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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,
12 PLAINTIFF,
13 vs.
14 ERNEST EDWARD DYKES,
15 DEFENDANT.

No. 118376
PEOPLE’S MOTION REQUESTING
RECALL OF SENTENCE &
RESENTENCING HEARING
PURSUANT TO 1172.1
Dept. 13
August 13, 2024 at 2:00 p.m.

16 The People move the Court to recall the sentence of Ernest Edward Dykes and
17 resentence him in the interests of justice. This motion is made upon the grounds that the
18 circumstances of the case warrant that the court exercise its discretion and re-examine the
19 disposition in the case.

20 FACTUAL AND PROCEDURAL HISTORY

21
22 On July 26, 1993, Ernest Dykes shot Bernice Clark and killed nine-year-old Lance
23 Clark during the course of a robbery.

24 Seventy-year-old Bernice Clark owned an apartment building in East Oakland.
25 Ernest Dykes (and his mother) lived for several months in one of Clark’s apartment units.
26 This apartment looked down on the rear parking lot of the building.

27 Bernice was known by her tenants, including Dykes, to carry cash on her frequent
28 visits to the apartment building. Bernice would often cash checks for her tenants and lend

1 them money. Bernice was also known to bring her grandson Lance with her to the
2 apartment when she visited.

3 On July 26, 1993, Bernice drove to the rear parking lot with Lance in the front
4 passenger seat. A tenant, Edward Tyson, approached her as she sat in her car and asked to
5 borrow \$20. She agreed, and as Tyson signed a receipt, Dykes approached wearing a
6 stocking mask as a poorly conceived disguise. He put a gun against Bernice's head and
7 demanded her money. Bernice recognized him and told him that he looked like her
8 tenant. Dykes then shot Bernice.

9 Tyson saw Dykes approach Bernice and point a gun at her. As he fled to safety, he
10 heard the gun 'dry fire' once and then heard two shots in quick succession. Tyson heard
11 Dykes continue to demand money after the "dry fire." After a short interval, the tenant
12 heard the additional shots.

13 Dykes left the area on foot, over the back fence.

14 Bernice had been shot in the neck and, in a state of shock, did not notice that
15 Lance was shot and slumped over in the car. Neighbors came to assist the two and called
16 911. Lance died before reaching the hospital. He was nine years and five days old.

17 Meanwhile, Dykes changed his clothes and returned to the crime scene. He spoke
18 with a police officer and, pretending to be a helpful scene witness rather than the
19 perpetrator, gave a phony description of the culprit.

20 Lance was killed by a single gunshot that went through the left side of his chest,
21 penetrating his heart, stomach and liver, and exited on the lower right side of his body.
22 The same bullet that killed Lance first passed through Bernice's neck. Two other bullets
23 were recovered from the car.

24 Bernice remained hospitalized for several days and initially was not told that
25 Lance had passed away because of fears that she would have a heart attack from the
26 trauma. She never fully recovered from the physical and emotional wounds.

27 Within days of the murder, Oakland Police Department (OPD) detectives received
28 information indicating that Mr. Dykes was responsible for the shooting. On August 7,
1993, he contacted OPD to determine whether there was a warrant out for his arrest. He

1 was arrested that same day and admitted that he was responsible for the robbery and
2 murder, though he denied that he intentionally shot and killed either victim, maintaining
3 that the bullet that injured Bernice Clark and killed Lance Clark had been fired
4 unintentionally. He testified similarly at trial.

5 The trial jurors rejected this testimony and, on August 2, 1993, convicted Mr.
6 Dykes of one count of first degree murder as to Lance Clark, (Pen.Code, § 187, subd.
7 (a)), one count of attempted murder (§§ 664, 189), and one count of robbery (§ 211), both
8 involving Bernice Clark. In connection with each count, the jury found true an allegation
9 that defendant personally used a firearm. (§ 12022.5.) With respect to the charge of
10 attempted murder, the jury found not true an allegation that the attempted murder had
11 been willful, deliberate, and premeditated. (§§ 189, 664, subd. (a).) In connection with
12 the attempted murder and robbery counts, the jury found true the allegations that
13 the victim suffered great bodily injury and that she was a victim age 70 years or older. (§
14 12022.7, subd. (c).) The jury found true a robbery-murder special-circumstance
15 allegation. (§ 190.2, subd. (a)(17)(A).) Following a penalty phase, the jurors sentenced
16 Mr. Dykes to death on August 24, 1995. The abstract of judgment will be filed with this
17 Motion as Exhibit 1.

18 Mr. Dykes' conviction and sentence were upheld by the California Supreme Court
19 on June 15, 2009. (*People v. Dykes*, 46 Cal.4th 731.) A state habeas petition was filed on
20 his behalf on July 6, 2004. As will be discussed further below, that petition included an
21 allegation that trial counsel was ineffective for failing to object to the trial prosecutor's
22 use of a peremptory strike to eliminate the only Black juror who was preliminarily seated
23 in the jury box. That petition was denied on August 31, 2011. Counsel was appointed to
24 represent Mr. Dykes in federal habeas proceedings on December 21, 2011, and a federal
25 habeas petition was filed on December 21, 2012. The case was referred to United States
26 District Judge Vince Chhabria on April 20, 2023 for settlement proceedings. The federal
27 cause of action will be vacated, if this Court grants the People's request for resentencing
28 as recommended herein.

1 **LEGISLATIVE HISTORY, DISTRICT ATTORNEY AUTHORITY TO RECOMMEND**
2 **RECALL, AND JUDICIAL DISCRETION GRANTED UNDER PENAL CODE**
3 **SECTION 1172.1**

4 On June 27, 2018, Governor Brown signed into law the Public Safety Omnibus
5 Act of 2018, Assembly Bill ("AB") 1812, which amended the recall and resentencing
6 procedures set forth in the former Penal Code section 1170(d)(1) to provide guidance on
7 how the Court should evaluate certain post-conviction factors. Pursuant to AB 1812,
8 courts were directed to consider "postconviction factors, including, but not limited to, the
9 inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that
10 reflects whether age, time served, and diminished physical condition, if any, have
11 reduced the inmate's risk for future violence, and evidence that reflects that
12 circumstances have changed since the inmate's original sentencing so that the inmate's
continued incarceration is no longer in the interest of justice." (§ 1172.1)

13 AB 2942 added district attorneys to the list of parties vested with authority to
14 recommend recall and resentencing to the court. (formerly § 1170, subd. (d)(1); see also
15 Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 2942
16 (2017-2018 Reg. Sess.) as amended Aug. 17, 2018, p. 3.) The extension of this authority
17 reflected an underlying legislative intent to rely upon the knowledge and insight
18 prosecutors have of postconviction factors that might justify recall and resentencing of an
19 inmate.

20 On October 8, 2021, Governor Newsom approved Assembly Bill 1540. This new
21 bill amended the former Penal Code §1170(d)(1) and created a presumption favoring
22 recall and resentencing in resentencing hearings ““which may only be overcome if a court
23 finds the defendant is an unreasonable risk to public safety.”” (*People v. McMurray*
24 (2022) 76 Cal.App.5th 1035,1040 [explaining the “court is also now required to ... state
25 on the record its reasons for its decision, provide notice to the defendant, and appoint
26 counsel for the defendant”].) The bill authorized the court to grant a resentencing without
27 a hearing whenever the parties are in agreement. It also clarified that the court has the
28 authority to reduce a defendant's term of imprisonment and modify the judgment. AB-

1 1540 was enacted and codified into law as PC §1170.03 on January 1, 2022. On July 1,
2 2022, this law was renumbered as Penal Code §1172.1.

3 Penal Code section 1172.1 was amended still again via A.B. 88, which went into
4 effect on January 1, 2024. This amendment added the following provision to the list of
5 pre- and post-conviction factors that the court may consider: "Evidence that the
6 defendant's incarceration is no longer in the interest of justice includes, but is not limited
7 to, evidence that the defendant's constitutional rights were violated in the proceedings
8 related to the conviction or sentence at issue, and any other evidence that undermines the
9 integrity of the underlying conviction or sentence." (§ 1172.1, subd. (a)(5).)

10 A court can resentence cases involving both indeterminate sentences and
11 determinate sentences. In July 2022, the Legislature clarified that the resentencing
12 scheme also applies to defendants previously sentenced to death. (See Legis. Counsel's
13 Dig., Assem. Bill No. 200, Sec. 7 (2021-2022 Reg. Sess., July 1, 2022).) The court may
14 modify the judgement and change the conviction to a lesser included. The entire sentence
15 may be reconsidered, (*In re Guiomar* (2016) 5 Cal.App.5th 265, 274; *People v. Garner*
16 (2016) 244 Cal.App.4th 1113, 1118), and the court can use all of its judicial powers
17 available at the time of the resentencing hearing, including such familiar considerations
18 as: (1) which term of imprisonment should be imposed; (2) whether any enhancements
19 charged should be stricken under Penal Code section 1385; and (3) for multiple charges,
20 whether a sentence should run consecutively or concurrently.

21 When a court recalls a sentence, it resents the defendant "as if he or she had
22 not previously been sentenced." (§ 1172.1) As compared with its original sentencing
23 power, the court's resentencing power is restricted in only a few ways. "First, the
24 resentence may not exceed the original sentence. Second, the court must award credit for
25 time served on the original sentence." (*Dix v. Superior Court*, supra, 53 Cal.3d 442, 456;
26 see also *People v. Torres* (2008) 163 Cal.App.4th 1420, 1428-29.) The court must rely
27 on the ordinary sentencing rules promulgated by the Judicial Council when resentencing
28 a defendant so as to avoid disparity of sentences. (§ 1172.1.)

1 Coles specializes in conducting risk assessments, most commonly at the behest of the
2 State of California and related to parole or sexually violent predator proceedings. In
3 Pages 12 and 13 of his report (incorporated herein by reference), he lays out the factors
4 associated with youth recognized and used by the California Department of Corrections
5 and Rehabilitation in determining fitness for release. In his report, he also applies them to
6 Mr. Dykes, noting that Mr. Dykes' criminal conduct occurred in the context of an
7 underdeveloped brain and reflected his emotional and neuropsychological immaturity.

8 **Childhood Trauma**

9 Mr. Dykes' childhood was complicated by poverty, neglect and abuse. Throughout
10 his childhood, Mr. Dykes bounced back and forth between his mother and father, both of
11 whose homes were marked by poverty, neglect, and substance abuse. In both homes, he
12 suffered pervasive parental neglect and physical and emotional abuse from his parents
13 and step-parents.

14 Mr. Dykes' mother was a single-mother raising five children. Among her children,
15 Ernest was the second youngest child, and from a young age often would be left at home
16 alone with his younger sister while his mother was working or otherwise unavailable.

17 Mr. Dykes had a volatile relationship with his father and his stepmother, Lillian,
18 who his father married when Ernest was ten years old. Lillian did not like Ernest or his
19 siblings. Mr. Dykes' father had a history of violence, beating Ernest "when he needed it,"
20 or to appease his stepmother. For example, Mr. Dykes has reported that his stepmother
21 once accused him of tearing one of her dishwashing gloves, causing his father to beat him
22 for this transgression. His mother, stepfather and grandmother would also regularly beat
23 him.

24 In addition to pervasive poverty, violence, and neglect, Mr. Dykes was raised
25 surrounded by alcohol and substance abuse that led to his own substance abuse issues
26 starting in junior high. Mr. Dykes' father was an alcoholic who would often start drinking
27 in the morning and drink until he passed out.

28 Dr. Coles discusses these factors in his report at pages 13-15. (Exhibit 2.)

1 **Prior Criminal Record**

2 At age 14, Mr. Dykes was arrested for six counts of burglary and arson. Records
3 indicate that he started three fires at his junior high school between March 28, 1987 and
4 April 3, 1987. He also burglarized the school during that period. Ultimately, he was
5 charged with four counts of burglary, one count of arson, two counts of attempted arson,
6 three counts of trespass, and two counts of vandalism. After sustaining juvenile petitions
7 for these crimes, he was committed to the Chabot group home on May 5, 1987. In a
8 report to the court regarding his aftercare, dated January 28, 1988, it was noted that Mr.
9 Dykes' behavior was satisfactory and he was released to the custody of his father and
10 stepmother.

11 In 1991, Mr. Dykes was arrested in possession of a handgun. He was sentenced to
12 5 days in jail and two years of unsupervised probation.

13 **Post-Conviction Factors**

14 **Defendant's Disciplinary Record**

15 The Court may consider a defendant's prison disciplinary record in evaluating
16 whether he should be resentenced. (§ 1172.1)

17 Mr. Dykes' disciplinary record since arriving in CDCR custody has been minimal.
18 In 1997, Mr. Dykes was adjudicated guilty for two offenses. On January 3, 1997, he was
19 found in possession of a contraband razor. Six months later, he was involved in a fistfight
20 on the yard. No serious injuries were reported.

21 His only other offenses have been obstructing an officer by delaying yard recall
22 (1999), testing positive for THC (2014) and disobeying an order to remove his shirt
23 (2020), an offense for which his only punishment was counseling.

24 From November 2020 until his move this spring to a Level II prison, Mr. Dykes
25 was housed in San Quentin's North Segregation Unit ("North Seg"), essentially a death-
26 row honor yard which gave incarcerated people considerably more freedom than in the
27

1 erstwhile¹ primary area of death row (East Block). He currently carries a classification
2 score of 19.

3 **Defendant’s Programming History**

4 Although programming opportunities at San Quentin’s death row were limited,
5 Mr. Dykes programmed positively during his time there. Mr. Dykes obtained his high
6 school equivalency in 2019. (Exhibit 3) Since arriving at CHCF he has taken advantage
7 of educational services, Domestic Violence/Substance Use Disorder Courses, Victim
8 Impact and Restorative Justice classes. CDCR data indicates that he is currently enrolled
9 in “nursing-led therapeutic groups.”

10 **Risk and Re-Entry Assessments**

11 As part of efforts to reach a negotiated resolution in this case, the District
12 Attorney’s Office required that Mr. Dykes meet with both our Reentry Release Team
13 and, as referenced above, a psychologist specializing in the type of risk assessment
14 conducted by CDCR.

15 Mr. Dykes is now 52 years old. He has been in custody for over thirty years. Had
16 he received an indeterminate sentence, which he would have if he were charged today, he
17 would have come up for a parole hearing over five years ago, and based on the above
18 factors, would likely have been released.

19 He has met with the ACDAO’s Reentry Release Team, who felt immediate
20 release would be detrimental to Mr. Dykes’ successful transition back into the
21 community. They further opined that a continuation of his incarceration for the period
22 contemplated by this recommendation was warranted in order to give Mr. Dykes an
23 opportunity to solidify his plan for release, and so that parole services could be put in
24 place. They did not otherwise express concern about his re-offending upon release.

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28 ¹ In May 2024, death row at San Quentin ceased to exist.

1 As stated by Dr. Coles: “A person who committed an act of violence as a youth is
2 not necessarily prone to do so in the future and might, on the other hand, have changed
3 their behaviors and outlook; they might have a significantly different internal emotional
4 and ideational life. That said, many of the individuals that I assess in prison who are
5 significantly older than they were when they committed their last crimes, continue to
6 display anti-social behaviors [.] Mr. Dykes, on the other hand, has significantly changed
7 his behavior and attitudes.” (Exhibit 2.)

8 Dr. Coles concluded: “[I]t is my unequivocal opinion that Mr. Dykes is not the
9 person that he was in 1993. He has developed insight into himself, is no longer prone to
10 acting impulsively and violently, and is committed to living a prosocial life. ... There is
11 precious little reason to believe that he will return to a life of crime. It is my opinion that
12 he has rehabilitated himself and is at extremely low risk for committing a future act of
13 violence.” (Id.)

14 Given Dr. Coles’ expertise, the People respect his judgment and thus recommend
15 the below proposed re-sentencing.

16 **Legal Considerations**

17 The resentencing statute specifically recognizes that, “[e]vidence that the
18 defendant’s incarceration is no longer in the interest of justice includes... evidence that
19 the defendant’s constitutional rights were violated in the proceedings related to the
20 conviction or sentence at issue, and any other evidence that undermines the integrity of
21 the underlying conviction or sentence.” (§ 1172.1, subd. (a)(5).)

22 Pursuant to the federal settlement proceedings discussed above, the People
23 reviewed their trial files and identified previously undisclosed materials contained therein
24 indicating that Mr. Dykes’ state and federal constitutional rights under *Batson/Wheeler*²

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27 ² *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1979) 22 Cal 3rd 258.

1 had been violated by the trial prosecutors. Recent case law clarifies that jury selection
2 materials are entitled to only a qualified work product privilege,³ and the District
3 Attorney’s Office determined that it would be unethical to engage in settlement
4 negotiations meant to reach a final resolution in this matter without disclosing the
5 materials indicating that Mr. Dykes’ constitutional right⁴ to a jury selected without racial
6 and ethnic discrimination had been violated. Specifically, the notes indicated that the
7 prosecutors selecting the jury in Mr. Dykes’ case were seeking to prevent or limit the
8 number of Black and Jewish jurors serving in his trial. (Exhibit 4 (Selected notes))

9 The People will lay out only a brief analysis of this issue in this motion. No Black
10 or Jewish jurors served in Mr. Dykes’ trial. To achieve this result, the trial prosecutors
11 only needed to strike one Black juror and no *Batson/Wheeler* objection was made at trial.
12 However, the prosecution’s jury selection notes make clear that race was a consideration
13 in this strike, and that the prosecution was prepared to manipulate the jury to limit the
14 number of Black and Jewish jurors seated. Thus, for example, Seated Juror #9 was
15 flagged as “Wheeler fodder,” an indication that the prosecutor(s) likely intended to strike
16 this juror if necessary in order to justify the strike of a suspect-class juror who shared
17 characteristics with this juror – in this case, having a family member who was
18 incarcerated. (See Exhibit 4.) Similarly, a list solely consisting of qualified Black jurors

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21 ³ In *Jones*, the California Supreme Court held that the work product privilege does not
22 “categorically bar[] disclosure of jury selection notes in postconviction discovery.”
23 (*People v. Superior Ct. (Jones)* (2021) 12 Cal.5th 348, 365-366.) The discoverability of
24 prosecution jury selection notes was amplified in a subsequent District Court of Appeals
25 decision. “[T]he constitutional imperative of rooting out discrimination in the jury
26 selection process cautions against a broad work product privilege where a prima facie
27 case of racial bias under *Batson/Wheeler* has been made.” (*Box v. Superior Court* (2022)
28 87 Cal.App.5th 60, 80.)

⁴ Discriminatory jury selection practices also violate the potential jurors’ rights to equal
protection and due process. (*Edmondson v. Leesville Concrete Co.* (1991) 500 U.S 660.)

1 was made, evidently to identify one that the prosecution would “keep” in order to defeat a
2 *Batson* challenge as to the remaining Black jurors. This was an identical tactic as that
3 used years earlier in another Alameda death penalty trial which resulted in a *Batson*
4 reversal. (*Mitcham v. Davis* (2015) 103 F.Supp.3d 1091, 1118-1119.)

5 The notes in Mr. Dykes’ case were particularly troubling because the lead
6 prosecutor in this trial testified at an evidentiary hearing in 2005 that it would be
7 unethical to deliberately exclude Jewish jurors from jury service. (Exhibit 5.) This same
8 prosecutor was also found to have committed *Batson* error in another capital trial which
9 resulted in a Life-Without-Parole verdict at the penalty phase. (*Love v. Yates* (2008) 586
10 F.Supp.2d 1155, 1172-1173 (describing the prosecutor’s justifications for striking Black
11 jurors as “concocted,” “implausible,” and “contradicted by the record in nearly every
12 respect.”))

13 This newly-disclosed evidence of prosecutorial misconduct at trial would have
14 engendered further litigation and almost certainly resulted in relief to Mr. Dykes either
15 under *Batson/Wheeler* or under Penal Code section 745, the California Racial Justice Act
(RJA) or both.

16 The trial prosecutors’ actions at trial were unethical and unconstitutional. These
17 actions harmed not only Mr. Dykes’ right to a fair trial, but also the victims’ survivors.

18 Rather than prolong the litigation in this case and taking into consideration the
19 pre- and post-conviction factors in this case, the parties have reached a negotiated
20 resolution and the People request that this Court recall and replace Mr. Dykes’s
21 conviction and sentence as indicated below.

22 VICTIM’S NEXT OF KIN

23 The next of kin in this case will appear in Court to convey their viewpoint on
24 resentencing.

25 RECOMMENDED DISPOSITION

26 The intent of the parties is to reach a determinate sentence which effectuates Mr.
27 Dykes’ release ten months from the date of resentencing, with a standard period of parole

1 following his release. The purpose of this delay in Mr. Dykes's release is to facilitate
 2 CDCR's preparation of re-entry services for his release which will protect the interests of
 3 both Mr. Dykes' and the public. Mr. Dykes waives custody, conduct, programming or
 4 other credits earned either pretrial or during his CDCR incarceration, necessary to
 5 effectuate that result. Likewise, the parties submit to this Court's determination of an
 6 alternate disposition which would effectuate the resolution agreed upon by the parties.

7 The below stipulated resentencing agreement will require Mr. Dykes to waive his
 8 right to appeal any irregularities in sentencing and to waive the benefit or ordinary
 9 sentencing rules in order to achieve a result which he recognizes is in his best interest.
 10 Mr. Dykes will acknowledge that he does so knowingly and voluntarily after consultation
 11 with counsel. (See *People v. Hester* (2000) 22 Cal. 4th 290; see also *People v. Otterstein*
 12 (1987) 189 Cal.App. 3d 1548 [holding that while generally a sentence of 243(d) + GBI is
 13 prohibited, where the defendant benefits from the plea bargain and accepts the
 14 irregularity with knowledge, the issue is waived]; *People v. Couch* (1996) 48 Cal. App.
 15 4th 1053, 1056-57 [defendant estopped from challenging his plea bargained for sentence,
 16 since he agreed to accept it and thereby waived the alleged errors].)

Count	Original Sentence	Recommended Resentence
Count One: First Degree murder with special circumstances; personal use of a firearm;	Death + 4 years	Voluntary Manslaughter (section 192): 11 years +5 = 21 years
Count 2: Attempted murder (§§ 664, 189); personal use of firearm (12022.5); great bodily injury and victim 70 years or older (12022.7(c))	9+4+3 years= 16 years (stayed)	9+4+3 years= 16 years consecutive to Count 1, and without the benefit of Penal Code section 1170.1 (One-third of the middle term)
Count Three: Robbery (§ 211); personal use of firearm (12022.5); great bodily injury and victim 70 years or older (12022.7(c))	3+4+3 years = 10 years (stayed)	3+4+3 years = 10 years (stayed) or imposed as necessary to achieve the negotiated result described above.

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Mr. Dykes will also stipulate that this resentencing is a final resolution of all legal claims known or reasonably knowable including but not limited to claims arising under Penal Code section 745 (the Racial Justice Act).

DATED: July 12, 2024.

Respectfully submitted,
District Attorney

By: *Aimee Solway*
Aimee Solway
Deputy District Attorney
Attorneys for Plaintiff/Respondent

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**EXHIBIT ONE: ABSTRACT OF
JUDGMENT**

ABSTRACT OF JUDGMENT - PRISON COMMITMENT

FORM DSL 290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
 COURT ID _____ BRANCH OAKLAND
 PEOPLE OF THE STATE OF CALIFORNIA versus PRESENT
 DEFENDANT: ERNEST EDWARD DYKES
 AKA: AVE743 3184641 NOT PRESENT
 COMMITMENT TO STATE PRISON AMENDED ABSTRACT
 DATE OF HEARING (MO) (DAY) (YR) 12/22/95 DEPT NO 13 JUDGE JEFFREY W. HORNER CLERK Cheryl McCarthy
 REPORTER Arlene Howell COUNSEL FOR PEOPLE Colton Carmine, DDA COUNSEL FOR DEFENDANT Spencer Strellis, Esq. William Daley, Esq. PROBATION NO OR PROBATION OFFICER N/A

FILED
 ALAMEDA COUNTY
 DEC 22 1995
 RONALD G. OVERHOLT, Exec. Officer
 By Cheryl McCarthy

1 DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS).

ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT _____ (NUMBER OF PAGES)

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION			CONVICTED BY			TERM (M/D)	CONCURRENT	CONSECUTIVE TO PRIOR	CONSECUTIVE TO NON-VO	CONSECUTIVE TO TERM	CONSECUTIVE TO SENTENCES (CS REFER #)	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED	
					MO	DAY	YEAR	JURY TRIAL	COURT TRIAL	PLEA								YEARS	MONTHS
02	PC	187/664	Attempt Murder	93	08	02	95	X			U						X		
03	PC	211	Robbery Second Degree	93	08	02	95	X			M						X		

2 ENHANCEMENTS charged and found true TIED TO SPECIFIC COUNTS (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC. For each count list enhancements horizontally. Enter time imposed for each or 'S' for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Total
01	12022.5	S									
02	12022.7	S	12022.5	S							
03	12022.7	S	12022.5	S							

3 ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER. List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5(b) 2 times). Enter time imposed for each or 'S' for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter here any other enhancement not provided for in space 2.

Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Enhancement	Yrs or 'S'	Total

4 INCOMPLETED SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER	CREDIT FOR TIME SERVED

5 OTHER ORDERS \$200.00 Restitution Fine Stayed

Use additional sheets of plain paper if necessary

6 TOTAL TIME IMPOSED ON ALL ATTACHMENT PAGES (FORM DSL 290-A) _____
 7 TIME STAYED TO COMPLY WITH 5-YEAR OR 10-YEAR LIMIT ON SUBORDINATE TERMS, DOUBLE-BASED-TERM LIMIT, ETC (Do not include § 654 stays or discretionary stays of term for enhancements) _____
 8 TOTAL TERM IMPOSED _____

9 EXECUTION OF SENTENCE IMPOSED:

- A. AT INITIAL SENTENCING HEARING B. AT RESENTENCING PURSUANT TO DECISION ON APPEAL C. AFTER REVOCATION OF PROBATION D. AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT (PC § 1170(d)) E. OTHER _____

10 DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR)	CREDIT FOR TIME SPENT IN CUSTODY	TOTAL DAYS INCLUDING	ACTUAL LOCAL TIME	LOCAL CONDUCT CREDITS	STATE INSTITUTIONS
<u>12/22/95</u>		<u>1296</u>	<u>864</u>	<u>432</u>	<input type="checkbox"/> DMH <input type="checkbox"/> CDC

11 DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED

- FORTHWITH INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT _____
 AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS
 CALIF. INSTITUTION FOR WOMEN - FRONTERA CALIF. MEDICAL FACILITY - VACAVILLE CALIF. INSTITUTION FOR MEN - CHINO DEUEL VOC. INST.
 SAN QUENTIN OTHER (SPECIFY) _____

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE Cheryl McCarthy DATE December 22, 1995

This form is prescribed under Penal Code § 1213.5 to satisfy the requirements of § 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

ABSTRACT OF JUDGMENT - PRISON COMMITMENT
 FORM DSL 290

Pen.C. 1213.5

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EXHIBIT TWO: RISK ASSESSMENT REPORT

***** Filed Under Seal *****

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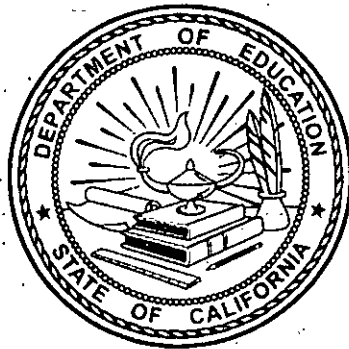
**EXHIBIT THREE: GED
CERTIFICATE**

State of California
High School Equivalency Certificate

This is to certify that

ERNEST DYKES

has met the standard of performance established by the California State Board of Education
for successful completion of the High School Equivalency Tests and is, therefore,
entitled to this High School Equivalency Certificate.



Zoy S. Howard
State Superintendent of Public Instruction

Linda Dally Howard
President of the
California State Board of Education

Credentialed on: October 10, 2019

Printed on: February 29, 2020

J90300

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**EXHIBIT FOUR: EXCERPTS OF JURY
SELECTION NOTES**

[REDACTED] H/F 49 Divorced
Hayward Rough Life → prior DUI's
Unemployed but has work history.
Really a good juror - Her
own son convicted 459pc fel. -
She was surprised how little
time he got -
Thinks D/P necessary

9

Must Kick → son convicted
must kick as wheelbarrow

1

[REDACTED] MW Doctor 41
2 daughters Jewish
Ph.D. in Physics, Educated
in home Russia, St. Petersburg

I liked him better than
any other Jew but No Way

possible, IQ of 180 his
Must Kick, too risky

26

(1)



FB 25 Single Oak.

UC Berkley Poli. Sci. Deg.

From New Jersey, Successful Family Lives w/ male roommate

Says she could do it but I don't know if I believe her -

Very Thoughtful - don't know if act or sincere.

No Kids ->

(4)



M/W Pleasanton 2 1/2 yrs.

47 Banker

Jew? Seltzer other name from New York

D/P. proper punishment for outrageous crime

Married / 1 child

Has lived in N.Y. and L.A.

nice guy - thoughtful but never a strong D/P leader -

Jewish Background

Anti Elderly/children crimes

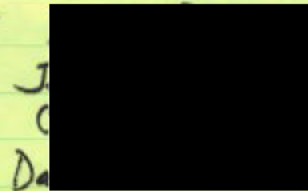
Used to be anti D/P, now pro in some cases 6/7

(4)

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Keep? NO

TX



M.B 54 Separated

9 yrs. Army → Comissioned officer Captain
Degree Bacteriology Baton Rouge LA
Has some concerns re race/economic status
affecting ~~system~~ system - But herast
and judge case on its merits -

Prior Jury 187pc acquittal ID case

Seems like squred away but why
live in Baybay? Also Lic. Plate says

B Free

27

Friend of OPD chief. For D/P Kill/ing must
be intentional

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3 EXHIBIT FIVE: TESTIMONY OF
4 COLTON CARMINE IN *IN RE FREEMAN*
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24 THE COURT: May this witness be excused?
25 MR. SOWARDS: Yes.
26 MR. WILLIAMSON: Yes, Your Honor.
27 THE COURT: All right.
28 Thank you very much. You are excused.

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1 THE WITNESS: Thank you.
2 THE COURT: Counsel, you anticipate that the
3 other witness will be here this afternoon?
4 MR. SOWARDS: That's what I need to check on,
5 with the Court's indulgence, because of the medical
6 appointment.
7 THE COURT: All right. If there is no
8 objection, Counsel, you can call your next witness.
9 MR. SOWARDS: Thank you.
10 MR. WILLIAMSON: I would like to call
11 Mr. Colton Carmine, C-a-r-m-i-n-e.
12 THE COURT: Please step forward.
13 COLTON CARMINE,
14 Called as a witness on behalf of the PEOPLE, was sworn
15 and examined and testified as follows:
16 THE COURT: Good morning.
17 THE WITNESS: Good morning.
18 THE COURT: Please have a seat to my right.
19 DIRECT EXAMINATION
20 BY MR. WILLIAMSON:
21 Q. Sir, could you please state your full name and
22 spell your name for the record, please?
23 A. Colton Carmine, C-a-r-m-i-n-e.
24 Q. would you tell us how you are employed and

25 what you do for a living, please.
26 A. I'm an Alameda County deputy district attorney
27 since 1979.
28 Q. What I would like to do, Mr. Carmine, is ask

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1 you if you know a former deputy who worked in the
2 Alameda County D.A.'s Office by the name of Jack
3 Quatman?

4 A. I knew him. I haven't seen him for a number
5 of years.

6 Q. Could you tell me for how long a period of
7 time did you know Mr. Quatman while he was at the
8 Alameda County D.A.'s office approximately?

9 A. An awfully long time. I worked in the file
10 room since I was 22, so I actually worked there since
11 '76. And so basically my whole adult life until he
12 left.

13 Q. Did you have personal and professional
14 dealings -- strike that.

15 Did you have professional dealings with Mr. Quatman
16 while he was in the office and you were a deputy
17 district attorney?

18 A. Yes.

19 Q. Did he ever supervise you in any fashion?

20 A. He didn't supervise me that -- he was never my
21 team leader, but he was someone that -- there was a time
22 when I respected him and I thought he had an excellent
23 track record. I would go to him for advice from time to
24 time.

25 Q. Has your respect for him changed now?

26 A. Yes.
27 Q. Do you have an opinion from your relationship
28 with Mr. Quatman having worked with him and so forth, as

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1 to whether or not he's an honest and credible person?

2 A. I can't speak for others, but as to myself,
3 there are --

4 MR. SOWARDS: Object to that. It's not based
5 on reputation, irrelevant.

6 MR. WILLIAMSON: I think we're offering an
7 opinion, we're not getting a reputation yet.

8 THE COURT: You haven't laid a sufficient
9 foundation yet for an opinion, so I will sustain the
10 objection --

11 MR. WILLIAMSON: How long --

12 THE COURT: Excuse me --

13 MR. WILLIAMSON: Excuse me.

14 THE COURT: Let me say, I sustain the
15 objection.

16 MR. SOWARDS: Thank you.

17 Q. (by Mr. Williams) How long did you work with
18 Mr. Quatman?

19 A. In various capacities for probably, with some
20 interruption of a year or so where he would be
21 transferred away or I would. I would say a period of
22 22, 20 years.

23 Q. Were there other situations arising involving
24 Mr. Quatman where you came to yourself question whether
25 or not he was a credible person?

26 A. On several occasions. There was one paramount

27 in my mind.

28 Q. Tell us what that situation was.

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1 MR. SOWARDS: Objection to specific instances,
2 irrelevant.

3 THE COURT: Your response?

4 MR. WILLIAMSON: He wanted a foundation as to
5 why he has the opinion that he has. I'm laying a
6 foundation.

7 THE COURT: So you are offering, you intend to
8 offer this witness as an opinion, is that correct?

9 MR. WILLIAMSON: That's correct.

10 THE COURT: All right. And you're attempting
11 to lay a foundation as to why he is in the position to
12 offer such an opinion?

13 MR. WILLIAMSON: That is exactly correct.

14 THE COURT: Therefore what this witness is
15 about to reveal is not for the truth of the incident,
16 but simply to establish his expertise.

17 MR. WILLIAMSON: To establish that he has a
18 bonafide basis for an opinion.

19 THE COURT: Expertise in the sense that he can
20 offer an opinion?

21 MR. WILLIAMSON: That is right.

22 THE COURT: Further comment?

23 MR. SOWARDS: If it's not being offered for
24 the truth of the matter, then I don't think it forms an
25 appropriate basis. I think it's also -- instances to
26 establish reputation for character traits.

27 MR. WILLIAMSON: That's not what I'm

28 inrefreeman3-23-05am#1.prt.txt
accomplishing.

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1 THE COURT: You challenged this witnesses'
2 ability to offer an opinion.

3 MR. SOWARDS: Yes, Your Honor.

4 THE COURT: Counsel is trying to show why this
5 witness is in a position to offer such an opinion. If
6 you withdraw that objection, then we won't get to the
7 point of hearing about this incident. If you don't,
8 it's going to be limited to whether this witness has
9 been in a position to offer such an opinion.

10 MR. SOWARDS: Then I will withdraw it and ask
11 it be limited to his exposure.

12 THE COURT: So you are not going to challenge
13 this witnesses' ability to offer an opinion?

14 MR. SOWARDS: well, I am objecting to an
15 opinion that has no basis. And I understand, Counsel,
16 that you don't understand --

17 THE COURT: That's not necessary.

18 MR. SOWARDS: I understand the proffer to the
19 Court was that this was not necessarily being offered
20 for the truth of the matter. So I'm saying that I
21 think, then we have an unreliable basis for the opinion
22 and no foundation.

23 THE COURT: Then I'm going to accept the
24 testimony for the limited basis of whether this witness
25 is qualified to offer an opinion and for no other
26 reason.

27 Go ahead, please.

28 MR. WILLIAMSON: Is the Court going to allow

1 Counsel to elicit the basis for the opinion, even though
2 it's not offered for the truth of the --

3 THE COURT: That's what I'm indicating.

4 I may not be making myself clear.

5 Obviously there is an objection.

6 Counsel is contending this witness is not qualified
7 to give an opinion.

8 You're attempting to respond to that objection by
9 showing that he is. And as part of your demonstration,
10 apparently this witness is going to refer to a specific
11 incident.

12 what I'm indicating is I will hear the incident
13 with reference to the issue of whether he's qualified to
14 offer an opinion.

15 MR. WILLIAMSON: That's fine. I understood
16 the Court's ruling.

17 Q. (by Mr. Williamson) Sir, can you tell us where
18 you have an opinion as to Mr. Quatman's honesty or
19 veracity?

20 A. There is more than one incident. Would you
21 like --

22 Q. Why don't we start with the first one.

23 A. When I was new to trying felony cases, I had
24 gone to the municipal courts, and I worked at the
25 superior court in the file room, so I already knew a
26 lot of people. In fact, I know many people in the
27 audience.

28 when I finally came back and made it to team 22

1 where I was on the murder team, it was not the capital
2 prosecution team. It was strictly the team that tried
3 murder cases. And I was experiencing exasperation. We
4 had been looking for a witness and couldn't find them.
5 Then my inspector would dig them up in the 11th hour. I
6 would get them in the office and they would say, "I
7 don't remember." "I don't recall," even though I would
8 have a statement of testimony given in front of them of
9 the Grand Jury or preliminary hearing.

10 Q. So this was a recanting witness problem or
11 witness reluctant --

12 MR. SOWARDS: Object to that as leading.

13 THE COURT: Sustained.

14 Q. (by Mr. Williams) Go ahead.

15 MR. SOWARDS: There is no question --

16 (Whereupon, the Reporter requests the
17 Attorneys to speak one at a time to secure an accurate
18 record.)

19 Q. (by Mr. Williams) How did this situation come
20 to involve Mr. Quatman and the feelings that you have
21 about him?

22 A. Well, first to explain that, let me say, when
23 you come from court at the end of the day, at 4:30,
24 5:00, whenever the court chooses to adjourn, we're on
25 the ninth floor, same building, walk up a couple flights
26 of stairs, and there is usually a lot of people standing
27 around, if they're not in trial themselves. And they'll
28 ask you what went on. And I, as I said, was exasperated

1 and Jack Quatman was standing in the hallway with some
2 other people asked me what is wrong. I was explaining
3 it and it's a common occurrence. He asked me to come
4 into his office and he said "Colton, here is what you
5 do." And he sat me down in a chair.

6 Each of our offices would have one or two desks and
7 several chairs where people would sit when you
8 interviewed them. And he sat down and said, "This is
9 what you do." And I took that to mean as if I was the
10 reluctant witness. And he walked over to his desk
11 drawer and pulled out a plastic bag that looked like a
12 bundle of some sort of drugs, came over and threw it
13 down at my feet, and said, "Colton, just do that, and
14 you tell them, 'It's that easy. If you don't want to
15 come across, it's that easy'."

16 Q. Were there other incidents beside this
17 incident?

18 A. He gave me a case once. He wanted to try the
19 capital cases that would have the best prospect of
20 coming back with a death verdict.

21 It's no secret that people in this business are
22 sometimes egotistical, and he was that to a high degree.
23 There was a case that --

24 MR. SOWARDS: Ask that that be stricken, Your
25 Honor, as irrelevant and nonresponsive.

26 THE COURT: I will strike the part of the
27 response where the witness commented on ego.

28 Q. (by Mr. Williamson) The second incident

2 THE WITNESS: He had a case. It was a
3 potentially capital case. One murder had been held to
4 answer and was in fact pending trial. Another unjointed
5 count of murder that was charged in a different
6 jurisdiction within Alameda County in a different
7 municipal court and was still awaiting preliminary
8 hearing.

9 We tried to get them together to go to trial on
10 multiple murder scenarios, but they were able to delay
11 one of the cases and then push the other case along. So
12 I was gonna go to trial on the case. And if I won that,
13 then we would have the other case held to answer and
14 bring it up and try it as a prior murder.

15 Q. So how does it involve Mr. Quatman?

16 A. He had the case, and he came to me and said --
17 I had never handled a case like this.

18 He came to me and said, "This is assigned to me,
19 but you are new and I want you to have a good case to
20 start with." And he laid it out to me in no short order
21 -- the case was gonna start within a few days. And so I
22 didn't know a lot about the case. I agreed to take it.

23 Q. Based upon his representation?

24 A. Yes. Although to be honest, I was not in a
25 position to decline it --

26 Q. Were the rep --

27 A. -- he was superior to me, and he could have
28 directed my team leader for me to do it. I wouldn't

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1 push that.

2 Q. Were his representations made to you in

3 describing the case accurate and true?

4 A. No, they weren't.

5 MR. SOWARDS: Object to that as vague.

6 Representations in what regard?

7 THE COURT: Sustained.

8 Q. (by Mr. Williams) Did he make the
9 representation to you about the facts of the case?

10 A. He made the case sound a lot better than it
11 was proof-wise, especially with regard to the case that
12 wasn't at the courthouse yet. That was still pending in
13 Berkeley Municipal Court pending preliminary hearing.

14 Q. Did you actually receive the case file, the
15 case that he had given to you for you to do?

16 A. The one that was already at the courthouse
17 that was gonna start in two, three days? Yes, he gave
18 me that case. The other case was still down in
19 municipal court so he didn't have it, but he basically
20 briefed me on the facts of that.

21 I went to trial on the case that he gave me. It
22 came back the way it should have -- I wouldn't say that.
23 That's a poor choice of words. -- came back with what
24 -- he was charged with first degree murder with the use
25 of a firearm.

26 Q. Did he make any misrepresentations to you
27 regarding the facts of the first case?

28 A. Yes, he did. The reliability or ease with

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1 which I would be able to use the defendant's girlfriend
2 who was supposedly cooperative.

3 Q. What about the second case?

4 A. That case ultimately had to be dismissed
5 because it was not provable.

6 Q. Had he made representations to you regarding
7 the goodness of the second case when you talked to
8 him?

9 A. He got me to take the case based on the
10 reputation that this would get to be my first capital
11 prosecution.

12 Q. Did you have the opinion that he had made
13 material misrepresentations to you when he described
14 these cases to you --

15 MR. SOWARDS: Objection, leading.

16 THE COURT: Sustained.

17 Q. (by Mr. Williamson) Now were there any other
18 incidents that stick out in your mind right now bearing
19 the issue of Mr. Quatman and his voracity?

20 A. He was somebody that exaggerated a lot, and he
21 was quick to criticize others. He could dish it out but
22 he couldn't take it.

23 Q. Let me ask you the bottom line --

24 MR. SOWARDS: Object to the last part. It's
25 irrelevant.

26 THE COURT: I will strike the comment, "dish
27 it out but couldn't take it."

28 Q. (by Mr. Williams) Let's get down to the

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1 bottom line.

2 Do you have an opinion as you sit there now given
3 your relationship with Mr. Quatman over the years as to
4 his honesty or veracity?

5 A. I do.

6 Q. Could you tell the Court what your opinion is
7 in that regard?

8 A. He would tell the truth if it suits him. I
9 don't think he's above misrepresenting someone if he
10 thought that would give him --

11 Q. Do you think he's ethical?

12 A. No, I don't. And I have -- there is one other
13 incident that I would like to talk about.

14 THE COURT: That's nonresponsive.

15 Just answer the --

16 THE WITNESS: No, I don't think he's ethical.

17 Q. (by Mr. Williamson) Can you tell me why you
18 don't think he's ethical?

19 A. Yes.

20 Q. Could you.

21 A. It was either 1990 or '91 and it's a factor
22 that can be ascertained with ease.

23 It was a C-D-A-A, that's the California District
24 Attorney Association Capital Prosecution Seminar, and it
25 was being held in San Diego. And by that time I was
26 trying capital cases. And I went to the seminar. And
27 Jack Quatman was amongst a great number of other people
28 were presenters or speakers at a formalized presentation

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1 under his aspects of handling these types of cases.

2 His address to the group -- and it was a large
3 group. It had to be 200, 300 people -- bigger than a
4 giant ballroom in a hotel in San Diego -- on jury
5 selection he said, "You should to never ever" -- and I

6 should say. He prefaced these remarks because there was
7 some people, that I didn't know, but I guess he did
8 know, that were of the Jewish faith that were attending,
9 and in fact, some of the panelists. And that he
10 prefaced his remarks by saying, "I know I probably
11 shouldn't say this, and I'm probably gonna get in
12 trouble." And he looked off to the side and said, "but
13 it has to be said."

14 He said, "Never, ever leave a Jewish person on a
15 capital jury. It's just not fair to the case, and it's
16 not fair to the jurors, given what's happened to them in
17 the past to ask them to execute another human being by
18 lethal gas."

19 Q. Given the status of California federal law at
20 the time, do you think that that was an ethical
21 statement to make?

22 A. I don't think it's an ethical statement to
23 make whether I'm a lawyer or not.

24 Q. Now did you ever discuss Mr. Quatman's honesty
25 and voracity and ethics with any other lawyers in or
26 outside the office?

27 A. A little bit. I talked -- when -- I've never
28 read the declaration that is, that I've heard reference

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1 to a declaration. I have not seen it.

2 I haven't talked to Jack Quatman.

3 Q. How about other people? Have you talked to
4 other people --

5 MR. SOWARDS: I'm sorry.

6 The last part was nonresponsive, Your Honor. I

7 would object to that.

8 THE COURT: The last comment will be ordered
9 stricken.

10 Q. (by Mr. Williamson) Have you discussed
11 Mr. Quatman's honesty and veracity and ethics with any
12 other people?

13 A. I've discussed it --

14 MR. SOWARDS: Object to that as vague as to
15 time, Your Honor.

16 MR. WILLIAMSON: At any point in time that you
17 knew Mr. Quatman.

18 THE WITNESS: Yes. And it's -- if you are
19 talking about the period of time when he was still in
20 the office, there was a period of time before he left
21 that he was sort of -- maybe exiled is not the right
22 word. But he was disciplined for remarks he'd made
23 about a woman lawyer in our office --

24 Q. Let me get to a more specific --

25 A. -- it was before that. Because once that
26 happened, he was no longer in the, or no longer amongst
27 us.

28 Q. So your answer is yes.

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1 Did you discuss Mr. Carmine's (sic) credibility
2 with --

3 A. Mr. Quatman's.

4 Q. I'm -- excuse me. Mr. Quatman's credibility
5 and honesty with other people?

6 A. Yes.

7 Q. Based upon your discussions of Mr. Quatman's
Page 69

8 honesty and credibility with other people, did you come
9 to believe that he had a reputation for not being an
10 honest and forthright person?

11 A. If it didn't serve his purpose, he wouldn't
12 tell the truth.

13 MR. WILLIAMSON: I have no further questions
14 at this time.

15 THE COURT: We're going to take the morning
16 recess for ten minutes.

17 (whereupon, the morning recess was taken.)

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1 STATE OF CALIFORNIA)
2 COUNTY OF SANTA CLARA) SS.

3 I, TANYA HOLLAND, do hereby certify that:
4 I am an Official Certified Shorthand Reporter of
the Santa Clara County Superior Court;
5 I was the duly appointed, qualified, and acting
Official Shorthand Reporter of said court in the matter
6 of People of the State of California versus FRED H.
FREEMAN, Case Number S122590, taken on 3-23-05.
7 I reported the same in machine shorthand, and
thereafter had the same transcribed into typewriting as
8 herein appears, and that the foregoing Pages 289 through
Page 70