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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **MARK CHRISTOPHER CREW,** Petitioner.	**CAPITAL CASE** S107856 (Related Appeal No. S034110)

Santa Clara County Superior Court No. 101400
The Honorable John Schatz and Robert Ahern, Judges

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **MARK CHRISTOPHER CREW,** Petitioner.	**CAPITAL CASE** S107856

Petitioner Mark Christopher Crew ("Crew") has filed a petition for writ of habeas corpus raising 20 claims of error in the guilt and penalty phases of his capital trial. For the reasons stated herein, he has failed to establish a prima facie case for relief. Therefore, the petition should be denied.

STATEMENT OF THE CASE

On August 5, 1985, the District Attorney of Santa Clara County filed an information against Crew charging him with one count of murder (Pen. Code, § 187), with a special circumstance of financial gain (Pen. Code, § 190.2(1)); five counts of grand theft (Pen. Code, §§ 484-487); and one count of conspiracy to commit murder (Pen. Code, § 182.1). (CT 1925-1926.) Crew entered a plea of not guilty. (CT 1934.) On October 14, 1986, the prosecutor filed an amended information adding one count of conspiracy to obstruct justice (Pen. Code § 182.5). (CT 1935.)

Crew was initially represented by the public defender. On July 7, 1987, Crew hired a private attorney, Joseph O'Sullivan, to represent him. (RT 7/7/87 3.) On November 29, 1988, the trial court appointed a second attorney, Joseph Morehead, to assist O'Sullivan. (CT 2087).

Jury trial began on April 17, 1989. (CT 2126.) On April 25, 1989,

the prosecutor filed a second amended information omitting the conspiracy charges and four of the five counts of grand theft against Crew. (CT 2133-2134.) On July 26, 1989, the jury found Crew guilty of first degree murder and grand theft, and found the financial gain special circumstance true. (CT 2272.) On August 10, 1989, the jury recommended the death penalty. (CT 2300.) On February 23, 1990, the trial court, Judge John Schatz, granted Crew's motion for modification of the verdict pursuant to Penal Code section 190.4, subdivision (e), and imposed a sentence of life without possibility of parole. (RT 5158-5182.)

The district attorney appealed the modification of sentence. On December 31, 1991, the Court of Appeal reversed the grant of modification in a published opinion and remanded the case for resentencing. (*People v. Crew* (1991) 1 Cal.App.4th 1591). On March 26, 1992, this Court denied review. (CT 2715.) The remittitur issued on April 3, 1992. (CT 2715.)

On April 10, 1992, the parties appeared before Judge Schatz to schedule the resentencing hearing. (RT 4/19/92.) On April 14, 1992, Judge Schatz announced that he would be on medical leave effective immediately, and would retire on August 2, 1992. (CT 2793.) On May 15, 1992, the case was reassigned to Judge Robert Ahern. (CT 2749.)

For the next year, defense counsel made various attempts to get the case back before Judge Schatz, despite the fact that he was no longer on the bench. In December of 1992 the presiding judge declined to reappoint Judge Schatz. (CT 2897.) On February 2, 1993, Crew challenged that decision in the Court of Appeal, which denied the petition the same day. On February 8, 1993, Crew filed a petition for review in this Court, which was denied on March 25, 1993 (CT 2923.) On June 22, 1993, this Court denied Crew's petition for stay and writ of mandate. (CT 3000.)

On June 23, 1993, the parties argued the motion to modify the verdict

before Judge Ahern. (CT 3002; RT 6/23/93 at pp. 190-233.) On July 22, 1993, Judge Ahern denied the motion, found the aggravating circumstances outweighed the mitigating circumstances, and imposed a judgment of death. (CT 3005-3014; RT 7/22/93 at pp. 234-257.)

The record was certified on June 11, 1999. On July 13, 1999, before any briefs had been filed, Crew filed a motion to preserve the testimony of Judge Schatz and his wife, Jacqueline Schatz. On November 10, 1999, this Court denied the motion, but granted Crew leave to immediately file a petition for writ of habeas corpus raising claims to which the motion related, without prejudice to later filing a timely second petition. Crew filed a petition raising three claims on December 21, 1999 (No. S084495). The state filed a response on February 25, 2000. Crew filed a reply on May 30, 2000. Crew also requested discovery, which the state opposed. On June 28, 2000, this Court denied the petition on the merits and denied discovery.

On June 29, 2000, Crew filed his opening brief on direct appeal (No. S034110). The respondent's brief was filed on August 10, 2001. Crew filed his reply brief on March 28, 2002. Crew filed the instant petition 90 days later on June 26, 2002.

STATEMENT OF FACTS

We provided a comprehensive statement of the facts the crime in our Respondent's Brief at pages 3-29, which we incorporate here by reference. Briefly stated, Crew met the victim, Nancy Andrade, a recently divorced mother of two, at a San Jose bar. Sometime after they began dating, Crew decided to kill Nancy and take all her money and property. He planned to kill her on a trip across the county and to conceal her body where it would never be found. As a ruse to accomplish the plan, Crew asked Nancy to move with him to South Carolina, where his mother lived. Nancy said she would move so far away from her family and friends only if they were married; Crew agreed to do so, and they got married in Reno, Nevada. Despite some trepidation, Nancy cashed out her bank accounts, packed up all her possessions, and said a tearful goodbye to her parents and two children. She was never seen or heard from again.

According to what Crew told his friend Richard Elander, after Crew and Nancy started on the cross-country trip they stopped by the side of the road, where Crew shot Nancy in the back of the head, rolled her body into a ditch, and covered it with a blanket. When Crew returned the next day with his friend Bruce Gant, Crew went to the location where he had left the body, but it had moved. Crew "freaked out" and ran back to Gant, who went to the body, tried to strangle Nancy, and ended up cutting her head off. The body was buried in Gant's back yard. However, Gant called Crew and informed him the body had begun to stink. Crew told both Elander and a former girlfriend, Jeanne Meskell, that Nancy's body ended up in a 55-gallon drum filled with cement, and her head ended up in a 5-gallon bucket that was thrown off the Dumbarton Bridge. Those containers were never found, and Nancy's body has not been recovered. Immediately after Nancy's disappearance, Crew started selling or giving away her possessions and using her money. He assumed a false name and moved to Connecticut, where he was arrested 17 months after the murder.

STANDARD OF REVIEW ON HABEAS CORPUS

"Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) In evaluating whether petitioner has established a prima facie case, the reviewing court asks whether, assuming the factual allegations are true, the petitioner would be entitled to relief. (*Id.* at pp. 474-475.) Absent such a showing, the petition will be summarily denied. (*Id.* at p. 475.)

ARGUMENT
I.

CREW RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

In Claim A, Crew contends he received ineffective assistance of counsel at the guilt phase of trial.

"To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant." (*In re Resendiz* (2001) 25 Cal.4th 230, 239 (citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688).)[1/]

Initially, Crew claims that he received ineffective assistance because his retained attorney, Joseph O'Sullivan, failed to conduct an adequate investigation. Crew relies on the fact that O'Sullivan requested a six-month continuance of trial in September 1988, stating he had an alcohol abuse problem, had just stopped drinking, and needed additional time to recover and prepare for trial.[2/] (CT 2065-2066; RT 9/13/88 1-17, RT 9/16/88 18-43.) The

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1. Crew purports to reserve his right to assert the attorney-client and work product privileges. (Petition at p. 25.) However, by electing to challenge counsels' representation, he has waived the attorney-client and work product privileges as to all matters put into issue by his claims. (Evid. Code, § 958; *In re Gray* (1981) 123 Cal.App.3d 614, 617.) In other words, "he can't have his cake and eat it too." (*Ibid.*)

2. Crew also relies on the fact that in late 1994 O'Sullivan was put on probation for two years by the State Bar in a disciplinary proceeding in an unrelated case. In that case, O'Sullivan did not obtain written consent to a conflict of interest and failed to file a timely complaint in a wrongful death case in 1989. The bar also found that excessive use of alcohol contributed to the misconduct. (Petition at pp. 33-34.) The fact that O'Sullivan was the subject

court granted the continuance and appointed Joseph Morehead as co-counsel on November 29, 1988. According to Morehead, most of the investigation was conducted in the five months after he was appointed. (Petition, Exh. 1.) Crew does not contend that O'Sullivan was abusing alcohol during trial or that he suffered any residual effects that impaired his judgment or ability;[3/] his claim is that O'Sullivan's earlier alcohol abuse unreasonably delayed the investigation.

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." (*Strickland v. Washington, supra,* 466 U.S. at p. 690.) Assuming arguendo the truth of these allegations, Crew fails to point to any *specific* fact relating to the guilt phase defense that was not discovered or discovered too late to be useful as a result of O'Sullivan's earlier alcohol abuse. All his particular allegations of ineffective assistance, which we discuss below, concern trial events, such as the failure to seek instructions, object to evidence or argument, or impeach witnesses with known information. Crew does not contend that any of these errors stemmed from the allegedly delayed investigation. Accordingly, this general claim of deficiency is meritless.

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of a state bar disciplinary proceeding five years after the trial in this case does not establish ineffective assistance. (*See People v. Sanchez* (1995) 12 Cal.4th 1, 42-44.) Moreover, the fact that an attorney is an alcoholic does not automatically establish ineffective assistance; the defendant "must still prove specific deficiency." (*People v. Garrison* (1989) 47 Cal.3d 746, 787.)

3. O'Sullivan stated at the end of trial, "I would be glad to put on the record that the malady under which I suffered when asking for continuances for this trial has no longer afflicted me. Counsel would want that so that would never be an issue in the appellate process. . . ." The prosecutor agreed, stating, "I have not made any personal observations that would indicate that has been a problem. Quite to the contrary." (RT 5118-5119.)

A. Failure To Seek Instruction On Territorial Jurisdiction

Crew contends trial counsel were ineffective because they failed to seek an instruction requiring the jury to find sufficient evidence that the murder occurred in California to confer territorial jurisdiction on the courts of this state. Counsel did raise the sufficiency issue at the preliminary hearing. (CT 1797-1800.)

Territorial jurisdiction is a legal question, not a question of fact that should be left up to the jury. Crew cites no cases holding that the jury must resolve this question. While this Court has not directly addressed this precise issue, it has seriously questioned whether the related issue of venue should be presented to the jury, noting that "analogous procedural issues that do not relate to the guilt or innocence of the accused (such as whether the prosecution has complied with statutory and constitutional speedy trial requirements) [] uniformly are treated as legal questions to be decided by the court rather than a jury." (*People v. Simon* (2001) 25 Cal.4th 1082, 1110 n. 18; see also *post*, Arg. I-B.) Other courts have expressly held that jurisdiction is a question of law that should be decided by the trial court, not the jury. (*State v. Beverly* (Conn. 1993) 618 A.2d 1335, 1338 ["the question of where a murder occurred generally is not an element of the offense, but is merely an issue of territorial jurisdiction to be decided by the court. [Citations.] A defendant's constitutional right to a jury does not extend beyond the factual issues that are relevant to the ultimate question of guilt or innocence under the relevant statute."]; *Mitchell v. United States* (D.C. 1990) 569 A.2d 177, 180 ["The question of where an offense took place is 'not one of fact for the jury.'"].)[4/] Since the defense was

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4. Some courts have held that the jury should decide the question if the jurisdictional facts "are controverted and their resolution intertwined with proof of elements of the crime." (*State v. Willoughby* (Ariz. 1995) 892 P.2d 1319, 1325-1326.) Even in those courts, if there is no evidence that the acts alleged by the prosecution to confer jurisdiction might have taken place outside the

not entitled to have the jury resolve the question of territorial jurisdiction, counsel could not have been ineffective for failing to request an instruction on that issue.

Additionally, Crew insists that the legal standard for jurisdiction is governed by *People v. Buffum* (1953) 40 Cal.2d 709. He acknowledges, as he failed to do in his opening brief, that this Court overruled *Buffum* in *People v. Morante* (1999) 20 Cal.4th 403. However, he argues that *Morante* is prospective only. (Petition at pp. 38-39.) In *Morante*, this Court expressly found that its holding regarding the standard of jurisdiction for charges other than conspiracy is retroactive. (20 Cal.4th at p. 437.) Accordingly, the standard of jurisdiction in this prosecution for murder and theft is that set forth in *Morante*. Under that standard, all that is required to establish California's jurisdiction over the case is evidence that Crew formed the intent to kill and committed "any act" in furtherance of that intent within this state, even if such act does not constitute an attempt. (*Id.* at p. 434.)

As we noted in our Respondent's Brief, there was ample evidence to satisfy the *Morante* standard. (RB at pp. 39-40.) Crew's attempt to characterize such acts as "de minimus [sic]" and based only on the testimony of Richard Elander, whose credibility he claims was suspect, is unavailing. (Petition at pp. 39-40.) Crew asked Nancy to move to South Carolina with him because he had decided it would be easier to kill her and get away with it during

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state, then there is no requirement that the jury decide the question of jurisdiction. (*Id.* at p. 1328.) Thus, in *Willoughby*, where the evidence showed "the murder scheme was hatched in Arizona," and defendant contested the interpretation of his discussions about the scheme but not where they took place, the question of jurisdiction was properly determined by the trial court. (*Id.* at 1328-1329.) Likewise, at trial in this case Crew challenged the import of the evidence that he engaged in acts in furtherance of his intent to kill Nancy in California, but not that they occurred in the state.

a cross-country trip. He then agreed to marry her to ensure she would go on the trip. These acts showed the drastic lengths to which Crew was willing to go to advance his plan. Crew encouraged Nancy to close out her bank accounts and bring a large amount of cash on the trip, and helped her pack up virtually everything she owned into her two cars and horse trailer; this gave him ready access to all her money and possessions. Crew and his stepfather, Bergin Mosteller, picked up Nancy's horse and, contrary to what they had told Nancy, boarded him in San Jose until she was dead and they could sell it. These actions furthered Crew's intent to gain financially from Nancy's death. The fact that all the above actions occurred, and that they occurred in California, was not disputed. (See *ante*, fn. 4.)

Further, strong circumstantial evidence showed that Nancy was in fact killed in California. Otherwise, Crew would not have had time to leave the Motel 6 in Fremont, shoot Nancy in the head, conceal her body in a ditch, drive to his friend Bruce Gant's house in Campbell, return to the scene with Gant to retrieve the other car, and drive back to Gant's house, all in one day. (See RB at pp. 35-37.)

Accordingly, even if territorial jurisdiction were a jury question for which counsel should have sought a jury instruction, Crew cannot establish prejudice because there is no reasonable probability the jury would have found he did not commit "any act" in furtherance of his plan to kill Nancy in California.

B. Failure To Seek Instruction On Venue

Crew contends trial counsel were ineffective because they failed to seek an instruction requiring the jury to find sufficient evidence that the murder occurred in Santa Clara County. Counsel raised the sufficiency issue at the preliminary hearing, the Penal Code section 1118.1 motion, and the

motion to arrest the judgment. (CT 1800-1803, 2345-2353; RT 4475-4479, 5147-5150.)

The issue of whether venue is a jury question is unsettled. One line of cases, commencing with *People v. Megladdery* (1940) 40 Cal. App. 2d 748, 762-764, has held that venue is a question of fact that should be reserved for the jury. Another line of cases, commencing with *People v. Mitten* (1974) 37 Cal.App.3d 879, 881-885, has suggested that the issue of venue should be raised and adjudicated prior to trial at the preliminary hearing. The jury question issue is currently pending before this Court in *People v. Posey*, No. S100360. However, in *People v. Simon, supra,* 25 Cal.4th at p. 1110, fn. 18, the Court articulated compelling policy reasons for treating venue as a question of law, although it ultimately did not decide the issue:

> [T]he characterization of venue as presenting the type of factual question that properly is to be determined by a jury, rather than the type of procedural legal issue that is determined by the court, appears inconsistent with contemporary treatment of other, analogous procedural issues that do not relate to the guilt or innocence of the accused (such as whether the prosecution has complied with statutory and constitutional speedy trial requirements) — issues that uniformly are treated as legal questions to be decided by the court rather than a jury. (Citations.) Indeed, treating venue as presenting a question to be resolved by a jury appears particularly problematic when one considers that the principal purpose underlying the venue statutes from a defendant's perspective — to protect a defendant from being required to stand trial in a distant and unduly burdensome locale — can be meaningfully effectuated only if a defendant's venue challenge is considered and resolved prior to trial, well before a jury is empanelled or any issue is submitted to it. In addition, unless the jury is instructed to return a separate special verdict on the issue of venue before returning a general verdict, a finding that the proceeding has been brought in an improper venue can result in an unwarranted acquittal, rather than in a new trial in an authorized venue. (*Ibid.*)

Even if this Court were to find that venue is a jury question and that counsel should have requested an instruction, Crew cannot show there is a reasonable probability the jury would have found Santa Clara County was an

improper venue for trial. Penal Code section 790 provides that the proper venue in a murder case is the county where the fatal injury was inflicted, where the victim died, or where the body was found. Penal Code section 781 states: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory." In a murder case involving more than one county, sections 790 and 781 should be read together. (*People v. Price* (1991) 1 Cal.4th 324, 385.) Section 781 "is to be construed liberally to vest venue in a court of a county where preliminary acts, leading to the commission of a crime in another county, occur." (*People v. Simon, supra,* 25 Cal.4th at p. 1092.) Venue lies "even though the preparations did not constitute an essential element of the crime." (*People v. Price, supra,* 1 Cal.4th at p. 385.)

Under Penal Code section 790, Nancy's body was "found" in Gant's back yard in Santa Clara County because it was buried there at least temporarily.[5/] Further, under Penal Code section 781, there was ample evidence that "preliminary acts" took place in Santa Clara County. Crew's contention that the only preliminary acts consisted of planning activity that occurred in South Carolina is incorrect. (Petition at p. 43-44.) An integral part of Crew's

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5. Crew contends the prosecutor's reliance on this reasoning in his closing argument constituted misconduct, and counsels' failure to object to the statement constituted ineffective assistance. (Petition at p. 45; see RT 4568-4569.) Prosecutorial misconduct results only from "deceptive or reprehensible" argument, or actions that are so egregious as to render the trial unfair. (*People v. Silva* (2001) 25 Cal.4th 345, 373.) The prosecutor's statement was a reasonable, good faith interpretation of Penal Code section 790 and in no way amounted to misconduct. Indeed, the trial court had already agreed with that interpretation of the venue statute. Moreover, since the jury was not asked to decide the venue question, Crew cannot possibly show prejudice resulting from the prosecutor's mention of it in closing argument.

strategy was to lure Nancy into taking a cross-country trip with him, because he had determined it would be easier to get away with murder under such circumstances. To that end, he persuaded Nancy to move South Carolina with him and even agreed to get married in order to guarantee that the trip took place; those conversations could only have occurred at the locations where Nancy had contact with Crew while they were dating, i.e., the Saddle Rack bar, Darlene Bryant's house, and Crew's apartment on Maria Way, all of which were in San Jose. Crew subsequently helped Nancy load up her possessions at Darlene's house in San Jose. Crew and Mosteller deceived Nancy about her horse by boarding him in San Jose. Crew and Nancy left on the trip from San Jose, where they stayed at a motel before stopping in Santa Cruz to say goodbye to her family. These events clearly constituted preliminary acts leading to the commission of the murder, and all took place in Santa Clara County. Accordingly, under any circumstances the jury would have concluded that venue was proper in Santa Clara County, and Crew cannot show prejudice from trial counsels' failure to request a jury instruction on venue.

C. Failure To Argue Lack Of Corpus Delicti

Crew contends trial counsel were ineffective because they failed to seek exclusion of his statements about the murder based on insufficient evidence of corpus delicti, and failed to make this argument to the jury. The jury was instructed with CALJIC No. 2.72 that the corpus delicti must be proved independent of Crew's statements. (CT 2621.)

The corpus delicti consists of two elements: the fact of an injury, loss, or harm, and the existence of a criminal agency as its cause. (*People v. Kraft* (2000) 23 Cal.4th 978, 1057.) The prosecution must establish the corpus delicti of the crime independently of the defendant's extrajudicial statements, admissions, or confessions. (*Ibid.*)

"Only slight evidence is required to establish the corpus delicti, which may be inferred from circumstantial evidence." (*People v. Morales* (1989) 48 Cal.3d 527, 553.) The "slight" or "prima facie" evidence standard is appropriate even where the victim's body is never found, because "[t]o hold otherwise would lead to the incongruous result of permitting a criminal to publicly proclaim his guilt so long as he was able to successfully hide the body of the victim." (*People v. Jennings* (1991) 53 Cal.3d 334, 368.) Stated another way, "successful disposal of the victim's body 'is one form of success for which society has no reward.'" (*Id.* at pp. 368-369, quoting *People v. Manson* (1971) 71 Cal.App.3d 1, 42.)

Crew argues there was insufficient evidence without his statements to show that Nancy was actually dead. He contends she was so "erratic" and "unstable" that "it was not unreasonable to infer, absent petitioner's alleged statements, that she disappeared willfully." (Petition at p. 47.) This tactic of blaming the victim for her disappearance will not work here. Witnesses testified that after Nancy's divorce she lived with several different friends and was unhappy and confused, but there was simply no evidence to support a conclusion that she would deliberately sever all ties with her family and friends. To the contrary, she had very close relationships with her children, parents, and friends. (See RB at pp. 4, 48-49.) Nancy's failure to contact any of these important people in her life as of the day she left with Crew established a strong inference that she was dead. (*People v. Fauber* (1992) 2 Cal.4th 792, 850-851; *People v. Ruiz* (1988) 44 Cal.3d 589, 610-611; *People v. Johnson* (1991) 233 Cal.App.3d 425, 440.) Nor would she have simply abandoned her beloved horse, when her dream was to start a ranch with him. And it was even more unlikely that she would have left behind thousands of dollars, all her clothing, and every single personal possession she owned; there certainly was no evidence that she wanted to become destitute.

Crew also contends that even if there was enough evidence to conclude Nancy was dead, there was insufficient evidence that her death was caused by criminal agency. His own actions belie this claim. Almost immediately after Nancy's disappearance, Crew started using her money and giving away or selling her possessions. He lied to numerous people about acquiring those possessions as a result of their "divorce." He left California and eventually moved to Connecticut, where he lived under an alias for more than a year. These actions supported a conclusion not only that Nancy was dead, but that Crew killed her. (*People v. Scott* (1969) 274 Cal.App.2d 905, 908-909; *People v. Bolinski* (1968) 260 Cal.App.2d 705, 716.) Moreover, the fact that Nancy's body was never recovered, despite the protracted attempts of her parents and the private investigator to find her, justifies an inference that her death was the result of a criminal agency. "It is highly unlikely that a person who dies from natural causes will successfully dispose of his own body. Although such a result may be a theoretical possibility, it is contrary to the normal course of human affairs." (*People v. Manson, supra,* 71 Cal.App.3d at p. 42.)

Crew misunderstands the prosecution's burden of proof to establish the corpus delicti. That burden is met by evidence that creates a reasonable inference that the death could have been caused by a criminal agency, "'even in the presence of an equally plausible noncriminal explanation of the event.'" (*People v. Mattson* (1990) 50 Cal.3d 826, 874, citation omitted.) Where the victim's body is never found, the evidence "need not negate all possibilities of the victim's death by noncriminal agency or of the victim's continued existence." (*People v. Fauber, supra,* 2 Cal.4th at p. 851, citation omitted.) Thus, even assuming arguendo Crew's interpretation of the evidence is "equally plausible," the evidence clearly supported a reasonable inference that Nancy was killed. Accordingly, Crew cannot show that his attorneys were

unreasonable for failing to seek exclusion of his statements under the corpus delicti rule, nor can he establish prejudice.

D. Failure To Seek Adequate Instruction On Prosecutorial Misconduct

Trial counsel objected to the prosecutor's inadvertent comment and elicitation of Nancy's statements of her fear of Crew, which the trial court had ruled were inadmissible. Counsel requested and drafted a limiting instruction, which the trial court read to the jury. Crew now contends counsel were ineffective because the instruction did not go far enough.[6/]

We have explained the context of the prosecutor's actions at length in the Respondent's Brief. (RB at pp. 51-54.) In brief, the trial court had ruled that Nancy's statement that she was afraid of Crew was inadmissible. (RT 3458.) However, the court found that *observations* of Nancy's fear, and Nancy's specific statement to call the police if she had not been heard from in two weeks after leaving on the cross-county trip, were admissible. (RT 3451, 3466.) In his opening statement the prosecutor noted that Nancy had told her friends she was "very apprehensive about the move. Not only the move, but apprehensive of the defendant, fearful of the defendant." (RT 3506.) During his examination of Nancy's friend Debbie Nordman, the prosecutor asked about the last conversation Debbie had with Nancy about whether to go to South Carolina with Crew. Debbie responded that Nancy "expressed some concern and some fear, and basically she said to me, `If you don't hear from me in two weeks, send the police.'" The prosecutor then asked what Debbie had told

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6. Crew argues that trial counsel "subsequently acknowledged that the cautionary instruction was inadequate by citing the prosecutor's misconduct as grounds for its motion for new trial. CT 2436." (Petition at p. 52.) However, the motion did not address the fact that an instruction was given, much less whether it was sufficient.

Nancy *before* Nancy made that statement; presumably he was attempting to elicit the context for Nancy's statement, which was that Debbie had asked Nancy about getting left in the desert during the trip. However, Debbie responded with what she told Nancy *after* Nancy made the statement about calling the police, which was that "if she had fear, reservations or that, you know, first of all, she should not take the children because if anything was going to happen, she didn't want, didn't feel she should have had children involved. And I - and I also told her that if she had the fear, and up until that point -" (RT 3587-3588.)

As to both the opening statement and the examination of Debbie Nordman, the trial court apparently accepted the prosecutor's representations that the mention of such evidence was inadvertent. Indeed, the prosecutor had instructed Debbie not to mention Nancy's statements of fear, but Debbie mentioned it anyway in her non-responsive answer to his question. (RT 3514-3515, 3594-3595.) Crew's contention that the prosecutor deliberately violated the court's order is wholly refuted by the court's implicit factual finding that the prosecutor had acted inadvertently.

But even assuming the truth of Crew's allegations, he cannot establish that counsel were ineffective. Counsel objected to both the opening statement and the examination of Debbie. (RT 3514-3515, 3587-3588, 3594-3595.) Counsel then submitted the following instruction: "You are not to consider any testimony or evidence that Nancy Jo Crew may have expressed either fear or apprehension of the defendant Mark Crew as evidence that Mark Crew either killed Nancy Jo or that she is dead. Such evidence may be considered only for the limited purpose of establishing whether or not it was likely that Nancy Jo Crew would have traveled to South Carolina with Mark Crew." (RT 3723-3724.) Crew contends this instruction was insufficient because the trial court had originally ruled that Nancy's statements were

inadmissible altogether, while the instruction simply limited the purpose for which the jury could consider that evidence. However, the instruction specifically addressed the only potentially damaging inference that could have be drawn from the evidence: that since Nancy expressed fear of Crew, he in fact killed her. By its express terms, the instruction precluded the jury from drawing such an inference. The jury is presumed to have followed such an instruction. (*People v. Smithey* (1990) 20 Cal.4th 936, 961.) Thus, the instruction was sufficient to cure any possible harm from the evidence.

Further, Crew cannot show prejudice. Evidence that Nancy *exhibited* fear of Crew clearly was admissible, even if her statements to that effect were not. (See RT 3451.) The jury had already heard testimony from Nancy's friend Tanis Palmer that she believed Nancy was afraid of Crew. (RT 3564.) And the statements of fear at issue, which were extremely general and not in response to any specific threat of harm by Crew, could have had only minimal prejudicial effect. Crew contends the evidence was damaging because there were "substantial questions not only whether the defendant killed the victim, but whether she had been killed at all." (Petition at p. 53.) As we explained in Section I-C, even without Crew's statements there was compelling evidence that he killed Nancy; after hearing Crew's description of her death and the subsequent disposal of her body, the jury could have reached no other conclusion. Accordingly, evidence of Nancy's generalized fear of Crew was not what tipped the balance toward conviction. There was no reasonable likelihood the jury would have reached a different verdict if counsel had drafted a different instruction.

E. Failure To Object To Evidence

Crew contends trial counsel were ineffective at four points in the trial for failing to object to the admission of evidence and failing to request

limiting instructions.

1. Mosteller's False Statements

The prosecution introduced evidence that Crew's stepfather, Bergin Mosteller, made false reports of a car theft and robbery to police and his insurance agent. Mosteller claimed the robbery took place in Boulder City, Nevada, in the early morning hours of August 23, 1982, which was the last day Nancy was seen alive. (See RB 60.) Defense counsel objected to the evidence on grounds that it was irrelevant and more prejudicial than probative. (RT 4259-4260.) The prosecutor argued the evidence was relevant to show that Mosteller went to great lengths to establish an alibi and disassociate himself from San Jose, which inferentially showed he knew beforehand that Crew was going to kill Nancy there during that time period. (RT 4254-4255, 4261-4252.) The trial court held that the probative value of the evidence outweighed the possible prejudice, but excluded evidence of the details of the alleged robbery. (RT 4266-4268.)

Crew now contends counsel should have argued the evidence was irrelevant for the additional reason that Mosteller made the false report because the car was actually stolen by a prostitute in Reno, Nevada. Crew claims this showed Mosteller made the false report to prevent his wife from finding out about the prostitute, not to establish an alibi. However, Crew fails to show that Mosteller's car in fact was stolen by a prostitute. He relies solely on Mosteller's statement to that effect in a July 1984 police interview. (Petition, Exh. 53.) However, Mosteller clearly lied to the police about other facts during the same interview. For example, Mosteller claimed he didn't think anything had happened to Nancy until "just recently." (Petition, Exh. 53 at p. 28.) But in 1982, Mosteller and Crew had decided to go to California expressly "to kill Nancy." (RT 3973-3974.) Mosteller also had demonstrated his knowledge of

the murder by lying to Nancy's father, telling him that Nancy and Crew had arrived safely in South Carolina with Nancy's horse; in reality Nancy did not survive the trip, and Mosteller personally had boarded the horse at a stable in San Jose instead of transporting him across the country. (RT 3784-3786.) Mosteller also lied in his letter to Nancy's parents, implying that he had recently talked on the phone to Crew and Nancy in Texas, and erroneously claiming there were "hard feelings" between Crew and his mother, whom he falsely stated had cancer. (See RT 3782, 4247.) In short, Mosteller had lied about so many facts that his allegation the car was stolen by a prostitute was wholly unreliable. Based on the only supporting evidence offered here, Mosteller's own statement, there is no reasonable probability Crew's counsel could have convinced the judge that the prostitute story was true.

Moreover, even assuming arguendo that for once Mosteller told the truth, the fact that he may have wanted to hide his sexual misconduct from his wife fails to show that he did not *also* want to establish an alibi because he knew Crew was planning to kill Nancy. The prostitute's actions could have sparked the idea of making the report, albeit with a different perpetrator as the thief, as a way to establish that he was in Nevada around the time of the murder. Thus, there is no reasonable likelihood the judge would have excluded the evidence as irrelevant if counsel had raised this argument.[7]

Crew also contends that counsel should have introduced the prostitute evidence at trial to show that Mosteller was not trying to establish an alibi when he made the false reports. Crew fails to explain how counsel could have presented that evidence, since Mosteller was the only one who could have testified about it and he was unavailable, as he was then awaiting trial on his own charges. In addition, such evidence would likely have been excluded as

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7. For the same reasons, the prosecutor did not commit misconduct by presenting the evidence of Mosteller's false reports.

more prejudicial than probative, as it would have involved a mini-trial on the tangential issue of what really happened to Mosteller's car. Further, for the reasons stated above, that evidence was so weak that there is no reasonable probability the jury would have discounted the inference that Mosteller knew about Crew's plan to kill Nancy. And, while the evidence of Mosteller's knowledge, and therefore Crew's premeditation, was clearly relevant, there was ample other evidence that Crew had been planning Nancy's death for months. (See RB at pp. 65, 67.) Therefore, even if the defense were able to show that Mosteller did not know Crew intended to kill Nancy, there was no reasonable probability the jury would have reached a different verdict on the charges against Crew.

2. Elander's Statements About Disposing Of A Body

Crew next contends trial counsel were ineffective for failing to object to Richard Elander's statements to Richard Glade, the ranch owner for whom he worked, about "disposing of a body" in the primitive land in the Utah mountains. (RT 3969, 4216.) Elander was not positive but thought he had specifically mentioned Crew during the discussion, and also said that Crew wanted to kill "a woman." (RT 3969.) Glade testified that Elander said that Crew, whom he mentioned by name, "might have occasion to dispose of a body," and asked Glade if you could pack a body into the high country of the Utah mountains. (RT 4216.) Crew contends counsel should have challenged this evidence as hearsay, irrelevant, and more prejudicial than probative.

Crew constructs a straw man argument by insisting Elander's statements do not fall under the co-conspirator exception to the hearsay rule. We do not contend they do. However, the statements are admissible as prior consistent statements under Evidence Code sections 791 and 1236. Crew disagrees because "there was no subsequent statement regarding a plan to

dispose of a body in Utah that was called into question." (Petition at p. 59.) However, the *specific* statement need not be called into question for it to qualify as a hearsay exception. The statute allows for admission of a witness's prior consistent statement where "[a]n express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias of other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subd. (b); see *People v. Bolin* (1998) 18 Cal.4th 297, 320-321.) Elander's general credibility was vigorously challenged by the defense at trial; defense counsel repeatedly suggested that Elander was lying about Crew's actions to avoid prosecution for his own involvement in the crime. Elander's statements to Glade took place in May or June of 1982, at least two months before Nancy's murder, and long before Elander was arrested or granted immunity in exchange for his testimony. Accordingly, the statements were admissible as prior consistent statements.

Crew also contends the statements were irrelevant and more prejudicial than probative, because there was no evidence that Crew asked Elander to talk to Glade about disposing of a body in Utah. However, Elander's statements were relevant to show that Crew was planning to kill a woman as early as May of 1982, regardless whether Crew directed Elander to make such an inquiry to Glade. Thus, even assuming that Elander acted entirely on his own in broaching this topic with Glade, it plainly had a tendency in reason to prove Crew's intent and premeditation. And because it was relevant to show those elements of first degree murder, it was not more prejudicial than probative.

Crew argues this evidence was particularly prejudicial because it was the only evidence that he was planning to kill Nancy even before their marriage. Not so. Elander testified that Crew talked about killing Nancy even

before Elander left for Glade's ranch. There was also ample other evidence that Crew continued to plan the murder for the two months after the wedding until Nancy left for South Carolina with him. (See RB at p. 67.) There is no reasonable probability the jury would have reached a different verdict if counsel had objected to evidence of Elander's statements to Glade.

3. Elander's Statement To Mitchell

Crew argues trial counsel erred by failing to secure a ruling on their objection to Elander's statement to Marion Mitchell, whom Elander had worked for in South Carolina. Sometime around October 1982, Mitchell had agreed to buy Nancy's Corvette from Crew, who said he was going to receive the car as part of their "divorce settlement." Crew promised to get the title when the divorce became final and turn it over to Mitchell. (RT 4434-4437.) However, when Crew did not return to South Carolina with the title, Mitchell repeatedly asked Elander where Crew was. Elander finally told Mitchell that Crew was not coming back because the police were looking for him. Elander said that Crew had killed his wife, and that when he went back to get her body it wasn't where he had left it and she had crawled off. Elander said that Crew had shot her, cut off her head, put her in a barrel filled with concrete, and buried her in someone's back yard. (RT 4441-4442.)

Counsel objected to Elander's statement to Mitchell as hearsay. (RT 3912.) The prosecutor argued it was a prior consistent statement made before Elander had any motive to lie. (RT 3912-3915.) In response, defense counsel appeared to concede that the statement was admissible under that hearsay exception, but contended it was not admissible for the truth of the matter asserted in Crew's original statement to Elander and the jury should be so instructed. (RT 3916-3928.) The trial court did not expressly rule on the objection because Mitchell's testimony was proffered out of order, before

Elander testified; the court determined that it should be presented in the proper order to avoid confusion. (RT 3928-3929.) When Mitchell later was called to the stand, counsel did not renew the objection.

Crew contends the evidence was not admissible as a prior consistent statement because it was not made before Elander's motive to lie arose. (See Evid. Code, § 791, subd. (b).) He insists that Elander must have known at the time he made the statement to Mitchell that the police would want to question him.[8/] (Petition at p. 62.) However, "the focus under Evidence Code section 791 is the specific agreement or other inducement suggested by cross-examination as supporting the witness's improper motive." (*People v. Nogura* (1992) 4 Cal.4th 599, 630.) At trial defense counsel challenged Elander's credibility because he had previously lied to the police during interviews in December 1982, May 1983, and July 1984, had lied under oath at the preliminary hearing in May 1985, and been granted immunity in May 1985. (RT 4041-4089, 4094, 4102-4103 [cross-examination]; see also RT 4596-4599 [closing argument].) Elander's statement to Mitchell was made well before he was granted immunity, interviewed, or testified in court. Therefore, the prosecutor was entitled to introduce the prior consistent statements to refute

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8. Around the time he made the statement at issue, Elander was an unsophisticated, non-college-educated 21-year-old from Minnesota whose life admittedly consisted of working on cars, going to bars, and using drugs, including cocaine, speed, and LSD. (RT 3965, 4036-4037.) It is questionable that Elander would have understood he might be criminally liable for his role in the murder, which consisted of discussing with Crew how to kill Nancy, and helping to sell her property after her death. Likewise, there is no reason to believe Elander was crafty enough to begin falsely implicating Crew at that point. Indeed, Elander reluctantly told Mitchell that Crew had murdered his wife only after Mitchell repeatedly pressed him for an explanation for Crew's failure to return with the title to the Corvette. Elander also told Mitchell not to repeat the story, and said he would deny it if anyone brought it up. (RT 4441-4443.)

the specific implication of bias raised at trial by the defense.

Crew admits that "Elander's cooperation with the police and immunity agreement raise questions of bias." (Petition at p. 63.) However, he contends the statement was inadmissible because the defense did not *expressly* suggest that Elander falsely implicated Crew because of that favorable treatment. Not so. Counsel pointed out on cross-examination that Elander had never provided an alibi for the time of Nancy's disappearance, but now could not be prosecuted for her murder because he had gotten immunity. (RT 4081.) Counsel also argued that the immunity deal made a "mockery" of justice, and that it was "amazing" Elander was not in jail "where he belongs." (RT 4598.) Further, this Court has rejected the argument that an express accusation is required. "The mere asking of questions may raise an implied charge of improper motive." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1203.) And the statute itself permits the introduction of a prior consistent statement to rebut an "express *or implied* charge" of bias. (Evid. Code, § 791, subd. (b), emphasis added.)

Crew contends this case is governed by *People v. Coleman* (1969) 71 Cal.2d 1159, in which the codefendant voluntarily went to the police station two months after the murder and confessed, also naming the defendant as the main perpetrator. The Court found that the codefendant's prior consistent statements to his father and wife, which were made before he turned himself in, did not qualify under Evidence Code section 791, subdivision (b). The defense had impliedly accused the codefendant of lying by placing more blame on defendant than himself, but there was no reason to believe such improper motive did not arise before the codefendant decided to go to the police and confess. (*Id.* at pp. 1165-1166.)

Coleman distinguished *People v. Duvall* (1968) 262 Cal.App.2d 417, in which the implied charge of improper motive referred to a specific time,

namely, when the accomplices made a "deal" with the district attorney. The accomplices' prior consistent statements made before that time were properly admitted. (*Id.* at p. 1166 fn. 1; see *Duvall, supra,* 262 Cal.App.2d at p. 420 ["The idea that Allen and Gary were implicating defendant because of a deal made with the office of the district attorney was firmly planted in the minds of the jurors. This entitled the prosecution to show that the two brothers had implicated the defendant even before the alleged motive to fabricate arose"].) Similarly, in *People v. Andrews* (1989) 49 Cal.3d 200, the Court rejected a claim that an accomplice's prior consistent statements were inadmissible because of a general motive to lie in order to obtain leniency at the defendant's expense. Defense counsel's questions about the accomplice's "deal" with the prosecution raised an implicit charge that the deal provided the accomplice with an additional motive to testify untruthfully. The prosecutor was entitled to show that the accomplice's prior statements were consistent with the statement he gave police before the deal was consummated, "that is, before the subsequent, specific motive to fabricate arose." (*Id.* at p. 210.) Likewise, in this case Elander's prior consistent statement to Mitchell was admissible to refute the implication that he was lying because he had the benefit of immunity.

Moreover, this Court has held that a prior consistent statement is admissible if it was made "before the existence of *any one or more* of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witness's testimony." (*People v. Hayes* (1990) 52 Cal.3d 577, 609, emphasis added.) Thus, even assuming Elander knew he might be a suspect at the time he made the statement to Mitchell, the prosecutor was entitled to introduce the statement to refute the additional charge that Elander was lying as a result of his grant of immunity. There is no reasonable probability the trial court would have excluded the evidence if defense counsel had renewed their objection when Mitchell testified.

4. Testimony About The Bloody Blanket

Crew contends trial counsel were ineffective for failing to object to Kathy Harper's testimony about a bloody blue blanket. Kathy stated that some time while Crew was living with her in South Carolina between October and December 1982, she entered the trailer and Crew and Elander suddenly stopped talking. (RT 3891.) She heard one of them say something about "a bloody blue blanket" and "I got sick." She could not recall who said it. (RT 3892.) At an in limine hearing, counsel stated they had "no problem" with that evidence. (RT 3887.) Crew argues counsel should have contended the evidence was irrelevant and prejudicial.[9/]

Evidence is relevant where it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Crew told Elander that after he shot Nancy in the head, he rolled her body into a ditch and covered it with some blankets. (RT 3982.) The fact that Crew and Elander were discussing a bloody blanket several months later tends to prove that Crew killed Nancy in the precise manner he had previously described to Elander. Bloody blankets are not such a common topic of conversation that there "could be no plausible connection" to the murder, as Crew asserts. (Petition at p. 65.) Also, the fact that Crew and Elander abruptly stopped talking when Kathy walked in suggests they were discussing something incriminating. Thus, both the manner and subject of the conversation were so suspicious that the evidence had "some tendency in reason" to prove Crew's guilt.

Further, the evidence was not more prejudicial than probative.

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9. Crew also briefly contends the statements were hearsay. If Crew made the statements, they were admissible as party admissions. (Evid. Code, § 1220.)

Crew contends it inflamed the jury by "creating an image of a bloody blanket." (Petition at p. 65.) However, Crew's own description of the way he concealed Nancy's body in the ditch had already created that image in the minds of the jury. In addition, evidence of the grisly manner in which Nancy's body was ultimately disposed of — including cutting off her head, burying her body parts in Gant's back yard, digging them up again when they began to stink, putting her head in a bucket and throwing it off a bridge, and putting her body in a 55-gallon drum filled with cement — would evoke a more visceral reaction than would a mere reference to a bloody blanket.

Finally, counsel did attempt to defuse the impact of the overheard conversation by pointing out that Kathy herself had "no idea what it concerns." (RT 3895.) Counsel also elicited the fact that Elander initially told authorities he had no memory of the conversation, and told an investigator the only bloody blue blanket he recalled was one that had gotten bloody when his stepbrother had sex with a virgin. (RT 4095-4098.) There is no reasonable probability the trial court would have excluded this evidence if counsel had objected, and no reasonable probability the jury would have reached a different verdict absent the evidence.

F. Failure To Object Or Seek A Limiting Instruction To "Victim Impact" Evidence

Crew argues trial counsel were ineffective by failing to object or seek a limiting instruction to "victim impact" evidence introduced by Nancy's daughter Stacey.[10/] Stacey, who was twelve when Nancy was killed and

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10. Stacey's testimony, if not her response to the court's question, did not constitute "victim impact" evidence, which has been defined as "evidence of the specific harm caused by defendant." (*People v. Fierro* (1991) 1 Cal.4th 173, 235.) On direct examination Stacey simply described her relationship with her mother, without discussing the impact of her loss.

nineteen at the time of trial, testified that she and her mother were "very close." They went horseback riding together, took walks, went shopping, and did "typical mother-daughter" things. (RT 3626.) Nancy intended to bring Stacey to South Carolina to live with her at some point later on or at Christmas. (RT 3630-3631.) When Nancy dropped off Stacey and her brother Tommy at their father's house the last time before she was killed, they had a tearful farewell. (RT 3639.)

As Stacey was leaving the witness stand after testifying, the trial court asked her how she was "getting along." Stacey stated that for a few years she had had "a lot of trauma" in her life and had "a lot of problems dealing with it." "It really put me back a lot," because she needed her mother during her teenage years and she wasn't there. However, Stacey had seen a counselor and was "moving on." She stated her mother "taught me to be the best that I can be and go to school," and was "very smart and very career oriented." Stacey was attending a junior college. The trial court stated, "That's a tremendous loss for a young lady to suffer. But it seems to me that you're making the best of things." (RT 3640-3641.)

Crew contends counsel should have argued this evidence was "false and misleading." He again attacks the victim, asserting that Nancy "willingly abandoned" her children by giving custody of them to their father when she left for South Carolina, that she had "given custody of them to her parents while she adopted a life style more compatible with a `single life,'" and that she spent "little time" with her children, noting that she took a vacation with her friend Darlene Bryant. (Petition at pp. 66-67.) It is Crew's portrayal of Nancy that is false and misleading.[11/] The evidence showed that she decided

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11. The only person who testified that Nancy wanted to get back into the "single life" was her ex-husband, Stephen Andrade, who was not an unbiased witness on issues about their divorce, and who in any event simply agreed with counsel's characterization. (RT 3650.) Nancy's friends testified

only reluctantly to give custody of the children to their father while she was getting settled in South Carolina, and that the decision was extremely traumatic for her: the day she called her attorney to make the arrangements to transfer custody she got so emotional at work that she spent most of the day crying in the bathroom while a friend covered for her. (RT 3609-3610.) Nancy never "gave custody" of the children to her parents, but the year after she got divorced they spent most of the school year with the Wilhelmis because she was working full-time as a nurse. One of her friends noted that there were better schools in Santa Cruz. (RT 3538-3439, 3625.) And during the long-planned trip with Darlene, Nancy made sure to call her children from the road. (RT 3674.) While it is true that Nancy went to bars and sometimes went home with men, there was no evidence that she ever left her children home alone at such times or that they even knew about it. Far from suggesting that Nancy wanted to dump her children to become a "swinging single," the evidence showed that she tried to provide the most stable environment possible for them when she became a divorced working mother.[12/]

Crew acknowledges that Stacey's testimony "ostensibly" could show that Nancy had a close relationship with her children and therefore would not have simply disappeared. (Petition at p. 67.) He nevertheless argues that "a twelve-year-old's perception of her mother's view of their relationship and her mother's intentions" is not probative. (Petition at p. 67.) We disagree. A

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to the contrary that she wanted a steady relationship. (RT 3563 [she "wanted to settle down again and have a real, you know, marriage type relationship"]; RT 3566 [she was seeking the "typical American dream. . . .a husband, family, dog, two point five children"]; RT 3607 [she was "looking for someone special"]; RT 3668 ["She wanted to be married. She wanted to be settled down."].) That testimony was borne out by Nancy's quick marriage to Crew.

12. We doubt Crew would be questioning Nancy's interest in her children if she had done exactly the same things but was a working father.

twelve-year-old is certainly capable of having an opinion whether her mother loves her and wants to maintain a relationship, or is so unstable that she would simply leave without ever contacting any family member again. There is no reasonable probability this evidence would have been excluded as irrelevant if counsel had objected.

Crew also contends the evidence was more prejudicial than probative because Stacey was such an "emotional witness." The record does not show that Stacey became upset during her testimony. Further, the fact that it was hard for Nancy to leave her children was unquestionably relevant to the disputed issue of whether she was really dead. Evidence that she would not have suddenly jettisoned her children was probative of that issue. The "prejudice" of such evidence lay not in its potentially sympathetic appeal, but in its significant value in establishing the fundamental fact of her death. Evidence that is damaging to the defense because of its highly probative nature is not inadmissible under Evidence Code section 352. (See *People v. Karis* (1988) 46 Cal.3d 612, 638.) There is no reasonable probability the trial court would have excluded the evidence if counsel had objected.

In addition, Stacey's response to the judge's question contained no information the jury would not have surmised already: any loving daughter whose mother was murdered — or had even simply disappeared — when she was twelve years old would have missed her and had "problems dealing with it." (See *Kinnamon v. Scott* (5th Cir. 1984) 40 F.3d 731, 734 [no prejudice resulted when murder victim's teenaged daughter entered courtroom with jury present, crying and screaming that defendant had killed her father: "That the young girl was upset and angry at the person accused by the state as the murdered of her father communicated nothing new to the jury"].) The statement also contained positive information that the jury was not otherwise aware of: Stacey stated she had seen a counselor, was "moving on," and was

going to college in order to "be the best that I can be." The judge's response simply noted the unsurprising news that Stacey had suffered a "tremendous loss" when she was young, and confirmed that she appeared to have gotten over it by "making the best of things." Neither the statement by Stacey nor the reply by the judge contained any reference to Crew or even suggested that Nancy was dead as opposed to missing. On balance, this evidence was not more prejudicial than probative.

Nor were counsel ineffective for failing to request a special limiting instruction. The jury was instructed pursuant to CALJIC No. 1.00 not to be swayed by passion or sympathy in determining whether Crew was guilty. (CT 2594-2595.) No additional instruction was required.

Finally, Crew contends counsel should have requested an order preventing the prosecutor from mentioning Stacey's testimony in the penalty phase argument.[13/] However, the prosecutor was entitled to argue at the penalty phase that Stacey was traumatized by the loss of her mother. Crew had actually met Nancy's children and knew she was close to them, but still carried out his plan to kill her. The prosecutor therefore could argue that Crew's actions were all the more callous because he knew full well that her death would cause her children deep distress. (*People v. Fierro, supra,* 1 Cal.4th at p. 235; accord, *Payne v. Tennessee* (1991) 501 U.S. 808.) The trial court would not have granted a request to limit the prosecutor's penalty phase argument if counsel had requested it.

G. Failure To Object To Proximate Cause Instructions

Crew contends trial counsel were ineffective for failing to object to the proximate cause instructions. The trial court instructed the jury with

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13. The prosecutor did not mention Stacey's testimony at the guilt phase argument.

CALJIC No. 8.55, which states that murder requires an unlawful act which is a proximate cause of the victim's death, and defines proximate cause as "a cause which, in natural and continuous sequence, produces the death, and without which the death would not have occurred." (CT 2637.)

The court also gave the following version of CALJIC No. 3.41:

> There may be more than one proximate cause of the murder. When the conduct of two or more persons contributes concurrently as a proximate cause of the murder, the conduct of each such persons is a proximate cause of the murder if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the murder and acted with another cause to produce the murder.
>
> If you find that the defendant's conduct was a proximate cause of death to another person, then it is no defense that the conduct of some other person, even the deceased person, contributed to the death.
>
> If you are convinced beyond a reasonable doubt that Mark Crew shot his wife but you are not certain beyond a reasonable doubt that the shot was a proximate cause of the her death, you must find Mark Crew not guilty of murder unless you believe the evidence proves beyond a reasonable doubt that Mark Crew directed, aided, or encouraged another to kill Nancy Crew.
>
> If the evidence shows that Nancy Crew was killed by someone other than Mark Crew, and you have a reasonable doubt as to whether or not Mark Crew directly aided by act or advised this person to kill Nancy Crew, you must find Mark Crew not guilty of the crime of murder. (CT 2638-2639.)

Crew contends counsel should have objected because these instructions created a mandatory conclusive presumption that his conduct was the proximate cause of Nancy's death if it followed Crew's actions in a "natural and continuous sequence." In assessing this claim, the Court must determine whether there is a reasonable likelihood the jury construed the instructions in an objectionable fashion — i.e., as a mandatory conclusive presumption. (*People v. Osband* (1996) 13 Cal.4th 622, 679.) In making that determination, the instructions must be considered as a whole. (*Ibid.*) Here, the jury was instructed not only with the "natural and continuous sequence" language, but

also that Crew's conduct must be a "substantial factor" contributing to the murder, which correctly stated the legal requirement for proximate cause. (See *People v. Caldwell* (1984) 36 Cal.3d 210, 22.) There was no reasonable likelihood the jury interpreted the proximate cause instructions read as a whole to state a mandatory conclusive presumption. (*People v. Pock* (1993) 19 Cal.App.4th 1263, 1276.)

Crew also contends counsel should have requested additional instructions on intervening cause, and argued that Crew was not guilty of murder because Bruce Gant's actions constituted an independent intervening cause of Nancy's death. An independent intervening cause is one that is "so disconnected and unforeseeable as to be a superseding cause," and thus absolves the defendant of any criminal responsibility. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 49.) Crew argues it is "entirely plausible" that his shot to Nancy's head did not cause a fatal wound, that he might not have done anything further to harm her after he went back to her body the next day, that he did not specifically instruct Gant to kill her after "freaking out" upon discovering she was still alive, and that Gant's actions were completely unforeseeable, thereby constituting an independent intervening cause. Even assuming arguendo the premise and plausibility of this argument, the evidence fails to support the conclusion that Gant's actions were unforeseeable. Gant accompanied Crew back to the crime scene — twice — in order to help Crew accomplish Nancy's murder. First they retrieved Nancy's car so it would not attract attention parked by the side of the road, and the next day they retrieved her body. Gant subsequently allowed her decapitated corpse to be buried in his own back yard. Accordingly, even if Gant was the one who struck the final blow that killed Nancy, that action was not so "disconnected and unforeseeable" as to exonerate Crew.

Moreover, even if the jury had been instructed on intervening

cause, there is no reasonable probability the jury would have acquitted Crew of murder. The proximate cause instructions expressly stated: "If you are convinced beyond a reasonable doubt that Mark Crew shot his wife but you are not certain beyond a reasonable doubt that the shot was a proximate cause of her death, you must find Mark Crew not guilty of murder *unless you believe the evidence proves beyond a reasonable doubt that Mark Crew directed, aided, or encouraged another to kill Nancy Crew.*" (CT 2639, emphasis added.) Crew clearly was liable at least as an aider and abetter. He instigated Gant's actions by leading Gant to his wounded and dying victim for the purpose of disposing of her body. Absent Crew, Gant had absolutely no reason to kill Nancy; there is no evidence he had ever even met her. Crew, on the other hand, had been plotting her murder for months. Under such circumstances, asking the jury to place full responsibility on Gant and find Crew not guilty would have been ill-advised and futile. Since Crew cannot establish prejudice, he cannot demonstrate that counsel were ineffective for failing to request instructions on intervening cause or to rely on that theory as a defense.

H. Failure To Impeach Elander

Crew argues that trial counsel were ineffective for failing to impeach Elander with "readily available evidence" that would have undermined his credibility.

In making these arguments, Crew asserts that Elander was the prosecution's "key witness" and the only person to testify about the manner in which Nancy was killed. (Petition at p. 75.) However, Crew also told Jeanne Meskell that he had killed a girl, that she was in two pieces in two 55-gallon drums, and that one drum was in the Bay and the other was buried in someone's yard. (RT 3870.) Further, while Elander was undeniably an important witness, the prosecution's case was based on many pieces of evidence that collectively

established Crew's guilt.

Indeed, Elander was effectively impeached at trial. Virtually the entire cross-examination focused on his lies about particular facts on prior occasions, to the San Francisco homicide detectives, the FBI, the district attorney's investigator, and under oath at the preliminary hearings. Counsel also pointed out that Elander had never provided an alibi for the time of Nancy's disappearance, but had received immunity and therefore could not be prosecuted for her murder. (RT 4040-4103.) In addition, counsel vigorously attacked Elander's credibility on these grounds in closing argument. (RT 4596-4600.) Each of the following claims must be evaluated in light of that evidence, as well as the remaining evidence that overwhelmingly (and independently) established Crew's guilt.[14/]

1. Lisa Moody's Phone Records

Elander testified that he called Crew at Lisa Moody's house after Crew went back to California and told him not to kill Nancy because it was the wrong thing to do. Crew said it had already been done. (RT 3976-3977.) Crew argues that trial counsel should have impeached Elander with Lisa Moody's phone records, which did not reflect such a call. Crew notes that at Gant and Mosteller's subsequent joint trial, Gant's counsel introduced Lisa's

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14. Elander admitted on cross-examination that he lied repeatedly at the preliminary hearing after taking the same oath he had taken in this case (RT 4041-4042, 4078, 4089); that when he lied to the San Francisco homicide detectives he was trying to act sincere and appear truthful, just as he was doing in court at that moment (RT 4043-4040); that he told the district attorney investigator he had not been telling the truth before but was going to start, and then told more lies (RT 4064); that he decided to tell authorities about Crew's incriminating statements only after learning that he himself was a possible suspect in the murder case and had no alibi (RT 4079-4080); and that he lied to make himself look better and diminish his own involvement in the case (RT 4094, 4102).

phone records for the time period between August 15 and August 30, 1982; they did not include a call from South Carolina.[15] (Petition, Exh. 54.) Crew contends this evidence was critical to rebut the prosecutor's argument that even though Elander had lied in the past, he was telling the truth at trial.

As noted above, Elander's credibility was already thoroughly impeached at trial. Evidence that he tried to dissuade Crew from going through with the murder was clearly self-serving, and Elander had already admitted that he had lied in order to make himself look better. Further, the evidence that during the phone call Crew said it had already been done was essentially cumulative of other, more detailed admissions by Crew. Even if Elander had been confronted with the phone records and the jury had concluded that Elander was lying about the phone call, there is no reasonable probability the jury would have returned a more favorable verdict.

2. Crew's Blistered Hands

At Crew's preliminary hearing in 1985, Elander testified that when Crew returned to South Carolina with Lisa Moody after killing Nancy, Crew said he was "never going to mix that much cement again," referring to the quantity it took to fill the 55-gallon drum in which Nancy's headless body was concealed. Crew showed Elander his hands, which "looked like they might be a little blistered." Elander saw "blisters, calluses that looked like they'd been swelled up from working." (CT 242-243.)

Lisa Moody did not testify at Crew's preliminary hearing. At Mosteller and Gant's trial, which took place after Crew's trial in 1990, Lisa testified that she did not notice anything unusual about Crew's hands during

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15. Elander testified at the Mosteller preliminary hearing in 1986 that he called collect from a phone booth. (Petition, Exh. 54.) He did not specify how the call was made at Crew's trial. A direct dialed call from a phone booth would not have been recorded on Lisa Moody's phone bill.

that time period. She did not recall seeing any blisters, and he did not complain about blisters to her. (Petition, Exh. 54 at p. 423.)

Crew contends trial counsel should have impeached Elander by asking Lisa Moody if she saw blisters on Crew's hands. However, since Lisa did not testify at Crew's preliminary hearing, counsel would not have known what she would say on this point. Moreover, Lisa's 1990 testimony did not directly impeach Elander. She stated only that, eight years after the fact, she did not notice "anything unusual" or "recall" any blisters on Crew's hands. Since Elander said Crew's hands were only "a little blistered," more like swollen calluses, it was not remarkable that Lisa did not remember such blisters many years later. Nor was it notable that Crew did not complain to Lisa about the blisters; at that point he had not told her about the murder, and even when he finally did he lied about the facts, omitting the concrete-filled drum. There is no reasonable probability the jury would have reached a different verdict if counsel had asked Lisa about the blisters.

3. Crew's Plan To Kill Nancy

Elander testified that in South Carolina in August 1982, while packing the car for the trip, Crew said he was going back to California "to kill Nancy." Crew told Elander he had not decided how he was going to do it, and they discussed "strangulation, suffocation, hitting her with a big wrench;" "bleeding her in the shower so she wouldn't make any mess;" and going into the Utah wilderness where you could "bury her up there, you could hang her in a tree, let the bears eat her." (RT 3974-3876.)

At Crew's preliminary hearing, Elander initially testified that Crew said he was going to California to kill Nancy, but Elander did not remember Crew's exact words. (CT 228.) Elander subsequently recalled that Crew said he wasn't certain how he would kill her, "whether he would just

make a sharp blow to the head, shoot her, strangle her or what." (CT 432-433.) On cross-examination, counsel asked how Elander knew that Crew was talking about Nancy during this discussion; Elander replied, "I guess it was my assumption that he was." When counsel asked if Crew mentioned the name of his intended victim, Elander said, "Not that I recall, sir, no." When counsel asked if Crew ever indicated that he was even talking about killing a human being, Elander said, "I don't recall, sir." (CT 462-463.)

Crew contends counsel should have elicited the fact that Elander did not recall Crew specifically mentioning Nancy's name during the August 1982 discussion of how to kill her. However, Elander also testified that Crew had previously talked to him about killing Nancy as early as May 1982. (RT 3968.)[16/] Thus, even if Crew did not identify Nancy by name in the August 1982 conversation, Elander's "assumption" that he was referring to her was well-founded. Unless counsel wanted to suggest that Crew had considered killing other women as well, it was reasonable not to press the point, which would have allowed Elander to explain the basis for his assumption by reiterating the earlier discussion. (See fn. 16.) It would not have assisted the defense to emphasize that Crew had been planning Nancy's murder for months.

I. Failure To Impeach Jeanne Meskell

The evidence showed that Crew confessed to Nancy's murder to both Richard Elander and Jeanne Meskell at separate times. Crew contends trial counsel were ineffective for failing to "create at least the inference that Elander

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16. The prosecutor asked, "Now, before you left to go to Utah [at the end of May 1982], do you recall conversations you had with the defendant relating to Nancy? Specifically, the woman Nancy, the one you've identified?" Elander replied that he had, and said Crew "was talking about killing Nancy. He talked about a plan to take a trip out across the country and end up in South Carolina. On his way he was going to stop and see me in Utah, and he said he would then kill her in South Carolina, then come back." (RT 3968.)

had influenced Meskell's testimony." (Petition at p. 83.) He argues such an inference could have been suggested from evidence that Meskell and Elander traveled together for a week in September 1981 when they drove from California to Connecticut to get Meskell's car; and from evidence that on a few occasions Meskell and Elander went together, without Crew, to the Saddle Rack bar. Absent testimony that Elander and Meskell actually discussed Crew's confession, the mere fact that they had spent time together *before the murder* fails to support such an inference. At most, the proffered evidence showed that they knew each other, but the jury was already aware that Elander lived with Crew when Meskell came to stay with him for several months in 1982.

Crew also argues counsel should have introduced testimony from Meskell's friend, Cami Bieri. Meskell testified at the preliminary hearing that after Crew's arrest in June 1984, she told Bieri that Crew told her he had killed a woman. (CT 587.) According to a declaration signed by Bieri in April 2002, Meskell did not tell Bieri about Crew's statements. Also, Meskell had asked Bieri and her husband if Crew could stay with them for a few months when he first arrived in Connecticut, which they agreed to do. Bieri did not think Meskell would have asked her to give Crew a place to stay if Crew had told Meskell he killed someone. However, Bieri had the impression that Meskell thought Crew was innocent. (Petition, Exh. 8.)[17/]

It is questionable whether Bieri's evidence would have been admitted at trial, since it would have required a mini-trial on the peripheral issue

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17. The defense investigator interviewed Bieri numerous times during trial. (ACT 987.9 191, 192, 193, 200, 205, 208.) At one point he "set up travel plans" for Bieri. (ACT 987.9 206.) It is unclear what she told the investigator and why she did not ultimately testify. She did not reveal in her 2002 declaration that she had been in contact with the defense during trial. (Petition, Exh. 8.)

of whether Meskell really told someone else what Crew told her. In any event, even if the jury had believed Bieri's evidence, they could still have believed that Crew told Meskell about the murder. Those statements had independent indicia of reliability since Crew revealed details about the disposal of the body that Meskell would not otherwise have known.

Further, Meskell testified that Crew told her about the murder after she picked him up at the bus station upon his arrival in Connecticut. Despite this immediate confession, Meskell found a place for Crew to stay and helped him set up an auto mechanic business using a false name. (RT 3870-3871.) The clear implication of this evidence is that Meskell did not believe Crew's statement. (See CT 623 [Meskell expressly acknowledged at the preliminary hearing that she did not believe he killed someone].) Thus, Bieri's "impression" about Meskell's belief in Crew's innocence was already before the jury. Accordingly, even assuming the accuracy of Bieri's declaration purporting to recall events that occurred 19 years earlier, there is no reasonable probability the jury would have acquitted Crew if Bieri had testified.

J. Agreement To No Accomplice Instructions

Crew contends trial counsel were ineffective because they chose not to request instructions that Elander was an accomplice whose testimony should be viewed with distrust and required corroboration. (See CALJIC Nos. 3.18, 3.11.) Counsel expressly stated their tactical reason for this action: "the word accomplice makes it sound as though Mr. Crew has in fact committed a crime, Mr. Elander has in fact helped him with that. So we move not to ask for the accomplice instructions." (RT 4562.) Counsel noted that they had discussed the issue with their client; Crew personally agreed to the decision on the record. (*Ibid.*)

Crew now contends that decision was unreasonable because, in

light of the instructions that were given, the lack of accomplice instructions allowed the jury to discount the fact that Elander was testifying under a grant of immunity when assessing his credibility. Crew notes that the jury was given CALJIC No. 2.11.5, but counsel did not request modification to exclude Elander.[18/]

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Strickland v. Washington, supra,* 466 U.S. at p. 690.) "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." (*Ibid.*) For purposes of determining if instructional error occurred, the question is what a reasonable juror could have understood the charge as meaning, in light of all the instructions given. (*People v. Cox* (1991) 53 Cal.3 618, 667.)

When counsel asked that the accomplice instructions be omitted, they presumably reached that decision after considering the instructions that would be given to the jury. In particular, CALJIC No. 2.20 tells the jury how to evaluate the credibility of witnesses generally, including whether the witness had a bias, interest or other motive. (CT 2607-2608.) Accordingly, it was not reasonably likely that the jury construed the instructions to preclude all consideration of the grant of immunity to Elander. (See RB at pp. 74-75.) Thus, counsel's tactical decision to forgo accomplice instructions, where Crew and Elander were obviously close friends but the defense was that Crew did not commit the crime at all, was reasonable inasmuch as such instructions could have suggested Crew did commit the murder with Elander's assistance.

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18. That instruction states: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. Do not discuss or give any consideration to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted." (CT 2605.)

In any event, Crew cannot show prejudice. Counsel vigorously challenged Elander's credibility in closing argument. Specifically, counsel asserted that the fact that Elander had been granted immunity instead of being "in jail where he belongs" constituted "a mockery to our system of justice." (RT 4598.) Nor did the prosecutor suggest that CALJIC No. 2.11.5 allowed the jury to disregard the immunity evidence; he simply offered his belief that, regardless of an immunity deal, it is difficult to admit involvement in a murder. (RT 4570.) Thus, the jury clearly was aware that it could consider the grant of immunity in assessing Elander's credibility. Further, Elander's testimony about Crew's statements was independently corroborated by Jeanne Meskell. Accordingly, there is no reasonable probability the jury would have reached a different verdict if counsel had requested accomplice instructions or modification of CALJIC No. 2.11.5.

K. Failure To Seek Additional Special Circumstance Instructions

Crew contends trial counsel were ineffective for failing to request additional instructions on the financial gain special circumstance. The jury was instructed pursuant to CALJIC No. 8.81.1 that in order to find the special circumstance true, it must find that: (1) the murder was intentional; (2) it was carried out for financial gain; and (3) defendant "believed the death of the victim would result in the desired financial gain." (CT 2653.) The jury was also instructed pursuant to CALJIC No. 1.10 that the People had the burden of proving the special circumstance beyond a reasonable doubt, and that the jury must agree unanimously on its finding as to the special circumstance. (CT 2652.) The jury was also instructed pursuant to CALJIC Nos. 8.83 and 8.83.1 on how to apply circumstantial evidence and the intent requirements to the special circumstance allegation. (CT 2654-2655.)

It is unclear exactly what additional instructions Crew now

believes were required. He contends counsel should have requested an instruction "that informed the jury to find that the killing was necessary or that the defendant believed it was necessary in order to gain financially." (Petition at p. 89.) He also contends counsel should have argued to the jury "that it could not find true the special circumstance without first finding that the theft [sic] was an `essential prerequisite' to the financial gain." (Petition at p. 90.) Both the "necessary in order to gain financially" and "essential prerequisite" formulations are based on the holding in *People v. Bigelow* (1984) 37 Cal.3d 731. However, in *Bigelow* the Court limited construction of the financial gain special circumstance in order to prevent overlapping special circumstances based on the same conduct, such as robbery-murder or burglary-murder and financial gain. Crew fails to acknowledge that after *Bigelow* this Court has held that where such overlap is not a concern, the jury need not be instructed that the financial gain must be the motivating cause of the murder. (*People v. Noguera* (1992) 4 Cal.4th 599, 635; *People v. Howard* (1988) 44 Cal.3d 375, 410.)

Although Crew characterizes CALJIC No. 8.81.1 as a "bare bones instruction" that is "ambiguous, vague and legally inaccurate" (Petition at p. 89), this Court has expressly upheld that instruction. "CALJIC No. 8.81.1 accurately reflects the mandate of the special circumstances provision that anyone who intentionally commits murder for purposes of financial gain should be eligible for the death penalty or life imprisonment without possibility of parole." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1228.) Moreover, the third element of the instruction does require the jury to find that the defendant believed the death of the victim would result in the desired financial gain, which is essentially the same instruction Crew suggests was lacking.[19/]

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19. The CALJIC Use Notes and Comment indicate that the third element of No. 8.81.1 is required only when there is a danger of overlapping special circumstances. That danger was not present here, but the third element

Accordingly, counsel had no duty to request an additional instruction on the financial gain special circumstance. Nor should counsel have argued that the jury could not find that special circumstance true unless the murder was an "essential prerequisite" to the financial gain. Likewise, counsel were not ineffective by conceding Crew's guilt of grand theft.

Finally, even assuming arguendo that additional instructions based on *Bigelow* were required, there is no reasonable probability the jury would have reached a different verdict if such instructions had been given. This was not a case where the victim's property could have been stolen without killing her. Crew took everything Nancy had: her cash, her savings, her cars, her beloved horse, and every last piece of personal property and clothing she owned. Such a theft of a lifetime accumulation of property could only be accomplished by killing the victim. Thus, the jury would have concluded that Nancy's death was an "essential prerequisite" to the financial gain.

For all the above reasons, Crew has failed to establish a prima facie case of ineffective assistance of counsel at the guilt phase.

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was included in the instruction anyway.

II.

CREW RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

In Claim B, Crew contends he received ineffective assistance of counsel at the penalty phase. He alleges his attorneys failed to conduct a timely and adequate investigation into Crew's background, family history, and mental health, and failed to present expert testimony to explain that evidence. Counsel presented nine witnesses at the penalty phase who described Crew as a kind, generous person, an excellent soldier and a skilled mechanic, and a model inmate who could make a positive contribution in prison. Crew now contends counsel should have portrayed him as a victim of a dysfunctional family who was molested by his mother and thereafter descended into depression and addiction.

A. Standard Of Review

Crew relies exclusively on federal authority in making this claim. (Petition at pp. 92-94.) This is not surprising, as some recent Ninth Circuit cases appear to have imposed a higher standard of performance on trial counsel in capital cases that is well beyond the requirement of "reasonableness" established in *Strickland* (which was itself a capital case). The Ninth Circuit categorically requires capital defense lawyers to unearth "*all* relevant mitigating information" for consideration at the penalty phase. (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227, emphasis added.) Its holdings further suggest that the discovery of *any* additional mitigation by appellate or habeas counsel in the years following the trial is sufficient to show prejudice, regardless of the relative strength of the aggravating factors. (*Id.* at pp. 1227-1228; *Visciotti v. Woodford* (9th Cir. 2002) 288 F.3d 1097, 1117-1118.) The Ninth Circuit also imposes a special duty on capital defense attorneys to develop sufficient

expertise to independently determine what kind of experts to consult, and to obtain background information even if the selected expert does not request it. (*Caro, supra,* 165 F.3d at p. 1226; *Wallace v. Stewart* (9th Cir. 1999) 184 F.3d 1112, 1116-1117.)

Aside from the fact that Ninth Circuit law is not binding on this Court (see *People v. Burton* (1989) 48 Cal.3d 843, 854 & fn. 2), those holdings are at odds with *Strickland* and the decisions of this Court. Relying directly on *Strickland,* this Court has held that, in determining the kind of showing that will undermine confidence in a capital judgment, the reviewing court considers the weight of the aggravating evidence and whether the newly discovered mitigating evidence is essentially cumulative. (*In re Fields* (1990) 51 Cal.3d 1063, 1078-1079; *In re Avena* (1996) 12 Cal.4th 694, 737-738 [no prejudice resulted from counsel's failure to investigate and present available mitigating evidence where aggravating evidence, "especially the circumstances of the crime of which petitioner was convicted (§190.3, factor (a)), was quite strong"].) In addition, this Court has rejected the notion that counsel must seek repetitive examinations of a defendant until he locates an expert who will offer a particular opinion, especially when the existing experts do not indicate a need for further investigation to look for alternative psychological explanations of defendant's behavior. (*In re Fields, supra,* 51 Cal.3d at 1074-1075.) This Court's interpretation of both the reasonable performance and prejudice prongs of *Strickland* clearly differs from that employed by the Ninth Circuit. (See *In re Andrews* (2002) 28 Cal.4th 1234, 1265 [finding Ninth Circuit decisions in capital cases distinguishable "even if we assume they are correct"].)[20/]

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20. The *Visciotti* case illustrates how the Ninth Circuit's approach varies from that of this Court and the United States Supreme Court. On habeas corpus in *Visciotti*, this Court held it was not reasonably probable that the jury would have found "evidence that petitioner's childhood was troubled or that he turned to drugs as a means of escape from an unbearable family situation mitigating

Moreover, the Ninth Circuit's capital jurisprudence appears to conflict with that of the United States Supreme Court. In *Strickland v. Washington, supra,* 466 U.S. 668, defense counsel's entire penalty phase investigation consisted of talking to defendant about his background and speaking on the phone to defendant's wife and mother. Counsel ultimately presented no mitigating evidence, making a tactical decision to rely on the lack of evidence of a criminal record and defendant's acceptance of responsibility for the crime. Habeas counsel subsequently presented evidence from a number of character witnesses, as well as two mental health experts who would have testified that defendant was under considerable emotional stress at the time of the crime. The Supreme Court noted that counsel's duties at a capital sentencing proceeding "need not be distinguished from an ordinary trial," and established the standards of performance and prejudice applicable to any criminal case. (*Id.* at pp. 686-687.) Applying those standards, the Court concluded, "On these facts there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." (*Id.* at p. 699; accord, *Burger v. Kemp* (1987) 483 U.S. 776 [upholding capital judgment where trial counsel conducted limited penalty phase investigation and presented

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or sufficiently so that the evidence would have affected the jury determination that the aggravating factors outweighed the mitigating in this case," inasmuch as the aggravating evidence was "devastating." (*In re Visciotti* (1996) 14 Cal.4th 325, 355-356.) On federal habeas corpus review, the Ninth Circuit concluded it was reasonably probable the jury would have returned a different verdict at the penalty phase, finding that the aggravating factors were not overwhelming, as evidenced by the fact that the jury deliberated a full day and requested additional guidance on some factors. (*Visciotti v. Woodford, supra,* 288 F.3d at pp. 1117-1118.) The U.S. Supreme Court recently reversed the Ninth Circuit, finding this Court's conclusion entailed no unreasonable application of *Strickland.* (*Woodford v. Visciotti* (2002)123 S.Ct. 357 (per curiam)).

no mitigating evidence, and habeas counsel discovered evidence showing that the defendant had "an exceptionally unhappy and unstable childhood" and stunted mental and emotional development]; *Bell v. Cone* (2002) 122 S.Ct. 1843 [upholding capital judgment where trial counsel made a strategic choice to present no mitigating evidence and to waive closing argument at the penalty phase]; see *In re Andrews, supra,* 28 Cal.4th at pp. 1253-1262 [discussing *Strickland, Burger,* and *Bell*].) At the very least, these cases illustrate that there is no one right way to provide effective assistance (*Strickland v. Washington, supra,* 466 U.S. at p. 689), and that counsel's performance cannot be judged based on "mechanical rules." (*Roe v. Flores-Ortega* (2000) 528 U.S. 470, 481.)

B. Sufficiency Of Investigation

Crew contends trial counsel failed to begin their investigation early enough to discover and present available mitigating evidence.[21/] He relies on declarations to that effect from attorney Morehead and defense investigator John Murphy.[22/] O'Sullivan had been representing Crew for almost two years

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21. Crew also contends counsel failed to timely request funding for investigation and experts, and failed to state sufficient grounds for the need for such funding. (Petition at p. 100.) Counsel made two pretrial requests for funds pursuant to Penal Code section 987.9, which were granted in part for a total of $27,000. (ACT 987.9 14, 28.) In December 1988, four months before trial, counsel obtained funding for an investigator, a psychiatrist, and an "initial work up" of Crew's background for any penalty phase. (ACT 987.9 12, 170.) Counsel obtained funding for a substance abuse expert and additional funding for the psychiatrist in March 1989, a month before trial. (ACT 987.9 25.) Since counsel did obtain the necessary funding, they were not ineffective. (See also *post*, Arg. VI.)

22. O'Sullivan's declaration states only that he reviewed Morehead's declaration and "accept[s] his assessment of the penalty phase." (Petition, Exh. 2 at p. 3.)

when the trial began; Morehead was appointed almost five months before trial; and Murphy was hired two months before trial.

At the penalty phase, counsel called nine witnesses who testified over a span of four days: Crew's father, grandmother, girlfriend, his best friend from high school, his commanding officer from the Army, three deputy sheriffs, and the former head of the California Department of Corrections. These witnesses portrayed Crew as a compassionate, generous, worthwhile person who would pose no future danger in prison. Based on that testimony, Morehead delivered an eloquent closing argument in which he contended Crew had many positive characteristics and had much to offer in the prison environment. (RT 5040-5042, 5047-5054, 5056-5058, 5074-5077, 5080.) Crew now argues that counsel should have painted a "negative" picture of him as a victim of a dysfunctional family who felt compelled to numb the effect of his childhood experiences with alcohol, drugs, and compulsive sexual behavior.

Much of the allegedly new evidence is essentially cumulative of evidence that was introduced at trial. Specifically, the jury was aware of Crew's drinking, insomnia, and depression. Emily Bates testified that she argued with Crew about his drinking during the time they lived together. One time Crew and his father had a "drinking contest" in which Crew got very drunk and threw up all over himself, and they had to "hose him down." Another time Crew stayed out all night and came home drunk in the morning. Emily told him she could not tolerate his drinking because her father had been an alcoholic. (RT 4767-4769.) Emily noticed that Crew drank "a lot more" when he was with Elander. (RT 4771.) Beverly Ward testified that when she spent four days with Crew in August 1982, he "drank constantly," and did not sleep. (RT 3947.) Crew's grandmother stated that when he was at her house in Texas in September 1982, he did not eat or sleep. (RT 4796.) Lisa Moody described Crew's month-long depression after he received the phone call in

Texas. (RT 4151-4152.)

In addition, the documents that Crew contends counsel should have discovered before trial were either irrelevant or already obtained.[23] The two-page military record showing that Crew received an honorable discharge from the Army (Petition, Exh. 82) is cumulative of evidence of that fact that was introduced at trial. (RT 4739.) That document had less much impact than the testimony of Crew's commanding officer, who stated that Crew was intelligent, dependable, and one of the best soldiers he had ever seen; he also asked the jury to spare Crew's life. (RT 4843-4847.) The medical records from the jail (Petition, Exh. 84) are not material to any mitigating factor; they show only that while Crew was awaiting trial he complained of high blood pressure, skin rashes, back pain, and one episode of dizziness. Crew's school records (Petition, Exh. 80) are arguably relevant, but they show only that he was a mediocre student; they would not have made a difference at the penalty phase. Records of his *relatives'* school, medical, psychiatric, and criminal histories (Petition, Exhs. 86, 93, 95, 114, 117) would have been relevant, at most, only to the extent an expert might have relied on them to establish a family history of such problems; even so, such tangential matters would have had little significance. Crew himself had no history of criminal, medical, or mental problems. Marriage, birth, and divorce records from Crew and his extended family (Petition, Exhs. 79, 81, 83, 85, 87, 88-92, 94, 96-113, 115, 116, 118, 119) were simply unnecessary, as they related, at most, to matters not in dispute.

Crew also contends it was unreasonable for counsel to rely primarily on Crew's father for information about his family background. Counsel interviewed Crew's father and mother, and met with Crew's grandmother before her testimony. (Petition, Exh. 1 at 2-3.) It was not

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23. Murphy obtained Crew's military service records and jail records. (Petition, Exh. 3 at p. 3.)

unreasonable to conclude that those family members who were closest to Crew would be the most knowledgeable about his childhood and upbringing. Crew cites no authority for the proposition that counsel had a duty to independently corroborate that information with other, more distant relatives.[24/]

Further, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." (*Strickland v. Washington, supra,* 466 U.S. at p. 691.) Both Morehead and the investigator had a "good relationship" with Crew, and found him "very cooperative" regarding decisions about what evidence to present. (Petition, Exh. 1 at p. 4; Exh. 3 at pp. 4-5.) The investigator met with Crew in person at least twelve times before and during trial (ACT 987.9 178, 179, 183, 184, 185, 191, 206, 207, 208, 209), and spoke to him on the phone at least fifteen times before and during trial (ACT 987.9 179, 184, 189, 190, 191, 192, 193, 205, 207, 208, 209). According to the investigator, Crew wanted counsel to "explain his family as a whole." (Petition, Exh. 3 at 5.) Thus, Crew presumably discussed his background with his attorneys and investigator. However, Crew apparently failed to tell them anything that conflicted with his father's depiction of their family life. In particular, there is no evidence that Crew told counsel, the investigator, or any mental health expert until 2002 that his mother had sexually molested him.[25/] Counsel cannot be faulted for failing to discover what Crew neglected to tell them. (See *In re Andrews, supra,* 28

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24. Crew attempts to smear his father by portraying him as an alcoholic and a child abuser who molested his stepdaughter, Debbie Martin, while she was growing up. (Petition, Exh. 4 at p. 32.) Crew notably fails to include a declaration from Debbie herself, relying instead on hearsay from Debbie's mother and brother. (Petition, Exhs. 27, 34.)

25. Crew apparently first revealed the alleged sexual abuse during an interview with Dr. Morris on February 26, 2002. (Petition, Exh. 4 at pp. 4, 8.) According to Crew's account, no one else witnessed or knew about the abuse except him and his mother. Jean Crew died in 1990.

Cal.4th at p. 1255 [counsel was not ineffective where defendant did not inform him of the conditions he had endured in the Alabama prison system, which could have alerted counsel to the need for further investigation of possible mitigation].)

Moreover, to the extent Crew is suggesting counsel should have *independently* suspected he had been sexually molested because he exhibited signs of depression, addiction, and insomnia, his claim must fail. An attorney is not required to possess the expertise of a psychiatrist in recognizing mental conditions. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1038.) Dr. Morris, an expert on male sexual abuse, apparently believed Crew's claim of molestation in part because of his behavior (Petition, Exh. 4 at pp. 8-10), but counsel had no duty to acquire such highly specialized knowledge and "diagnose" sexual abuse notwithstanding Crew's failure to disclose it.

The fact that trial counsel and the investigator now assert they did not have enough time to conduct a full investigation into Crew's background and instead chose what they call the "easier" path of focusing on Crew's good qualities does not establish deficient performance. (See Petition, Exh. 1 at 3.) "The latter-day emergence of [counsels'] belief in their own incompetence runs afoul of the rule of contemporary assessment." (*Hendricks v. Calderon, supra,* 70 F.3d at p. 1039.) Moreover, "valid strategic choices are possible even without extensive investigative efforts." (*Andrews, supra,* 28 Cal.4th at p. 1254.) Based on the significant positive evidence uncovered by counsel, it was not unreasonable to portray Crew at the penalty phase as a worthwhile human being instead of as a traumatized victim. Indeed, it is the failure to introduce such favorable evidence that may fall short. (*In re Marquez* (1992) 1 Cal.4th 584, 601-602, 609 [finding ineffective assistance at penalty phase where counsel failed to present evidence of defendant's generosity, consideration for others, and capacity for hard work]; *Williams v. Taylor* (2001) 529 U.S. 362,

396 [finding ineffective assistance at penalty phase where counsel failed to present, inter alia, evidence that defendant had helped crack a prison drug ring, returned a guard's missing wallet, and was one of the "least likely [inmates] to act in a violent, dangerous or provocative way"].) Therefore, the penalty phase investigation was not constitutionally insufficient.

C. Failure To Present Mental Health Experts

Crew contends trial counsel failed to retain "appropriate" experts for the penalty phase. He does not explain why Drs. Smith and Phillips, who were retained for the guilt phase but whom counsel expressly considered calling at the penalty phase, were inappropriate. Both appear to be well qualified in their respective fields. To the extent Crew is suggesting counsel should have hired an expert on male childhood sexual abuse, his claim fails. "Competent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion." (*People v. Payton* (1992) 3 Cal.4th 1050, 1078; *In re Fields, supra,* 51 Cal.3d at 1074-1075; *Turner v. Calderon* (9th Cir. 2002) 281 F.3d 851, 875-876 ["[C]ounsel is not required to retain additional mental health experts where he does retain experts he believes to be well-qualified"].) Where the retained expert does not indicate he requires the services of additional experts, counsel has no duty to seek them out independently. (*Babbitt v. Calderon* (9th Cir. 1998) 151 F.3d 1170, 1174).

Crew further argues that counsel failed to provide the experts that were retained with relevant information that would have led them to suspect he had been sexually molested. However, neither doctor has indicated that he requested any further information from counsel.[26] "To now impose a duty on

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26. Dr. Smith has no present recollection of this case at all, and did not write a report at the time he was consulted. He asserts that it was his practice

attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation." (*Hendricks v. Calderon, supra,* 70 F.3d at p. 1038.)

Crew contends counsel unreasonably decided not to present mental health evidence at the penalty phase. As noted, Morehead considered calling Dr. Smith and Dr. Phillips at the penalty phase, but decided not to because he did not want to "open the door to cross-examination on the facts of the crime." (Petition, Exh. 1 at 3.) Crew appears to agree with trial counsels' opinion that it was important not to reemphasize the grisly facts of the crime at the penalty phase. However, he argues that counsel could have presented mental health information that was *not* directly related to the crime, through lay witnesses, documents, and experts. (Petition at p. 109; Exh. 1 at p. 5.)

Crew fails to explain how expert testimony about his mental state could have been limited to avoid evidence of the crime. An expert may be "fully cross-examined" as to "the subject to which his or her expert testimony relates" and "the matter upon which his or her opinion is based and the reasons for his or her opinion." (Evid. Code, § 721, subd. (a).) The prosecutor clearly

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in 1989 to "recommend" to counsel that they conduct a complete investigation into the defendant's personal, medical, psychological, and drug history in order to determine the nature and extent of his substance abuse. (Petition, Exh. 5 at pp. 2-3.) However, Morehead does not state in his declaration that Dr. Smith requested any further investigation.

Dr. Phillips states that when he interviewed Crew he was unaware of Crew's drug and alcohol abuse, depression, or sexual abuse. (Petition, Exh. 6 at p. 2.) However, Dr. Phillips was "retained initially for use at the guilt phase in support of a potential mental state defense that Mark's depression, sleep deprivation, and cocaine and alcohol use at the time of the crime negated specific intent." (Petition, Exh. 1 at 3.) Aside from the fact that it is unlikely that Dr. Phillips was totally ignorant about the very issues counsel hired him to explore, Dr. Phillips does not indicate that he requested any additional information.

would have been entitled to ask any mental health experts who offered an opinion on Crew's mental health if they were aware of the facts of the murder. If the expert replied in the affirmative, the prosecutor could have explored how such evidence affected the expert's opinion. (*People v. Howard* (1992) 1 Cal.4th 1132, 1183 & n. 21.) If the expert were unaware of those facts, the prosecutor could question whether the opinion was valid in the absence of such significant information. The prosecutor also would be entitled to ask "whether the expert has considered matters in evidence that may be relevant to the weight to be given to the expert's opinion." (*People v. Coddington* (2000) 23 Cal.4th 529, 607; *id.* at p. 615 [prosecutor was allowed to ask mental health expert if he was aware defendant possessed a book on torture and, if so, whether he took it into account in reaching his diagnosis].)

For example, Lisa Moody testified that Crew acted depressed after he received the phone call from Gant where he learned that Nancy's body was beginning to stink. The prosecutor could have asked an expert whether in his opinion that depression was the result of Crew's alleged childhood sexual abuse and genetic predisposition, or a dawning realization that he might get caught due to the difficulties of disposing of a decaying human corpse. Likewise, the prosecutor could question whether Crew's insomnia during that time period was the product of mental illness, or concern over whether he would get away with the murder. Further, the prosecutor could have asked an expert on male childhood sexual abuse, such as Dr. Morris, whether Crew lied about Nancy's "disappearance" after their "divorce" because of a need to avoid confronting the shame of sexual abuse, or because it made it easier to sell off her property, assume an alias, and evade law enforcement. (See Petition, Exh. 4 at p. 10.)

Dr. Smith has stated that the cumulative effect of chronic dependence on alcohol and drugs like marijuana and hallucinogens starting at

a young age results in significantly impaired judgment, difficulty concentrating, and depression. (Petition, Exh. 5 at p. 12.) The prosecutor would have been entitled to ask a drug expert like Dr. Smith if a diagnosis of "impaired judgment" was valid in light of evidence that Crew appeared to fully comprehend that what he had done was wrong, as shown by his lamenting to Lisa after the murder that he sometimes thought he "had no morals." (RT 4614.) The prosecutor also could have questioned whether evidence that Crew made a conscious decision *over a period of several months* to murder Nancy — by discussing methods of killing her, driving back to California specifically for that purpose, and even marrying her to get her on a cross-country road trip — rebutted the conclusion that his cognitive functioning and ability to concentrate were impaired from substance abuse.

In short, if any mental health expert had testified at the penalty phase, additional evidence about the details of the murder would have been unavoidable. "[D]efense counsel, in determining whether to present such information [about defendant's childhood and background], properly may take into account the detrimental consequences that may result from the introduction of such evidence, including the nature of the evidence that the prosecution may elicit either on cross-examination of the proposed defense witnesses or on rebuttal." (*In re Jackson* (1992) 3 Cal. 4th 578, 614-615.) Counsel here reasonably decided to deflect the jury's focus away from the specific details of the crime at the penalty phase.

Moreover, the kind of evidence Crew now says would have averted a death sentence actually would have portrayed him unfavorably. For example, Crew states that as a result of inappropriate sexual conduct by his mother and grandfather, he started engaging in "non-relational sexual activity" when he was around 11, that for years he "peeked in windows and watched other people have sex," and that he liked "three-way sexual activity." (Petition

at pp. 135-136; Exhs. 19, 34.) As it was, the jury was aware that he had many women in his life, but not that his sexual behavior was abnormal or deviant. "Omission of an item of proof may seem foolish until one understands the tradeoffs counsel would have had to make to include it." (*Lord v. Wood* (9th Cir. 1999) 184 F.3d 1083-1085.) Similarly, evidence that he used drugs and alcohol to excess could have been a two-edged sword. (See *Bell v. Cone, supra,* 122 S.Ct. at p. 1852.)

For the above reasons, the decision not to call mental health experts at the penalty phase was not unreasonable.

D. Prejudice

Crew contends there is a reasonable probability the jury would have returned a verdict of life without possibility of parole if counsel had offered the evidence of his background and mental health discussed herein. He notes that attorney Morehead now believes such evidence would have provided "a compelling and sympathetic explanation" of Crew's character, and would have offered a meaningful response to the prosecutor's portrayal of him as a "lying, manipulative womanizer." (Petition, Exh. 1 at p. 5.) However, it is not likely that evidence of deviant sexual behavior and addiction would have created a more sympathetic portrait than the evidence presented that Crew was a compassionate, useful person. Evidence of "good" character can be more compelling than the "abuse excuse." (*See In re Marquez, supra,* 1 Cal.4th at pp. 601-602, 609; *Williams v. Taylor, supra,* 529 U.S. at p. 396.)[27]

Crew relies on a number of juror declarations purporting to state

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27. Crew argues the evidence presented regarding his good conduct in jail was "not relevant" to the penalty phase determination. (Petition at p. 157.) He is wrong. Lack of future dangerousness in prison is a valid mitigating factor. (*People v. Robertson* (1989) 48 Cal.3d 18, 53-57; *Skipper v. South Carolina* (1986) 476 U.S. 1.)

that evidence of a disturbed childhood could have made a difference in their assessment at the penalty phase. (Petition at pp. 157-159.) Aside from being speculative, such evidence is patently improper. "No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror wither in influencing him to assent to or to dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a); *People v. Steele* (2002) 27 Cal.4th 1230, 1260-1264.) This Court clearly cannot consider such declarations.

Finally, even if counsel had presented the background and mental health evidence, it is not reasonably probable the jury would have reached a different verdict. The sole aggravating factor was the facts of the crime — but those facts were "devastating." (*See In re Visciotti, supra,* 14 Cal.4th at pp. 355-356.) Crew planned the murder in cold blood over a period of at least three months; he deliberately deceived Nancy into thinking he wanted to start a new life with her when he apparently had no affection for her whatsoever; he persuaded her to leave behind everyone she knew and loved in order to be with him; he had met her children and parents and knew what her death would mean to them. The manner of Nancy's death was particularly appalling: she apparently suffered overnight in the ditch, alive but mortally wounded, realizing that Crew had betrayed her and she would never see her family again; she was then strangled and decapitated; her corpse was defiled first by being buried in Gant's backyard, then by the shocking disposal of her head and body; finally, Crew's failure to ever reveal the location of Nancy's body permanently deprived her parents of their desire for a "decent burial." (See RT 3780.) Evidence of Crew's troubled childhood would not have outweighed this overwhelming aggravating evidence. Accordingly, he cannot establish a prima facie case that counsel provided ineffective assistance at the penalty phase.

III.

TRIAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO IMPEACH THE INFORMANT WITH ADDITIONAL INFORMATION

In Claim C, Crew contends trial counsel were ineffective in failing to investigate and impeach Clint Williams, the informant who testified on rebuttal at the penalty phase that Crew had been involved in an escape attempt at the Santa Clara jail.[28/]

A. Background

Defense counsel first learned about the escape attempt when they obtained a report of the escape attempt on September 30, 1989, the day before the penalty phase began. (RT 4695.) The name of a witness who had discussed the attempt with Crew was blocked out on the report. (RT 4697.) The defense moved to exclude the evidence on grounds that it would require a trial within a trial on the issue of whether Crew was really a participant in the plot. (RT 4696.) The prosecutor agreed not to mention the incident unless he could determine the identity of the witness. (RT 4699.) The next day the prosecutor indicated he had learned the name of the witness and intended to call him. (RT 4902.)

Clint Williams testified on rebuttal that he was incarcerated for grand theft at the time of Crew's trial, and had been in and out of jail and prison for theft-related crimes much of his adult life. (RT 4974, 4979.) Williams had been housed with Crew in the Palo Alto jail in 1985 for about three weeks. (RT 4973, 4978.) Crew told Williams about a plan to escape by having someone cut the fence in the sun deck area. (RT 4975-4976.) Crew was allowed on the sun

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28. Crew raises a related claim of prosecutorial misconduct in Claim J. (See Arg. X.)

deck about once a week. He asked Williams, who was a trustee and had freedom to walk around the prison, to tell him if the hole had been cut by the next time he was scheduled for the sun deck. (RT 4975-4976.)

Crew said he wanted to escape because he believed he was going to be found guilty of first degree murder. (RT 4977.) He told Williams he had done the murder. He said the police came to his residence in Campbell and that he got rid of the body by burying it in an orchard out of state. He said the victim was a woman. (RT 4978.)

Williams saw Crew again when they were both at the main county jail in the maximum security wing. He said that Crew threatened his life. (RT 4983.)

Williams told Deputy Sheriff Todd Dischinger about Crew's plan on Sunday, December 8, 1985. (RT 4976, 4993.) Dischinger testified that he had used Williams as an informant in the past and found him credible. (RT 4987-4988.) A deputy checked the fence on the sun deck on December 8, 1985, the day Dischinger obtained the information, and did not find any cuts. (RT 4996-4997.) As a result of Williams' allegations, Crew was transferred to the main county jail, which was more secure, on Monday, December 9, 1985. (RT 4989, 4992-4994.) On December 10, 1985, after Crew was no longer in the facility, deputies found cuts in the sun deck fence. (RT 4997-4998.) Other inmates were suspected of cutting the fence, but nobody was ever prosecuted for attempted escape in connection with the incident. (RT 4998.) Williams did not receive any benefit for giving Dischinger the information. (RT 4998.)

The escape attempt was also discussed with penalty phase defense witness Jiro Enomoto, former head of the California Department of Corrections, who testified he did not believe Crew was a high security risk. Enomoto stated the report of the alleged escape attempt would not change his opinion, because it was based on statements by an informant, the district attorney had found there

was insufficient evidence to prosecute Crew for attempted escape, and the plan did not involve violence, weapons, or hostages, but cutting through a wire fence. (RT 4953-4955.)

At the penalty phase closing argument, counsel argued that the escape attempt had not been sufficiently proved because Williams was a convicted felon who was not believable, and the fence was not cut until after Crew had been transferred. (RT 5051-5052 ["You would hardly think of sending a man to death on the testimony of Clint Williams"]; RT 5075-5076 ["Are you going to decide human life on that kind of evidence?"].) Even the prosecutor described Williams as living "in the sewer of the penal system," and acknowledged in his closing argument, "We can't have anything good to say about Mr. Williams. He's an informant. He's had a record as long as your arm. He survives in the society. For reasons of his own, he gives information. He's a snitch, informant, call it what you will." (RT 5066.)

When Judge Schatz granted the motion to reduce the sentence to life without possibility of parole, he relied in part on Crew's lack of prior criminal activity involving the threat of force or violence and his good "custodial conduct" as mitigating factors, thereby impliedly rejecting Williams' testimony. (RT 5177; CT 2514; see Penal Code, § 190.3, subds. (b), (k).)

When Judge Ahern imposed the death penalty on remand, he expressly rejected Williams' testimony. Judge Ahern found Williams' credibility "questionable," and stated that even if true his testimony did not qualify as an aggravating factor under Penal Code section 190.3, subdivision (b). Judge Ahern further relied on the fact that Crew had presented evidence from a number of witnesses "which have established the fact that the Defendant has no history of force or violence." Accordingly, Judge Ahern found the absence of force or violence to be a mitigating factor. (CT 3010.) Judge Ahern also specifically found that Crew's "good behavior while in custody awaiting

trial, and his probable positive contributions to the prison system if he were allowed to live," constituted mitigating evidence under Penal Code section 190.3, subdivision (k). (CT 3013.)

B. Analysis

Crew contends counsel should have searched Williams' criminal files and found evidence that another Santa Clara prosecutor, then-deputy district attorney George Kennedy, stated pursuant to Penal Code section 1203.01 that he believed Williams "will never be a law-abiding citizen. He is a sneaky, hard-core, professional con-man." (Petition, Exh. 55.) Even if Kennedy had been called to testify to that opinion, however, it is not reasonably probable the verdict would have been different. The jury was well aware of Williams' extensive criminal record, which dated back to 1968, and included so many felony theft convictions Williams himself had lost count. Specifically, he had been convicted of numerous counts of grand theft, grand theft auto, passing bad checks, and, ironically, attempted escape from jail. (RT 4979-4980.) As a result of his convictions he had served time in at least four different California prisons. (RT 4981.) That Williams would never be a law-abiding citizen and was a professional thief was obvious to the jury.

Crew also contends counsel should have discovered in Williams' files a motion filed by Williams' public defender on May 9, 1986, seeking modification of his probation based in part on a request by Deputy Paul Jones, a Santa Clara deputy sheriff who Williams worked for at the jail.[29/] (Petition, Exh. 56.) At that time Williams was serving a one-year county jail sentence for

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29. Williams testified he was "more or less working for" Deputies Jones and Dischinger at the jail, by which he meant that he brought statements from other prisoners to their attention immediately. (RT 4976.) Williams' description of the relationship clearly implied that he reported information in multiple cases.

grand theft. (*Ibid.*) On May 15,1986, the motion was granted and Williams was released from custody on probation. (*Ibid.*) No reasons for Deputy Jones' request are stated. The public defender's declaration states only, "the request for modification has come from Deputy Paul Jones of the Santa Clara County Jail, North County Facility," as well as other San Mateo police officers. (Petition, Exh. 56.) Since Williams apparently had an ongoing relationship with Deputy Jones, it is entirely speculative to assume the request was based on the information Williams supplied about Crew, as opposed to anyone else.[30/] The modification request was made three years before Williams testified in Crew's case; Deputy Jones could not have known at that time whether Williams would actually agree to testify against Crew. Thus, the fact that Deputy Jones supported a modification of Williams' probation does not contradict Williams' statement that he received no benefit for providing information in this case.

Crew also contends counsel should have interviewed other jail inmates, who would have stated that it was "common knowledge" that Williams was an informant, that Crew was "not naive," and that it was therefore "extremely unlikely" Crew would have talked to Williams about either his offense or escaping. (Petition, Exhs. 59, 60, 61.) Since Crew had never been incarcerated before, there is no reason to believe he would be familiar with the subtleties of jail society. The notion that he "must" have known that it was imprudent to confide in Williams is sheer conjecture. This speculative testimony would not have been admitted at trial.

Crew further relies on the declarations of inmates Earthy Young and Marcus Cato, who were also suspects in the escape attempt. Not surprisingly, both deny any involvement in the plan. (Petition, Exhs. 58, 62.) Even assuming arguendo their testimony might be deemed believable and

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30. Crew does not supply a declaration from Williams, Deputy Jones, or the deputy public defender.

admissible,[31] it fails to demonstrate that *Crew* was not part of the escape plan. Nobody was ever prosecuted for the attempt, and there is no evidence that Young, Cato, and Crew were inextricably linked in forming the plan. Indeed, Williams thought the other people involved in the plan were "on the outside." (RT 4977.) Williams did not recall Young or Cato, and had not discussed the escape attempt with any inmate other than Crew while in jail. (RT 4984-4986.)

The thrust of Crew's argument is that, in the absence of the foregoing evidence, "counsel's cross-examination of Williams was wholly ineffective and the jury was permitted to discount petitioner's exemplary conduct in jail as a factor in mitigation." (Petition, p. 170.) However, Williams was so substantially impeached at trial that neither Judge Schatz nor Judge Ahern credited his testimony. The evidence before the jury showed that Williams was an incorrigible thief, and that the district attorney had declined to prosecute Crew for attempted escape based on insufficient evidence. Deputy Dischinger's testimony established that the sun deck fence was not cut until after Crew had been transferred out of the Palo Alto jail, casting some doubt on Williams' claim that Crew was involved in the escape attempt. Counsel argued persuasively that a man should not be sent to his death based on such questionable testimony. On this record, it is unlikely the jury gave any weight to Williams' testimony. Accordingly, it is not reasonably probable the jury would have reached a different penalty phase verdict if the defense had offered additional impeachment of Williams.

Crew next claims counsel unreasonably failed to seek an instruction on the untrustworthiness of jailhouse informants,[32] or a limiting

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31. The trial judge could have excluded such testimony under Evidence Code section 352 because the guilt of Cato and Young was not at issue.

32. The trial court had no sua sponte duty to give a cautionary instruction on informants. (*People v. Williams* (1997) 16 Cal. 4th 153, 228.)

instruction stating that Williams' testimony constituted rebuttal to evidence offered in mitigation but could not be considered aggravating evidence. This Court has held that "jailhouse informants have no inherent motive to lie and that the standard instructions on credibility adequately guide the jury's assessment of a jailmate's testimony." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1210.) Here, the jurors were instructed that in evaluating a witness's credibility they should consider the witness's bias or interest, whether the witness had been convicted of a felony, that a witness false in part is to be distrusted, and that the uncorroborated testimony of a single witness should be carefully evaluated. (CT 2542-2545.) Williams' lengthy record of crimes involving moral turpitude was explored both in his testimony and at argument, as was the fact that he was essentially a professional snitch. Since the jury was sufficiently equipped to evaluate Williams' credibility without a special instruction, Crew cannot show prejudice. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1210.) Further, the prosecutor expressed stated, "This is not aggravating evidence. It's only evidence in rebuttal of what they presented of his good character." (RT 5066.) There is no reasonable probability the jury viewed Williams' testimony as evidence in aggravation; nor is there a reasonable probability, in light of Williams' clearly suspect credibility, that a limiting instruction would have resulted in a different verdict.

IV.

TRIAL COUNSEL DID NOT LIMIT THE EVIDENCE TO BE CONSIDERED IN MITIGATION

In Claim D, Crew contends his attorneys failed to ensure that the jury understood its role in determining the appropriate sentence.

Crew first contends counsel failed to object to alleged prosecutorial misconduct that misled the jury about its sentencing task. As we explained in our Respondent's Brief, no misconduct occurred. (RB 104-109.)

Crew also criticizes counsel's decision to request a "pinpoint" instruction on mitigating evidence.[33/] (CT 2554.) He argues this instruction misled the jury into believing the listed evidence was the only evidence it could consider in mitigation. He asserts the jury therefore was precluded from considering the fact that Gant "struck the fatal blow to the victim;" lingering doubt; the fact that Crew had no prior felony convictions and had committed no prior acts of violence; and sympathy and mercy.

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33. The instruction stated: "In deciding whether or not to impose a sentence of life without the possibility of parole rather than a sentence of death you are entitled to give consideration to the evidence set out below as evidence in mitigation." The specified evidence included the testimony of Crew's father that Crew's mother and stepmother were emotionally neglectful of him; the testimony of Crew's grandmother and others that he was kind, thoughtful, helpful, and generous; the testimony of Crew's commanding officer that he was "an outstanding soldier and that he served his country honorably and was promoted to sergeant;" the testimony of the jail deputies that Crew was a model prisoner and helpful to the jail staff and other prisoners; the testimony of Jerry Enomoto that Crew "would make an ideal inmate in the state prison system and would provide a calm and moderating influence" on other prisoners; the testimony of Crew's family and friends that they did not believe he should be sentenced to death; and the testimony of various witnesses that Crew had a high degree of mechanical aptitude and "could provide useful skills to benefit others in the state prison system." (CT 2553-2554.)

In determining the effect of a jury instruction, the court considers whether, in light of all the instructions given, there is "a reasonable likelihood that the jury misconstrued or misapplied" the instruction. (See *People v. Clair* (1992) 2 Cal.4th 629, 663.) In addition to the pinpoint instruction, the jury was instructed that it "shall" consider as mitigation "all of the evidence which has been received during any part of the trial of this case. . . ." (CT 2550.) It was also instructed that it "shall" consider whether the defendant has been involved in other criminal activity involving the use or attempted use of force or violence, whether the defendant had any prior felony convictions, and "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death." (CT 2550-2551.) Read together, there is no reasonable likelihood the jury viewed the pinpoint instruction as an exclusive list of the mitigating evidence it could consider.[34]

Moreover, the instructions must be considered in light of the arguments of counsel. Morehead told the jurors to consider all the evidence in mitigation. (RT 5035-5036 [jurors should consider "the entire panoply of things. This man's entire life, his background, what brought him to this point, and also what factors there are in mitigation"]; 5038-5039 [should consider all guilt and penalty phase evidence]; 5046 [should consider any "sympathetic or other aspect of character which calls for a sentence less than death"]. Morehead

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34. Crew suggests that since the factor (k) instruction referred to evidence the defendant "offers" as a basis for mitigation, the jury would limit such evidence to that "offered" in the pinpoint instruction. (See CT 2551.) However, as noted above, the jury was specifically instructed to consider "all of the evidence which has been received during any part of the trial of this case." (CT 2550.) Thus, the jury would have understood the factor (k) instruction to refer to evidence "offered" at trial.

specifically pointed out that Crew had no prior criminal record of violence and no prior felony convictions, and contended this was a "very important factor" in mitigation. (RT 5040-5042.)

In addition, the jury knew that Gant had finished off the victim, but was also well aware that if he had not, Nancy eventually would have bled to death from the bullet Crew fired into the back of her head after luring her onto the trip for that specific purpose. Gant had absolutely no reason to wish Nancy dead on his own; there is no evidence he had ever previously met her. Gant's role in the murder, while gruesome, simply did not reduce Crew's culpability as the driving force behind the murder. (See *ante*, Arg. I-G.)

As to lingering doubt, counsel wisely chose not to rely on this approach at the penalty phase. (See 5039-5040, 5054, 5070-5072, 5077 [acknowledging crime and jury's finding of guilt].) This Court has held that, although the jury may consider lingering doubt, there is no requirement that the court specifically instruct the jurors that they may do so. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.) Further, the Court has determined that the factor (k) instruction "is sufficiently broad to encompass any residual doubt any jurors might have entertained." (*People v. Lawley* (2002) 27 Cal.4th 102, 166.)

Finally, Morehead did invoke the consideration of sympathy and mercy in his closing arguments. (RT 5077 ["each and every one of you in your hearts and souls should pray God, be convinced there's no other alternative (before imposing death)]; 5082 ["if there is any doubt in your minds, if there's any hope, I know there is - give Mr. Crew the benefit of that hope"]; 5083 [paraphrasing John Donne's poem: "No man is an island entirely to himself, every man is a piece of a continent, a part of me. The death of one man diminishes all. Therefore, never ask to know for whom the bell tolls, they toll for me"].

In light of these arguments, as well as the other instructions,

counsel were not ineffective for submitting the pinpoint instruction.

V.

THERE WAS NO CUMULATIVE INEFFECTIVE ASSISTANCE OF COUNSEL

In Claim E, Crew contends the cumulative impact of trial counsels' errors were prejudicial. As discussed above in Arguments I through IV, counsels' performance was reasonable and no prejudice resulted. Since "counsel performed their task largely free of deficient performance, and certainly free of any lapse of constitutional dimension," this claim must fail. (*People v. Ochoa* (1998) 19 Cal.4th 353, 435.)

VI.

THE STATE'S DENIAL OF ADDITIONAL FUNDING DID NOT DENY CREW A FAIR TRIAL

In Claim F, Crew contends the state court's failure to grant in full his requests for funding pursuant to Penal Code section 987.9 rendered his trial unfair. The court granted a total of $29,700 for pretrial investigation.

Crew's original appointed trial counsel, deputy public defender Bryan Schechmeister, received $2,000 in 987.9 funds in April 1985 to interview witnesses in South Carolina, Connecticut, and Minnesota. (ACT 987.9 6.) Schechmeister received another $700 in May 1985 to interview witnesses in Utah. (ACT 987.9 7-9.) Crew subsequently hired O'Sullivan, who apparently received reports of those interviews. (See ACT 987.9 11 [stating witnesses had already been interviewed in Minnesota, Texas, Connecticut, South Carolina, and Nevada].)

In December 1988, O'Sullivan requested $20,125 in 987.9 funds. The court authorized $12,000. (ACT 987.9 10-15.) From notations on one copy of the motion, it appears the court allowed funding for copies of the preliminary hearings of Crew, Gant, and Mosteller; a psychiatric interview of Crew; a private investigator; transcription of 60 cassette tapes; and an "initial work up" of Crew's background for the penalty phase. (ACT 987.9 170.) It appears the court did not allow $3,200 for a "juristic psychologist;" $5,000 for interviews with unnamed "out of state witnesses;" $3,500 for a forensic anthropologist; $4,500 for a forensic pathologist; and $1,000 for unspecified miscellaneous costs. (ACT 987.9 170.)

In March 1989, O'Sullivan requested $31,000 in 987.9 funds. The court authorized $15,000. (ACT 987.9 23-28.) O'Sullivan sought funds for additional psychiatric interviews by Dr. Phillips; a substance abuse expert, Dr. Smith; further investigation and travel expenses; and miscellaneous costs.

(ACT 987.9 25-26.) As noted above, Dr. Phillips and Dr. Smith were hired to examine Crew. O'Sullivan also repeated his requests for a jury selection expert and a forensic anthropologist and pathologist, which presumably were again denied. (ACT 987.9 25-26.)

In August 1989, during the penalty phase, O'Sullivan requested an additional $12,000. (ACT 987.9 60-61.) No ruling on the request appears in the record. It appears it was not granted. (See ACT 987.9 104.)[35/]

"Section 987.9 commits to the sound discretion of the trial court the determination of the reasonableness of an application for funds for ancillary services." (*People v. Mattson* (1990) 50 Cal.3d 826, 847.) "An appellate court reviews a trial court's ruling on an application for authorization to incur expenses to prepare or present a defense for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 234.) No abuse of discretion occurs where the claim is speculative or the defendant fails to show that additional funding would have resulted in a different outcome. (See *People v. Staten* (2000) 242 Cal.4th 434, 447-448.) If the trial court did not abuse its discretion, there is no predicate for a constitutional violation. (*Id.* at p. 448 n. 1.)

Crew fails to identify any *specific* request for funding that he believes would have changed the outcome of trial if granted. For that reason alone, he has failed to establish a prima facie case. In addition, trial counsel failed to demonstrate that a jury selection expert was reasonably necessary to the defense. O'Sullivan was an experienced defense attorney who had previously tried murder cases, including capital cases. This Court has upheld the trial court's discretionary denial of funding for jury selection experts in such circumstances. (*People v. Box* (2000) 23 Cal.4th 1153, 1182-1185; *People v.*

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35. After the verdict counsel sought and received $4,650 for investigation of the jurors. (ACT 987.9 72-73.)

Mattson, supra, 50 Cal.3d at p. 847.) Likewise, Crew could not have suffered prejudice from the denial of funding for a forensic anthropologist and pathologist. The trial court excluded the only evidence to which their testimony could have related.[36/]

Further, Morehead alleges in his declaration that, because of lack of time and resources, counsel failed to obtain additional records about Crew and his family; failed to investigate Crew's background by interviewing relatives and friends in California, Texas and South Carolina; and failed to obtain additional evidence of Crew's "depression, sleep disorders or substance abuse." (Petition, Exh. 1 at 2-3.) Morehead does not specify what the records would have shown, which relative and friends should have been interviewed, what those interviews would have revealed, or how additional evidence of Crew's mental state would have assisted the defense. To the extent this claim overlaps with Crew's claims of ineffective assistance of counsel, we have demonstrated above that no prejudice resulted from the failure to present additional evidence of Crew's background or mental state. (See *ante*, Arg. II.)

For these reasons, Crew cannot show that trial court's limitation of funding rendered his trial unfair. Nor did the trial court's rulings deprive Crew of a state-created liberty interest in violation of *Hicks v. Oklahoma* (1980) 447 U.S. 343. The *Hicks* rule applies to state statutes that are "unqualified" — that is, laws that impose a mandatory obligation that eliminates any official discretion. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 745-757.) Penal

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36. Counsel stated the forensic experts were relevant to an issue concerning Nancy's dog. (ACT 987.9 25.) Nancy's body was not found when the police dug up Gant's back yard, but some dog bones were discovered. Nancy had left on the cross-country trip with her English Springer Spaniel from whom she was "inseparable;" the dog was never seen again after Nancy's disappearance. (See RT 3784-3785, 4248.) The trial court excluded this evidence as speculative.

Code section 987.9 clearly grants the trial court discretion to determine appropriate disbursements of public funds. No *Hicks* violation occurred.

VII.

THE CHARGING DECISION WAS NOT DISCRIMINATORY OR ARBITRARY AND CAPRICIOUS

In Claim G, Crew contends the Santa Clara District Attorney's Office discriminated and acted arbitrarily and capriciously in seeking the death penalty in this case.

This Court has held that "prosecutorial discretion to select those eligible cases in which the death penalty actually will be sought does not, in and of itself, evidence an arbitrary and capricious capital punishment system, nor does such discretion transgress the principles underlying due process of law, equal protection of the laws, or the prohibition against cruel and unusual punishment." (*People v. Crittenden* (1994) 9 Cal.4th 83, 152.)

Crew argues the Santa Clara District Attorney's Office's decision was arbitrary in specific ways. He alleges that in the 1980s Santa Clara County was "more prone" to seek the death penalty than "many other counties" in California. (Petition at p. 180.) He provides no factual support for this sweeping statement. Even assuming arguendo that the allegation is true, it may be because more serious murders occurred in Santa Clara than in other counties. And, if true, that fact does not establish that the decision *in this case* was arbitrary or capricious. Crew contends the death penalty was not sought in cases involving similarly situated defendants in Santa Clara or other counties, but fails to identify any such cases. Moreover, Crew's crime was so distinctive that it is doubtful there are many, if any, cases that could convincingly be placed in the same category.

Crew also alleges that the Santa Clara District Attorney's Office had no written criteria for determining whether to seek the death penalty at the time it charged him with special circumstances murder. Even if that allegation were true, the absence of a *written* policy does not establish that the office had

no criteria, or that its decision here was arbitrary or capricious.[37]

Crew argues the Santa Clara District Attorney's Office relied on irrelevant factors in deciding to seek the death penalty in this case. He lists the race of the victim as one such factor. Both Nancy and Crew are white. He fails to explain how the charging decision was based on any improper racial factors.

Crew also argues the decision was based on the "socio-economic status, political influence and prominence, and persistence" of the victim's family. There is no evidence the Wilhelmis had any political influence or prominence in the community. They were simply an anonymous middle-class family who were convinced their daughter had been murdered. It is true that they hired a private investigator and contacted their congressman to inquire about the progress of the police investigation, but that course of action was dictated by the peculiar facts of the case, namely Nancy's disappearance and Crew's flight, which prevented a more conventional investigation. The mere fact that the Wilhelmis wrote their congressman does not show that they were "politically well-connected;" any constituent may contact a representative. Further, there is no evidence that the district attorney's office was even aware of the correspondence between the congressman and the police, or that the congressman's two letters of inquiry caused the prosecutor to file a murder charge, much less special circumstances.[38]

Crew also argues the district attorney's office improperly

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37. Crew argues there was no special circumstance that applied to his case. As we contended in our Respondent's Brief, he was properly charged with murder for financial gain under Penal Code, section 190.2, subdivision (a)(1). (See RB at pp. 91-94.)

38. The San Jose police department had already commenced its investigation when the congressman wrote the letters in February and April 1983. As of May 1983, the department had obtained an arrest warrant for Crew charging him with grand theft. (Petition, Exh. 65.)

considered the publicity generated by the case. He has attached to his petition only one article from the San Jose Mercury News about the case, which was published after the district attorney's office decided to pursue the death penalty. (Petition, Exh. 67.) The defense did not ask for a change of venue based on publicity. This allegation is completely unsupported.

Crew also contends the decision to pursue the death penalty was based on the political aspirations of unnamed members of the DA's office, and on the "personal proclivities" of Dave Davies, the trial prosecutor. This allegation is too vague to establish a prima facie case of discrimination or an arbitrary and capricious charging decision. For all the above reasons, the claim must fail.

VIII.

THE DISTRICT ATTORNEY'S OFFICE DID NOT TAINT THE JURY VENIRE

In Claim H, Crew contends that unnamed members of the Santa Clara District Attorney's Office tainted the jury venire by knowingly providing inflammatory and inaccurate information about the facts of the case to the San Jose Mercury News, encouraging publication of an article during jury selection, and failing to ensure that prejudicial or inadmissible information was not included in the article.

This claim focuses on a Sunday, April 23, 1989, article in the Mercury News that was headlined "Charmed to Death." The article contained some information that was not introduced at trial. (Petition, Exh. 67.)

Jury selection in this case began on April 17, 1989, and concluded on June 26, 1989. Seventeen of the three hundred prospective jurors were excused because they had read or heard about the article.[39/] (Petition at pp. 186-187, n. 16.)

Crew contends the information in the article must have come from the district attorney's office. However, he fails to provide any evidence to support this claim; the source of the information could have been witnesses, the victim's family, the private investigator, or the police. Even if some or all of the information was provided by members of the district attorney's office, no impropriety is demonstrated; the district attorney's staff was permitted to talk

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39. Three hundred prospective jurors were called for the case. (RT 506.) The court divided the jurors into four groups for individual questioning. (RT 662; see CT 2126, 2128, 2151, 2154.) The court expressly admonished the first group, whose questioning began on April 19, 1989, four days before the article was published, not to "read, view, listen to any media, if there be any, concerning the case." (RT 679.)

to the press about the case at that time.[40/]

Crew also suggests the district attorney's office could have influenced the timing and content of the article to reduce any prejudice. He argues the district attorney's office had a "very friendly and cooperative relationship" with the Mercury News. In support of that contention, he refers to a letter authored by someone who apparently worked for the paper addressed to someone named "Alan," who Crew states is a deputy district attorney. (Petition at p. 187.) The letter states in its entirety: "Alan, Enclosed are the clips about the Nancy Crew case. I thought you'd be interested in reading what we've carried so far. Delia Rios." (Petition, Exh. 66.) Even assuming Alan is a prosecutor, this brief note fails to show that the district attorney's office had any control over the Mercury News. There is no reason to believe that the Mercury News would have given the prosecutor an advance copy of the article and allowed him to edit out "prejudicial" facts. Nor could the district attorney's office have prevented or delayed the publication of the article until after trial. As the prosecutor noted, "I couldn't stop the publication obviously. They were going to publish it. But I had requested that she not publish it until after last Friday, so that you could admonish the prospective jurors, which you have done." (RT 752.)

Finally, there is absolutely no evidence that Crew was deprived of a jury drawn from a fair cross-section of the community as a result of the article. (See *People* v. *Howard* (1992) 1 Cal.4th 1132, 1159; *Duren* v. *Missouri* (1979) 439 U.S. 357, 364.)

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40. After publication of the article, defense counsel requested a gag order, which the trial court signed on May 2, 1989. (RT 755-767; CT 2139-2140.)

IX.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT CONCERNING ELANDER

In Claim I, Crew contends the prosecutor committed misconduct by failing to disclose evidence impeaching Richard Elander and knowingly presenting false testimony.

A prosecutor commits error only if his conduct amounts to "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury," or is "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Silva*, *supra,* 25 Cal.4th at p. 373, citations omitted.)

Elander received immunity for his role in the murder but not for perjury. Crew claims the prosecutor "had no intention" of prosecuting Elander for his alleged perjury at the preliminary hearings, Crew's trial, and the Gant-Mosteller trial.[41/] Crew construes the failure to prosecute Elander for perjury as an additional consideration for testifying, other than the grant of immunity, which was not disclosed to the jury. He also construes the prosecutor's failure to "correct" Elander's testimony about the scope of the benefits he received for testifying as a due process violation. He argues that if such information had been presented to the jury, Elander's credibility would have been undermined.

The jury was aware that Elander lied under oath at the preliminary hearing, and that he was not being prosecuted for perjury. (See *ante,* fn.14.) Neither the prosecutor, defense counsel, nor the judge viewed this circumstance as a "benefit" for testifying. However, to the extent it bore on Elander's credibility, the pertinent information was clearly before the jury.

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41. Crew does not specify how he believes Elander committed perjury at Crew's trial or the Gant-Mosteller proceedings. Elander admitted lying at Crew's preliminary hearing.

Therefore, the prosecutor's conduct could not have been deceptive or unfair. Further, there is no reasonable likelihood the jury would have reached a different verdict if the lack of prosecution had been expressly characterized as a "benefit." Nor can Crew show that counsel were ineffective for failing to "discover" this known information, or that the judgment was unreliable.

X.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT CONCERNING CLINT WILLIAMS

In Claim J, Crew contends the prosecutor committed misconduct by failing to disclose benefits that were promised to Clint Williams for his testimony in this case, failing to disclose that another member of the district attorney's office considered Williams untrustworthy, and presenting Williams' testimony when he knew or should have known it was false.

The prosecutor has a duty to disclose to the defense material exculpatory evidence, including impeachment evidence, about which the prosecutor knows or should have known. (*In re Brown* (1998) 17 Cal.4th 873, 879.) Evidence is "material" if its suppression "undermines confidence in the outcome of trial." (*Id.* at p. 884, citing *United States v. Bagley* (1985) 473 U.S. 667, 678.) Stated another way, constitutional error results "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*Bagley, supra,* 473 U.S. at p. 682; *In re Brown, supra,* 17 Cal.4th at p. 886.) Reversal is not required "whenever `a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" (*Giglio v. United States* (1972) 405 U.S. 150, 154, citation omitted.)

Crew claims that, contrary to Deputy Jones' testimony that Williams received no benefits for providing information (RT 4998-4999), Deputy Jones requested modification of Williams' probation in exchange for the information about Crew. However, as noted above in Argument III, no specific reasons for the request are stated and there is no evidence that Deputy Jones sought the modification based on Williams' testimony *in this case.* (Petition, Exh. 56.) Williams clearly had an ongoing relationship with Deputy Jones, and there is no indication Deputy Jones based his request on Williams'

information about Crew. Crew fails to establish a prima facie case that Williams in fact was promised this benefit.

Crew also contends the prosecutor told Williams he would be able to serve the last two months of his then-current sentence for grand theft in protective custody at the county jail instead of being sent back to prison. He relies on an undated letter Williams wrote to Judge Schatz after testifying, which the court filed on August 25, 1989.[42/] (Petition, Exh. 57.) Williams' credibility was clearly suspect, and he had considerable expertise "working the system." It is reasonable to conclude Williams would not be above fabricating such a promise by the prosecutor if he preferred serving time in county jail. The letter fails to establish a prima facie case that Williams was in fact promised county jail time.[43/] Moreover, even assuming arguendo the letter is not a product of Williams' wishful thinking, there is no reasonable likelihood the outcome would have different if the jurors had known the prosecutor agreed to let Williams finish his sentence in county jail. As previously discussed, Williams was already sufficiently impeached. (See Arg. III.)

Crew further argues the prosecutor should have discovered and

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42. As noted, Crew did not submit a declaration from Williams. Williams' letter stated, in pertinent part, "I was brought down from state prison with the promise I would spend my remainder of time in protective custody at Palo Alto county jail. This was the under-standing I got from Mr. Davies the District Attorney. I only have 52 days left on my sentence. Last week another DA calls down at the jail tells the sargent [sic] that they are through with me and I can be sent back [to prison]. . . . Mr. Davies told me personally that I would get to serve the rest of my time here." (Petition, Exh. 57.)

43. Crew also contends the trial court committed judicial misconduct by failing to disclose to defense counsel the alleged promise of favorable treatment in the letter. At the motion to modify the judgment, Judge Schatz noted that he had received letters from unnamed witnesses; counsel presumably saw those letters. (RT 5178.) In any event, Judge Schatz clearly did not credit Williams' testimony, and ultimately reduced the death sentence.

provided to the defense the statement of then-deputy district attorney George Kennedy that Williams would never be a law-abiding citizen and was a "sneaky, hard-core, professional con man." (Petition, Exh. 55.) As stated above, the jury was well aware of Williams' extensive criminal record, and therefore knew that he would never be a law-abiding citizen and was a professional thief. Indeed, he was back in custody for another offense at the time he testified at Crew's trial. Thus, Williams "admitted in his testimony to a laundry list of prior convictions and a chronic criminal lifestyle that could have left no doubt in the mind of any reasonable juror concerning the witness's likely truthfulness and integrity." (*People v. Padilla* (1995) 11 Cal.4th 891 932.) Also, Kennedy's statement was made to the Department of Corrections pursuant to Penal Code section 1203.01; it did not purport to represent Kennedy's views about Williams' reliability as an informant.

Crew also contends Williams' testimony was false and the prosecutor should have known it was false. However, the inmate declarations Crew relies on fail to establish that Williams in fact lied about Crew's involvement in the escape attempt. None of those inmates takes responsibility for the escape plot and then avers from that position of knowledge that Crew was not involved; instead, the inmates deny involvement in the plot and speculate that Crew would not have told Williams about it. In other words, if the inmates were not in fact involved in the plot, they would have no way of knowing whether Crew was involved. Thus, the declarations do not show that Crew had no involvement in the escape attempt.[44/] In addition, since Crew

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44. While hindsight shows that the two superior court judges did not find Williams believable and likely therefore neither did the jury, the prosecutor was not required to refrain from presenting Williams' testimony simply because he knew Williams would be subject to impeachment. It was the trier of fact's job to assess Williams' credibility generally, and with respect to particular statements that may or may not have borne independent indicia of reliability.

cannot show that Williams' testimony was false, the inmates' declarations fail to constitute newly discovered evidence that undermines confidence in the reliability of the verdict. In any event, while the prosecutor knew Williams was subject to impeachment, he did not "know" whether his testimony was false. To the contrary, the prosecution "simply presented its evidence and allowed a fully informed jury to evaluate it." (*People v. Riel* (2000) 22 Cal.4th 1153, 1181-1182.)

Crew argues that if the defense had been aware of the alleged benefits promised to Williams, he would have been so substantially impeached that the verdict would have been different. As discussed above, Williams was already thoroughly impeached. Since neither Judge Schatz nor Judge Ahern credited his testimony, it is reasonable to conclude the jurors reached the same conclusion. Accordingly, even assuming the allegations are true, none of the evidence was material.[45/]

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45. It is unclear whether Crew is also raising a claim based on *Massiah v. United States*, 377 U.S. 201 (1964). (See Petition at 196.) If he is, he has failed to establish a prima facie case. There is no evidence that Williams was deliberately housed with Crew in order to secure a confession.

XI.

THE PROSECUTOR DID NOT SUPPRESS EVIDENCE CONCERNING CREW'S FATHER

In Claim K, Crew contends the prosecutor knew or should have known that Crew's father molested his stepdaughter. He argues this constituted material evidence relating to the penalty phase of trial which the prosecutor had a duty to disclose.

According to a declaration by Crew's second wife, Barbara Miller, Miller called the San Jose police department in 1986 and reported to a Sgt. Graves that Bill Crew had molested her daughter Debbie. Sgt. Graves indicated he would inform the Fremont police, but nobody from that agency ever contacted Miller. (Petition, Exh. 27.)[46/]

Initially, Crew has failed to establish a prima facie case that his father in fact molested Debbie Miller. The hearsay declarations from Debbie's mother and brother do not meet that burden. (See *ante*, fn. 24.) Also, the fact that neither Miller nor Debbie pursued the matter casts doubt on the validity of the claim. Miller apparently made one phone call and then took no further action. Miller made the allegation shortly after the breakup of her marriage to Bill Crew, when he was seeing another woman; the claim could have been retaliatory.

In addition, that evidence was probably inadmissible at trial. Bill Crew does not admit to molesting Debbie in his declaration, and presumably would deny it under oath. (See Petition, Exh. 16.) It is unlikely the trial court would have allowed a mini-trial at the penalty phase on the peripheral issue of

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46. Miller states that Sgt. Graves "was aware" Bill Crew was the father of Mark Crew, who was in custody awaiting trial at the Santa Clara county jail. (Petition, Exh. 27.) She does not explain how she knew that Sgt. Graves knew of that relationship. (*Ibid.*)

whether Crew's father had molested his stepdaughter. Crew does not claim that he personally was aware of the alleged molestation while he lived with his father, or that its alleged occurrence had any direct impact on his emotional development. He simply makes a broad allegation that evidence of child molestation by a member of his immediate family constitutes mitigating evidence. (Petition at p. 201.) However, we have found no cases that support such a sweeping proposition. The absence of that evidence did not undermine the reliability of the proceeding, nor was counsel ineffective for failing to discover it.

XII.

THERE WAS NO PROSECUTORIAL MISCONDUCT, CUMULATIVE OR OTHERWISE

In Claim L, Crew contends the instances of prosecutorial misconduct alleged in his direct appeal and on habeas corpus, "[i]ndividually and collectively," violated due process and rendered the trial unfair. As we have demonstrated, Crew failed to show that the prosecutor committed misconduct in any respect. (See *ante*, Args. VII-XII; RB 45, 51-56, 79, 103-109.) Further, Crew has not established that he suffered any prejudice. Thus, even if the Court were to find misconduct, there was no harm, much less aggregate prejudice. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1132.)

XIII.

THE PENALTY PHASE INSTRUCTIONS WERE SUFFICIENT

In Claim M, Crew contends the penalty phase instructions were unconstitutionally vague and rendered the sentence unreliable.

Crew argues that although the jury was instructed pursuant to CALJIC No. 8.85 in the language of Penal Code section 190.3 concerning mitigating factors, some studies show that juries who vote for death are likely to reach that conclusion based on an erroneous interpretation of the law. He concludes that the death sentence in his case is therefore unreliable. Not so. The Court presumes that the jury followed the instructions. (*People v. Welch* (1999) 20 Cal.4th 701, 773.) "The presumption that the jurors in this case understood and followed the mitigation instruction supplied to them is not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross examination." (*Ibid.* [rejecting two of the same studies by Haney cited here by Crew].)

Crew also contends that the instruction on factor (a), which directs the jury to consider the circumstances of the crime as an aggravating factor, fails to sufficiently distinguish death-worthy crimes from other murders. Both this Court and the U.S. Supreme Court have rejected this contention. (*People v. Osband* (1996) 13 Cal.4th 622, 703; *Tuilaepa v. California* (1994) 512 U.S. 967, 976, 978.)

Crew next contends the instruction on factor (b), which directs the jury to consider the presence or absence of criminal activity involving the use, attempted use, or threat of force or violence, is improper because it does not require the jury to unanimously agree beyond a reasonable doubt on the defendant's guilt of the other crimes. A unanimity instruction is not constitutionally required. (*People v. Osband, supra,* 13 Cal.4th at p. 710.) Nor

is the factor (b) instruction unconstitutionally vague. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1245-1245; *Tuilaepa v. California, supra,* 512 U.S. at p. 976.)

Crew contends the jury may have erroneously considered Clint Williams' rebuttal testimony and the prosecutor's argument about Crew's future dangerousness[47] to be aggravating evidence under factor (b). The prosecutor never suggested that the evidence of Crew's future dangerousness qualified under factor (b). He specifically stated Williams' testimony "is not aggravating evidence. It's only evidence in rebuttal of what they presented of his good character." (RT 5066.) Defense counsel had specifically pointed out that there was no evidence that qualified under factor (b), which he argued was an important consideration. (RT 5040-5041.) Both Judge Schatz and Judge Ahern found no evidence of prior incidents of violence or the threat of violence. Accordingly, there was no reasonable likelihood the jury found aggravating circumstances under factor (b). (See *People v. Lewis* (2001) 25 Cal.4th 610, 667.) For the same reasons, Crew was not deprived of a state-created liberty interest in violation of *Hicks v. Oklahoma, supra,* 447 U.S. 343.

Crew repeats the argument made on direct appeal that the jury was reasonably likely to be misled about the scope of the mitigating evidence because of the prosecutor's argument about Crew's "good" qualities. As we explained at length in the Respondent's Brief, the prosecutor did not suggest that the jurors should consider only Crew's good qualities and ignore any other mitigating evidence; he argued that deliberately taking a life in order to gain a few thousand dollars was so morally reprehensible that it was entitled to great weight as an aggravating circumstance when comparing the two sentencing choices. (RT 5060; see RB 104-105.) In the defense closing argument,

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47. The prosecutor argued that Crew posed a threat because he had innate qualities of leadership and charisma but used them to do evil and to manipulate people. He also mentioned Williams' testimony that Crew had threatened to kill him after being transferred. (RT 5065-5066.)

Morehead went through the entire list of aggravating and mitigating factors from (a) through (k). The instructions repeated those factors and mandated consideration of them. (CT 2550-2551.) There was no reasonable likelihood the jury believed mitigation was limited to Crew's "good" qualities. The instructions did not cause the verdict to be unreliable.

XIV.

THE DEATH JUDGMENT WAS NOT UNRELIABLE OR DISPROPORTIONATE

In Claim N, Crew claims the death judgment is unconstitutional based on all the above claims of error, along with the claim that the sentence was grossly disproportionate. As discussed above, no error or prejudice occurred; defense counsel did not provide ineffective assistance, the prosecutor did not commit misconduct, and the instructions were not misleading. Further, this Court has repeatedly held that proportionality review of a death judgment is not required. (*People v. Millwee* (1998) 18 Cal.4th 96, 167.) Even if it were, the involvement of Richard Elander, Bruce Gant, and Bergin Mosteller in the murder paled in comparison to that of Crew, who conceived of the plan to kill Nancy, deliberately deceived her into thinking he wanted to spend his life with her, carried out the plan despite numerous opportunities to abandon it, and has failed to reveal the location of her body even to this day.

XV.

THERE WAS NO CUMULATIVE ERROR

In Claim O, Crew contends the cumulative effect of all the errors alleged in his first habeas corpus petition, his direct appeal, and this habeas corpus petition require reversal of the judgment. For the reasons discussed herein, as well as in the informal response to the first habeas corpus petition and the Respondent's Brief, no error or prejudice occurred.

XVI.

CREW WAS NOT DENIED MEANINGFUL REVIEW OF HIS FIRST HABEAS CORPUS PETITION

In Claim P, Crew contends this Court deprived him of meaningful review of the claims raised in his first habeas corpus petition because it summarily denied the petition without issuing an order to show cause and denied discovery and an evidentiary hearing.

"The denial of a habeas corpus petition without issuance of an order to show cause, often referred to as a 'summary denial,' does not mean that the court has not considered the merits of the claims. Unless a procedural bar is apparent, the court will determine whether the petition states a prima facie case for relief, i.e., whether it states facts which, if true, entitle the petitioner to relief." (*In re Clark* (1993) 5 Cal.4th 750, 769 fn. 9.)

Here, the Court allowed Crew to file the first petition raising the claims on which he sought discovery without prejudice to the filing of a later petition. The Court considered those claims after full briefing from the parties on both the habeas and discovery issues. The fact that the Court summarily denied relief does not mean it did not meaningfully consider the claims; it simply means Crew failed to meet his burden to establish a prima facie case.

XVII.

THE CALIFORNIA STATUTES SUFFICIENTLY NARROW THE CLASS OF DEATH-ELIGIBLE DEFENDANTS

In Claim Q, Crew contends Penal Code section 190.2 fails to sufficiently narrow the class of offenders eligible for the death penalty. This Court has previously rejected that claim. (*People v. Box, supra,* 23 Cal.4th at p. 1217.) Likewise, the Court has rejected the contention that Penal Code section 190.3, which sets forth the aggravating and mitigating circumstances, fails to sufficiently narrow the class of death-eligible offenders. (*People v. Michaels* (2002) 28 Cal.4th 486, 541.) The Court has also rejected the claim that the financial gain special circumstance is overbroad. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1025; see RB at pp. 94, 101-102.) To the extent Crew takes issue with the constitutionality of the special circumstances for lying in wait and felony murder, those are clearly inapplicable to his case.

Crew also argues the death penalty is arbitrarily imposed due to the lack of statewide standards governing the exercise of prosecutorial discretion to seek the death penalty. This Court disagrees. (*People v. Bemore* (2000) 22 Cal.4th 809, 857.) The Court has also rebuffed the claims that the aggravating factors must be proved beyond a reasonable doubt, that the jury provide written findings, that the jury must be unanimous about each aggravating circumstance, that the jury must conclude the aggravating factors outweigh the mitigating factors beyond a reasonable doubt, and that the jury must conclude death is the appropriate penalty beyond a reasonable doubt. (*People v. Lucero* (2000) 23 Cal.4th 692, 741.)

XVIII.

THE LENGTH OF CREW'S CONFINEMENT PENDING EXECUTION DOES NOT VIOLATE DUE PROCESS

In Claim R, Crew contends his confinement on death row pending execution, along with the time he spent in custody awaiting trial and during the appeal of his sentence of life without possibility of parole, violates the state and federal constitutions and international law. Crew has been in custody since his arrest in 1984; the jury returned the death verdict almost thirteen years ago, and the judgment of death was entered nine years ago.[48/] This Court has previously rejected that claim. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1096.)

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48. Crew argues the delay is not his fault but is a product of "the system." However, Crew elected to discharge the public defender and hire his own attorney, who then had to become familiar with the case, and later required an additional six-month continuance to recover from alcoholism, which Crew supported. (See RT 9/13/88 2, 13; RT 9/16/88 31-32.) And after remand on appeal, Judge Ahern's final ruling was delayed for more than a year because Crew's counsel repeatedly tried to get the case back before Judge Schatz, who had retired. (See generally respondent's Informal Response to Petition No. S084495.)

XIX.

EXECUTION BY LETHAL INJECTION IS NOT CRUEL AND UNUSUAL PUNISHMENT

In Claim S, Crew contends he cannot be executed because lethal injection constitutes cruel and unusual punishment. This Court has previously rejected that claim. (*People v. Hughes* (2002) 27 Cal.4th 287, 406.)

XX.
THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW

In Claim T, Crew contends his death judgment violates international law, including but not limited to the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention Against All Forms of Racial Discrimination, and the Vienna Convention on the Law of Treaties. This Court has previously rejected that claim. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

CONCLUSION

For the reasons stated herein, respondent respectfully requests that the petition for writ of habeas corpus be denied.

Dated: December 27, 2002

Respectfully submitted,

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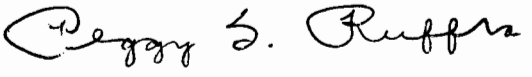

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PSR:js
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re MARK CHRISTOPHER CREW** No.: **S107856**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 27, 2002, I served the attached

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004, addressed as follows:

Andrew S. Love
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District Attorney
County of Santa Clara
70 West Hedding Street, 5th Floor
San Jose, CA 95110

County Clerk
Santa Clara County Superior Court
190 West Hedding Street
San Jose, CA 95110

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 27, 2002, at San Francisco, California.

J. Sun
Declarant

Signature