EXHIBIT P

DECLARATION OF MICHAEL ROTHSCHILD

Michael Rothschild declares under penalty of perjury as follows:

I am an attorney at law, licensed to practice in California since 1969. I have always worked as a trial attorney and have emphasized defense of persons accused of crimes, primarily felony physical and sexual abuse allegations. My initial experience and training was within the Los Angeles County Public Defender's Office. Private practice in Sacramento followed.

California Attorneys for Criminal Justice is the statewide bar association for criminal defense attorneys - both public defenders and those in private practice. Within that organization I served as secretary in 1986, treasurer in 1987, vice-president in 1988 and 1989 and as president in 1990 and 1991. CACJ regularly offers statewide seminars as continuing education for criminal defense attorneys. I so-participated throughout the time that I served as an officer. From 1987 through 1990 I also served as a member of the CACJ Seminar Committee, planning and then implementing continuing education classes for criminal defense attorneys throughout California.

Trial in *People v. Larry Pohlschneider* occurred in January, 2001. Prior to that I had taught seminars specifically focused upon defense of child sexual abuse cases for CACJ in 1985, and for the National Child Abuse Defense and Resource Center in 1997, 1998 and 1999. I thereafter first participated in and then served as chairperson for a three-day skills workshop at Asilomar Conference Center, California, sponsored by CACJ and exclusively devoted to trial skills and defense preparation for trial of criminal allegations in 1992, 1993, 1995, 1997 and 1999.

In my capacity as a criminal defense attorney, for five years commencing 1990, I served as a guest lecturer at the California Law Enforcement Officers Training Center in Sacramento. My presentation to law enforcement officers from throughout California

focused upon proper investigation of sex molest cases. I have served as a moot court judge at the UC Davis School of Law and California Regional Moot Court Competition, as a judge at the National Ethics Trial Competition sponsored by McGeorge School of Law in Sacramento and have authored articles for the California Criminal Defense Practice Reporter (Matthew Bender Company) relating to defense of sex offense allegations.

I have emphasized my foregoing statement of experience to the time period preceding the *Pohlschneider* trial for purposes of illustrating some of the resources available to a criminal defense lawyer who wished to remain current about legal and factual issues then-relating to their practice of law and defense of sexual molestation allegations in particular. In addition, "Forum" magazine regularly published by CACJ and "The Champion" magazine published by the National Association of Criminal Defense Lawyers served to inform their members about issues pertinent to this matter.

I have tried to verdict over 200 criminal trials. Even if an attorney had not attended the presentations that I personally participated in, advertisement of the subjects covered throughout the California Criminal Defense Bar would have made a reasonably competent defense attorney aware of subjects being discussed. Based upon inquiry to California Attorneys for Criminal Justice, I am informed and believe that attorney Thomas J. Hilligan was never a member of that organization and never attended any of its continuing education programs.

Throughout the decade preceding the *Pohlschneider* trial issues relating to competent defense of felony sex molest cases were frequently addressed in published appellate decisions. That decade witnessed unprecedented public attention upon what many then characterized as "crisis in child protection." Local to California was the McMartin pre-school case in Los Angeles which garnered headlines for months. It was an environment counsel must have been aware of if he was simply conscious.

As a basis for this declaration, I have read and considered the following:

- Transcript of trial proceedings (including discussion of jury instructions and the instructions themselves) and of the following motion for a new trial in *People v. Larry Pohlschneider*, Tehama Superior Court Case No. NCR54406 commencing January 25, 2001 and consisting of over 400 pages.
- Declarations of the alleged victims: Ethel [redacted] (October 29, 2012), Ashley [redacted] (September 9, 2014) and David [redacted] (September 9, 2014).
- Declaration of James Crawford-Jakubiak, M.D.
- Declaration of Michael Cassidy, M.D.
- Shasta Community Health Center record of 11/3/2000 examination of David Harris by S. Relyea, P.A. and M. Vovakes, M.D. (signed 11/10/2000).
- Shasta Community Health Center record of 11/1/2000 examination of Ashley Harris by M. Vovakes, M.D. (signed 11/3/2000).
- Shasta Community Health Center record of 11/1/2000 examination of Ethel Jordan by M. Vovakes, M.D. (signed 11/3/2000).
- Transcription of interview of David H. (a minor) on November 16, 2000, filed with the court January 26, 2001.
- Transcription of interview of Ethel J. (a minor) on November 16, 2000, filed with the court on January 25, 2001.
- Transcription of interview of Ashley H. (a minor) on November 16, 2000, filed with the court on January 25, 2001.
- Transcribed notes from the file of Attorney Hilligan.
- California court of Appeal opinion affirming conviction of Larry Pohlschneider. Case No. C037869, August 8, 2002.

For the reasons set forth below, considered individually as well as taken as a group, I strongly believe that defendant Larry Pohlschneider at his January 2001 trial in Tehama County received ineffective assistance of counsel in violation of his rights protected by the Sixth Amendment to the United States Constitution and Article 1 section 15 of the California Constitution. There is far more than a reasonable probability that, absent errors in both preparation for trial and the conduct of trial by attorney Thomas J. Hilligan, the jury would have had a reasonable doubt respecting Mr. Pohlschneider's guilt.

For the reasons set forth below, individually and as a whole, I believe that the record affirmatively discloses that attorney Hilligan failed to investigate all defenses of fact and law available to his client, conducted negligible pretrial preparation, if any, which led to what can only be considered to be an abject failure to properly represent his client before the trial jury.

Defense of child sexual molest cases requires that any minimally competent defense attorney be familiar with psychological and medical issues then-currently relevant to those types of allegations. The trial of Larry Pohlschneider is typical. Allegations of child sexual molest, even in the abstract, are highly disturbing to a trial jury and sophisticated evidence in these matters is unusually susceptible of being misunderstood and misapplied by a jury. Attorney Hilligan's failures were, in my opinion, monumental, even taken singularly. It was as if he was completely unaware of issues which potentially could-and then-arise at trial. It was as if he was unaware of issues frequently debated both in the popular press and considered by appellate courts of California and throughout the nation. Cross-examination of prosecution experts was minimal and ineffective. Utilization of readily available resources such as consultation with or testimony by experts was non-existent.

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

The prosecution's initial witness was Ray H. Carlson, a clinical psychologist. (RT p. 30-45.) Although Dr. Carlson was presented as an expert about the "Child Sexual Abuse Accommodation Syndrome" (RT p. 33), he rarely referenced that concept. Without objection he was allowed to repeatedly discuss his personal experience as a clinician. The prosecutor early in his testimony signaled that was about to occur: "And based upon your expertise. . ." (RT 34, line 11).

The subject "Child Sexual Abuse Accommodation Syndrome" was well known and the subject of heated professional debate at the time. The article entitled "The Child Sexual Abuse Accommodation Syndrome" was authored by Roland C. Summit, M.D. in 1983. It was not a scientific study. Dr. Summit's article was based upon what he characterized as observations within his four years of clinical practice ". . . which specializes in community consultation to diverse clinical and para-clinical sexual abuse programs." It was based wholly upon his observation and that of colleagues of ***confirmed*** victims of child sexual abuse.

In the decade following its publication, Dr. Summit's article frequently generated more heat than light. That led Dr. Summit to publish in 1992 a follow-up article in the Journal of Child Sexual Abuse entitled "Abuse of the Child Sexual Abuse Accommodation Syndrome." That article commenced with a frank overview of what had occurred over the preceding decade.

> The Child Sexual Abuse Accommodation Syndrome (CSAAS) is a clinical observation that has become both elevated as gospel and denounced as dangerous pseudoscience. The polarization which inflames every issue of sexual abuse has been kindled further here by the exploitation of a clinical concept as ammunition for battles in court. The excess heat has been generated by false claims advanced by prosecutors as well as a primary effort by defense interests to strip the paper of any worth or relevance.

Dr. Carlson relied on Dr. Summit's 1983 paper and on his own experience. He did not cite any other research or point out that Dr. Summit had limited the use of the syndrome. The prosecutor led Dr. Carlson on a testimonial excursion which far exceeded the permissible limits defense counsel should have imposed by seeking an *in limine* pretrial order or timely objections. Expanding well beyond limits of the Child Sex Abuse Accommodation Syndrome, the prosecutor walked his witness, based on the latter's personal experience, through the fact patterns about to be presented by the witnesses who were to immediately follow. Dr. Carlson focused about what "is common" for child victims of sexual molest to experience:

> Q. Now, after there has been disclosure by a child victim of sexual molest, is it common for that child then to at some point after the disclosure retract the disclosure?
>
> A. It certainly happens. (Tx p. 36, line 10-13.)
>
> Q. To take that a step further, to take retraction a step further, is it also common for child victims of molest to, and I call it flip-flopping. They will - - they go back and forth? They say, "Yes, this happened." "No, this didn't happen." "Yes, it happened." "No, it didn't happen." Is that a common occurrence?
>
> A. I don't know the percentages, but it certainly is something that I have seen happen many times. (RT p. 37, line 15-21.)
>
> * * *
>
> Q. Now, Doctor, in your experience would it be uncommon for a child, who has been the victim of one perpetrator, to become the victim of another perpetrator?
>
> A. It is very common. (RT p. 38, line 7-10)
>
> * * *
>
> Q. And so would it be fair to say, then, that these children who have previously been abused, sexually molested, become easy targets for new perpetrators?
>
> A. Very often do. Not all the time, but it is very common. (RT p. 38, line 24-28.)

Note that the court of appeal, in affirming the conviction, ruled that the "easy target" testimony went beyond the confines of the CSAAS, but held that trial counsel had waived any appellate attack on that testimony by failing to object at trial.

Dr. Carlson's testimony begged for rebuttal. Petitioner has submitted a Declaration and Report of Professor Kamala London. Her submissions reflect what was known in the scientific and legal community prior to Mr. Pohlschneider's trial. Nationally known psychologists and psychiatrists were available to attorney Hilligan for preparation of *in limine* motions to narrowly restrict testimony about CSAAS, to assist in preparation of intelligent and probing cross-examination and, if necessary, to offer testimony which would reveal countervailing considerations about CSAAS. Among other things, such experts have, in my experience, pointed out that:

- No such "syndrome" is recognized within the diagnostic and statistical manual (DSM) of the American Psychological Association. It is not accepted by any organization.
- It was not the product of scientific research. It was based solely upon anecdotal observation. It is at best a "thought piece."
- It has not subsequently undergone scientific testing in the decades since it was proposed. There are no published peer review articles.
- It is based upon an unsupported key assertion - adults generally do not believe children's allegations. Properly researched literature suggests that this claim is false.
- Children who have been properly interviewed and have accused family members of sexual abuse rarely recant their accusations.
- One cannot tell from the fact of recantation itself whether the initial accusation was true or false. The factors comprising the Child Sexual Abuse Accommodation Syndrome can be present in cases of initial false accusations and the Syndrome cannot differentiate initial false from initial true accusations.

- It does not have a known error rate - it is not tested and therefore it is not known how close it is to reality.
- It is not generally accepted within the scientific community.

Competent counsel defending child sexual abuse cases in the mid-1990s and thereafter, including late 2000 and early 2001 thereafter were well aware that the Syndrome had been challenged by defense counsel and by researchers.

In the courses I taught prior to January to January 2001, I urged counsel to retain an expert to both challenge the Syndrome and explain its limitations to the jury. Indeed, I retained such experts during my own practice. Dr. London includes the names of several experts whom trial counsel could have called to refute Dr. Carlson's testimony.

In short, Dr. Summit's article could be shown to not be accepted within the scientific or psychological community and subject to significant attack by a respected defense witness. At or about the time of the Pohlschneider trial, I personally was aware of such experts at the University of Nevada, Reno and the University of California, Davis Medical Center in Sacramento. Mr. Pohlschneider's attorney would not have needed to look far. As discussed supra, both Dr. Summit and the Court of Appeal recognize that there are two - often heated-sides to the CSAAS issue. Mr. Pohlschneider's attorney allowed the jury to hear only one.

The prejudicial effect of the failure of Mr. Pohlschneider's trial counsel's to consult or retain an expert cannot be overstated. Absent a defense expert, the Pohlschneider jury *first* heard expert testimony stating that a child who allegedly had been abused regularly recants that accusation and the jury then heard the children's recantations. Dr. Carlson's testimony was shrewdly placed by the prosecutor at the inception of proceedings so as to set a tone or theme for the entire matter. Left unchallenged, it was devastating. Absent any testimony explaining the defects in the Syndrome, the jury reasonably concluded that the children's recantations actually established that Mr. Pohlschneider had abused them.

Attorney Hilligan's incompetence was further exacerbated by his remarkably brief cross-examination of Dr. Carlson.

Mr. Hilligan further demonstrated his failure to render effective assistance when he failed to seek an instruction limiting the jury's use of Dr. Carlson's testimony. Given the professionally heated discussion about CSAAS in the late 1980's, any minimally prepared counsel - both prosecutor and defense - involved in a child sexual abuse case would have been aware of the line of cases commencing with *People v. Bowker* (1988) 203 Cal.App3d 385. That court held CSAAS evidence to be admissible only for the limited purpose of disabusing a trial jury of common misconceptions concerning how child victims react to abuse. For example, an expert may testify that a certain characteristic or particular behavior, such as delayed reporting or recantation, is not inconsistent with a child having been molested (*Id.* at p. 393).

Bowker was concerned that absent a limiting instruction, a jury could incorrectly apply testimony of an expert's recitation of the general attributes of the syndrome to simply conclude on the basis of that testimony that a child experiencing those attributes was molested. The court explained, "there may be more danger where the application is left to the jury because the jurors' education and training may not have sensitized them to the dangers of drawing predictive conclusions. The expert may be aware that although victims of child abuse generally exhibit a particular type of behavior, that behavior is also found in significant numbers of children who have not been molested. The jury may not be similarly cognizant." (p. 393).

To ensure a trial jury understood the limited purpose of this CSAAS evidence, the court imposed general requirements for instructing the jury. Beyond narrow tailoring by an expert witness of the evidence itself, the jury must be instructed simply and directly that the experts testimony is not intended and should not be used to determine whether the victim's

molestation claim is true. The jurors must understand that CSAAS research approaches the issue from a perspective opposite to that of the jury. CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to that experience. The evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested. (*Id.* at p. 394.)

An expert's testimony must therefore be narrowly limited to that subject. Mr. Pohlschneider's attorney appeared oblivious to the Court of Appeal's direction in *Bowker, supra*, about steps he must take to protect his client. Even if he somehow had "missed" the advance street publication of that seminal case, its direction to defense counsel was consistently reiterated in:

- *People v. Sanchez* (1988) 208 Cal.App.3d 721, 736
- *People v. Stark* (1989) 213 Cal.App.3d 107, 116
- *People v. Harlan* (1990) 22 Cal.App.3d 439, 449-450

In 1992 the court of appeal decided *People v. Housley* (1992) 6 Cal.App.4th 947. It held the courts must thereafter admonish the jury *sui sponte* that an expert's testimony on the syndrome does not establish that abuse has occurred. In reaching that conclusion, the Court of Appeal could very well have been describing the record in *People v. Pohlschneider*:

> The frequency with which defendants have challenged the alleged misuse of CSAAS evidence suggests this type of testimony may be unusually susceptible of being misunderstood and misapplied by a jury, perhaps because the expert commonly is asked to offer an opinion on whether the victim's behavior was typical of abuse victims, an issue closely related to the ultimate question of whether abuse actually occurred. Such testimony, especially from one recognized as an expert in the field of child abuse, easily could be misconstrued by the jury as corroboration for the victim's claims; where the case boils down to the victim's word against the word of the accused, such evidence could unfairly tip the balance in favor of the prosecution. A simple instruction similar to that described in *Bowker* would clearly define the proper use of such evidence and would prevent the jury from accepting the expert testimony as proof of the molestation. Furthermore, requiring such an instruction would avoid

> potentially erroneous convictions occasioned by counsel's inadvertent or incompetent failure to request a limiting admonition. There is no point in requiring that jurors be instructed concerning the proper weight to be accorded expert testimony (Penal Code section 1127b) when they are not advised of the proper use of this testimony.
>
> We thus conclude that because of the potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, it is appropriate to impose upon Courts a duty to render a *sui sponte* instruction limiting the use of such evidence. (*Id.* p. 958-959.)

Thereafter, California Jury Instructions Criminal (CALJIC) were amended to add section 10.64:

> Evidence has been presented to you concerning Child Sexual Abuse Accommodation Syndrome. This evidence is not received and must not be considered by you as proof that the alleged victim's molestation is true.
>
> Child Sexual Abuse Accommodation Syndrome research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that a molestation has occurred, and seeks to describe and explain common reactions to children to that experience. As distinguished from that research approach, you are to presume that the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt.
>
> You should consider the evidence concerning the syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's actions, as demonstrated by the evidence, are not inconsistent with him or her having been molested.

Inexplicably, Attorney Hilligan had overlooked the prosecutor's statement in his papers seeking permission to call Dr. Carlson in which the prosecutor stated that "the prosecution should be allowed to introduce evidence for the limited purpose of disabusing a jury's misconception about how a child reacts to sexual molestation. [citations omitted] Other cases have held that with proper sua sponte instructions from the court, expert testimony regarding CSAAS is admissible," citing *Housely*. (Clerk's Transcript, p. 26).

Being aware of the foregoing, any properly informed attorney confronted with an expert such as Dr. Carlson should, at the inception of trial, have litigated an *in limine* motion requesting an order limiting the prosecution expert testimony to the narrow confines prescribed by the appellate courts. They would have also requested a cautionary instruction, both at the close of the expert's testimony and again at the end of trial. Neither occurred.

Defense counsel's minimally short four page cross-examination of Dr. Carlson failed to clarify any of the concerns addressed by the appellate courts in *People v. Bowker, supra,* and *People v. Housley, supra.*

In order to undermine the children's retractions of their accusations against Larry Pohlschneider, the prosecution relied primarily on two "scientific" pieces of testimony: (1) Dr. Carlson's CSAAS testimony which, particularly in light of the absence of a limiting instruction, allowed the jury the infer that the children's retractions actually evidenced their molestation and (2) the testimony of the medical professionals, particularly PA Sandra Relyea, who stated that David had been subject to molestation *after* Albert Harris had left California. Although, like the Carlson testimony, no scientific basis existed for PA Relyea's testimony, trial counsel conducted minimal cross-examination of the medical professionals and, more significantly, failed to consult or retain an expert who undoubtedly would have eviscerated Ms. Relyea's testimony. It is to that medical testimony I now turn.

MEDICAL TESTIMONY

Testifying that David Harris had been abused subsequent to Albert Harris' departure from California, PA Sandra Relyea pointed to several findings she had made describing the appearance of David's perianal area:

(1) Incontinent of stool

(2) Laxity of anal sphincter muscle

(3) Rugae or folds in the perianal area which were flattened