officer. He held up the note as the officer came by his cell. (40RT 11467-68.) However, he crumpled up the first note he wrote because he questioned whether he had actually heard what he thought he did. He then wrote another note which Renault took. (40RT 11480, 11491.)

When Renault came upstairs, Seems tried to wave and mouth to him; Renault grabbed the note and took off running toward the door by the shower and grabbed his radio. Seems saw people coming out of the shower

saw appellant and Williams grab Renault and drag him back towards the shower, but he saw nothing in their hands. In the note he tried to tell the officer that he thought the two men had homemade knives. (40RT 11470-72.) Seems saw the deputies come up the stairwell and as they came into the pod, appellant ran toward the upper part of the stair area and said he had nothing to do with it. Appellant had blood on his chest and a bloody paper or rag hanging out of his pants as he walked by Seems' cell. (40RT 11473-75.) Seems denied receiving any benefit as a result of his testimony. (40RT 11477.)

Criminalist Sara Day testified that blood stains found on the shoes and blue shirt worn by appellant on June 22 were consistent with Renault's blood type. (41RT 11629-35.) The blood on appellant's shirt back and neck looked like smear or transfer stains. (41RT 11638.)

B. Evidence Presented in Mitigation.

1. Family background: birth to age five.

Appellant's mother Doreen Smith testified that appellant was born in 1977 when she was 21 years old and had two other children ages three and two. Three other children were born in 1978, 1980 and 1981.[41] She and appellant's father lived all over during these years, sometimes with Paul

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[41] Doreen had 13 children with six different fathers. (42RT 12024.)

appellant's father lived all over during these years, sometimes with Paul Smith Sr.'s mother Phyllis Jones. (41RT 11774-76.) Paul Sr. worked seasonal jobs and they were on welfare when he wasn't working. (41RT 11777.)

When Lori Smith was born in 1980, Head Start made house visits. (41RT 11778.) Doreen took care of her kids at night but was and always had been a "day sleeper." She said her brothers cared for her children while she slept during the day. Doreen denied spanking the kids and was "more of a yeller." However, Paul Smith Sr. whipped the kids with a belt or his hand if they didn't pick up their toys.[42] He was usually gone and then the kids did what they were supposed to do until he got home, when they would break and tear each other's things. (41RT 11780-82.)

In December of 1982 appellant (then five years old) and his brother Tim told her and her mother-in-law that their "dad stuck his dong up their butt" but her mother-in-law Phyllis Jones, a licensed practical nurse, took the kids to the bedroom and then said that they had not been touched. Doreen herself saw Paul Smith Sr. standing over appellant who had his

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42 Doreen also testified that she would have stopped her husband if she knew he was beating the kids, even though when she once saw a bruise that her daughter said had been inflicted by Paul Sr. who denied it. (42RT 12020.)

pants down and was crying. Doreen asked Paul Sr. what he was doing but he said everything was okay.[43] She did not talk to appellant about this incident, although she eventually "turned it in" and the Child Protective Services came and took her children, which she said was "understandable," as she couldn't deal with her sons. (41RT 11783-85, 11807.) Doreen thought she visited appellant once a week for 30 to 60 minutes but at some point stopped visiting.[44] When appellant was six years old Doreen moved to Eureka and never saw him again. (41RT 11787.)

Doreen had used methamphetamine once when she was pregnant with appellant but denied smoking marijuana (although she recalled telling

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[43] Doreen was present when Paul Sr. said that he "blacked out" when he molested the three oldest children; he didn't know how long he had done it and they didn't talk about it; everything was hush-hush. Rebecca had said that "daddy punished" her but she didn't know then that punishment meant something besides being spanked: it meant "don't trust men" which she was telling them anyway. (41RT 11797-98.)

[44] James Briggs worked at a treatment center for juveniles at time of trial. (43RT 12092.) He lived in Redding in 1983 and dated Doreen for over three years. He sometimes drove her to the CPS office for meetings and accompanied her a few times on visits to appellant and his brother Tim. Appellant was withdrawn and backed away from his mother: Briggs saw this some six or eight times over a year. (43RT 12092-94.) Doreen said she wanted appellant and Tim back but was more afraid to get them back because she had already made a mistake. On a scale of one to ten, and based on his observations, Doreen's parenting skills were maybe a two; she was inconsistent, she was abusing alcohol, marijuana and methamphetamine at the time. (43RT 12098-99.))

an investigator that she did). Doreen described herself as bipolar and said she routinely used marijuana when she was young because it calmed her down. She started drinking at age 16 and drank off and on when she was pregnant with appellant, mostly beer, but sometimes bourbon or vodka, and sometimes combined alcohol with marijuana. (42RT 11794-95.) She had been drinking since she was 16 years old and "guessed" that she was an alcoholic when the children were little even though she didn't drink all the time. (42RT 12019.)

Doreen was raised with 11 brothers and sisters in upstate New York. Her stepfather molested her from the time she was three years old until she was 13, and even though she reported the abuse at one point and the police were called, nothing happened. Another time her mother told her it was all her fault. She was also physically abused and finally left home. (42RT 12011-17.)

After the molestation was reported, Doreen wanted to give up appellant and Tim, and then wanted to take them back, but then when they came back to visit, she couldn't deal with them and she thought it was best if appellant were to be adopted. Doreen was using drugs at that time and was not sure if all six of the children she had at the time of the molestation were ever given back to her. (42RT 12021-26.)

2. Social workers.

Carla Alexander, director of Northern Valley Catholic Social Services, worked for Shasta County Head Start in 1983, coordinating social services and parental classes. Alexander first went to the Smith house on a report that five-year-old Rebecca was being molested by the uncle. Rebecca, appellant, and another toddler were at home, as was a woman on the couch whom they could not waken. The house was filthy, there was nothing edible in the refrigerator, the children's bedroom doors had hook locks high up on the outside (too high for a child);[45] there were holes in the floor with the ground and pipes visible below. The woman on the couch was "really out" and the toddlers roamed the house whining. Finally, the mother came back with a hamburger and fries and a baby in arms. Appellant and the toddler were begging for food but the mother said, "Get away from me, this is Momma's lunch." (42RT 11827, 11831-33.)

Although Alexander had seen many bad homes, appellant's home stuck in her memory because it felt "dark and dangerous" even "evil."

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[45] Doreen denied that there were locks on the bedroom doors but admitted she had trouble keeping the house clean because she was a night person, not a day person, and there were "too many overwhelming things going on" in her life and she "was too young." (41RT 11779.)

"There was something really wrong in that home." Catholic Services reported gross neglect and the alleged molest to the Child Protective Services [CPS]. (42RT 11834.) Another visit was made that same day with social worker Janet Green. The little girl was sitting straight up with her eyes closed and could not be woken. Appellant was there and whining. (42RT 11837, 11841.)

Alexander's opinion was that it was not safe for the children to remain in the home. However, CPS decided that the Smith family had "a different lifestyle" and nothing was done. (42RT 11839-40.) Alexander observed in appellant a rare but true attachment disorder: he had no attachment to his mother, who in terms of food outright rejected him. (42RT 11840-41.) It was one of the worst homes Alexander had ever seen, but in those days there was a different level of intervention. (42RT 11844, 11846.)

Indeed, social worker Janet Green of CPS accused the Head Start workers of being unduly judgmental, and insisted the situation was merely a difference in lifestyle. (42RT 11860.) The Head Start workers were astonished and could not understand why CPS did not remove the children. At that time, the conventional wisdom was to keep families intact despite that the Head Start workers complained loudly that the severity of the

neglect was a danger to the children. (42RT 11861, 11867.)

Judith Englesby-Smith, executive director of Head Start, had worked for that organization for 29 years. In her role as a speech therapist she visited Tim Smith in 1980 after Julie Harvey expressed concern about his delayed language development. (42RT 11848-50.) Doreen was not interested in her ideas to help Tim and didn't see anything wrong with her kids or their development. A CPS multi-disciplinary team visited regularly to teach Doreen parenting skills but nothing made much of an impression and Doreen did not change her behavior. In any case, Doreen was not around very much and the children were on their own with seven-year-old Rebecca in charge. (42RT 11853-54.)

The house was extremely dirty, notably dirtier than most houses visited by Head Start; it was chaotic and noisy with people coming and going. (42RT 11851.) There was little furniture in the house and no curtains or bedding, just filthy rags. The living room was piled with wet and dirty diapers and overflowing garbage and smelled of urine and feces. (42RT 11855-56.) The children were locked in their rooms for long periods on end. At the age of two-and-a- half or three, appellant had broken his arm trying to climb out fo a window after he had been locked in for a long time. (42RT 11855.)

Appellant attended a Head Start class which Englesby-Smith's daughter also attended. Englesby-Smith volunteered there and observed appellant. He was sad, shy and withdrawn, he played alone and didn't maintain much eye contact: abused children commonly retreated into themselves because it was safer. (42RT 11851-52.)

Appellant was finally taken out of the house when he was five, two and a half years after Englesby-Smith first visited the house, which she described as memorable as it was one of the worst she had ever seen, a "very, very damaging and very horrendous" home in which appellant lived during the most critical years of child development, from birth to age four. (42RT 11862, 11869-74.)

Julie Buick was a home visitor for Head Start in 1980. She made weekly visits to the Smith home over a nine-month period because Tim Smith was not speaking properly. (42RT 11879.) The house was filthy and smelled of urine; dirty diapers lay open on the floor; the house was in a state of disrepair with broken windows and mattresses on the floor, no sheets and extremely soiled furniture, and holes in the floor to the dirt below. (42RT 11882-85.) The only food was that which came from WIC although Buick always brought nutritional snacks for the kids who acted hungry. It was hard to engage Doreen: she said she was cooperating but Buick saw little

change and Doreen always had some excuse for why the beds had no sheets, etc. (42RT 118883-87.) On one scheduled visit, Doreen was not home and the kids had the oven on and were making mud pies. Another time, Buick found Doreen asleep at 10:00 a.m. and could not awaken either her or the one-year-old and newborn who were sleeping with her. (42RT 11888.-89.)

The oldest girl told Buick that her uncle (who had been sleeping on the couch) had molested her. Buick called CPS and the police were involved but apparently nothing happened. Buick was disgusted because she thought the children should be taken out of the home but it didn't happen. (42RT 11889-90; 11897.) When Buick first started visiting, appellant had a cast on his leg and Doreen said he broke his leg jumping out of the bedroom window;[46] Doreen said the children were locked into their rooms at night because otherwise they got out in the morning before the adults were awake. (42RT 11895.) Everything about the way these children were being raised was shocking. They had no toys or books; people were in and out of the house who shouldn't have been there. (42RT 11896.)

The children displayed "indiscriminate" or inappropriate affection

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[46] Doreen testified that appellant broke his leg double-riding a bike. (42RT 12021.)

or interact with each other, which was unusual. They just huddled around Buick. Buick quit Head Start after this case because no action was taken on the complaint of sexual abuse. (42RT 11981-92; 11895-97.)

3. Aunts and uncles.

Leonard Cromp, Doreen's younger brother, also knew appellant when he was two and three years old. Paul Smith Sr. would beat his young sons when they did something he thought was wrong and appellant got the worst beatings. Leonard did not suspect that the boys were being sodomized although Paul Sr. was mean to them and hard on appellant and Tim. He would shake them and hit them hard. Leonard thought the force was excessive and a couple of times said something to Paul Sr., who shrugged it off. The children acted intimidated and scared of their father; and never got the attention they sought from their mother. They were "always neglected." Doreen stayed out till 2:00 or 4:00 a.m. and left the kids alone. Paul Sr. was on welfare. (42RT 11920-26.) Leonard testified that Doreen was treated like a normal kid but their father disciplined "kind of harsh." (42RT 11923.) A sister Pam was in and out of mental hospitals. (42RT 11927.)

Another of Doreen's younger brothers, Jonathon Cromp,[47] stayed with the Smiths when appellant was four or five. He said he was the "one that walked in and caught [Paul Sr.] molesting the boys." (42RT 11929.) Jonathon heard the boys crying and went into the bedroom where he saw Paul Sr. with his pants down. Jonathon moved out of the house shortly after that, but had been there six months and knew something was wrong because the boys were always acting funny: they would wipe their own feces on the walls to get attention. Jonathon kept telling Doreen something was wrong with them but she ignored him, although Jonathon knew that Doreen knew what was going on by the way she acted. The house was a pig pen; food was dumped on the floor; dirty clothes and diapers were strewn around. The kids had to fend for themselves and acted "like when you whoop a dog . . . and it's always shying away? That's what they acted like when they were younger." (42RT 11928-32, 11936.) Doreen and Paul Sr. went out at night to coffee shops and sat there for hours and the kids mostly stayed at home. The boys cried a lot. The boys were starved for attention and were spanked "all the time." Paul Sr. used a belt and it was excessive. (42RT 11934-35.) The children "went through hell when they were younger."

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[47] Jonathon had been to prison three times for drug offenses. (42RT 11939.)

(42RT 11936.) Jonathon never saw appellant after that time until appellant was in jail for the charged offense. (42RT 11936.) Jonathon felt that Doreen and Paul, Sr "should have been here in this courtroom." (42RT 11937.)

Debra Miller[48] is Doreen's younger sister. She was around the Smith family from the time of appellant's birth until he was five when he was taken away and lived nearby for a couple of years. Debra testified that Doreen beat the boys with belts and coat hangers. Doreen often slept during the day and the boys (appellant and Tim) would get up to get themselves something to eat; Doreen would then get mad because they had made a mess. (44RT 12411-13.) Debra had five children ages one to seven and the cousins played together. There was an attic bedroom with a cubby hole (in which the boys could not even stand up) where Doreen would lock up the boys to scare them when they were in trouble. (44RT 12413-18.)

Debra was present when seven-year-old Rebecca (Doreen's oldest child) told Doreen about what Paul Smith Sr. molesting her and Tim and appellant. Doreen slapped her and said, "You are lying, little bitch." (44RT 12419.) Debra and Doreen drank and did drugs together. Doreen's house

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[48] Debra was in custody on her fifth felony conviction at the time of trial. (44RT 12411.)

was filthy, with dogs and cats defecating on the floor and the babies wearing the same diaper all day. (44RT 12420-21.) CPS was called to the house a couple of times but nothing was ever done. (44RT 12421.) Debra would ask "why are you doing that" when she saw Doreen and Paul Smith, Sr. beat the boys and they told her to stay the hell out of their business. (44RT 12423-24.) The boys mostly took care of themselves. Appellant was starving for affection every time Debra went to the house. (44RT 12424-26.) Debra didn't call CPS because her mom had already called and nothing was done. (44RT 12427.)

Appellant's aunt Karen Smith is married to Paul Smith Sr.'s twin brother. Karen visited the Smith house when appellant was a toddler, and noticed no problems other than that the house was messy and reeked of urine and Pine-sol. There were so many clothes and boxes and extra relatives living there that there was barely a path to walk in through the house. (42RT 11905-07.) Also there was no set dinner or bed time, and no structure and no love. However, when appellant and his siblings were at Karen's house they seemed happy. (42RT 11909-10.) Doreen had too many children all at once and was unable to care for them. (42RT 11911.) Doreen told Karen she had to lock the young boys in their bedrooms at night so that she wouldn't wake up to messes. (42RT 11912.) Karen

thought that appellant broke his leg when he was two or three when a door fell on him when he was playing on the porch at Karen's house. (42RT 11912.) Karen and her husband thought seriously about trying to get the children to live with them, but they had a small house and financial concerns. (42RT 11913.) Karen had little contact with the family after appellant turned three. (42RT 11914.) Karen knew that Doreen was going out to bars but never personally saw her drink. (42RT 11918.)

Sara Belongie, appellant's paternal aunt, testified that Paul Sr. had been sent away one summer to a mental facility but it was understood that the family did not talk about it. After her father died, her mother (Phyllis Jones) remarried Jim Brooks, who was not a good stepfather. (43RT 12364-66.) However, before her father died and when she was in fourth or fifth grade, he molested her more than once. (43RT 12373-74.)

4. Appellant is removed from the family home at age five.

In 1983 Paul Sr. confessed to Dr. Steven Blankman that he had sodomized appellant and Tim over the course of several years. Blankman reported the abuse (mandatory reporting had come into effect that year) to the Department of Social Services and the children were taken into custody. (43RT 12241-47; 42RT 12234-36.)

Paul Sr. admitted he was also molesting his daughter. He said he didn't know why he was doing it but told the boys it was their punishment for not doing right in the house; he penetrated their rectums with his erect penis twice a month for over two years. At first the boys cried in pain, but recently he hadn't noticed much crying. Paul Sr. said he had molested his sister when he was growing up and had been sent away for a short time at the age of 15 or 16. Paul Sr. was arrested and sent to prison after pleading guilty to several counts of sodomy. (42RT 12034-39.)

Dr. Anthony Borschneck treated the five-year-old appellant in 1983 when he was brought in by the CPS. Appellant had loose rectal muscles consistent with rectal penetration. There was no tearing or bleeding, which would be the case if rectal penetration had been going on for years. Other than sodomy, there was no medical explanation for the rectal laxity found in appellant's sphincter muscles: for example, a child could not create this condition with his own finger. (42RT 12028-30, 12033.)

Appellant was removed from the family home by the CPS despite the CPS policy of trying to rehabilitate families because he had been sodomized by his father, and was finally recognized to be in immediate danger. Dennis McFall reviewed the "very extensive files" of appellant's placement history with the CPS. (42RT 11951-56, 11964-67.)

Appellant was in 13 placements during the seven-year period from 1983-90 (when he was five to 13 approximately) which McFall described as an "alarming" number of moves as such disruption of neighborhood, school and friends (or lack thereof) is not healthy for children. (42RT 11970-71, 12001.) During that time CPS had severe budgetary limitations and the mental health services available for children were somewhat limited. There was no emphasis on early intervention with children's psychological or mental health problems. (42RT 11971-74.) In 1983 the CPS was not equipped to deal with appellant because the CPS workers' knowledge and training regarding sexually abused kids was minimal: they "didn't have a clue." (42RT 11978.) Social workers had heavy case loads of children and foster parents required only letters or reference: no training or orientation was required and placements were informal. (42RT 11979-80.)

Appellant's situation was "certainly the worst situation that [CPS] had encountered . . . and remain[ed so in his mind] in terms of the early onset [of abuse and neglect and abandonment] and the length of time and the severity." The damage to appellant was in the top one or two percent of worst cases he had ever seen. (42RT 11983-84.)

Appellant suffered more than simple abandonment because it was an off-and-on abandonment by the mother, who wanted the kids back and then

abandoned them again. (42RT 11986.) McFall explained that some children respond to the difficulty in being removed from a home by aggression, and others by withdrawal. Children with adequate parenting from birth to the age of one year have more emotional reserves in comparison to children such as appellant, who suffered chronic and long-term deprivation from the time of birth. (42RT 11992.) McFall's professional opinion was that the CPS system failed appellant, because of funding, resources and organizational issues. (42RT 11997, 12002.) On occasion appellant settled in to a particular foster home and did reasonably well and on other occasions he made a swing to the other extreme: "it was a fairly complex situation." (42RT 11999-12000.)

Appellant had experienced "all of the negativity that [one] could possibly [] experience as a five year old." (42RT 12002.) Although appellant had 12 different psychological examinations over the years he had no ongoing therapy or relationship with a therapist and thus did not have the opportunity at any time to make a decision or choose to "get rid of [his] baggage." (42RT 12002.)

Blanch Orsini took appellant and his sister Catherine into her foster home in June of 1983. At that time Orsini just filled out some paperwork on her background to qualify as a foster parent. Appellant stayed at her

home a little under two years: Orsini did not consider herself a long-term foster parent; she wanted to be temporary home for children awaiting permanent placement. (42RT 13043-50.) When appellant first came he was impulsive and had difficulty controlling his impulses. For example, once the noise in the gym was too much stimulation for him and he sat down and pounded the floor because he couldn't think. He was diagnosed with Attention Deficit Disorder and prescribed Ritalin; on his medication he did better in school and wasn't so aggressive. (42RT 12050-54.) Appellant went to counseling once a week for awhile.[49] Appellant found it difficult to accept affection and would turn away from touch. (42RT 12058.) Orsini could not remember much except that appellant was a little boy with ADHD [attention deficit and hyperactivity disorder] and the behaviors that go along with that; at times he acted out and was somewhat aggressive. She did not have appellant removed because of any problem: it was just time for him to move on. (42RT 12061-62, 12069.) When appellant was five or six a

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[49] Bill Grubbs was appellant's first grade teacher. He tutored him in reading at Orsini's home twice a week. Appellant sought and needed attention and affection. At school appellant was not a problem and acted out only when his space was invaded or when he was extremely focused on some activity. (43RT 12297-99.) The Orsini foster home was run more like a business than a family and appellant definitely needed a family. (43RT 12302.) Orsini disciplined appellant (for example at times, she locked the children outside the house) but didn't provide for his emotional needs. (43RT 12303-04.)

duckling was found with a broken neck and appellant was the only one there. She might have reported that to the CPS. (42RT 12075, 12078-79.) Appellant returned to her home for a short period of time at the age of 12: she thought he was then a "product of the system," "foster homes, group homes, are not the best place for our young people to be." (42RT 12059, 12080.)

In 1985, at the age of eight, appellant went to the foster home of Frances Jones, who worked with boys with difficult backgrounds. Gary Janeiro worked as a child therapist for the Shasta County Mental Health unit and assessed appellant when he was in a group home in 1985. (43RT 12309-11.) At the end of six sessions appellant had made some progress at school and in the foster home and Janeiro recommended that therapy be reinstituted with a woman: Janeiro he felt strongly that appellant needed nurturing and constancy. Janeiro anticipated that absent constancy and appellant being in a placement for a period of time where he could learn to trust authority (to counteract the effect of child molestation) appellant would exhibit more aggressive behavior. (43RT 12317-20, 12328.) However, Janeiro was never asked to give further treatment to appellant. (43RT 12322.) In 1985 there was not the amount of communication between CPS and the Mental Health unit that there is at the current time.

(43RT 12324.)

In 1987, Frances Jones' foster home was decertified and the program converted into a group home run by Jones' son Ken Sloan and appellant was transferred to Sloan's New Hope group home. (43RT 12171.) A foster home had two or three children from broken homes; a group home could have up to six and usually they were kids involved in crime and from rougher backgrounds. Appellant was placed with the group home delinquent children even though he was a placement from CPS not the probation department. (43RT 12179-80.) There were some problems with Sloan who had to be warned against using corporal punishment. Sloan was a large and physical man who used to intimidate kids with his size and angry voice: the opposite of Francis Jones' nurturing style. (43RT 12181-83.)

According to pastor and social worker Lyle Faudree appellant had been in a close and loving relationship with Jones; he was a charming boy with a winning smile although he suffered from ADHD and took Ritalin at some point. (43RT 12172-73.) Appellant had a high energy level but at times was quiet and depressed: molestation and abuse results in anger and depression. Appellant's adjustment at the Jones home was good although he had some problems with teachers and fighting at school. (32RT 12173-

74.) He sought attachment and non-threatening relationships with both men and women. (43RT 12175-76.)

Mary Ranken was principal of the elementary school appellant attended from 1985 to 1989. (43RT 12338-39.) Ranken tried to meet appellant's needs by letting him do his school work and reading in her office. (43RT 12340-41.) She and her husband discussed adopting him but didn't because he appeared to have a close father/son relationship with Ken Sloan. Sloan was also in her office frequently and called appellant "son" and kept saying "I am here for you buddy." (43RT 12342.) Appellant loved Sloan and walked and talked like him. For two and a half years Sloan repeatedly told appellant that he was his son and that Sloan would never leave him. (43RT 12343.)

Then things changed. A van would come to pick appellant up instead of Sloan. Sloan's attitude toward appellant became more business-like and distant. And appellant changed from a boy who loved and found everything interesting to a hostile, distant and angry boy. He was hurt and angry. (43RT 12344-45.) On December 12, 1986, appellant told her that Sloan had physically abused him and she filed a report with the CPS. However, after this appellant began to overreact to perceived slights. Ranken tried to find out what had happened but couldn't get any

information. After a couple of months, appellant ran away and she didn't see him for several years until he was brought to Sloan's wedding. (43RT 12349-52.)

Ranken expressed her concern to every agency she could but had problems communicating with the other agencies: at that time there was not the team-approach and active partnership with the CPS that exists now. (43RT 12355.) Ranken confronted Sloan about his change in attitude toward appellant and was told that appellant was "one of the kids at the home." When she reminded him that he said he would always "be there" for appellant, Sloan said that "things change." (43RT 12356-57.)

Raymond Trippo[50] was in Ken Sloan's group home with appellant in 1988. Sloan was cruel and struck appellant with boards, grabbed him by the hair, and made him stand in corners for hours. This abuse went on for a few months. Trippo and appellant ran away numerous times. Appellant acted timid around Sloan when Trippo first came to the home and appeared to be afraid of Sloan. (44RT 12435-36.) Sloan never told them the rules but if they broke a rule they would "catch a back hand." (44RT 12437.) Sloan also used the wood pile punishment: making appellant move a large

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50 At the time of trial, Trippo was in custody for a parole violation for attempted robbery. (44RT 12434.)

pile of wood from one side of the house to another. (44RT 12437-38.) Sloan called appellant "little punk" and "little bastard" every time he got in trouble. (44RT 12439.) Sloan's mother Francis Jones, on the other hand, treated them well and spoke to them gently and with respect, "like how you should speak to a child." But appellant only got to go with Jones six or seven times. (44RT 12440.)

After Trippo and appellant got in trouble for talking on the bus they ran away and jumped a train. They got off in Placer County and eventually talked to a deputy up there. At first they said they were runaways from Oregon (because Trippo was afraid to be sent back to Sloan) but eventually told the truth. (44RT 12440-41.) Sloan once broke a board across appellant's face but it was never reported. (44RT 12444-45.)

Michael Bringle was a social worker and had appellant assigned to his caseload when appellant was placed in Frances Jones' foster home. At first appellant did fairly well with her and in school; Bringle also arranged for appellant to see Gary Janeiro for counseling. (45RT 12901-05.) Although Bringle had recommended long-term foster care for appellant, appellant was transferred from Jones' foster home to Sloan's New Hope group home, under the assumption that Jones would be around to provide continuity for appellant. Appellant did not have problems in the Jones

foster home but once in Sloan's group home, problems arose. Appellant reported that Sloan[51] hit him with a 2x4 (Bringle had counseled Sloan about corporal punishment and told him it was prohibited under state licensing regulations) and appellant ran away many times. (45RT 12904-09.) Bringle was informed that after running away to Placer County appellant threatened suicide and did not want to go back to Sloan, although in the end appellant agreed and Bringle returned him to Sloan. (45RT 12912-14.)

At some point Bringle wrote a letter[52] recommending that appellant go under the jurisdiction of the probation department (a 602 rather than a 300) rather than under the CPS jurisdiction, even though the reports indicated that appellant had done well in foster homes and until he went into Sloan's New Hope group home. (45RT 12917-23.)

Greg Parker was the Department of Social Services attorney who prosecuted actions against group home licensees. In 1990-91 he filed an action against Kenneth Sloan based on accusations and investigations by their investigators. Parker met with appellant a couple of times to assess his credibility and thereafter included seven or eight accusations against Sloan

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51 Sloan was a muscular weight-lifting type and appellant was very small. (45RT 19222.)

52 Exhibit T-QQ.

involving appellant. (44RT 12636-39.) Parker told appellant he believed him which surprised appellant. Appellant was a reluctant witness against Sloan and told Parker that he had bonded with him and that Sloan was as close to a father figure to him as he had ever gotten; he said he had asked Sloan more than once to adopt him. (44RT 12643-45.)

In 1992, the Department of Social Services determined that Sloan had engaged in 21 incidents of improper physical discipline and contact with the children in his group home; and that Sloan was less than credible and lacking in insight into his personal anger management. Sloan was barred from serving as an employee of any licensed facility. (41CT 10454-89 [Exh. T-TT]; (44RT 12646-47.)

Barbara Granberry testified that appellant arrived from Sloan's New Hope Group Home to her foster home in 1989 (when he was almost 12) and left two months later. Appellant was a "very angry little boy." Granberry tried to give him good food and hugs but she wasn't a very experienced foster parent at that time and had six kids of her own, so appellant did not get a lot of her time. (43RT 12207-10.) Granberry did ask social worker Michael Bringle from CPS to come to the house to talk to appellant and he did so almost weekly. However, appellant was not seeing any therapist or psychologist. Granberry felt she needed better training to treat appellant

and knew she had to give him up after two months after appellant threatened another boy in an argument one night.[53] (43RT 12211-13.) Granberry had thought then that affection would be enough, but over the years had learned that love was not enough and training was required to be able to help sexually abused and neglected children deal with their anger and sadness. (43RT 12217, 12219.) Granberry did not think appellant got sufficient help. (43RT 12228.)

In 1990, at the age of 12, appellant was charged with a misdemeanor battery and Shasta County probation officer Frank Hartmann recommended placement in a suitable foster group home. Hartmann knew of appellant's past and recommended counseling. (44RT 12385-88; 12391.) Appellant had very poor social skills and was undeveloped emotionally; he had an issue with trust and problems with attachment. Furthermore, he was institutionalized. Although appellant was intelligent and young, Hartmann was concerned that appellant was "fundamentally broken." (44RT 12391-97.)

William Sweeney of the Helping Hands group home testified that there was a staff member available for counseling kids who were acting out

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[53] Appellant had threatened to cut the other boy's throat when they went to sleep that night and it frightened her. (43RT 12224-26.)

sexually; but he didn't know if there was anyone with special training to deal with sexual incident. (38RT 10738, 10741.) In 1990 there was more "warehousing" of children in group homes and the curriculum was not as developed as at the present: there is now more access to mental health services and staff are required to have more training. (38RT 10755, 10757-60.)

James Masterson, of the Shasta County Probation office testified that he got to know appellant well when he came into contact with him at various times in juvenile hall between July of 1990 and December of 1994. (44RT 12595.) Masterson liked appellant who was bright and interested; he never had any problems with him. Around 1992 or 1993, Masterson and his wife discussed adopting appellant. Masterson thought appellant had a lot of potential and was personable and had come from a bad background. (44RT 12596.) Appellant was the only juvenile Masterson ever considered adopting but in the end decided against it. (44RT 12601-02.) Although appellant sometimes kicked his door and flooded his room, Masterson never saw him exhibit violence toward another person. (44RT 12603.)

Bunny Masterson (James' wife) also worked in juvenile hall and met appellant on various occasions. She and her husband discussed adopting appellant and wanted to give him a chance to benefit from having a family

who loved and cared for him instead of abusing him; to give him opportunity to grow into a decent productive adult. However, because it would mean leaving their employment at juvenile hall, and because they had two teenage girls, one of whom had started a family, they decided against adopting appellant as they wanted to give their time to their children and grandchildren. (44RT 12615-19, 12627) Appellant was always respectful and seemed to be searching for a mother figure; he was in need of one-on-one attention and normal parenting. (44RT 12620, 12628.) There were many incidents in which the staff provoked appellant by putting him in a room when he wanted to do something so they could restrain him: she personally saw this happen at least six times, starting when appellant was only 12 years old. (44RT 12621-24.) Appellant was no more manipulative than most children. (44RT 12628.)

Isaac Mann was a child care worker at I'SOT when appellant was there at age 13 in 1991. Mann spent time with appellant trying to develop a relationship with him. Appellant was intelligent and imaginative but had a hard time with large groups. (46RT 13202-09.) What triggered appellant to anger was having his things messed with or being bullied by bigger people; he was frustrated by what he considered as manipulation or abuse by others. Appellant realized at times he was out of control; he seemed to understand

why, but was unable to control it. (46RT 13213-14.) Up to the time appellant injured himself in a ball game (requiring 50-60 stitches), he was making progress, but his injury interfered with his program and things deteriorated from that point on. (46RT 13215; 46RT 12964.) Appellant was expelled from I'SOT after he and another ward were found firing a gun at ground squirrels in a field one night and breaking a truck window with a bat (46RT 13215-17; 12966, 12976.)

Elzena Metcalf worked at the Excel Center as appellant's therapist for a short period of time in 1991. Appellant was unable to trust her or any adult and thus was unwilling to talk about his feelings. The abuse he suffered at the hands of those he did trust damaged his ability to trust others. He was severely damaged emotionally. (45RT 12836-39.) The decision to terminate him from the program was not hers. However, the Excel program was not appropriate for appellant because it did not have sufficient security to deal with his acting out. His supposed "not wanting to change" was characteristic of damaged and abused children who don't want to express their internal feelings. The damage done to appellant at such an early age was so severe that Metcalf didn't think he would ever be able to overcome it. (45RT 12843-47.)

Lisa Rowe met appellant when he was 13 years old in 1991. She

worked for McAllister Ranch group home as the bookkeeper. Appellant did his homework in the office and she had daily contact with him. Rowe took appellant home every other weekend; he fit in with her six-year-old and eight-year-old children and he was bright and nice. She loved appellant as her own at the time, and hoped to bring appellant permanently into her house. However, she was engaged and planned to have more children with her fiance, who was against having appellant in the home. (46RT 13242-46.) Consequently, Rowe left McAllister Ranch. She explained the situation to appellant and he understood. They corresponded and later when he was in the CYA he found her and called; he was crying and begging him to let him live with her. It took him a year to accept her decision not to take him in and she decided it was best to end the relationship completely because it was not good for him to hold on to a dream that wasn't going to happen. (46RT 13247-48.)

Rothel Williams had the 16-year-old appellant in his Stockton group home for six or eight months in 1993-94. Overall appellant did well: he did his chores, came home on time, followed the rules and shared a room with his brother Tim. (46RT 13229-32.) Williams (who is African American, as is his wife) saw no signs of racial tension and appellant treated him and his wife with respect. (46RT 13233.)

Daniel MacAllair testified as an expert in the California Youth Authority and the county juvenile justice system services. (44RT 12506-14.) He examined the conditions at CYA during the time appellant was in custody there, from February 1995 to November 1997, to determine how it might have affected appellant's later behavior. (44RT 12518.) Appellant was initially considered for the Dewitt Nelson and Ventura facilities because he consistently tested at grade level (he was 17.8 years old when he entered), which was very unusual for CYA candidates, but he was eventually placed at the Stockton "Close" institution at the most crowded time in its history, when it had almost 500 youth despite a capacity of 350. Close was for young offenders and appellant was placed with the older of these youngsters but was mainstreamed so he got no counseling or access to mental health professionals. (44RT 12522-27.) Appellant performed well in school but was unable to maintain relationships with peers or staff and was a consistent management problem. Despite that appellant was sent to CYA for possession of stolen property, a crime neither violent or sophisticated, he was sent to the most infamous CYA facilities because he was a management problem. (44RT 12542-43.) After four months he was moved from Close to Preston for a year, an institution for older, more criminally sophisticated wards with a reputation as the most difficult and

dangerous of all CYA facilities except for one. (44RT 12535-36.) A year later he was sent to Chaderjian ["Chad"], the one facility more difficult and dangerous than Preston. (44RT 12537, 12541.)

Appellant was often placed in isolation[54] for arguing or disobeying the staff: he was reported as saying that he could not deal with people who touched him or tried to touch him. (44RT 12538 .) Appellant's report noted his great fear of people thinking of him as weak: those entering CYA had to prove they were ready to fight to avoid a label of weak which would mean being victimized and raped.[55] (44RT 12544-47.) CYA was also extremely stratified racially and the inmates were expected to show loyalty to their race and not to mingle. (44RT 12548.) It was not so much that the CYA taught violence but that it could not provide the services necessary to address the wards' problems which resulted in exposing the youth to violence, aggression and manipulation on a daily basis: violence was deeply ingrained into the institutional culture of the CYA. (44RT 12550-52.) CYA was unable to provide long term rehabilitative services. (44RT

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54 Isolation meant a poorly lit and ventilated cell for 24 hours a day, often clothed only in underwear, with an enforced code of silence. (44RT 1253-40.)

55 This atmosphere in CYA was the subject of numerous legislative hearings at which Mr. MacAllair testified. (44RT 12546.)

12529.) Nonetheless, appellant earned his GED and did well in computer training. (44RT 12541, 12543.)

5. Expert testimony.

Dr. Steven Blankman (who had reported appellant's father to the CPS) explained that sexual molestation from the age of two to five can cause severe damage to a child persisting into adulthood in terms of the victim's ability to relate to people and to achieve goals. It can result in psychological disorders and greatly interfere with a person's ability to form relationships and understand other people and their feelings; particularly where the family support system is not intact. (43RT 12252-54.)

Appellant began therapy with Dr. Blankman in June of 1983. Dr. Blankman believed that appellant was psychologically damaged and was in danger of developing a more entrenched conduct disorder because of abuse and neglect and thus needed individual therapy with the involvement of his parents. (43RT 12275-77, 12282.) In March of 1984 Dr. Blankman reported that appellant had been prescribed Ritalin and a diet free of artificial additives (both believed helpful for children with ADHD) and seemed to display inappropriate aggression less frequently. (43RT 12279-80.)

Appellant's mother Doreen had missed a great number of

appointments; she was unstable and impulsive[56] and Dr. Blankman recommended that the children be placed in foster homes. (43RT 12282.) In September of 1984, Dr. Blankman suggested permanent foster placement for appellant. Blanch Orsini reported that appellant was disobedient and destructive in the house. Dr. Blankman noted that the previous decrease in aggression had increased possibly due to appellant's awareness that he would not return to his mother and visits with her had been discontinued (children, no matter how abused or neglected, always want to return to their families). (43RT 12283-84, 42RT 11990.)

By the fall of 1984, Dr. Blankman moved out of Redding and could not continue therapy with appellant. Dr. Blankman reported that all of the Smith children had been "seriously warped because of the abusive, neglectful and chaotic circumstances in which they ha[d] been raised" – in the 20 years of Dr. Blankman's practice, the Smith family was definitely one of the worst, and possibly the worst, family he had known in terms of psychological damage inflicted on the children. (43RT 12286-87.)

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56 Dr. Blankman explained that Doreen herself had been beaten by her mother and molested by her father from the age of three; she was taken out of school in the 8th grade to care for her eight younger siblings and then kicked out of the house at the age of 16 when she began extensive use of alcohol and drugs. She could not function as an adequate parent. (43RT 12273-74.)

Dr. Blankman conducted psychological testing on appellant. Appellant was not completely cooperative; some of his behaviors themselves indicated emotional disturbance resulting from the long-term and severe molestation appellant suffered. The fact that the molestation was described as punishment made it worse, as it affected his ability to understand limits and confused him as to what is and is not proper behavior. (43RT 12261.) Testing showed appellant of average intelligence and revealed possible neurological or development difficulties in hand-eye coordination and ability to pay auditory attention. He was shown to be insecure, overwhelmed and isolated, and inclined to act out those feelings and to seek extra structure from his environment. (43RT 12263.) Acting out is common in severely molested children such as appellant; it is a defense mechanism allowing him to deal with anxiety caused by the abuse by expressing those impulses in sexual or violent behavior. (43RT 12264.) Dr. Blankman diagnosed appellant with an adjustment disorder with conduct disturbance – a response to the psychosocial stressors of incest, inconsistent and inadequate care. and removal from his home. (43RT 12269-70.)

Dr. Myla Young, a certified clinical neuropsychologist and full time provider of mental health to severely mentally ill inmates, administered a

series of psychological tests to appellant to determine whether he had a mental disorder affecting his functioning.[57] (45RT 12665-74.) Dr. Young explained that brain development begins before birth and continues to develop after birth, as the brain triples in size during the first two or three years. (45RT 12684.) This brain increase occurs with normal development and nutrition as long as a traumatic environment doesn't interfere. (45RT 12684.)

The brain develops in three stages: first the limbic system. Environmental trauma occurring during the critical first few years damages this system the most: it is the part of the brain that controls emotion and filters out stimuli. The second part of the brain to develop is learning; and the frontal lobes develop last, allowing rational thought. (45RT 12687-90.)

When a child does not receive its needs of warmth, comfort and nutrition, the brain is damaged in a specific way: the subcortical system that allows appropriate emotional response is damaged (yet other areas of the brain can develop in a reasonably normal way so that emotional damage to the subcortical system does not affect cognitive development). (45RT 12706-07.)

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[57] Dr. Young also reviewed many CPS, school, and group home records as well as the evidence in the murder prosecution. (45RT 12720-21.)

Dr. Young conducted six days of testing on appellant in February of 2001 and March of 2002 (before and after the concussion bomb was thrown into his cell during the cell extraction). (45RT 12710.) The first raft of tests showed appellant's functioning to be severely impaired except for his IQ which was only impaired. His attention, memory and executive functioning were all very, very significantly impaired. (45RT 12710-11.)

Neither round of testing showed any evidence of malingering. (45RT 12722.) Appellant's IQ was high average showing that the second functional area of the brain developed appropriately and worked significantly better than the first functional area of the brain (limbic system). However, both testings showed his attention and concentration to be from mild to moderately impaired. (45RT 12724-27.) The subcortical areas (psychomotor and organization) were found to be moderately to severely impaired, which affected appellant's ability to perceive, reproduce and organize. The most important way this impairment affects behavior is in terms of not being able to see something, make sense of it and organize it. (45RT 12729-31.) For example, appellant's behavior in the cell extraction was consistent with his test responses in emotional functioning: he was not perceiving reality accurately and not thinking logically but more in a psychotic and rage-like manner. However, this was not a conscious

decision or choice; rather his neurotransmitters were flooding the area of the brain that allow reasonable thought. Dr. Young concluded that appellant's subcortical "first" functional area of the brain was definitely damaged. (45RT 12734.) Her second finding was that appellant's ability to perceive reality was not accurate in the sense that it was not similar to what others would perceive: his brain distorts information, making him vulnerable to misunderstanding situations. (45RT 12760.) The third finding showed appellant significantly vulnerable to illogical thinking when trying to make sense out of a situation, so that he draws erroneous conclusions. The fourth finding was that anger underlay appellant's emotional needs, interfering with his ability to have that need met. (45RT 12761-62.)

These abnormalities which were revealed by neuropsychological and emotional testing affecting appellant's ability to control his behavior: he misinterprets and then sets up unexpected behavior which result in people acting in unexpected ways towards him: the fact that he understands a given scenario differently form others activates the area of the brain that controls his emotions and his ability to modulate those emotions which results in him responding in an irrational way, and that irrational way is often based on the inability of his medulla to "not produce all of those

neurotransmitters, that makes you respond in a very aggressive way." (45RT 12765-66.)

Dr. Young explained a series of reasons why his brain functions the way it does, beginning prenatally, including his mother's stress and drug and alcohol use,[58] and sustained parental neglect and lack of nutrition, abandonment, and the two and a half years of bimonthly sodomy resulting in constant alertness or flooding with neurotransmitters raising adrenaline and hormone levels of the interior subcortical parts of his brain.[59] (45RT 12771-78.) Testing also showed serious depressive or mood disorder: long standing depression biologically related and not based on the fact of his incarceration. (45RT 12758-59.)

Dr. Young reviewed reports from other doctors in 1983, 1986, 1990 and 1990, which indicated major depression, PTSD, and suspicion of neurological impairment. (45RT 12786-90.) Her own diagnosis was depressive disorder NOS or depression, psychotic disorder NOS, PTSD

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58 A mother under constant stress affects the development of the fetal brain, preventing neurons from migrating and attaching in the locations which allow chemical communication. (45RT 12700-01.)

59 An abused child is subject to overstimulation because he must constantly be on the alert and ready for danger. The brain responds to this danger by pumping out neurotransmitters and adrenaline. (45RT 12705.)

(from repeated rapes as a child) and cognitive brain disorder NOS — NOS signifies either not enough information to make a specific diagnosis or that several elements of the diagnosis are present but none accurately reflect it. Dr. Young used the NOS diagnosis with appellant because he didn't want to talk about depression. (45RT 12792-93.) In sum, appellant is of high average intelligence but his traumatized existence left him with multiple vulnerabilities in brain functioning and emotional development making it difficult if not impossible to consistently use and access his high IQ. (45RT 12796.)

Psychiatrist Dr. George Woods specializes in trauma issues. He examined appellant three times for a total of six hours, and reviewed some of the materials in this case. (47RT 13276-81.) Dr. Woods concluded that appellant was raised as a "feral child." The sexual abuse was a significant issue in terms of appellant's mental disease or defects, but the neglect and abandonment were also significant factors. Appellant's mother, instead of protecting her children, colluded with the abuse. Her neglect was such that all 13 of her children were eventually taken from her (the last four at birth). These factors "increased the effect of the continual raping" of appellant as a child. (47RT 13284-87.) Abandonment, neglect and abuse during the all-important first five years of a child's life destroy that child's ability to cope

and to respond appropriately for the rest of his life. (47RT 13288-89.)

For an abused child it is extremely important to develop coping skills but instead of providing this curative to appellant, his parents were drinking, doing drugs, and telling him the rapes were punishment. Children at that age don't have logical brain processes and thus often act out their trauma. For example, appellant and Tim were suspended from school for running and screaming "out of control" in the hallways. This inability to respond appropriately to stress and inability to self-regulate can be the longest lasting and most significant of all problems resulting from child sexual abuse. Such abused children have a high probability of not being able to perceive situations accurately or respond to them appropriately. (47RT 13293.)

Appellant's history showed numerous examples of "internal isolation" and need for control. When the Smith children were told that their father was going to prison; appellant physically turned away (he could not cope); when appellant was in the Modesto psychiatric facility for 16 days he was restrained five or six times, not because he was psychotic but because it was necessary to control him. The doctors documented that appellant felt safer and more comfortable in restraints, which is consistent with someone whose history of neglect and abuse is so severe that he has no

coping mechanisms. (47RT 13294-97.) Such a child does poorly in groups and in group homes, because of his explosive behavior, which is his inability to cope or deal with the slightest thing, such as having someone brush by. (47RT 13298.)

Dr. Woods pointed out that appellant had had lots of contact with mental health providers when he was in placements but had no specific treatment, which is what was required, given the level of his damage. Appellant needed a combination of behavioral control and psychological treatment, starting at the age of five when the rapes were reported. (47RT 13303-04.) Dr. Woods noted that the proof that appellant's behavior was psychological "acting out" from trauma, as opposed to just bad acts, was that "every child in that family has had the same problems" and acted out with aggressive behavior. (47RT 13305-06.)

Dr. Woods explained that the stress from repeated rapes creates in a child a chemical brain change (from the stress of the rape and the anticipatory anxiety after and before) of higher catecholamine levels, resulting in hypervigilance and a chronic state of hyperactivity. Traumatized adults may eventually "get over" that trauma, but a chronically traumatized child is different, because the chemical changes occurred during the critical time of development, so that his changed brain chemistry

became "fixed." This is particularly true because in addition to the years of anal rape by his father, appellant was neglected and abandoned: he was never comforted and nothing over the course of the rape years lessened his anxiety. (47RT 13315-21.)

Moreover, after being taken out of the house and his life of hell, appellant was retraumatized by events that brought back many of the original traumatic feelings, such as when Ken Sloan and Lisa Rowe held out promises of guardianship and then abandoned him again. (47RT 13321-23, 13374.) Children traumatized like appellant was can't lie down and cry because their emotions were damaged at such a young age: there was no family support system. Appellant, whose emotional system was dysregulated from abuse and neglect, had only two emotional options: numbness or explosiveness, and indeed the consistent word in appellant's record was "explosive." (47RT 13323-26.)

The appropriate diagnosis for appellant is PTSD [post-traumatic stress disorder]. Dr. Woods explained that the ability to choose depends on information fed into the system. If the information fed into appellant's brain during development was rape and chaos and neglect and abandonment, that information affected his ability to make choices and to understand. (47RT 1330-31.) According to Dr. Young's testimony,

appellant had a high potential to make "damaged choices" because he perceives things differently than others, and his anxiety is so high, it impairs his ability to think through a problem. (47RT 13333.) In effect, despite Frances Jones' positive influence, with appellant the die was cast. He could not recoup the emotional damage done to him; it would be like asking someone who has had a leg shortened to walk faster when he got older. Sexual abuse from a family member is the most destructive and long-lasting traumatic experience a child can have; and when neglect and abandonment are added into the equation, the probability of permanent damage is even greater. (47RT 13335-36.)

Attachment is part of a normal nurtured childhood; appellant had problems with attachment and instead disassociated himself from situations: a common symptom of severe trauma is to imagine that the trauma is not happening or to suppress the memories. This symptom manifests itself later in life as the inability to assimilate information. (47RT 13334, 13338-40.)

Dr. Woods' conclusion was that appellant suffered from PTSD and that the symptoms of this mental disease were present at the time of the offense, impairing his ability to conform his behavior to the law. (47RT 13351-52.) Dr. Woods said that although the description of conduct disorder (diagnosed by Shasta County Mental Health) fits appellant, it's

different when there is serial anal rape in one's background. Dr. Woods distinguished "bad behavior" from psychiatric disease: with PTSD the stressor is such that it in itself creates the disorder. (RT 13364-67.)

6. Mitigation of the 1990 incident of supposed forced oral copulation.

Justin Burger (who testified for the prosecution in the 1990 incident) was currently the administrator of a no- profit agency providing intensive programs for emotionally, physically, and sexually abused children. He testified that the type of intervention therapy for abused children was not available until 2000. (45RT 12824-29.) In the Helping Hands group home appellant responded with hypervigilance, hypersensitivity to perceived threats and an almost involuntary startle response: all symptoms of PTSD. (45RT 12832-33.)

7. Mitigation of the 1992 incident.

Cedric Burgess worked at the Capitol City group home in 1992. Parrish Parker and appellant were in a group session when Parker cursed at the counselor and appellant told him to stop cursing. Parker cursed at appellant and jumped in his face, then Burgess heard a thud and turned back to see Parker on the ground. Fights in the group home were not unusual. (44RT 12577-79.) Wards in a group home were treated to an extent like

prison inmates. (44RT 12580.) Parker had other problems with aggression and intimidation, and had even attacked Burgess once. (44RT 12587.)

8. Mitigation of the Renault assault.

Deputy Janet Breshears was assigned to investigate the Renault assault. She interviewed inmate Harold Seems who said he sometimes heard voices in his head – he did not state that he was an alcoholic who only had these audio hallucinations outside of jail when he was drinking. Seems said he heard bits and pieces of one person saying something like "do you have it" and something about killing a cop. (43RT 12116-18.)

Arthur Wooden, a private investigator who had worked 22 years for the sheriff's department, including eight years managing the crime lab, testified as an expert in blood patterns. (43RT 12112-13.) He reviewed photographs of Ben Williams which showed blood spatters on his shoulders, chest and face: blood spatters (as distinct from drops or smears) result from blood flying through the air with velocity. (43RT 12122-26.) Williams' back left arm and both shoulders showed contact blood. Wooden's expert opinion was that these blood contacts were from Renault's bloody arms reaching around Williams' waist with Williams holding Renault under his arm. (43RT 12130-31.) The photographs of appellant showed no blood on either of his hands, even when the photographs were

viewed at a 7x magnification. (43RT 12137-38.)

9. Appellant's testimony.

Appellant testified on his own behalf. He did not recall much of his parents other than one time when his father sodomized him and his brother Tim, saying that it was punishment. Appellant remembered crying beforehand because he knew it was going to happen. He remembered that his mother and father used to get drunk and physically fight a lot. He remembered that his brother burned down one house they lived in; that his sister burned down another; and that he and his brother burned (but not down) his grandmother's house. He remembered being locked in the attic of the house his brother burned down, but did not remember toys or books. (46RT 12989-95.) With his parents, appellant does not recall having shoes or a lot of clothes. As to his father, he remembered only the sodomy and being spanked or hit with a switch. He was afraid of his father. He and Tim once told their mother what their father was doing. Their mom took them to talk to his grandmother who said she would take care of it and nothing happened. (46RT 13002-05.)

It was never explained to appellant why the children were taken from their parents. (46RT 12995.) He had always been with Tim and felt alone when he was taken to a farm without any of his siblings. Appellant

later went to the foster home of Blanch Orsini, who treated her grandchildren differently than the five or six foster children there. Appellant and a grandson played with a duck she had and it died: he didn't think they killed it on purpose although he was punished for it. (46RT 12998-1300.)

Appellant liked the Orsini home because it was clean, there were toys and no hunger and Mr. Orsini was very nice. Appellant testified that Blanch Orsini cared for him but didn't love him like Mr. Orsini did. (46RT 13001, 13007.) Still, appellant missed his brothers and sisters. (46RT 13007.)

Right before his eighth birthday, appellant went from the Orsini home to Frances Jones' foster home, where he also met her son Ken Sloan. Frances Jones explained to appellant about his father and why his parents didn't want him anymore. He liked Frances and stayed there for a year and a half until she moved when her husband got out of prison. (46RT 13009-14.) Sloan repeatedly promised that if appellant was good Sloan would adopt him when Sloan got his group home established. (46RT 13017.)

Appellant got in trouble "just like anybody" and Sloan punished him by spanking and slapping, even when appellant was at Jones' foster home. When Sloan took over the facility appellant was able to visit Frances on

occasion but their relationship changed because her husband was with her. Appellant loved her and called her mom and he thought she loved him but it changed. (46RT 13017- 20.) Sloan's attitude also changed when he started working out at the gym and riding motorcycle. The slightest thing would make Sloan mad and he'd take it out on the kids, slamming them up against the wall, throwing them on the ground, or slapping and hitting him. This was different than when he spanked appellant for punishment. Sloan had become mean, like the time Sloan hit appellant with a piece of lumber for no reason. (46RT 13021-22.) Appellant reported this to Bringle who talked to Sloan which made Sloan mad; Bringle told appellant to stop lying.[60] Sloan also punished appellant by making him move a rock pile or wood pile, over and over again, if his grades were not good enough or once because he got into a fight at school. Sloan also kept the money from appellant's paper route. (46RT 13023-26.)

Appellant ran away from Sloan's group home many times, usually because Sloan had hit him. Appellant was afraid of Sloan who had become unpredictable, but appellant still loved him. Sloan took him on boats and to Yosemite and once to Disneyland. (46RT 13027-29.) It was later when

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[60] Bringle admitted in his testimony that he didn't believe appellant, although appellant was eventually vindicated when Sloan's license was revoked.

Sloan started hitting appellant that appellant ran away. He and Eagle Trippo (around the age of 12) ran away together at least three times, once after a fight at school where the other kids attacked Trippo who was Native American and had long hair, and appellant jumped in. Sloan beat them both when they were kicked out of school. Trippo and appellant jumped a train but they were eventually returned to Sloan. (46RT 13029-32.) Appellant told Pam Owens what had been going on and considered suicide, wondering if death would be better than living at Sloan's or having to live with what his father did to him. (46RT 13033.) He told Bringle he didn't want to go back to Sloan but Bringle sent him back every time he ran away and said he was lying about Sloan hitting him. Eventually appellant ran away from Sloan's group home alone and refused to go back. A social worker took him to Barbara Granberry, who allowed him a lot of freedom which he didn't know how to handle (Sloan's home had been very regimented). He was removed from Granberry's for getting into a fight at school which he doesn't recall. He was in five or six group homes – the places run together — and then ended up in juvenile hall when he was 13 after kicking Christopher Hill in the face. Appellant admitted that his behavior was always non-compliant and that he "d[id] things that . . . ma[d]e sense when he [did] them, but they [didn't] make no sense after [he did] them." (46RT

13042, 13045.) Hill had angered him in a group session on anger management in which a person on one side was to anger the other talking about his past or family so that the person could try to control his anger. Appellant told Hill not to do it, that he didn't want to get mad, but the staff made Hill do it and started talking about appellant's "history" (which they all knew about) and appellant kicked Hill. (46RT 13045-47.) Appellant was taken to juvenile hall after this incident. (46RT 13055.)

Appellant did not recall the incident about forcing Hill to orally copulate another boy. He recalls that the boys were horse playing and one boy had an erection and Justin Burger came in and asked why. Appellant did not force Hill on the boy; he thinks molestation is sick. (46RT 13051.) Appellant himself was molested at Sloan's group home by 16-year old Melvin Green, who did the same thing that appellant's father had done; Green threatened to kill him if he said anything and appellant didn't for a long time but eventually told Sloan in front of his fiancé. Sloan called him a liar and went off on an anger streak and smacked him in the head with a board. Appellant reported Sloan's behavior to Molly Ranken at school and eventually answered a judge's questions even though he felt like he was betraying Sloan. (46RT 13052-55.)

Appellant did not know why he was angry and aggressive in those

homes and did not recall being that way before being at Sloan's group home. (46RT 13048.) Around the ages of 12 and 13, appellant had problems controlling himself and he didn't know why. For example, as to the incident which landed him at the Modesto Psychiatric Center for 17 days, he didn't remember hitting Jerry Holloway in the shin but he did remember stabbing Craig with the pen because he wouldn't let him go. After the fact, he recalls being out of control and when someone explains, sometimes he understands and sometimes he doesn't as to being out of control. (46RT 13057-58.)

Appellant met Lisa Rowe when he was 13 or 14 years old. She worked for McAllister Ranch and used to take him to her house on weekends where he played with her son. (46RT 13124-25.) She talked about having him as a foster son which he would have liked, but he was terminated from McAllister. (46RT 13125.)

Appellant's father visited him at the CYA in Stockton a couple of times. Appellant ran away from Ralph White's group home and went to live for a few months with his father. Later, appellant turned himself in and then in November of 1994, when he was 17, he was placed with his father. (46RT 13062-63.) He met Jessica and had a daughter with her in August of 1994, although his father asked his probation officer to take him out of the

house and appellant spent from February through August in juvenile hall. Appellant then went to Rothel Williams' foster home in Stockton for four months, until, on a Christmas pass home he and his cousin got into a high speed chase; appellant admitted possession of stolen property and was sent to CYA. (46RT 13064-67.)

CYA was segregated racially and all the wards were out to "prove" themselves. Appellant did well in school and got his GED and computer training, but ended up in the Chad after getting in trouble in Preston, Smith and Owens where he eventually paroled to his grandmother's house in 1997. Appellant most of his CYA time in isolation which was all right with him: he just sat and read. He had read more than 1000 books during his four years in county jail. (46RT 13067-74.)

Appellant looked for work and stayed with his aunt and uncle. He spent time with his daughter but not with Jessica, whom he had married in Reno only at her insistence that their daughter be legitimized. (46RT 13075-77.)

From Reno, the wedding party went to Stockton. Mike Murchison wanted a gun and appellant told him he could get him one. Murchison borrowed the money from Mary Shelton and they discussed stealing money to pay Shelton back. Appellant didn't see anything wrong with stealing

from gang members and drug dealers in the neighborhood, but Murchison wanted an unarmed target like a pimp or prostitute. (46RT 13077-80.) Appellant had sex with the prostitute and then said he would pay her. He got the gun from Murchison – appellant didn't know the gun was loaded. When he brought the gun out, the prostitute took off running and screaming and that's when the gun went off as it was pointed at the ground. He saw a round hit the ground but didn't recall pulling the trigger. He jumped in the car and tossed the gun across the seat and took off, and then realized that he didn't have his wallet. (46RT 13081-83.) He was arrested and after a month bailed out in March of 1998. (46RT 13084.)

Appellant had recently met his sister Lori Smith and his brother Tim and Lora Sinner came down to Redding around the end of March. He met Amy Stephens around March 20. She said her foster father was molesting her and appellant found her a place to stay with Cody Cannady's mother Barbara Atkinson. After a few days, the five of them went camping in Sinner's car. (46RT 13086-88.)

Appellant did not plan to kill Sinner and didn't talk to anyone about it; he did not tell Cody Cannady he was going to kill her. He ended up participating in her death because he thought then, and still thought, at the time of trial, that she was dying. However, at the time of trial he realized he

did not make the right decision. (36RT 13089-90.)

Earlier he had told Amy and Lori to stop beating her because what they were doing wasn't right. Sinner hadn't done anything. When he first saw them at the creek, Lori was pushing Sinner's head under the water. Appellant felt her head and it was soft where it was supposed to be hard. He asked her how she felt. She said she didn't know why they beat her up and he told her he didn't know either. Sometime later he decided to kill her because he thought she was dying. Appellant accepted responsibility for her death but denied torturing her or even wanting to hurt her. He did cut her wrists but didn't think that hurt her as she didn't scream. And he did not pour alcohol over her wrists. He did try to hit her with the dent puller but didn't put the plastic bags over her head until he had checked to see that she wasn't breathing. (46RT 13091-94.)

Appellant didn't go for help because he didn't want to leave Sinner there with the others. He felt sorry for Sinner and was annoyed by his sister who always had to be the center of everything. He was not in charge of the group but did try to take care of them as none of them had anything, and he knew how to get stuff which he learned from being in group homes and being incarcerated. (46RT 13095-97.)

Appellant felt sad for Sinner, angry at Lori, and ashamed of himself.

He had done nothing in life to be proud of, but didn't think he had the opportunity to do so. He does have the desire to learn and enjoyed school even at the CYA. (46RT 13012-03.)

As to the piece of metal from the corner of a metal tray found by Detective Collette in his mattress, it was his. The sharpened piece of metal belonged to his cellmate Melvin Hawkinson. He had the rolled-up paper to dampen noise and stop water from when other inmates flooded their rooms. He never hid them. (46RT 13103-04.)

As to the jail extraction incident, he could not remember why he was mad and didn't know why he didn't comply with the officer, except that when he gets mad he sometimes gets out of control. He has thought about escaping from the jail even though he believes he deserves to be locked up for participating in Sinner's death. (46RT 13105-06.) He wanted photos of the outside of the jail to see the distance from certain parts of the jail to other parts: everybody thinks of escaping. He was trying to find someone who was willing to send something upon on a rope; he planned to heat up a window and shatter it and then use a rope to rappel down the side of the mail. (46RT 13106-08.)

In May of 2002, he was in cell 12 which had only one or two windows facing the recreation yard, but since the 1998 earthquake the

concrete had cracked and appellant figured he could knock out the concrete while other inmates kicked the door to cover the noise. It was not true what Aaron Cozart said about trying to get a gun into jail: there was no need for a gun in appellant's opinion. His next escape plan was to go through the doors by the shower and out that window. (46RT 13109-10.) He planned to handcuff the deputy, lock him in a cell, and dress in his uniform and use his keys. Appellant concocted this plan with Benjamin Williams. On the night of the attempted escape, he hid behind the pillar and went into the shower when the lights went out. He first saw the drain grate weapon in Williams' hand when he was in the shower. They let Renault pass through twice before attacking him because they wanted to wait for an officer who matched appellant's description: appellant knew the radio codes and Williams' voice was too distinctive. (46RT 13111-14.) While Williams and appellant waited in the shower they conversed but never talked about killing a cop. (46RT 13116.)

At 4:00 a.m. Renault came around and because there was now no chance for another deputy to come around, they decided to put the plan into action. Renault was smaller than appellant so Williams undressed so he could wear Renault's uniform. (46RT 13139.) They heard Renault talking and walking towards them; they came out of the shower and appellant

grabbed him by the back of his shirt. Renault landed against his chest and then appellant felt something like hot water hit the side of his (appellant's) face. Renault started screaming so appellant put his hand on his face; then he saw Renault get hit again and appellant pushed him away and walked off, because that was not what was supposed to happen. The plan was just to tie him up. Appellant walked away. He never struck the deputy and didn't actually see Williams do anything because it was dark. When appellant asked Williams earlier what the grate was for, Williams said "just in case we need it" and appellant said they didn't need anything like that. Williams said okay and put it down in the back and that was the last appellant saw of it until he was in court. (46RT 13117-19, 13149.) They had discussed using the grate to bash out the window once they got into the "mod" room beyond the shower but there was no planned intent to injure the deputy. The plan was built specifically so the deputy would not be injured. (46RT 13129-20.) Appellant believed Williams when Williams said he wouldn't use the grate. (46RT 13131-32.) Appellant didn't know what happened to Renault's radio; he never touched it and didn't respond to the intercom but he did hear a woman ask a question on the speaker and heard a radio response that everything was "code 4A" when he was standing in front of the staircase. (46RT 13151-52.)

Appellant didn't know if he had blood on his hands or his pants but he did have it on his shirt. Most of the deputies, including Deputy Karen Luce had a lot of blood on them and he assumes that Luce would have transferred blood onto him when she patted him down. (46RT 13163.)

He may have told his wife Jessica that he was going out in a "blaze of glory" and that he didn't care; but appellant denied he planned to kill a deputy to escape. (46RT 13167.) Appellant also denied threatening one of the cell extraction deputies he would go after him with a shotgun as that would be very stupid: the deputies' shotguns didn't carry ammunition just bean bags and tear gas, and such a threat would just give them a reason to beat him. (46RT 13168-69.) In the Modesto Psychiatric Center he said he was admitted into their care because he "tried to kill someone," that he hit someone in authority, and that he was out of control. (46RT 13171-72.) Appellant was angry about what had happened because it wasn't supposed to happen; and mad at himself for choosing an unstable person (Williams) for the plan. (46RT 13121.)

Appellant knew that he had attempted murder charges pending, and that he did not have to testify, and that his testimony incriminated him in the pending charges. However, he chose to testify after hearing everyone else's side two different times as they were not always correct. He was painted as

an animal not a human and he did not believe that was true. (46RT 13127.)

10. Other witnesses.

Rebecca Brown is appellant's oldest sister. As to his father (and her stepfather) Paul Smith Sr., she testified that all he ever did was molest or neglect or abuse them. Her first memory of abuse was at the age of three when he penetrated her with objects and forced him to touch her, as "punishment." He did the same to appellant and their brother Tim and the abuse continued until the children were taken out of the home. (47RT 13270-73.)

C. Prosecution's Rebuttal Testimony.

1. Appellant's background.

Janet Green was a social worker for Shasta County CPS and was part of the team of various agencies who monitored the Smith case. (47RT 13377.) She found the children neglected, dirty, and unsupervised, the house in chaos, but she saw no evidence of malnutrition or abuse warranting court intervention during the six months she monitored the family. She recommended that no petition of court intervention be filed as the children were not, in her opinion, in immediate danger. (47RT 13381-85.) Green acknowledged that the public health nurse had given her opinion that the children were in an unsafe environment and in danger of

neglect, and acknowledged that the situation was not corrected "a great deal." There was also a referral noting that Doreen's brother had possibly fondled Rebecca, which was investigated by the police, but nothing came of it. Also Doreen frequently locked the children in the bedroom as her way of "supervising" them, but neither this nor the bad hygiene indicated an "immediate danger" to the children in Green's opinion. The Head Start program did recommend court intervention, but Head Start was not part of the decision-making team, and Green's belief was that the family did not meet the criteria for court intervention. (47RT 13385-97, 13400.) The family did receive services in an effort to better the situation. (47RT 13398.)

Kenneth Sloan[61] testified that he probably did tell appellant's elementary school principal Molly Ranken that he was going to adopt appellant, and that he ran it by social worker Mike Bringle, but denied ever promising appellant that he would adopt him. (49RT 13899-900.) Sloan did admit calling appellant "son" and said that he probably did tell Ranken that he would "be there" for appellant, but did not recall telling him in Ranken's presence that he would "never leave him." (49RT 13946.)

Appellant lived with Sloan from about the age of seven to 12. Sloan

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[61] Sloan had been convicted of a felony in 1977 or 1978. (49RT 13920.)

professed to love appellant, even to this day, but said that appellant reacted in a hostile manner when Sloan got engaged. (49RT 13908.) Sloan, who had since married, told appellant he had to "grow through" it, but Sloan terminated appellant from his group home before he got married. (49RT 13915-19, 13942.)

Sloan admitted using corporal punishment on his group home wards but didn't think that "swatting" them was "a big deal." (49RT 13911.) He denied using a hammer on appellant (although the licensing board found it substantiated). After reading the report, Sloan testified that he had just "tapped" appellant with the hammer as Sloan was "tacking" something on the wall, because appellant was rocking against the wall. (49RT 13924, 13969.) Sloan also could not recall that Bringle or Faudree warned him against using corporal punishment. (49RT 13957.)

Appellant's behavior deteriorated as he got older and he became more violent. On the other hand, appellant was intelligent and could discuss issues in an adult manner. (49RT 13915.) Sloan was not aware that appellant had been diagnosed with PTSD in 1986 but did know he had been diagnosed with hyperactivity and had been prescribed Ritalin. However, Sloan and his mother Frances Jones took appellant off the medication. (49RT 13957-58, 13964.)

Gary McGee investigated the allegations of abuse lodged against Ken Sloan in 1992; four of the 17 counts against him involved appellant's allegations that Sloan struck him with a stick, hit him with a belt, hit him with a hammer and pulled him up by the ears. Sloan was interviewed and admitted a number of the allegations but tried to talk his way out of them. (47RT 13512-14.) The last two allegations were substantiated, and Sloan lost his license as a result. (47RT 13518, 13525-27.)

Paralee Roberts' former husband ran the Endless Bridges group home when appellant was placed there, and Mrs. Roberts, who worked as a dental assistant, sometimes helped the children with their homework. Appellant was not a favorite with Mrs. Roberts because he threw frightening temper tantrums. (47RT 13533-37, 13551.) In group sessions, and in a conversation joined by all the boys, he talked about decapitation and strangulation of animals as if speaking from experience. (47RT 13548, 13551.)

Ann Stow was appellant's probation officer in 1990. He had been adjudged a ward of the court and put in three placements before she took his case" and was terminated from all three for aggressive behavior. (47RT 13409-11, 13416, 13421.) Stow placed him at Excel Center in Turlock because it was very structured. However, appellant was terminated from

that program after three months for stabbing a staff member with a pen. He was then sent to I'SOT where he stayed for six months but was terminated for the squirrel-shooting incident (theft of a firearm). (47RT 13421-30.) After running away after a month at Good Samaritan, appellant was placed in Capital City in Sacramento where he was charged with battery. He was then placed at the Stockton Youth Foundation and was reunited with his father on a trial basis for several months. Stow violated appellant's probation for drinking and not following house rules, and he was returned to juvenile hall. (47RT 13434-35, 13437-39.) Stow hadn't met appellant's father when she placed appellant there; when she later met him she found him "despicable" and "nasty." (47RT 13473-74.)

Stow was aware of appellant's background of abuse, neglect and abandonment and was knowledgeable about the psychiatric trauma and damage such mistreatment causes to children during their critical years of development; she was also aware that sexually traumatized children often "act out" through aggressive behavior.. (47RT 13443-47.) Appellant's problems in placements always resulted from such aggressive acting-out behavior. Residential treatment centers for psychiatric care are very expensive. (47RT 13471-72.)

In 1990, Dr. Buley recommended specific juvenile psychiatric

residential treatment centers for appellant.[62] Dr. Buley testified that appellant was "one of the sickest in many ways," which was attributable to appellant's acting out to his traumatic childhood. Stow was not sure if she checked any of the treatment centers recommended by the doctor (they were very expensive). Stow thought that appellant's mental health problem was being dealt with although "not successfully." (47RT 13471-72, 13476-87.)

Sherri Leitem was appellant's juvenile probation officer in 1994 after he was terminated from placement with his father and returned to juvenile hall. They had difficulty finding a place for appellant as he had been denied placement in many facilities for a variety of reasons (some did not accept sexual abuse victims, some places dealing with psychological problems required appellant to be certified and she didn't refer him to the mental health unit for a certification evaluation). (47RT 13494-96, 13506-09.) Leitem knew that appellant had substantial psychological and psychiatric issues and had tried to get him into camps, but was told he needed intense psychiatric treatment they couldn't offer. She did not recall that Dr. Buley had recommended residential treatment centers and had

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[62] Dr. Woods also testified that a structured residential psychiatric facility was what appellant needed; and his failure to get such treatment resulted in his inability to accurately perceive and react to situations and his subsequent bad behaviors.

never heard of those places; she also did not know that CYA at that time was seriously overcrowded with a 92% recidivism rate, but recommended appellant to CYA because she thought a structured locked facility was better equipped to deal with him. (47RT 13500-02.)

Thomas Palacioz worked at the living units in the Preston youth facility in 1995. (49RT 13869.) According to appellant's record appellant was needy, banged on his door a lot and showed a hostile attitude. (49RT 13873-74.) Michael Millington worked at Preston in 1996. The reports showed that he had problems with appellant tattooing and cutting himself, and he was transferred to Chad because of his behavior. It was not that he was assaultive but that he was a pest, and turned his anger and frustration in on himself. He did not have psychological counseling. (49RT 13883-89.)

Karri Burks worked at Chad, the highest security youth facility in the state, where she was appellant's parole agent for eight months. (49RT 13890-91.) Appellant didn't complete any of his programs in anger management, drugs, victim awareness, or social thinking. (49RT 13892.)

Dr. Derek Washington, was staff psychologist at the CYA Preston facility and did a psychological evaluation on appellant in 1996, after appellant had been at Preston for a year and a half. (48RT 13656, 13663.) The "evaluation" consisted of an hour-long review of appellant's files and

then an interview. Dr. Washington concluded that appellant suffered no organic brain damage, but was merely an "angry and embittered person." Dr. Washington conducted no tests (and was not a licensed or certified psychologist in any case). He did not review any of the previous reports on appellant authored by mental health experts: these were not made available to him. (48RT 13663-66, 13674-77, 13678 .) Dr. Washington was of the opinion that appellant was not motivated or interested in addressing his issues. Dr. Washington also did not believe that appellant's history of abuse was significant in terms of appellant's current behavior and decision-making. Finally, he saw no evidence of any major brain disease, disorder, or dysfunction. (48RT 13671-72.) Instead, he concluded that appellant had an antisocial personality disorder. (48RT 13673.)

However, Dr. Washington did agree that long-term sexual abuse, and neglect and abandonment would require a tremendous amount of intervention (psychotherapy) to correct the psychological damage to the child; and also agreed that a child abandoned again would experience retraumatization. (48RT 13683-87.)

Psychiatrist Dr. John Shale reviewed extensive records in this case but declined the opportunity to interview appellant. (48RT 13709, 13741.) Nonetheless, Dr. Shale testified that he did not agree with Dr. Myla

Young's finding that appellant suffered from major depression. (48RT 13713.) He testified that although he did not dispute Dr. Young's test findings, those findings evidenced no organic brain disorder or history of brain trauma. (48RT 13720, 13813.)

Dr. Shale also disagreed with Dr. Woods' diagnosis of PTSD and testified that appellant exhibited antisocial personality disorder rather than PTSD. (48RT 13724, 13731.) He did not think that any of the appellant's experiences in foster and group homes, such as Sloan's promise never to leave him and then leaving him, amounted to retraumatizations. Instead, Dr. Shale viewed these incidents of appellant traumatizing others. (48RT 13750-51.) He testified that appellant was "spring loaded to act out aggressively." (48RT 13727, 13776.)

Dr. Shale did agree that childhood trauma can affect the way the brain develops and that abuse and neglect can have a negative effect: but he denied that such consequences were long-lasting. To "get over" such trauma, even a five-year-old had to "want to change," and appellant slapped away attempts at therapy. (48RT 13794-96.)

However, Dr. Shale had no special training with children apart from general psychiatric training 30 years prior; and the majority of his experience since that time had been in the military. (48RT 13755, 13801.)

Anthony Vegas worked at the Amador residence at the CYA facility called Close, where appellant was incarcerated for four and a half months in 1995. (48RT 13841.) Appellant had an extremely difficult time adjusting and clingy and needy. (48RT 13843.) He received a number disciplinary actions for contraband, indecent conduct (showing pornography), and threats, resulting in his transfer to Preston, a more restrictive facility. (48RT 13846-47, 49RT 13856.) Vegas agreed that Close was referred to as a "gladiator school" because of all the fighting and staking out of territory and appellant "just did as the natives did." (49RT 13849.) Appellant did not fit in with anyone and was not accepted in any of the groups and so constantly strove for attention. (49RT 13852-53.) He did what he thought he had to do to get along. (49RT 13856.) Vegas had informed the prosecutor and the investigating officer in this case that appellant had "more bark than bite" and "talked a lot but did little to back it up." (49RT 13860.)

2. Forensic testimony.

Thomas Vasquez testified as an expert in blood stains. (49RT 13983-84.) Vazquez prepared a plastic overlay on which he traced the blood stains on appellant's pants (worn during the Renault assault) as the stains were only otherwise visible under intense lighting. (49RT 13985-89.) Some of the stains were transfers or smears but there were cast off droplets

near the crotch and on the left side and inside bottom of legs. (49RT 14000-03.) Blood spatter patterns on appellant's left shoe showed that blood was cast off onto the shoes from different directions; some droplets on the top of the shoe likely came from above. (49RT 14010-14.)

Vazquez agreed that the transfer or smear blood patterns on appellant's pants could have come from being placed in the same evidence tub as his shirt while the blood was wet; or that a stain on one part of the pants could have come from another part, which would alter the whole interpretation; the same problem existed with appellant's shoes. (49RT 140226, 14047.) Vazquez confirmed that it was "very, very difficult" to reconstruct the manner in which the blood stains got onto appellant's clothing because of contamination by the emergency medical technicians and the movements;[63]even the weapon used on Renault was capable of casting off blood. (49RT 14037, 14039.)

Vazquez also compared a photograph of a bloody foot print in the shower area and testified that the bottom of appellant's left shoe appeared to the same as the pattern present in the blood although he could not say for certain as he could find no individual characteristics in the shoe print.

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[63] Appellant's clothes had been placed in tub outside holding cell. (49RT 14072.)

(49RT 14008-10.)

Joseph Scarry responded to the attack on Renault. He was asked to take appellant downstairs and out of the pod. Scarry did not recall any blood on the floor where appellant was standing at that time; Scarry himself was not bloody. (49RT 14049-50.) Nor did he recall any blood on the floor on the route downstairs, although Scarry was not looking for it. (49RT 14063.) He and another deputy lay appellant face down on the floor and removed he pants and underwear (but not his shirt) and then threw the items outside to a hallway where there was no blood and placed appellant in leg irons in a locked cell. (49RT 14055-56.) Scarry denied causing any of the injuries shown in photographs of appellant, although it crossed his mind to take revenge on appellant. (49RT 14052, 14056.) Deputy Gerry Maul, who admitted that he and Scarry had discussed their testimony, testified the same in every respect as did Scarry. (49RT 14065-69.) But added that they found a razor in appellant's pants. (49RT 14070.

D. Surrebuttal Testimony.

1. Appellant's background.

Thomas Young was executive director of the Endless Bridges group home in 1990 when appellant was a ward there. Young was married at the time to Paralee Roberts. Roberts never reported to him either verbally or in

writing having heard a conversation among the wards about decapitating or otherwise abusing animals (which if she had, he would have been obligated to report it, and would have reported it, to the CPS), nor did he ever indicate that she was afraid of appellant. (49RT 14102-04.) David Runyon, an investigator for the prosecutor, interviewed Paralee Roberts in February of 2001 and she referred to comments made by appellant regarding doing things to animals. However, she could not state that appellant was recounting a personal experience only that she so suspected. (50RT 14178-79.)

2. Forensic testimony.

Forensic scientist Linda Jacobson, a specialist in impression evidence, testified that to make a comparison of a shoe to a footprint, a test impression of the suspect shoe (rather than a photograph) should be used because unless the photograph is the correct enlargement, the ratio of the pattern could be off. Jacobson viewed Exhibit T-157, the photograph of appellant's shoe and testified that without the actual shoe and test impressions, and ensuring that the photograph was at a one-to-one ratio, no comparison could be made or should be attempted. (50RT 14201-06.)

3, Expert testimony.

Psychologist Dr. Julie Kriegler, whose entire training was with

children, child development, and PTSD, developed the interview for a diagnosis of PTSD, including a means of establishing the validity of responses; her interviews are now widely used in the field. (49RT 14105-07, 14109-12.) Dr. Kriegler reviewed approximately 68 interviews of people who knew and had direct information about appellant; and also reviewed his CPS and juvenile records, his jail records, and mental health records, and statements to the police. She also reviewed the penalty phase testimony of Dr. Shale. (49RT 14113-14.)

Dr. Kriegler did not agree with Dr. Shale's contention that appellant's principal problem was antisocial personality disorder. Dr. Shale's presentation of PTSD as secondary to antisocial personality is precisely the opposite of what is considered proper diagnostic technique. (49RT 14114-15.) In diagnosing appellant with antisocial personality, Dr. Shale seemed to misunderstand the extensive impact of early trauma on brain and personality development; he apparently did not understand the latest research and clinical findings showing that childhood trauma has a significant impact in determining biochemical development and thus the ability to cope and to behave normally. (49RT 14116.) For example, Dr. Shale inaccurately testified that aggressive acting out is not a result of early trauma. (49RT 14126.) Dr. Kriegler testified that acting out is due to the

abnormal development of the brain preventing the child from responding in normal ways when he is in a heightened stare or negative or reactive state. (49RT 14126.) That is, if a child is in an abnormal situation, the neurological wiring (neurons) end up being abnormal, resulting in disruption of neurological functioning in perception, memory and reality testing. Personality is interlinked with brain development and also affected by trauma. (49RT 14118-21.)

Dr. Kriegler reviewed Dr. Young's report and agreed with her results. She disagreed with Dr. Shale that "time heals all wounds." Time does not heal a disease like diabetes, and likewise does not heal " a broken biology or brain . . . or even a broken personality" when there is trauma as significant as that suffered by appellant. Intensive treatment is required to assist in coping with such trauma in order to function in a better way at all. (49RT 14121-22.) Dr. Shale described appellant as "spring loaded" to react with violence in order to discredit the idea that appellant suffered from trauma-based disorders or that he exhibited behaviors that are known to be linked to trauma. In fact, children like appellant who suffered chronic trauma are hyperaroused and overready to react, **because** of the trauma that affected his ability to perceive, and to accurately judge threats and safety. (49RT 14124-25.) Moreover, appellant's ability to form caring

relationships (with Frances Jones, Molly Ranken, Lisa Rowe, and to an extent with Ken Sloan) is totally inconsistent with antisocial personality disorder. (49RT 14130.)

Neglect and abandonment, the ultimate extension of neglect, suffered by an infant and child produces some of the worst outcomes of any childhood trauma because the failure to meet the infant and child's basic human needs prevents normal development. Appellant suffered neglect, abandonment, and rape, the types of abuse all predictive of the worst outcomes in terms of normal brain development. (49RT 14135-36.) Simply placing such a damaged child in foster care is not an adequate response: the child needs intensive treatment as well as external placement because his brain has been altered and he has not developed a self that is necessarily able to respond in a positive way. (49RT 14137.) Foster treatment is not treatment for PTSD; treatment requires licensed mental health professions specifically trained. Dr. Kriegler would have recommended long term consistent treatment or care with the a provider with solid knowledge in trauma, in addition to family treatment. Appellant never received such treatment. (50RT 14143-44.)

Dr. Shale also seemed to confuse risk factors with symptoms when he criticized Dr. Woods for simply listing risk factors – the abuse suffered

by appellant are actual stressors and criteria or symptoms of PTSD not "simply risk factors." (50RT 14145.) Appellant clearly displayed all of the criteria needed for a proper diagnosis of PTSD. (50 RT 14146-64.) Moreover, for appellant, the symptoms have occurred throughout his entire life, i.e., chronic PTSD, a mental disease which affects his ability to accurately perceive and respond to experiences, and which affects his cognitive or neurological brain functioning. Appellant's relatively high IQ does not overcome his deficiencies: intelligence and disease are not opposites. Appellant suffered from a mental disease such that the odds are very high that had appellant received appropriate care, he would not be standing trial for capital murder. (50RT 14165-68.)

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GUILT PHASE ARGUMENTS

ARGUMENTS RELATED TO JURY SELECTION

I. THE TRIAL COURT'S REFUSAL TO GRANT A CHANGE OF VENUE IN ONE OF THE MOST SENSATIONALIZED MURDER CASES IN SHASTA COUNTY HISTORY VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Appellant contends that the trial court erred by failing to grant a change of venue in the first instance, and in denying a change of venue during jury selection after the rampant prejudicial publicity resulting from the jailhouse incident (in which appellant was charged with attempted murder of a jail deputy and attempted escape). Appellant's trial in Shasta County where there was sensational and extensive media coverage of both the charged offenses and the jailhouse incident violated his Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury and to due process. (Irvin v. Dowd (1961) 366 U.S. 717, 722 [constitutional rights to impartial jury and due process violated where prejudicial publicity immediately preceding trial rendered trial unfair]; Murphy v. Florida (1975) 421 U.S. 794, 799 [federal due process violated where circumstances indicate jury's exposure to prejudicial publicity rendering trial fundamentally unfair].) The death verdict reached by a jury tainted by prejudicial publicity must be deemed too unreliable to satisfy appellant's

Eighth Amendment rights. (Johnson v. Mississippi (1988) 486 U.S. 578, 584 [the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment].)

A. Summary of Proceedings Below.

1. The first change of venue motion.

Appellant filed a motion for change of venue in October of 2001, several months prior to the beginning of trial. (9CT 1290-1307.) The testimony summarized directly below was given at a hearing on the motion on October 31 by Dr. Stephen Schoenthaler, a professor of criminal justice and international consultant in change of venue issues, who had worked for the prosecution and directly for the superior court in other cases. (5RT 1048-52.) The trial court deferred ruling on the motion until after voir dire, which was scheduled to be completed by the end of May 2002. (6RT 1311; 10CT 1627-30.)

2. Testimony on the change of venue motion.

Between September and October of 2001, Dr. Schoenthaler conducted a survey of the community measuring the extent of prejudgment in this case. Prejudgment is a fixed opinion of guilt or as to penalty formed

prior to the survey contact. (5RT 1053-56, 1063, 1072; 6RT 1159.) The survey tested long-term memory (short-term is less than one year); thus if the trial were to start in May of 2002 (which it did), and the survey was done the preceding month, the results would vary little. (6RT 1159-63.)

Shortly after appellant's arrest, the news media reported that appellant had confessed to a reporter. Dr. Schoenthaler testified that media reports about confessions are known to produce the highest level of prejudgment by potential jurors.[1] (5RT 1064, 1070.) A newspaper article in August of 1998 noted that the District Attorney called for the death penalty in this case, and referred to appellant's "adult and juvenile record, plus suspected main role" in the offense. Whether readers or viewers believe information reported in the news varies according to the reported source of the information . News reported as coming from prosecutors rates next to statements by judges and the clergy in terms of the credibility accorded to their statements. (5RT 1076-76.) This credibility factor was magnified in this case, because the news quoted the District Attorney himself as saying that every time his office sought the death penalty, it had been imposed. (5RT 1079-80.)

Other "facts" mentioned in news articles (appellant's prior criminal

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[1] See e.g., Rideau v. Louisiana (1963) 373 U.S. 723.

history, his leadership role as a supposed "cult leader" with a "Charlie Manson-like life style" who seduced the minor Amy S. even though he was married, his uncooperative attitude in jail, and the victim's stepfather's desire for the death penalty) are of the type shown by scientific testing to be prejudicial; and the combined effect of such prejudice is not cumulative but multiplicative. (5RT 1078.) The newspaper article quoting Amy S.'s attorney claim that Amy fell into the clutches of the cult leader (appellant) who made her change her hair and clothes to resemble his wife, and told her what to eat and had sex with her after getting her drunk (although no evidence of these "facts" was admitted at appellant's trial), also reported that the group of teenagers beat the victim up because they wanted her car and $50. This information supplied a motive for those readers who prejudged the facts. (5RT 1089-90, 6RT 1099.)

Moreover, the newspaper article referring to appellant's manipulation of Amy S. quoted the juvenile court judge, thus adding credibility to the claim — even though the judge was repeating testimony originating with the defense-hired psychologist who testified for Amy S. The article also called appellant the "most brutal" participant and the one who planned and directed the killing, all of which was extremely prejudicial. (5RT 1091-92.) Other prejudicial reporting included claims of

"grisly images from a gruesome horror movie," and quotes from the District Attorney that the death penalty was the minimum sentence warranted, that each of the participants deserved to die, and that the victim's family was haunted by nightmares. (6RT 1102–04.) Also prejudicial were media reports that Lori Smith had pleaded guilty to a "sadistic killing" and that the deputy district attorney said Lori had received threats from appellant and another inmate. (6RT 1105-07.)

As a result of this afore-mentioned prejudicial publicity, Dr. Schoenthaler determined a survey was necessary. He prepared a questionnaire specifically for this case, designed to poll likely jurors. (6RT 1108-14.) The design of the survey applied the same margin of error (2-3%) to those with a pre-formed opinion based on their exposure to publicity, as to those with no knowledge (apart from what they were told by the pollster) but who had an opinion. This design lowered the ultimate prejudgment rate substantially but increased the intellectual integrity of the results. (6RT 1114-37.)

On the first probe of names taken from every page of the phone book, 71% recognized the case, whereas typical capital cases have around 50% recognition. (6RT 1157-58, 1165-66.) "Torture" and "chili can" were the most common things people remembered. Many people "remembered"

the incorrect and never-reported fact that the victim was burned to death. The fact that the majority of the community recalled multiple alleged facts as well as multiple exaggerations (which had to have been transmitted outside the media) indicated that the publicity had permeated the community. (6RT 1170-73.)

A full 49% of those polled had formed an opinion that appellant was guilty prior to taking the survey (comparatively speaking, this is very high); and 52% had formed an opinion that appellant should get the death penalty. (6RT 1174-77.) The local newspaper, the Record Searchlight,[2] was the source cited by those who had prejudged the case. (6RT 1180.) Of those who had knowledge of the torture allegation, 72% had prejudged guilt; and of those who weren't sure if they remembered something about torture, 75% prejudged guilt, which was a very high rate of prejudgment. (6RT 1205-06.) For example, in response to one question which was the same as a question asked in the Richard Allen Davis [Polly Klass case], 70% of those polled in this case considered appellant guilty compared to 83% in the

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[2] Dr. Schoenthaler testified that in Shasta County, with a population of 163,000, the Record Searchlight had a daily circulation of 40,000. (6RT 1151.) In its ruling, the trial court relied on information from the jury commissioner that the newspaper had a circulation of approximately 35,000 in a county with a population of approximately 168,000 and a jury pool of 70,000. (19CT 4111; 25RT 6982-83.)

Davis case. And in the Davis case 59% of those polled said they had formed an opinion that Davis should be sentenced to death, whereas almost the same percentage (52%) in this case had formed an opinion that death was the appropriate sentence. (6RT 1187-90; see People v. Davis (2009) 46 Cal.4th 539, 569-78 [upholding change of venue from Sonoma County to Santa Clara County rather than Southern California].)

Fewer of those polled had knowledge of the co-defendants' fate, or of appellant's alleged confession, but of those who did, 80% and 94%, respectively, had prejudged him guilty. (6RT 1208, 1212.) Fewer of those polled recognized "confession" and "the co-defendants" than "torture" and the "chili can," because the former two facts appeared less frequently in the media reports. (6RT 1213.) The number of facts recognized is in direct correlation to the number of persons who prejudged guilt: knowing just one fact, 33% of those surveyed prejudged guilt; knowing three facts, the prejudgment rate jumped to 89%. (6RT 1215-16.)

Dr. Schoenthaler's opinion was that it was "clear and convincing" that appellant could not receive a fair trial in Shasta County, i.e., appellant more than met the standard of "no reasonable likelihood" of a fair trial. Because the survey measured long-term memory, Dr. Schoenthaler did not expect that the passage of time until May of 2002 would reduce the

prejudgment rates shown in his survey. (6RT 1228.)

In response to questions from the trial court, Dr. Schoenthaler explained the danger of using voir dire (rather than a survey) to test knowledge of the case. Voir dire cannot ask questions regarding inadmissible evidence which is present in media reports. Also, to test knowledge in voir dire, fact-specific questions must be asked, because unless or until certain questions (e.g., chili can, torture) are posed, a juror's memory might not be triggered. Such questioning presents the risk of prejudicing a prospective juror with no prior information about the case. For example, in this case, a full 91% of those polled who did have knowledge about the dent puller weapon did not recall it until their memory was triggered with a specific question. (6RT 1218.) Thus, fact-specific questions must be asked or there will be under-reporting, but the question itself carries the danger of creating prejudice. With a change of venue to a less media-saturated county, there is no need to ask this type of recognition questions. (6RT 1146-50, 1210.) Dr. Schoenthaler testified that surveys in the neighboring counties showed "phenomenal differences" in knowledge of the case by those surveyed. (6RT 1220.)

In response to the court's question whether jurors would get the same prejudicial information in opening statement in any case, Dr.

Schoenthaler pointed out that mock trials had shown that there is a significant difference between jurors chosen from a community contaminated with publicity and jurors who have learned something about the case only after having been informed by the court not to form an opinion until the evidence has been presented. (6RT 1223-25.) Studies with mock trials also showed that anonymous phone interviews yield more candid answers than voir dire in court. (6RT 1290-95.)

3. The trial court's findings.

On November 5, 2001, the trial court stated that the nature and extent of the publicity **favored** a change of venue (showing a possibility that appellant could not have a fair trial), but concluded that the defense presentation did not establish that possibility as a reasonable probability. The trial court described the size of the county, and the death penalty charge as "neutral" factors; and found that the case had no political overtones, and that the relative status of the victim compared to the accused was "insignificant." The trial court thought the need for a change of venue would depend on an evaluation of the credibility of venire members during voir dire, even if that meant having to use fact-specific questions. The trial court therefore deferred ruling on the change of venue until after jury selection proceedings took place. (6RT 1315-23.)

4. During voir dire proceedings appellant was involved in a highly publicized attempt to escape from jail involving an attack on a jail deputy after which appellant filed a new change of venue motion.

Jury selection began on May 14, 2001 and continued through June 20. On June 22, 2002, when jury selection procedures were still ongoing, appellant was involved in a highly publicized escape attempt and attempted murder of a jailhouse deputy. At the next proceeding, on June 25, appellant moved to disqualify the entire jury panel, renewed his change of venue motion, and in the alternative, requested voir dire of all prospective jurors (even those who had already been questioned) regarding exposure to media reports about the jail escape incident. (17CT 3803; 20RT 5433-34, 5505-08.) Appellant also made a blanket cause challenge to all prospective jurors which the trial court denied. (18CT 3825, 3827, 3835; 21RT 5955, 23RT 6385-87.)

The trial court denied appellant's motion to disqualify the entire panel and instead proposed returning for further voir dire those prospective jurors who had already been qualified. (20 RT 5433, 5505-11.) On June 28, appellant requested a new panel or a new survey for the change of venue motion. (22RT 6072-79.)

Meanwhile, the newspapers and television stations reported the violent attack by appellant and Benjamin Williams ("two alleged murderers

who have horrendous pasts and their history"). Williams, already notorious as a hate-criminal, was repeatedly described as the bomber of a synagogue and an abortion clinic, who was also charged with the murder of a gay couple. (19CT 4038-43; 4067-70.) Other articles and editorials questioned the safety of the jail and whether accused murderers should be held for long periods in the local jail. (19CT 4035-4105.)

5. The trial court denied appellant's request for change of venue.

On July 5, 2002, appellant filed another change of venue motion[3] and a motion to continue; both parties briefed the issue requested by the trial court,[4] i.e., the impact of pretrial publicity caused by the defendant's "intentional" rather than "spontaneous" acts. (19CT 3837-39, 3842-46.)

The renewed change of venue motion was argued on July 11 (25RT 6968-84) and denied in a written ruling the next day. (19CT 4108-12.) The specifics of this ruling are addressed below in Part D, pp. 165-177, below.)

Jury selection continued. On July 16, the defense again requested that the jury panel be disqualified or that voir dire be re-opened. The trial court denied the motion; the jury was empaneled and testimony began that

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3 Recent sensational newspaper and television reports of the jail house attack were admitted into evidence for this motion. (25RT 6968-69, 6977-78; 19CT 4035-4105.)

4 See 22RT 6075-76.

same day. (22CT 5130, 5132, 5162-63.)

B. A Change of Venue Is Required Where There Is a Reasonable Likelihood A Fair Trial Cannot Be Had in the Original County.

A change of venue to another county must be granted when the defendant in a criminal trial shows a reasonable likelihood that a fair trial cannot otherwise be had. (People v. Farley (2009) 46 Cal.4th 1053, 1082.) On appeal, the defendant must show that at the time the motion was made it was not reasonably likely that the trial would be fair, and that it was reasonably likely that a fair trial was not in fact had. The appellate court independently reviews the trial court's determination of the likelihood of a fair trial. (People v. Lewis (2008) 43 Cal.4th 415, 447.)

The typical factors considered by the trial court in its initial venue determination, and on appeal, are five: (1) the nature and gravity of the offense; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the status in the community of the defendant ; and (5) the prominence of the victim. (Ibid.)

As explained directly below, a correct analysis of the relevant factors weighs heavily in favor of a change of venue in this case.

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C. The Trial Court Erred by Not Granting a Change of Venue at the Outset, and in Deferring the Ruling Until After Voir Dire Had Been Completed.

In its ruling of November 5, 2001, the trial court considered the nature of the offense and the size of the community as "neutral factors." (6RT 1315-16.) This is incorrect. While a capital murder does not require special rules for a change of venue motion, Martinez v. Superior Court (1981) 29 Cal.3d 574, 583, that does not mean that a capital murder prosecution is a "neutral" factor. To the contrary, the "gravity and nature" of the murder charged in this case, which involved various gruesome details (the chili can, the dent puller, the slitting of wrists), weighed in favor of a change of venue. (See People v. Farley, supra, 46 Cal.4th at 1083; People v. Hernandez (1988) 47 Cal.3d 315, 334, 336 [gruesome murders and sexual mutilation was a factor favoring change of venue]; People v. Edwards (1991) 54 Cal.3d 787, 807, 809 [nature of capital offenses of murder and attempted murder of two 12-year-old girls was a factor supporting change of venue].)

Nor was the size of the community of Shasta County a "neutral factor," as the trial court deemed it. In People v. Proctor (1992) 4 Cal.4th 499, 525, this Court described Shasta County's population as ranking 28th

out of 58 of the state's counties. (Id. at 525.)[5] This Court agreed with the defendant in Proctor that "cases involving counties with populations of similar size more frequently have occasioned venue changes than cases involving more populous counties." (Id. at 525-26.) Proctor declared, therefore, that "this factor weighs somewhat in favor of a change of venue." (Id. at 526.)

Finally, the trial court declared that the "nature and extent of the publicity" **did favor** a change of venue and showed a "possibility" that a fair trial could not be had. Appellant agrees that the widespread prejudicial publicity about this case favored a change of venue, but maintains that appellant showed much more than a "possibility" of an unfair trial. Rather, as explained in the undisputed testimony of the expert, the evidence was "clear and convincing" that appellant could **not** get a fair trial in Shasta County. (6RT 1228.)

In sum, an independent review of the record thus shows that three out of the four relevant factors[6] weighed in favor of a change of venue and that appellant had established a reasonable likelihood of an unfair trial.

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5 According to more recent statistics by the California State Association of Counties, Shasta is 29th out of 58 counties in terms of its population. (See www.csac.counties.org.)

6 The trial court described the relative status of the victim compared to that of appellant as "insignificant."

Consequently, the trial court should have granted a change of venue prior to trial and jury selection.

Appellant also contends that he trial court erred in deferring its ruling until after the voir dire. People v. Beames (2007) 40 Cal.4th 907 disapproved of such a procedure:[7]

> "[W]e do not suggest that trial courts may deny motions to change venue solely on the theory that jury voir dire is a better method of assessing the need to change venue.. As the defendant points out, all defendants have [a statutory right to seek a change of venue] and we do not hold that the mere availability of jury voir dire is sufficient to deprive a defendant of that right." (Id. at 922.)

D. The Trial Court Erred by Refusing to Change the Venue of Appellant's Trial After the Highly Publicized and Prejudicial Jail Attempted Escape and Attack on a Correctional Officer.

Even were this Court to reject appellant's claim that the trial court should have granted a change of venue in the first instance, a change of venue was required after the jail house incident of June 22 and the attendant prejudicial publicity. The trial court's failure to grant a change of venue at

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[7] Appellant recognizes that People v. Farley, supra, 46 Cal.4th at 1085 described as permissible the deferring of a ruling on the **second** change of venue motion until after voir dire. But here, the trial court refused to rule at all until after the voir dire, with the consequence that great quantities of time and expense (over 20 days of jury selection proceedings prior to the jail incident on June 22) were committed to the process before any ruling was made: those expenditures had the practical effect of weighing against a ruling changing the venue, even though they are not factors that should be considered.

that point resulted in an unfair trial in violation of appellant's due process rights to a fair trial and impartial jury under the Sixth and Fourteenth Amendments, and to a reliable and accurate sentence under the Eighth Amendment. (Irvin v. Dowd, supra, 366 U.S. at 722; Johnson v. Mississippi, supra, 486 U.S. at 584.)

In its final ruling denying change of venue, the trial court again found the size of the community, and the status of the victim related to that of the defendant to be "neutral" factors. The trial court found that the nature and gravity of the crime weighed "slightly in favor" of a change of venue; and that the extent and nature of the publicity weighed "somewhat in favor" but that the weight was moderated by appellant's "own allegedly wilful conduct" in the jail escape attempt (resulting in the new criminal charges) which "was the cause of the most recent pretrial publicity." (19CT 4112.)

The trial court concluded that the prejudicial publicity was "moderated" by several facts: (1) that "the circulation of the [local newspaper] was approximately 35,000 in a county with [] a jury pool of 70,000;" (2) that voir dire had revealed that the "prospective jurors, in general, had very little knowledge of specific facts of the crime charged, very few opinions that the defendant is guilty, and very good compliance

with the Courts [sic] orders" not to read or talk about this case; and (3) that prospective jurors who had formed a bias because of the latest media reports about the jail incident had been excused. (19CT 4110-11.) The trial court also denied the defense request for a continuance. The trial court relied on the assurances of prospective jurors who had "assured the Court they can be fair and impartial despite any publicity," and on the fact that the recent publicity regarding the jail incident did "not concern the facts underlying the charges in the case." Finally, the Court relied on the fact that it had "repeatedly reminded jurors of the incompleteness and inaccuracy of most media reports and its inapplicability to this proceeding," and concluded that because publicity on the jail incident was so recent it had "not time to permeate the prospective jurors' attitudes unchallenged by the reality that media coverage is often inaccurate and incomplete." (19CT 4111-12.)

In fact, the media reporting in this case **was** inaccurate and included "facts" such as appellant's leadership role as a supposed "cult leader" with a "Charlie Manson-like life style" who seduced the minor Amy S. even though he was married, then made her change her hair and clothes to resemble his wife, and told her what to eat and had sex with her after getting her drunk; his uncooperative attitude in jail; and the victim's

stepfather's desire for the death penalty – information known to be prejudicial. (5RT 1078.) Even worse, some of these facts were attributed to the juvenile court judge, although they originated with Amy S.'s defense-hired psychologist. (5RT 1091-92.)

Appellant agrees with the trial court ruling that the nature of the crime and the nature and extent of the publicity weighed in favor of a change of venue, but disagrees that the weight was "moderated" by the four factors cited by the trial court, as set out below.

1. The trial court erred by discounting the prejudicial publicity regarding the jailhouse attack on the grounds that it resulted from appellant's "wilful act."

The trial court erred by finding that the factors favoring a venue change could be discounted because the most recent publicity resulted from appellant's "wilful act" in the jailhouse incident. There is no authority for the trial court's position that a "wilful" act by the defendant causing prejudicial publicity mitigates against a change of venue. To the contrary, in the case most similar to the facts here, this Court found that a change of venue was warranted. In Fain v. Superior Court (1970) 2 Cal.3d 46, the defendant escaped from custody while awaiting retrial after reversal of his first trial. Sensational media coverage ensued as the defendant was at large for several days. This Court explicitly rejected the argument that because

"the publicity concerning the escape was the 'result' of [the defendant's] own misconduct, [it] should be excluded from consideration by reason of the doctrine of invited error." (Id. at 53.)

Fain observed that the invited error doctrine cited in People v. Gomez (1953) 41 Cal.2d 150 [and relied on here by the prosecutor in his supplemental briefing] involved a case in which the defendant had attempted to escape **from the courtroom during voir dire examination** of prospective jurors. Gomez, 41 Cal.2d at 162 upheld the denial of a motion to discharge the jury panel, stating that a "defendant should not be permitted to disrupt courtroom proceedings without justification [] then urge that same disruption as grounds for a mistrial " The Fain court distinguished Gomez because the defendant in Fain had

> "caused no courtroom disturbance, and it would be ingenuous in the extreme to believe that he escaped from jail before trial for the purpose of generating publicity of which he could subsequently complain in support of a future motion for change of venue. A defendant who attempts such an escape is no less entitled to a fair and impartial jury than one who, for example, attacks a guard or a fellow inmate – or, indeed, than a model prisoner. If his misconduct amounts to a crime, he can of course be prosecuted therefor, but he may not suffer the further and impermissible penalty of an unfair trial on the original charge against him." (Fain, 2 Cal.3d at 53.)

As in Fain, appellant caused no courtroom disturbance and it is absurd to think that he attempted to escape in order to generate publicity to support a

motion for change of venue. Appellant could be (and was) prosecuted for the escape attempt and attempted murder; and evidence of that incident was used against him at penalty trial. However, as this Court has emphatically proclaimed, the escape attempt and attack on a correctional officer cannot be used against appellant to defeat his change of venue motion. The trial court was thus incorrect in holding that the jail incident "moderated" or mitigated against the prejudicial publicity which favored a change of venue.

2. The local newspaper's circulation of 35,000 did not moderate the impact of prejudicial publicity on a jury pool of 70,000.

The trial court relied on the fact that "the circulation of the [local newspaper] was approximately 35,000 in a county with [] a jury pool of 70,000," but did not explain how publicity promulgated in a newspaper which reached one-half of the county's jury pool could "moderate" the prejudicial impact of such publicity. Appellant contends that it is reasonable to assume that many newspapers are read by more than one person (i.e., a newspaper reaches a home with more than one occupant, or a café where more than one person reads the newspaper). (See 6RT 1156 [expert testimony that each newspaper typically is read by two adults].) In fact, the statistic cited by the trial court actually shows the widespread impact of the negative publicity impairing appellant's ability to have a fair

trial. Moreover, the trial court's reasoning fails to take into account the impact of the television and radio reports. (See 19CT 4037-42; 4093-96; 4100-03 [television scripts from June 22 to June 26, 2002].)

3. Most of the actual jurors had knowledge of the charged offense and/or the jailhouse incident.

The trial court discounted the extent of publicity in this case in denying the change of venue on the grounds that (1) the prospective jurors had little knowledge of the specific facts of the crime and few opinions of appellant's guilt, and (2) good compliance with the court's orders not to read or talk about the case; and (3) that the jurors who had formed a bias based on media reports of the jail incident had been excused.

Appellant disagrees. Of the actual sitting jurors, almost half (5/12) had some knowledge of the facts of the murder charge (**JN1** 25RT 6796]; **JN2** [23RT 6408]; **JN5** [RT4678]; **JN9** [20RT 5274]; **JN10** [11RT 2789]; and three-quarters of them (8/12) had some knowledge of the facts of the jail incident (**JN1** [25RT 6796]; **JN2** [23RT 6408]; **JN4** [22RT 5987, 5982]; **JN 5** [22RT 6058]; **JN8** [24RT 6516]; **JN9** [23RT 6175]; **JN10** [22RT 6009]; **JN 12** [22RT 5963].)

Appellant acknowledges the case law stating that while constitutional fairness requires a panel of impartial jurors, the jurors need not be totally ignorant of the facts of the case prior to trial, as long as they

can lay aside their impressions and render an impartial verdict. (See Murphy v. Florida, supra, 421 U.S. at 800; People v. Lewis, supra, 43 Cal.4th at 618-19.)

Here, however, because the trial court refused to permit adequate voir dire on the jail incident (see Arg. II, below), it is impossible to conclude that the jurors were able to "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." (Irvin v. Dowd, supra, 366 U.S. at 723.) Notably, the trial court itself had remarked prior to its ruling that **most of the prospective jurors were hesitant to reveal how much information about the case they had.** (22RT 6096.)

Appellant contends that venire members hesitant to reveal objective facts of which they had learned would also be hesitant to reveal biases or opinions formed after having learned those facts. In consequence, it is impossible to determine that as to penalty phase (in which the jailhouse incident was critical to the case in aggravation) the actual sitting jurors, three-quarters of whom had been exposed to prejudicial pretrial publicity, were able to lay aside their impressions and opinions and reach an impartial penalty phase verdict.

For the same reason, the trial court's assertion that it had excused

prospective jurors with a bias resulting from media reports is incomplete. Although some jurors who had expressed their bias were excused, the trial court refused to allow the type of inquiry that would have exposed a bias in other prospective jurors, including the sitting jurors. (See Arg. II, pp. 179-187, below.) Thus it is impossible to determine that the biased venire members were actually excused.

Finally, the trial court's assertion that prejudicial publicity was mitigated by the jurors' "good compliance" with its orders not to read or discuss the case is questionable, since **at least** three jurors[8] later directly flouted the court's orders. (See Arg. XII, pp. 263-287, below [juror misconduct].)

4. The trial court's admonitions were inconsistent and incomplete and thus cannot serve to mitigate the prejudicial pretrial publicity.

The trial court also discounted the nature and extent of prejudicial publicity because it had "repeatedly reminded jurors of the incompleteness and inaccuracy of most media reports and its inapplicability to this proceeding." (19CT 4112.)

The trial court did instruct the jurors that media reports were not

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[8] Former JN 6, JN 4 and JN 11. Moreover, all of the final penalty phase jurors failed to heed the court's order to report any misconduct. (See Arg. XII, p, 282, below.)

evidence, and did state its intention "to remind the jurors of the incompleteness and inaccuracy of most media reports." However, the court failed to carry out this intention completely.

For example, three of the sitting jurors received no admonition as to the inaccuracy of publicity, because the general admonition given to the panel to which these jurors belonged told the jurors to consider only the evidence presented in court, but did not emphasize the often inaccurate accounts in the media.[9] (See 23RT 6341.) The other jurors received a general admonition about inaccurate reporting but not a particular one during individual voir dire.

5. The trial court's assertion that the prejudicial publicity was too recent to permeate the prospective jurors' attitudes is unsupported by case law or scientific studies.

The trial court discounted the prejudicial publicity regarding the jail escape attempt and attempted murder of a correctional officer on the basis that it was so recent it had "not time to permeate the prospective jurors' attitudes unchallenged by the reality that media coverage is often inaccurate and incomplete." (19CT 4112.)

Moreover, the trial court cited no evidence, scientific principle, or

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[9] JN 1 at 23RT 6341, 25RT 6800-01; JN2 at 23RT 6341, 6407; JN 8 at 24RT 6516, 23RT 6341.

legal authority for the notion that very recent publicity would not permeate prospective jurors' attitudes. In fact, common knowledge, scientific literature[10] and case law is to the contrary. (Irvin v. Dowd, supra, 366 U.S. at 725-26; People v. Lewis, supra, 43 Cal.4th at 449 [passage of time diminishes the potential prejudice from pretrial publicity]; People v. Prince (2007) 40 Cal.4th 1179, 1214 [passage of time ordinarily blunts impact of prejudicial publicity].

6. The assurances of impartiality made by prospective jurors were incomplete and insufficient to mitigate the prejudicial publicity.

The trial court reasoned that the prejudicial publicity was mitigated by the assurances of prospective jurors that they could be fair and impartial despite their exposure to such publicity. (19CT 4111-12.) This Court made a similar point in Farley, stating that the question is not whether the community remembered the case, but whether the sitting jurors had such fixed opinion "that they could not judge impartially." (46 Cal.4th at 1086, citing Patton v. Yount (1984) 467 U.S. 1025, 1035.)

However, both the United States Supreme Court and this Court have held that a juror's assurance that he or she can be impartial **cannot** be

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[10] See e.g., Suzuki, "Unpacking Pandora's Box," 4 Hastings Race & Poverty L.J. 235, 260 & fn. 130 (2007) [memory decays over time]; accord Woocher, "Did Your Eyes Deceive You?" 29 Stanf. L.Rev. 969, 982 (1977).

dispositive of the accused's rights. (Murphy v. Florida, supra, 421 U.S. at 800; People v. Lewis, supra, 43 Cal.4th at 450.) Thus, the jurors' assurances cannot be fully credited.[11] As stated in Murphy, it remains to the defendant to show actual bias. (421 U.S. at 800.)

Here, because the voir dire as to the jailhouse incident was improperly curtailed, and the trial court's admonitions were inconsistent, the assurances that were made by the prospective jurors must be deemed incomplete at best, in that their potential biases and opinions went unexplored.

In sum, the trial court should not have relied on assurances made by prospective jurors who were neither sufficiently voir dired on the jailhouse incident nor fully admonished as to the inaccuracy of media reports.

7. The trial court erred in ruling that the recent prejudicial publicity regarding the jail incident should be discounted in the venue analysis because it did "not concern the facts underlying the charges in the case."

Finally, the trial court discounted the impact of the prejudicial publicity relating to the jailhouse incident because it did not concern the facts of the murder. (19CT 4111-12.) The case law on venue does not

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11 See also Haney, "Exoneration and Wrongful Condemnation," 37 Golden Gate U.L.Rev. 131, 151 & fn. 65 (2006) [research shows that potential jurors exposed to and biased by pretrial publicity still tend to claim impartiality].

make the distinction made by the trial court[12]. As noted in Fain, a defendant is entitled to a fair trial even where he attempts escape or attacks a guard or fellow inmate while awaiting trial on the original charge. (2 Cal.3d at 53.)

Moreover, the prejudicial publicity on the jailhouse incident **did** concern the facts of this death penalty case, in which the prosecutor gave prompt notice that he intended to introduce the facts of that incident as evidence in aggravation. (22CT 6074.)

Thus, the fact that the publicity concerned aggravating evidence rather that guilt phase evidence does not moderate the prejudicial impact of the pretrial publicity to which the jurors were exposed.

E. Conclusion: Appellant's Trial Was Unfair.

The above analysis shows that the trial court erred in refusing to grant a change of venue. On appeal, however, appellant must also show to a reasonable likelihood that he did not in fact have a fair trial. (Lewis, 43 Cal.4th at 447.) Such a showing is made by looking to the voir dire of the actual jurors. (People v. Hernandez, supra, 47 Cal.3d at 336.) Here, however, because the voir dire was improperly curtailed (see Arg. II, below) appellant is unable to demonstrate that the sitting jurors were able to

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12 Under the trial court's analysis, the most inflammatory pretrial publicity regarding even inadmissible evidence could be discounted if it did not concern "the facts underlying the charge[d] offenses." This is clearly incorrect.

lay aside their impressions from the extremely recent and inflammatory publicity surrounding the jailhouse incident. Because appellant was erroneously prevented from making that showing, this Court has to presume that it is at least reasonably likely that he did not have a fair trial. (Cf. People v. Cash (2002) 28 Cal.4th 703 [reversing death sentence where trial court improperly restricted voir dire].)

Moreover, it is notable that this publicity tied appellant – through the already notorious Ben Williams, well-known hate-criminal and synagogue bomber[13] — to a homophobic racist, a fact that would be reasonably likely to keep some prospective jurors from laying aside negative impressions resulting from the publicity to which they were exposed.

In sum, the trial court's refusal to grant a change of venue in this case rendered appellant's trial and sentence of death unfair. This Court should reverse, or at a minimum, vacate the death sentence.

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[13] See 19CT 4109 [trial court notes that Williams is frequently in the press]; see also 20RT 5505 [defense attorney observes that "we all know" about Williams and refers to the many prospective jurors who knew about the Happy Valley case (in which Williams was accused of murdering a gay couple)].

II. THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO INQUIRE ON VOIR DIRE INTO POTENTIAL BIAS RESULTING FROM PRETRIAL PUBLICITY REGARDING THE JAILHOUSE INCIDENT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS, AND HIS EIGHTH AMENDMENT PROTECTION AGAINST AN UNRELIABLE SENTENCE

Appellant contends that the trial court' refusal to allow voir dire into the potential bias resulting from pretrial publicity about the jailhouse attempted escape and attempted murder of the jail deputy violated his Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury and to due process, and to his Eighth Amendment right to a reliable sentence. (Mu'mim v. Virginia (1991) 500 U.S. 415 [Sixth and Fourteenth Amendments require sufficient voir dire inquiry as to guarantee a fundamentally fair trial]; Johnson v. Mississippi, supra, 486 U.S. at 584 [Eighth Amendment requires a reliable sentencing].)

A. Summary of Proceedings Below.

After the trial court issued its written ruling denying appellant's renewed motion for change of venue or for a continuance, appellant again requested that the jury panel be disqualified, or that he be allowed to reopen voir dire. (20RT 5427, 5499; 25RT 6997.)

After the jail incident of June 22, appellant requested that the prospective jurors be voir dired not only as to their exposure to publicity

regarding that incident, but that they also be questioned as to potential bias arising from the fact that it was a correctional officer who was attacked, and that the alleged co-defendant was the notorious Benjamin Williams.

On June 25, the defense pointed out that the new incident changed the defense theory of voir dire because two subjects (a correctional officer victim and association with hate-crime criminal Benjamin Williams) were now relevant but had not been included in the juror questionnaire. (20RT 5505-06.) The trial court stated its intention to bring back those prospective jurors to inquire into their exposure to the recent publicity and to admonish them. (20RT 5510-11.)

On June 26, defense counsel submitted a list of voir dire questions to be posed as a result of the jailhouse incident, including questions as to the prospective jurors' exposure to prejudicial publicity, Benjamin Williams, the notorious "synagogue bomber" and appellant's alleged co-defendant in the jail incident, and the impact on the prospective jurors' based on multiple victims and a correctional officer victim. (18CT 3825-26.)

At the next proceeding on June 27, defense counsel emphasized that the existence of a correctional officer victim was the most significant fact or circumstance for additional voir dire, as "relevant to bias." (22RT 5937.) The trial court refused to allow voir dire on this point, stating that appellant

was "not charged" with the escape attempt and attempted murder on the correctional officer, and that to inquire of the venire regarding a correctional officer victim would be "prejudging" the evidence. (22RT 5936-37.) The trial court ruled that it would "consider" asking about the impact a correctional officer victim would have on a prospective juror, **but only** if the juror had close friends or relatives in law enforcement. (22RT 5938.)

The defense acknowledged that it could not and would not ask fact-specific questions about the attempted escape and attempted murder, but repeatedly requested permission to voir dire on the more general question whether the prospective juror could be fair if a correctional officer was a victim. The trial court refused the question.[14] (22RT 6074, 6099.)

On July 16, after the renewed change of venue motion and a writ filed in the Court of Appeal were both denied, defense counsel again requested that the panel be discharged, or that voir dire be reopened to question the prospective jurors as to bias resulting from a correctional officer victim, alleging that the trial court's refusal to allow this voir

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[14] The trial court's only concession was to ask a prospective juror whose father was a deputy sheriff whether the fact of her father being in law enforcement and "this incident [which she had heard about] happened in the jail. Is that going to have any affect on how you evaluate the case." (22RT 6100-01.)

violated appellant's Sixth Amendment right to an impartial jury. (25RT 6997-98.)

B. Where the Trial Court Restricts Voir Dire to the Extent that the Defendant Is Unable to Determine if the Prospective Jurors Harbor Bias, The Result is a Violation of the Defendant's Sixth and Fourteenth Amendment Rights to An Impartial Jury and Due Process.

People v. Cash (2002) 28 Cal.4th 703 reversed a death sentence where the trial court prohibited defense counsel from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder (alluding to anticipated aggravating evidence that the defendant had killed his grandparents). The trial court had refused to let defense counsel inquire about this because the other murders were "not charged in the Information" and voir dire was "restricted to this case." (Id. at 719.) This Court found that the restriction violated the defendant's state and federal constitutional rights to an impartial penalty jury. (Ibid.) The Court

> "affirmed the principle that either party is entitled to ask prospective jurors questions that are **specific enough to determine if those jurors harbor bias**, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." (Id. at 721-22; emphasis supplied.)

In Cash, the prior murder of the defendant's grandparents was a

general fact or circumstance "likely to be of great significance," and which could cause some jurors invariably to vote for the death penalty regardless of the mitigating evidence. Thus, the defense "should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance." (Id. at 721.)

Appellant contends that here, as in Cash, the trial court also erred by prohibiting voir dire of certain prospective jurors regarding the jailhouse attempted escape and attempted murder. It was beyond dispute that the facts of this incident would play a central part in the prosecution's penalty phase presentation. (22RT 6074 [on June 28, 2002, the prosecutor gave oral notice of his intent to introduce evidence of the incident in aggravation].) It is also beyond dispute that an escape attempt and an attack on a correctional officer could cause some jurors to invariably vote for the death penalty despite the strength of the mitigating evidence. (See e.g., Judges, Scared to Death (1999) 33 U.C.Davis L.Rev. 155, 206 [future dangerousness is a dominant, overt consideration in capital jury deliberations].)

The trial court allowed probing of the prospective jurors' attitudes and bias about the jailhouse escape attempt and attempted murder **only** if the prospective juror had already been exposed to publicity regarding the

incident. This is not the proper standard. The trial court also declared that such probing would amount to improperly asking the prospective jurors to "prejudge the evidence." (22RT 5937.) Again, this is incorrect.

Cash set out the parameters of voir dire in capital cases: "it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties" but "it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." (Cash, supra, 28 Cal.4th at 721-22.)

Here, defense counsel did not seek to conduct a highly specific voir dire such that it would require prejudging. The questions the defense sought to ask were to probe for potential bias arising from evidence of an assault on a correctional officer in general (and not as to the particular assault in this case). This is a question similar to those asked in most cases (including in the juror questionnaire in this case) as to bias for or against police officer witnesses.[15]

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[15] The cases rejecting arguments based on Cash are distinguishable from the facts here. In People v. Coffman (2004) 34 Cal.4th 1, 47, the trial court did not prohibit inquiry into the effect on the prospective jurors of other uncharged murders but merely cautioned the defense not to recite specific evidence in order to induce the juror to commit to voting in a particular way. In People v. Vieira (2005) 35 Cal.4th 264, 284-87, the trial court had denied a request to modify the jury questionnaire to ask whether prospective jurors would automatically impose death if they convicted him of multiple

Thus, as in Cash, the trial court's restriction on voir dire is in violation of appellant's Sixth and Fourteenth Amendment rights to due process and an impartial jury. (Cash, supra, 28 Cal.4th at 723; Morgan v. Illinois (1992) 504 U.S. 719, 739.) Moreover, a death sentence imposed by a jury that has not been adequately questioned on voir dire as to potential bias arising from a fact critical to the prosecution's case in aggravation (attack on correctional officer) is too unreliable to withstand Eighth Amendment scrutiny. (Johnson v. Mississippi, supra, 486 U.S. at 584.)

C. The Improper Restriction on Voir Dire Requires Reversal Of Appellant's Sentence of Death.

Appellant contends that, as in Cash, reversal of appellant's death sentence is required in this case. Cash points out that a defendant is entitled to a reversal if he can establish that any sitting juror was biased against him – however, if the defendant's inability to make that showing is "because he

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murders, but the court never prohibited the defense from asking this question in oral questioning. People v. Carasi (2008) 44 Cal.4th 1263, 1286-88 was the same: the trial court denied a motion to include case-specific factors in the written questionnaire but those facts were included in the oral questioning of the prospective jurors. In People v. Butler (2009) 46 Cal.4th 847, 858-61, the jury questionnaire addressed the fact of "multiple killings," but did not allow defense counsel to conduct voir dire on a jailhouse killing on which the defendant had not been convicted. This Court upheld that ruling, noting that, in contrast to Cash, the trial court had not prohibited questioning on other murders in general, or even on jailhouse murders in general, but had only prohibited defense counsel from exploring the prospective jurors' attitudes based on case-specific information. (Id. at 862.)

was denied an adequate voir dire" about a "possibly determinative fact for a juror," reversal is required. This is because the erroneous restriction of voir dire creates a risk that one of the sitting jurors would be of the view, and would act on that view, that the determinative fact would warrant an automatic vote to impose the death penalty.

> "Because the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the [charged] murder, it cannot be dismissed as harmless." (Id. at 723.)

In Cash, the "determinative fact" on which voir dire was foreclosed was an uncharged murder the facts of which were presented in penalty phase. In this case, the general fact on which voir dire was foreclosed was the existence of a correctional officer victim. Appellant contends that a correctional officer victim is even more likely to be a "determinative fact" at penalty phase than a second murder, because the sole question at penalty is a life in prison or death, so that evidence of an attack on a correctional officer is highly likely to trigger an "automatic death penalty" response from some prospective jurors.[16]

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[16] Coffman, supra, 34 Cal.4th at 47 found error restricting voir dire harmless where the defense didn't exhaust the peremptory challenges or express dissatisfaction with the jury. The facts at bar are quite different. Although the defense did

Thus, in this case as in Cash, the restriction on voir dire cannot be viewed as harmless, and reversal of appellant's death sentence is required.

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not exhaust its peremptory challenges, that was for an unrelated tactical reason (the remaining venire members were designated as worse for the defense than those sitting. (26RT 7071.) The defense repeatedly expressed its dissatisfaction with the jury and requested that voir dire be re-opened right up until the last minute. People v. Bolden (2002) 29 Cal.4th 515, 537-38 held that when voir dire is inadequate, the defense cannot intelligently exercise its challenges and because peremptory challenges cannot remedy the harm caused by inadequate voir dire, the defense is not required to use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire.

EVIDENTIARY ERRORS

III. THE ERRONEOUS ADMISSION OF LAY OPINION TESTIMONY BY AN OFFICER VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Summary of Proceedings Below.

At the end of its case-in-chief, during the testimony of Sergeant Clemens, the prosecutor played the videotaped statement of appellant's April 18, 1998 interview with the police,[17] in which appellant admitted killing Sinner but said he acted out of mercy, that he felt sorry for her, and that he knew she was going to die anyway after the beating she received at the hands of Amy S. and Lori S.

While questioning Clemens, the prosecutor stated that "several times during the playing [of this videotape], it appeared that [appellant] was breaking down and crying," and asked, "Did you observe that?" Clemens stated that he "saw what was on the video." The prosecutor asked about Clemens' "observation" of appellant's "physical condition at those points." The defense objected, stating "no foundation" and "speculation." (33RT 9339.) Outside the hearing of the jury, the defense also posed an objection under Evidence Code section 352, and argued that the video recording spoke for itself, so that Clemens' interpretation of it, or his opinion as to whether appellant's apparent remorse was sincere or not, was irrelevant. (33RT

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[17] See 33RT 9239-30, 9336; Exh. T-62A [transcript].

9340.) The trial court agreed that the officer's "opinion based on what he saw on the video" was irrelevant, but ruled that testimony as to appellant's "demeanor" was relevant:

> "[T]here's frequently a great difference between what's seen on the video and what people testify to who actually saw what happened. I don't think that precludes someone who was there from saying this is my observation, assuming it's a proper opinion that can be rendered and it's relevant." (33RT 9340.)

The prosecutor asserted that since "anybody can sniff," it was "relevant that there were no tears," and that there "was no attendant physical outward physical manifestations of this alleged [] emotional –." The trial court ruled that the officer could testify about "whether there were tears, red eyes, red face, those kinds of things." (33RT 9341.)

Sergeant Clemens then testified that during the videotaped interview he was sitting two or three feet from appellant and had a good look at appellant's face. (33RT 9341.) He said that during the two or three times that appellant (in the videotape) appeared to be displaying some emotion, Clemens never saw "any physical manifestations that would support that emotion;" rather, during those times, appellant "would always cover his eyes with his hand. And I didn't see any tears." He saw no "red face that would show that there was some emotion coming through." (33RT 9342.)

Over defense irrelevancy objections, Sergeant Clemens was also allowed to testify that with respect to police statements by the co-defendants, law enforcement told them to tell the truth, and that the "overriding premise"

in law enforcement's directives to these witnesses when making statements to the police was to tell the truth. (34RT 9631-32.)

B. Sergeant Clemens' Testimony as to Appellant's Supposed Emotional State During His Police Statement Was Irrelevant, Improper Lay Opinion, and Prejudicial.

Appellant contends that Clemens' refutation of the videotape evidence was inadmissible on all three grounds objected to below: it was (1) irrelevant; (2) improper opinion testimony; and (3) more prejudicial than probative under Evidence Code section 352.

1. Clemens' testimony was irrelevant to any issue relating to guilt.

Evidence Code section 210 defines relevant evidence as that which has "a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (See also People v. Garceau (1993) 6 Cal.4th 140, 177 [defining relevant evidence as that which tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent or motive].)

Evidence that appellant was or was not crying during his videotaped confession, or that he did or did not exhibit physical manifestations to support an apparent display of emotion, was **not relevant** to any fact of consequence to the guilt phase, or to any fact the prosecution had to prove. It is true that a plea of not guilty puts in question facts that the prosecution must prove, such as the defendant's intent, and the prosecution cannot be

compelled to accept a stipulation that would limit the prosecution's evidence if the effect would be to deprive the state's case of its force. (People v. Thornton (2000) 85 Cal.App.4th 44, 48-49.) However, neither appellant's emotional state during the interrogation, nor physical manifestations or the lack thereof indicative of an emotional state is relevant to any fact the prosecution had to prove at the guilt phase. Appellant's statement to the police was relevant to his intent and motive, but the nature and quality of his emotional state while making that statement did not tend to prove any material fact.

The prosecutor argued that Sergeant Clemens' failure to observe any tears was relevant to show that appellant's "sniffing" sounds on the videotape were phony, i.e., that appellant was putting on a fake show of emotional distress. (33RT 9341 ["Anybody can sniff."].) However, whether or not appellant was distressed, or whether or not any apparent distress was heartfelt, did not tend to prove or disprove any material fact, i.e., that appellant had intended to kill or torture, or that he premeditated.

More particularly, to the extent the prosecutor meant for Sergeant Clemens' testimony to prove that appellant's emotions were insincere, and that he felt no remorse, such testimony might have been admissible at penalty phase, but it was **not** relevant to any fact relating to guilt. For example, People v. Chatman (2006) 38 Cal.4th 344 held that the trial court properly overruled an objection in the penalty phase to testimony that the

defendant seemed to be enjoying kicking a custodian because "a history of enjoyment in the infliction of pain is relevant at the penalty phase." (Id. at 397.)[18]

Nor was the evidence relevant to "impeach" the videotape evidence presented by the prosecution. Although the prosecution can impeach its own witness,[19] it is improper to elicit otherwise irrelevant testimony merely for the purpose of impeaching the witness, where that impeachment has no bearing on the question of guilt or innocence. (People v. Lavergne (1971) 4 Cal.3d 735, 741; see also People v. Lo Cigno (1961) 193 Cal.App.2d 360, 379 [accord].)

In sum, the testimony from Sergeant Clemens was irrelevant, and thus inadmissible. The trial court has no discretion to admit irrelevant evidence. (People v. Crittenden (1994) 9 Cal.4th 83, 132.)

2. Clemens' testimony was improper opinion testimony that tended to invade the jury's fact-finding function.

Sergeant Clemens' testimony was also inadmissible as improper

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[18] Chatman also states that while a lay witness may not give opinion about another's state of mind, he or she may testify about objective behavior and describe behavior that is consistent with a particular state of mind. (Id. at 397.) However, this discussion assumes relevancy, i.e. in Chatman, the defendant's state of mind of enjoyment was relevant. In this case, appellant's state of mind during the interrogation was not relevant to any guilt phase issue. The rule that a witness may properly testify about (otherwise relevant) behavior does not render relevant otherwise irrelevant behavior.

[19] See People v. Gordon (1973) 10 Cal.3d 460, 474, fn. 8.

opinion testimony. A police officer – regardless of his professional experience – has no more expertise or insight than anyone else in determining the facts of the case, McCleery v. City of Bakersfield (1985) 170 Cal.App.3d 1059, 1072, a matter which is the exclusive function of the jury. (People v. Melton (1988) 44 Cal.3d 713, 744 [lay opinion testimony regarding the veracity of statements by another is inadmissible, because the fact finder, not the witnesses, must draw the ultimate inferences from the evidence]; People v. Sergill (1982) 138 Cal.App.3d 34, 39-40 [accord].)

People v. Smith (1989) 214 Cal.App.3d 904 is helpful. In that case, a deputy sheriff testified that he believed a dying declaration to be true, because he knew the declarant and he could tell by the tone of his voice (soft, shallow, expressing concern) that he was "sincere about it." (Id. at 914.) The Court of Appeal, relying on Melton, held that even though the deputy's opinion

> "may have been rationally based on his perceptions of the victim's physical condition and mental state, it was not necessary to elucidate his testimony. On the contrary, it also tended to invade the province of the jury on this issue." (Id. at 915.)

The same is true in this case. Sergeant Clemens' testimony was not necessary to elucidate for the jury the videotape recording.[20] Moreover, as in

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[20] The courts have upheld testimony from police officers who have identified defendants from a blurry surveillance camera photographs. (See People v. Perry (1976) 60 Cal.App.3d 608, 613; People v. Mixon (1982) 129 Cal.App.3d 118, 129-33.) In these cases, the surveillance photographs were

Smith, the testimony tended to invade the jury's province as sole determiner of credibility.

Sergeant Clemens' testimony is analogous to police officer opinion testimony as to the veracity of a witness because he was opining as to the sincerity of appellant's emotional condition. By stating that he saw no physical manifestations of the apparent emotion shown on the videotape, the officer was giving his opinion that the emotion displayed on the video was false, and that therefore what appellant was saying (expressing pity for the victim) was also false. The challenged testimony contains one more inferential link than straight testimony by a police officer that a witness is lying or telling the truth. Yet Clemens' testimony is inadmissible just as is direct police testimony as to the veracity of a witness, for the same reason. To the extent that appellant's emotional condition was relevant at all, it was a fact for the jury and not the officer to determine.

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of poor quality, and the officers' opinions aided the trier of fact. These cases are inapposite here, for at least two reasons. First, in Perry and Mixon the officers were testifying about a matter in issue, i.e., the defendant's identity; and secondly, in contrast to those cases, in this case there was no claim that the videotape was of poor quality, so that the officer's testimony would have assisted the jury. In People v. Medina (1990) 51 Cal.3d 870, 877, this Court allowed testimony by a deputy sheriff that the defendant appeared to be "responsive" and "descriptive" during a discussion regarding his need for protective custody, but this testimony was given at a **competency** hearing, at which the matter in issue was the defendant's ability to understand.

3. Clemens' testimony was more prejudicial than probative and thus inadmissible under Evidence Code section 352.

Because the challenged testimony was of no or marginal relevance, and was unduly prejudicial, in that (1) it was given greater importance than warranted by being presented through a police officer; and (2) misled the jury into thinking that appellant's supposed emotional state was something it could and should consider as part of the prosecution's case, the trial court should have excluded it under Evidence Code section 352.

C. Sergeant Clemens' Testimony as Prompted by the Prosecutor With Respect to the Police Statements of the Co-Defendants Was Improper Opinion Testimony as to Their Veracity.

Sergeant Clemens' testimony that the overriding premise in eliciting statements from the co-defendants was to tell the truth also amounted to improper opinion testimony as to their veracity in violation of People v. Melton, supra, 44 Cal.3d at 744. (See Part B, section 2, pp. 192-193, above, adopted and incorporated by reference here.) Although Clemens did not directly state that the co-defendants' police statements were truthful, the implication in his testimony as elicited by the prosecutor was to that effect. The trial court erred by allowing the irrelevant testimony.

D. The Admission of The Officer's Testimony Prejudiced Appellant.

State evidentiary error is generally assessed for prejudice under People v. Watson (1956) 46 Cal.2d 818. However, where highly prejudicial

evidence with no probative value is admitted, the defendant's federal due process rights are violated. (Estelle v. McGuire (1991) 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process]; McKinney v. Rees (9th Cir. 1994) 993 F.2d 1378 [admission of irrelevant and inflammatory evidence violated federal due process]; Holley v. Yarborough (9th Cir. 2009) 568 F.3d 1091 [admission of irrelevant and inflammatory evidence violated the defendant's due process rights and rendered the trial fundamentally unfair]; Lesko v. Owens (3rd Cir.1989) 881 F.2d 44, 52 [constitutional error in admitting evidence whose inflammatory nature "plainly exceeds its evidentiary worth"].)

Moreover, because the improper introduction of this evidence violated state law, it also denied appellant his federal constitutional due process rights under Hicks v. Oklahoma (1980) 447 U.S. 343, 346.)

Finally, because the testimony amounted to an improper credibility determination as to whether or not appellant felt remorse, it was unreliable evidence with respect to the penalty phase and thus in violation of appellant's Eighth Amendment rights under Johnson v. Mississippi (1988) 486 U.S. 578, 584.)

Federal constitutional error is reviewed for prejudice under the Chapman v. California (1967) 386 U.S. 18, 24 standard, which requires reversal unless the prosecution can prove the error to be harmless beyond a

reasonable doubt. Appellant submits that under this standard the error was prejudicial at both guilt and penalty phases of the trial.

Clemens' testimony relating to appellant was prejudicial at the guilt phase because it refuted appellant's statement in which he told the police that he felt sorry for Sinner and killed her in an act of mercy, i.e., without malice. Clemens' testimony that appellant's apparent remorse was basically faked made it look like appellant's statements were likewise fake. In this sense, Clemens' testimony amounted to a confession on appellant's behalf, and was thus an "evidentiary bombshell" which would have had an "indelible impact" on the jury. (Arizona v. Fulminante (1991) 499 U.S. 279, 313.)

Clemens' testimony as to the co-defendants' statements was likewise prejudicial for a similar reason: Because their statements contradicted appellant's statements, law enforcement assurances that they were telling the truth was tantamount to an assertion that appellant was lying.

Finally, Clemens' testimony as to appellant's mental state during his police statement was prejudicial at penalty phase, because it asserted that appellant felt no remorse for Sinner's death. Because the testimony came from a law enforcement officer, it was harder for appellant to rebut, and his own statements and testimony that he did feel remorse were thus not given proper mitigating effect.

CERTIFICATE OF SERVICE

Re: People v. Paul Smith, Jr.

I, Kathy Moreno, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at P. O. Box 9006 Berkeley, California 94709-0006. I served the attached

APPELLANT'S OPENING BRIEF, VOLUME I

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as follows:

Attorney General, ATTN: Angelo Edralin
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CAP – ATTN: Scott Kaufman
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Dist. Atty., Shasta Co.
1525 Court St., 3d floor
Redding, CA 96001

Clerk, Shasta Co. Super.Court
ATTN: Hon. James Ruggiero
1500 Court Street
Redding, CA 96001

Paul G. Smith, Jr.
T-75092
San Quentin, CA 94974

I declare under penalty of perjury that service was effected on February ___, 2010 at Berkeley, CA and that this declaration was executed on February ___, 2010 at Berkeley, CA.

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KATHY MORENO