SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DAVID ALLEN LUCAS,** Defendant and Appellant.	**DEATH PENALTY** S012279

San Diego County Superior Court Nos. CR73093 & CR75195
The Honorable Laura P. Hammes, Judge

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DAVID ALLEN LUCAS,** Defendant and Appellant.	**DEATH PENALTY** S012279

STATEMENT OF THE CASE

INTRODUCTION

Appellant's convictions of multiple counts of murder and attempted murder and his sentence of death began with the filing of two separate cases which were ultimately consolidated for trial. The procedural history of each case, CR 73093 and CR 75195, is described under its separate heading up to the consolidation order, the procedural history of both cases is then jointly described following consolidation.

CR 73093

On September 3, 1985, the District Attorney of San Diego County filed an amended information in case number CR 73093, charging appellant with:

Count One - the kidnaping of Jodie Santiago (Pen. Code, § 207, subd. (a));

Count Two - the attempted murder of Jodie Santiago (Pen. Code, §§ 664, 187);

Count Three - the murder of Rhonda Strang (Pen. Code, § 187);

Count Four - the murder of Amber Fisher (Pen. Code, § 187);

Count Five - the kidnaping of Anne Swanke (Pen. Code, § 207, subd. (a)); and

Count Six - the murder of Anne Swanke (Pen. Code, § 187).

It was alleged that appellant used a knife in the commission of all the charged offenses (Pen. Code, § 12022, subd. (b)) and intentionally inflicted great bodily injury in the commission of the kidnaping and the attempted murder offenses (Pen. Code, § 12022.7). Special circumstances of murder in the commission of kidnaping (Pen. Code, § 190.2, subd. (a)(17)(ii)) and multiple murder (Pen. Code, § 190.2, subd. (a)(3)) were alleged. It was also alleged that appellant had previously been convicted of a serious felony (Pen. Code, § 667, subd. (a)) and had three prior felony convictions. (1 CT 219-221.)

Appellant was arraigned on the amended information and entered pleas of not guilty to the charges and denied the allegations. (22 CT 4613.)

On December 23, 1985, the District Attorney filed a notice of aggravating evidence. (6 CT 1263-1267.)

On January 8, 1986, appellant's motion to dismiss (Pen. Code, § 995) was denied. At that time the prior conviction allegations, with the exception of the serious felony conviction allegation, were struck. (22 CT 4625-4626.)

On May 15, 1986, appellant's motion to change venue (7 CT 1452-1592) was denied. (22 CT 4714-4715.)

On July 8, 1986, the District Attorney filed a first amended notice of aggravating evidence. (8 CT 1697-1700, 1709-1712; 22 CT 4721-4722.) On November 3, 1986, a second amended notice of aggravating evidence was filed. (11 CT 2261-2263.)

On December 8, 1986, appellant's motion to suppress (4 CT 770-844) was denied. (22 CT 4800.)

On February 9, 1987, the case (along with CR 75195) was assigned to Judge Hammes. (23 CT 4808, 4811-4812.) On February 17, 1987, the parties entered a stipulation to the assignment of Judge Hammes. (The stipulation also covered CR 75195.) (13 CT 2722-2726; 23 CT 4814.)

On May 13, 1987, a second amended information was filed in case 73093, charging appellant with:

Count One - the kidnaping of Jodie Santiago (Pen. Code, § 207, subd. (a));

Count Two - the attempted murder of Jodie Santiago (Pen. Code, § 664, 187);

Count Three - the murder of Rhonda Strang (Pen. Code, § 187);

Count Four - the murder of Amber Fisher (Pen. Code, § 187);

Count Five - the kidnaping of Anne Swanke (Pen. Code, § 207, subd. (a)); and

Count Six - the murder of Anne Swanke (Pen. Code, § 187).

It was alleged that appellant used a knife in the commission of all the charged offenses (Pen. Code, § 12022, subd. (b)) and personally inflicted great bodily injury in the commission of the kidnaping and attempted murder offenses (Pen. Code, § 12022.7). A multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) was alleged. It was also alleged that appellant had previously been convicted of rape, a serious felony (Pen. Code, § 667, subd. (a)). (16 CT 3452-3457; 23 CT 4895-4896.)[1/]

On June 6, 1988, the prosecution's motion to consolidate the case with CR 75195 (43 CT 9350-9353) was granted. (24 CT 5211-5212.)

CR 75195

On August 1, 1985, the District Attorney of San Diego County filed an information charging appellant with:

Count One - the murder of Suzanne Jacobs (Pen. Code, § 187);

Count Two - the murder of Colin Jacobs (Pen. Code, § 187); and

---

1. This amended information deleted the kidnaping-felony murder special circumstance and deleted the prior conviction allegations, with the exception of the serious felony prior conviction allegation.

Count Three - the murder of Gayle Garcia (Pen. Code, § 187).

It was alleged that appellant used a knife in the commission of all three murders (Pen. Code, § 12022, subd. (b)). A multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) was alleged. It was also alleged that appellant had previously been convicted of a serious felony (Pen. Code, § 667, subd. (a)) and had three prior felony convictions. (27 CT 5744-5745.) Appellant entered a plea of not guilty to the charges. (68 CT 15029.)

On January 28, 1986, appellant's motion to dismiss (Pen. Code, § 995) was heard and denied. (68 CT 15034-15045.) On May 15, 1986, appellant's motion to change venue was denied. (68 CT 15137-15138.)

On July 7, 1986, the District Attorney filed a notice of aggravating evidence. (31 CT 6842-6845; 68 CT 15150-15152.)

On November 13, 1986, the case was assigned to Superior Court Department 10, the Honorable William Kennedy presiding, for trial. (68 CT 15180-15181.)

On December 12, 1986, the District Attorney filed a motion requesting consolidation of the case with CR 73093. (43 CT 9350-9453.) On December 23, 1986, the District Attorney filed a notice of evidence in aggravation. (44 CT 9503-9507.)

On February 9, 1987, the case (along with CR 73093) was reassigned to Judge Laura Hammes for trial. (44 CT 9666-9671.)

On May 13, 1987, an amended information was filed charging appellant with:

Count One - the murder of Suzanne Jacobs (Pen. Code, § 187);

Count Two - the murder of Colin Jacobs (Pen. Code, § 187); and

Count Three - the murder of Gayle Garcia (Pen. Code, § 187).

It was alleged that appellant personally used a knife in the commission of the murders (Pen. Code, § 12022, subd. (b)). A multiple murder special

circumstance (Pen. Code, § 190.2, subd. (a)(3)) was alleged. It was also alleged that appellant had previously been convicted of a serious felony (Pen. Code, § 667, subd. (a)). Appellant pleaded not guilty. (31 CT 6787; 69 CT 125320-15321.)[2/]

On June 6, 1988, the prosecution's motion to consolidate case CR 73093 with this case (43 CT 9350-9353) was granted. (24 CT 5211-5212; 71 CT 15679-15680.)

Consolidation

On July 11, 1988, the District Attorney filed a consolidated information, combining cases CR 73093 and CR 75195, and charging appellant with:

Count One - the murder of Suzanne Jacobs (Pen. Code, § 187);

Count Two - the murder of Colin Jacobs (Pen. Code, § 187);

Count Three - the murder of Gayle Garcia (Pen. Code, § 187);

Count Four - the kidnaping of Jodie Santiago Robertson (Pen. Code, § 207, subd. (a));

Count Five - the attempted murder of Jodie Santiago Robertson (Pen. Code, §§ 664, 187);

Count Six - the murder of Rhonda Strang (Pen. Code, § 187);

Count Seven - the murder of Amber Fisher (Pen. Code, § 187);

Count Eight - the kidnaping of Anne Swanke (Pen. Code, § 207, subd. (a)); and

Count Nine - the murder of Anne Swanke (Pen. Code, § 187).

It was alleged that appellant used a knife in the commission of all the charged offenses (Pen. Code, § 12022, subd. (b)) and intentionally inflicted great bodily injury in the commission of the kidnaping and attempted murder

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2. This amended information deleted the prior conviction allegations, with the exception of the serious felony prior conviction allegation.

offenses (Pen. Code, § 12022.7). A multiple murder special circumstance was alleged. (Pen. Code, § 190.2, subd. (a)(3).) It was further alleged that appellant had previously been convicted of rape, a serious felony (Pen. Code, § 667, subd. (a)). (19 CT 4107-4116; 25 CT 5219; 59 CT 12970-12973; 70 CT 15516-15517.)

Upon appellant's refusal to plead to the consolidated information, not guilty pleas and denials were entered on his behalf. (25 CT 5222; 70 CT 15918-15919.)

Jury selection commenced August 22, 1988. (25 CT 5235; 70 CT 15531-15532.) The jury was sworn December 8, 1988. (25 CT 5369; 70 CT 15647-14649.) The alternates were sworn December 13. (25 CT 5376; 70 CT 15653-15655.) Opening statements and presentation of the evidence commenced January 3, 1989. (25 CT 5378.) Following presentation of the evidence, instructions, and arguments, the jury retired for deliberations on June 12, 1989. (26 CT 5555.)

On June 21, 1989, the jury returned verdicts finding appellant guilty of the first degree murders of Suzanne Jacobs (Count One), Colin Jacobs (Count Two), and Anne Swanke (Count Nine), the kidnaping of Anne Swanke (Count Eight) and Jodie Santiago Robertson (Count Four), and the attempted murder of Jodie Santiago Robertson (Count Five). The knife use and great bodily injury allegations as to those six counts were found true. The jury found the multiple murder special circumstance true. The jury found appellant not guilty of the murder of Gayle Garcia (Count Three) and was unable to reach verdicts on the murders of Rhonda Strang (Count Six) and Amber Fisher (Count Seven). (26 CT 5563-5573; 64 CT 14232-14240.)

On July 6, 1989, appellant waived jury on the prior serious felony conviction allegation and, following a court trial, the allegation was found true. (26 CT 5574-5575.)

The penalty phase commenced July 10, 1989. (26 CT 5576.) On August 2, 1989, the jury returned its verdict imposing death. (26 CT 5600; 67 CT 14861.)

On September 19, 1989, appellant's motion for a new trial was denied. Modification of the death verdict was denied. Appellant was sentenced to death for the murders of Suzanne Jacobs, Colin Jacobs, and Anne Swanke. The trial court imposed a determinate term of 17 years as follows: The upper term of nine years on the attempted murder conviction with an additional three years for the great bodily injury finding, and a term of five years for appellant's prior serious felony conviction.[3/] (26 CT 5603-5604A; 67 CT 14999-15008.)

On September 25, 1989, on motion of the prosecutor, the two murder counts upon which the jury was unable to reach verdicts were dismissed. (26 CT 5678; 70 CT 15658.)

STATEMENT OF FACTS

INTRODUCTION

Appellant was convicted of six of nine charges arising from three of five incidents: the murders of Suzanne and Colin Jacobs, the kidnapping and attempted murder of Jodie Santiago, and the kidnapping and murder of Anne Swanke. The facts of those incidents are presented in separate, chronological headings. Because the jury heard and was allowed to consider evidence of the murders of Gayle Garcia, Rhonda Strang and Amber Fisher in reaching its verdicts, the facts of those crimes have been summarized in footnotes which

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3. Each murder conviction was enhanced by one year for appellant's use of a knife, and the one year enhancements were stayed. A ten year term for both kidnapping convictions (the upper term of seven years with three years added for the great bodily injury finding) was imposed and stayed pursuant to Penal Code section 654.

appear in the main text in the chronological sequence in which the crimes occurred.

The May 4, 1979, Murders Of Suzanne Jacobs And Her Three-year Old Son, Colin (Counts One And Two)

In 1979, Michael and Suzanne Jacobs lived at 3419 Arthur in San Diego, with their son, Colin. (1 TRT 111-112.)[4/] May 4 of that year started normally. (1 TRT 112.) After getting up, Michael dressed, had coffee, and went to work at his job at the North Island Air Station. (1 TRT 112.) At lunchtime, Michael called home; he had taken a sack lunch, but his name was not on the sack and he needed to ask Suzanne what she had packed in his lunch so he could figure out which lunch was his. (1 TRT 112.) He called between 11:00 and 11:30 a.m., but got no answer. (1 TRT 113.)

The Jacobs were expecting delivery of new dining room furniture that day. (1 TRT 113.) They had advertised their old furniture in the newspaper and received a few calls inquiring about their ad the night before. (1 TRT 113, 134.) It was Michael's understanding that one of the callers was supposed to come to the house that day. (1 TRT 135.)

Edward and Margaret Harris[5/] lived at 5005 34th Street in San Diego, which is on the corner of 34th Street and Arthur. (1 TRT 155-156, 172, 174.) The kitchen window of the Harris residence provided a view of the front of the Jacobs' house. (1 TRT 190.) Mrs. Harris had known Suzanne and Colin approximately two years and they visited daily. (1 TRT 173.)

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4. "TRT" refers to the Reporter's Transcript of the trial.

5. On the day of the murders, the Harrises were not married and Mrs. Harris went by her maiden name, Margaret Tucker. (1 TRT 155, 172.)

The morning of May 4, 1979, Mrs. Harris did not see Suzanne, but she saw a black-over-maroon sports car parked in the Jacobs' driveway between 8:00 and 9:00 a.m. (1 TRT 174-177; 2 TRT 190, 216, 235.)

Later that morning, around 11:00 to 11:30 a.m., Mrs. Harris telephoned the Jacobs residence to see if Suzanne wanted to go bicycle riding and received no answer. (2 TRT 198, 207.) From her backyard, Mrs. Harris saw a Montgomery Wards delivery truck arrive at the Jacobs residence between noon and 12:30 p.m., and she saw the furniture being left on the porch. (2 TRT 198, 213-215.) It surprised her that Suzanne was not at home for the delivery because Mrs. Harris knew Suzanne was expecting the furniture. (2 TRT 198.)

Louis Scott Hoeniger worked as a delivery truck driver for Montgomery Wards and delivered the Jacobs' dinette set to their residence on May 4 at 12:30 that afternoon; it was his first stop after lunch. (1 TRT 141, 143, 146.) He knocked at the front door and, receiving no response, checked the side of the house. (1 TRT 145.) He was at the house for approximately 10 minutes and never raised an occupant; he heard nothing inside the house. (1 TRT 146.) The dinette set was left at the house. (1 TRT 144.)

When Michael Jacobs returned home that afternoon, he saw the dinette set on the front porch. (1 TRT 118.) When he entered his house he called out his wife's name and got no answer, then headed toward the bedroom. (1 TRT 118.) He noticed the bathroom door almost closed and when he opened it, he saw blood everywhere. From the hall, he saw Colin's body. (1 TRT 119.) Michael walked out of the house, called to the Harrises, and collapsed on the sidewalk. (1 TRT 119.)

Edward and Margaret Harris ran to Michael. Michael appeared to be in shock and could not speak. (1 TRT 158.) The Harrises entered through the front door and called to Suzanne and Colin several times. (1 TRT 159.) Margaret went to the kitchen and Edward walked down the hallway where he

saw Colin. (1 TRT 160-161.) Edward stepped into the bedroom and saw Suzanne, also dead. (1 TRT 162, 171.) He asked Margaret to call the police, which she did. (1 TRT 162; 2 TRT 199.) Margaret checked and found Colin was not breathing, and the Harrises left the house. (1 TRT 162; 2 TRT 200.)

Captain Edward Fairhurst, a firefighter with the San Diego Fire Department, arrived at the Jacobs house within two minutes of receiving the emergency call. He spoke briefly with the Harrises, then entered the house. (2 TRT 246-247.) He walked down the hallway to the bedroom and found Colin on the floor, then went back outside to call the police and seal the premises. (2 TRT 249-250.)

San Diego Police Officer Frederick George Edwards responded to the Jacob's residence and spoke with a fireman. He then entered the house and walked down the hallway to a bedroom, where he discovered the bodies of Colin and Suzanne. (2 TRT 261-263.) After checking for vital signs and finding none, he retraced his steps and left the house. (2 TRT 263-264.)

Suzanne suffered a cutting or slashing style injury to her upper neck. (6 TRT 945.) The neck wound penetrated the skin, the underlying fatty tissue, the muscle and the larynx, and severed the right jugular vein and right carotid artery on the right side. (6 TRT 945.) The larynx had two cuts: one completely through the upper portion and a second smaller cut below the first. (6 TRT 945, 952.) The first, upper, and larger cut extended below the larynx to the surface of the backbone, cutting the fibrous tissue and muscle sheath on the backbone. (6 TRT 950-951, 961, 964.)

Three additional injuries were observed during the autopsy of Suzanne: a cut above the left collar bone, close to the midline, which penetrated the subclavian vein (6 TRT 952, 956); a second cut in the mid-chest, left of the mid-line in the same orientation as the neck wound, which penetrated the heart and cut the pulmonary artery (6 TRT 953, 955); and a third cut to the right of

the xiphoid process, which penetrated the abdomen and liver, and was vertically oriented (6 TRT 953, 960). All three of these wounds were long and thin, with one end rectangular and the other end coming to a tapering point. (6 TRT 954.) The thin edge of the wounds was caused by the sharp edge of a knife blade, with the other edge caused by the rectangular edge of a knife blade. (6 TRT 954.) All three additional wounds were potentially fatal without treatment. (6 TRT 954.)

Petechiae (specks of blood) on the far outer corner of Suzanne's left eyelid indicated reduction in oxygen or the circulation of blood in the capillaries of the eyes prior to cessation of circulation (i.e., prior to death) and could have been caused by the chest wound. (6 TRT 970-974.) Suzanne also had her tongue clenched between her teeth, a condition which can be caused by restraint under the jaw when a person is trying to open their mouth for air. (6 TRT 975.)

The cause of Suzanne's death was massive hemorrhage due to laceration of the right carotid artery, the right jugular vein, the liver, the pulmonary artery and the left subclavian vein. (6 TRT 979.) The gaping neck injury was caused by a very sharp-edged, relatively thick, stiff blade, at least two to two and one-half inches in length. (6 TRT 979-980.) The number of interruptions in the wound indicated at least six strokes. (6 TRT 980.)

Colin's neck was also slashed - at least twice - extending from the left side of the neck, across the larynx, to the right side behind the ear. (6 TRT 976-977, 984, 988.) Though the wound did not reach the backbone, it came within 1/4". (6 TRT 989.) The right jugular vein and right carotid artery were cut. (6 TRT 984.) He also had cuts on the fingers, on the right thumb, and on the palm at the base of the left thumb. (6 TRT 984.) Colin's death was caused by massive extensive hemorrhage from the carotid artery and jugular vein. (6 TRT 987.) The weapon was a sharped-edged, stiff blade. (6 TRT 987.)

There was blood in the bathroom on the floor, on the bathroom rug, and on the tub. (2 TRT 282-284.) There was blood in the hallway leading to the master bedroom where the bodies were located (2 TRT 281). Three small child-sized bloody footprints led from the bathroom into the master bedroom to where Colin's body was located. (2 TRT 343; 4 TRT 446.)[6/] In the opinion of the crime scene detective, Colin's throat was cut in the bathroom and he walked to the bedroom where he collapsed. (2 TRT 349; 4 TRT 483.)

In the bathroom, on the rug, was a blood-stained, piece of folded paper. (2 TRT 283-284, 345.) On the paper, in hand printing were the words "Love Insurance" and a telephone number, "280-1700." (2 TRT 347; 4 TRT 456-458; 8 TRT 1356, 1360-1361.) Love Insurance was a nonstandard insurance brokerage located at 4128 El Cajon Boulevard in San Diego. (11 TRT 1863.) In May 1979, the business telephone number was 280-1700. (11 TRT 1864.) The business advertised over the radio. (11 TRT 1864.) Price quotes were given over the telephone, but a customer would have to come to the office to fill out an application and make a down payment. (14 TRT 2434.) Love Insurance company records (14 TRT 2436, 2442-2445) included appellant's motor vehicle printout (14 TRT 2436), a price quote for insurance coverage (14 TRT 2436), a receipt dated July 7, for an insurance payment (14 TRT 2438), appellant's application for insurance coverage (14 TRT 2439), a Love Insurance check stub for a check to Colonial Insurance for appellant's insurance (14 TRT 2439), a second application for insurance by appellant (14 TRT 2447), and additional records concerning the application and payment. (14 TRT 2448-2456). The Love Insurance business records reflected appellant's driver's license number as N686991. (14 TRT 2441, 2447.)

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6. There was no blood leading to the child's bedroom and no blood in the child's bedroom. (2 TRT 358.)

The note was subjected to ninhydrin chemical process on May 11, 1979, and resulted in a partial fingerprint. The partial print was examined by Leigh Emmerson, a latent print examiner with the San Diego Police Department, on May 14, 1979. (10 TRT 1809.) The print did not have enough points to make an identification, but it came from an area close to the core or delta (the focal point) of the finger. (10 TRT 1809-1810, 1812.) Based on the general pattern that appeared, appellant could not be excluded. (10 TRT 1815, 1817.) However, the print was not photographed and when the paper was later examined in December 1980, the print was no longer visible. (8 TRT 1362-1366; 9 TRT 1519.)

Two days after the murders, Mrs. Harris and her husband drove around trying to find a car similar to the type of car she had seen parked in the Jacobs' driveway on the morning of the murders. They found a similar car; it was an MGB. (2 TRT 190-191, 221.) Department of Motor Vehicle (DMV) records established that on December 20, 1974, a 1974 MG Midget was sold to appellant's mother, Patricia Jo Lucas. (14 TRT 2498, 2500, 2502-2503, 2526.) The vehicle license plate number was 943MFD. (14 TRT 2500.) Appellant's DMV driving record reflected an accident on November 19, 1976, in a vehicle with license plate number 943MFD. (14 TRT 2538, 2540, 2543.) Another entry on appellant's DMV driving record was dated November 11, 1979, again in a vehicle with plate number 943MFD. (14 TRT 2544-2545.) Expert testimony established that in the 1974 model year, the MGB and MG Midget had the same body style. (14 TRT 2488.) The Midget was only slightly smaller than the MGB. (14 TRT 2491.) DMV records also showed a transfer of the MG Midget on October 23, 1986, to Robin Keith. (14 TRT 2527.) Keith was arrested in the MG Midget on December 21, 1986. (14 TRT 2473, 2476, 2478.)

John Harris, a questioned documents examiner or handwriting expert (13 TRT 2255-2262), compared the writing on the Love Insurance note to known samples of appellant's writing. (13 TRT 2270-2274, 2277-2278, 2306-2307, 2379-2385.) In his opinion, appellant wrote the writing on the Love Insurance note. (13 TRT 2309.)

In the master bedroom, Suzanne's body was on the floor between the bed and a chest of drawers. (2 TRT 319, 324.) The back of her shirt and her bra had been torn. (2 TRT 324-325.) There was blood on the front of the chest of drawers. (2 TRT 325.) There was blood on the bedding and on the floor. (2 TRT 325-326.) In the opinion of the crime scene detective, the disarray, blood, and Suzanne's body in the master bedroom indicated her death occurred during a struggle in the bedroom. (4 TRT 450.)

Adult-sized bloody footprints, with a waffle-type sole design, consistent with a Vibram boot sole were found in the master bedroom, in the living room, in the dining room, and in the kitchen. (2 TRT 311-312, 333-334, 340-342, 344-345, 347; 4 TRT 446.) The footprints in the bedroom, hallway and living room all headed toward the kitchen. (4 TRT 447.) The footprints in the kitchen were overlapping in front of the kitchen sink, where drops of blood were located. (2 TRT 314-316, 345; 4 TRT 447-448.) Two footprints - in the dining room and the living room - pointed toward the front door, away from the kitchen. (4 TRT 448, 485.) No footprints were found heading toward the backdoor. (4 TRT 481.) All of the prints were consistent in size and placement with a single person. (4 TRT 446.) None of the witnesses who entered the house that day were wearing shoes with a similar type of sole pattern. (1 TRT 124 [Michael Jacobs], 166 [Edward Harris]; 2 TRT 200 [Margaret Harris], 252 [Fire Captain Fairhurst], 266 [Officer Edwards], 356 [Detective Gleason]; 8 TRT 1269 [Evidence Technician Stewart].)

From March 19, 1979 to June 1985, appellant worked at Precision Metal on Bradley in El Cajon. (11 TRT 1914, 1916, 1928, 1994.) All employees were required to wear safety boots purchased through the company. (11 TRT 1916-1917.) Company records for Lehigh Safety Shoe Company (Lehigh) included an order from Precision Metal for boots, size 10½ D, for appellant dated April 3, 1979. (11 TRT 1884, 1886-1887.) Lehigh boots were individually fitted with Vibram lug soles. (11 TRT 1891, 1902.) Roy Nilson, retired Sheriff's deputy and an expert in shoe print examination, made a comparison between the bloody shoe print from the living room floor at the Jacobs residence (Exh. 19) and an overlay made from a left boot of a pair of Lehigh boots, size 10½, which were manufactured on January 7, 1979. (4 TRT 449; 11 TRT 1891, 1967-1968, 1979-1981.) The front of the sole fit "very closely" to the front of the shoe print, but the heel was out of alignment. (11 TRT 1982.) In Mr. Nilson's opinion, the front alignment indicated the shoe print was made by a style 100 Vibram sole and the heel variance was due to individual variance in the manufacturing process. (11 TRT 1990-1995; see also 11 TRT 1902.) The shoe print was consistent with a 10½ size left Lehigh boot. (11 TRT 2035, 2065.)[7/]

Appellant was not at work on Thursday, May 3, or Friday, May 4, 1979. (11 TRT 1938-1939.) Between March and June 1979, appellant lived at residential housing run by New Horizons program. (11 TRT 1955.) The housing was located at 825 7th Street in San Diego. (11 TRT 1955.)

Samples were taken of the blood found throughout the house: living room floor near television (7 TRT 1103-1104, 1124; 8 TRT 1272-1273); kitchen floor footprint (7 TRT 1107; 8 TRT 1275); kitchen floor (7 TRT 1108;

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7. Although Nilson opined on cross-examination that the bloody shoe print appeared to have been made by a size 12 sole, a larger size sole used when the correct size was is available, with the overage trimmed off. The heel of the shoe print was made by a size 10 heel. (11 TRT 2019-2020, 2030, 2062.)

8 TRT 1277); kitchen counter, near sink (7 TRT 1124; 8 TRT 1278); left faucet handle (7 TRT 1125; 8 TRT 1287); kitchen sink soap holder and left edge of sink (7 TRT 1127; 8 TRT 1289-1290); green towel on kitchen counter (7 TRT 1128; 8 TRT 1292); bathtub (7 TRT 1130; 8 TRT 1293); bath mat (7 TRT 1131; 8 TRT 1296); bathroom floor (7 TRT 1132; 8 TRT 1297); hallway floor (7 TRT 1133; 8 TRT 1299); hall side of bedroom door (7 TRT 1134; 8 TRT 1301); doorjamb above light switch in bedroom (7 TRT 1135; 8 TRT 1303); bedroom floor (7 TRT 1136; 8 TRT 1305); bedroom dresser and footboard of bed (7 TRT 1137; 8 TRT 1306-12307); Suzanne's nail clippings (7 TRT 1139-1140; 8 TRT 1310); Love Insurance note (8 TRT 1164). All of the blood tested consistent with Suzanne or Colin, or some other person with type "O" blood, but inconsistent with Michael Jacobs. (8 TRT 1168.)[8/]

Hairs were visible in Suzanne's right hand and were collected at the scene and mounted on slides. (8 TRT 1179-1182 [Exh. 61B, 61C - slides], 1330-1331 [Exh. 61A - hair]; 12 TRT 2077-2079 [Exh. 61D - slide], 2105 [Exh. 61E - slide].) Additional hairs were recovered from Suzanne's right hand at the morgue and mounted on slides. (8 TRT 1342 [Exh 65A - hair]; 12 TRT 2112-2113 [Exh. 65B, 65C - slides].) Hairs from Suzanne's left hand were collected at the morgue and mounted on slides. (8 TRT 1347 [Exh 66A - hair]; 12 TRT 2114-2115 [Exh. 66B, 66C - slides].) An additional hair was collected from Suzanne's left elbow at the morgue and mounted on a slide. (8 TRT 1347 [Exh 67A - hair]; 12 TRT 2115 [Exh. 67B - slide].) Hair and fibers were also collected from the bedding in the master bedroom (8 TRT 1172-1175; 12 TRT 2107-2110 [Exh. 62A (hair), 62B (slide), 62C (slide), 62D (hair), 62E (slide)]), the rug under Suzanne's body (8 TRT 1176-1177; 12 TRT 2110-2111 [Exh.

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8. Appellant's blood was ABO type "A." (12 TRT 2129; 28 TRT 5114.)

63A (hair), 63B (slide)]), and Suzanne's pants (8 TRT 1178 [Exh 64A (hair)]; 12 TRT 2111-2112 [Exh. 64B (slide)]).

Slides were also made containing the known head and pubic hair of Suzanne (8 TRT 1349 [Exh. 68A (head hair)], 1352 [Exh. 69A (pubic hair)]; 12 TRT 2116 [Exh. 68B (head hair slide)], 2117 [Exh. 69B (pubic hair slide)]), the known head hair of Colin (8 TRT 1353 [Exh. 70A (head hair); 12 TRT 2118-2119 [Exh. 70B, 70C (head hair slides)]), and the known head hair of appellant (12 TRT 2119-2122, 2130-2132 [Exh. 71A-71D]).[9/]

Appellant was a possible donor of the hair from the bedding. (12 TRT 2154-2159.) Appellant was also "very close" to a match for a hair from Suzanne's right hand (Exh. 61C); Colin's hair was less similar to the hair from his mother's hand than appellant's. (12 TRT 2191-2192, 2196.) Several other hairs from Suzanne's right hand (Exh. 61B, 61C, 61D) were also found to be most similar to appellant's hair and did not come from Suzanne or Colin. (12 TRT 2205-2209.) Other hairs from her right hand were also similar to appellant's hair. (13 TRT 2222 [Exh. 65C].) One hair from the rug under Suzanne's body (Exh. 63B) was similar to appellant but not to Suzanne or Colin. (12 TRT 2216.) The hair from Suzanne's left elbow (Exh. 67A, 67B) was similar to appellant but not Suzanne or Colin. (13 TRT 2224.)

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9. Samples of the chest, body, head, and pubic hairs were also collected from Johnny Massingale and mounted on slides. (12 TRT 2122-2124.) Those hair samples were compared with the hairs collected from Suzanne's right hand at the scene and there was no match. Massingale was excluded as the donor of those hairs based on differences between them and his known hair. (12 TRT 2127; 46 TRT 8679.) Massingale is more fully discussed in the **DEFENSE** subheading, *infra*.

The June 8-9, 1984, Kidnapping And Attempted Murder Of Jodie Santiago (Counts Four And Five)[10/]

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10. The jury acquitted appellant of the December 8, 1981, murder of Gayle Garcia. (26 CT 5563-5573; 64 CT 14232-14240.) Garcia was a real estate agent. (15 TRT 2613.) Her body was discovered on December 8, 1981, in the home of Annette Goff, around 6:05 pm, by Ms. Goff, a friend of Garcia's who had listed her house for sale with Garcia. (15 TRT 2611-2613, 2622-2623.) The house had a for sale sign out front and was listed in an advertisement in the newspaper that day. (15 TRT 2711-2712, 2745-2746.) Garcia had been at the house at 5:35 p.m., when Goff called before she left her work. (15 TRT 2616.)

Maria and Emmett Stapleton managed an apartment unit in the Casa De Oro/Spring Valley area in December 1981 and had an apartment advertised for rent in the December 7 newspaper. (38 TRT 7201, 7209-7210.) The evening of December 7, Mrs. Stapleton received a telephone call when her husband was at the store, from a man who insisted he be able to see the apartment that night. (38 TRT 7202.) Although Mrs. Stapleton refused, someone came to their door shortly after Mr. Stapleton arrived home from the store. (38 TRT 7204, 7211.) The man seemed shocked when Mr. Stapleton answered the door, stuttered, and left without asking about the apartment. (38 TRT 7216-7217.) The man was appellant. (38 TRT 7215.) Appellant drove away in a foreign car. (38 TRT 7217.)

Appellant was the manager of a carpet cleaning business (M&A Carpet Care) in December 1981. (20 TRT 3732, 3735.) Appellant did much of the paper work as manager. (20 TRT 3740-3747.) However, his friend and employee (and later business partner) Frank Clark made the entries for December 8 and 9, 1981. (20 TRT 3747.) Clark did not know where appellant was those two days. (20 TRT 3750, 3766; 23 TRT 4342-4343.) Appellant left the business the afternoon of December 8, saying he had things to do. (21 TRT 3766.) Appellant paid Clark for filling in for him those two days. (23 TRT 4303.)

Garcia died from a large gaping wound to the neck, which went between the hyoid bone and the thyroid cartilage, through the carotid arteries and jugular veins, and resulted in a notch on the side of the cervical vertebrae. (24 TRT 4493, 4504.) The edges of the wound were jagged and irregular. (24 TRT 4496.) Petechial hemorrhages in the eyes could have been caused by choking. (24 TRT 4496-4498.)

In June 1984, Jodie Santiago[11/] arrived in San Diego from her home in Washington, to visit her brother, Terry Hopperstad, who lived in El Cajon. (38 TRT 7315-7316.) The evening of Friday, June 8, Santiago visited Baxter's restaurant, an establishment located across the street from her brother's apartment complex (the Timbers) on the corner of Marshall and Petree. (38 TRT 7317-7318, 7322; see Exhs. 162 (diagram), 163 (photograph).) Santiago's brother was not feeling well that evening, so Santiago went alone, across the

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There were two parallel blood stains on the pants Garcia was wearing which were generally consistent in length, shape and characteristics with a model 112 Buck knife. (16 TRT 2792-2793.) A sheath for a model 112 Buck knife was seized during a search of appellant's residence. (16 TRT 2795.)

However, in the opinion of a defense expert who used eight different knife blades to wipe human blood on pants and compared those knife blades with the stain, none of the eight knife blades could be eliminated from possibly making the stain. (44 TRT 8294-8311.)

Erven Meyer testified he was appellant's landlord in 1981 when appellant lived on 33rd Place in San Diego. Appellant gave a 30-day notice when he paid his rent on November 4, 1981, and told Meyer he had found a new place on Bancroft Street. Meyer found the apartment empty when he checked it on December 1. (46 TRT 8622-8626; see 8631.) William Ellis, the brother of Donna Ellis, with whom appellant lived in 1981, testified that he spent Thanksgiving 1981 at appellant's and Donna's apartment on Bancroft. (46 TRT 8628-8630.)

Appellant also presented the testimony of several family members and friends of his family who said he attended a family birthday party on a week day in December 1981. He arrived sometime after 4:00 - 4:30 pm, when it was still light out, stayed several hours and left after dark. (46 TRT 8637-8639, 8649-8653, 8696-8699, 8706-8707, 8709-8714; 47 TRT 8863-8872, 8883-8884, 8900-8911, 8917-8926.) The trial court judicially noticed that on December 8, 1981, the sun set at 4:43 p.m., and that day was a Tuesday. (47 TRT 8916.)

11. By the time of her trial testimony, she had married and went by her married name, Jodie Robertson. (38 TRT 7314.)

apartment parking lot to Baxter's at about 7:30 p.m. (38 TRT 7320-7321.) That evening she danced, talked to other patrons and drank two to three margaritas. (38 TRT 7323.)

Santiago left Baxter's around 10:30 p.m. and headed back to her brother's apartment the same way she had come. (38 TRT 7324.) As she stood at the intersection of Marshall and Petree waiting for the light to change so she could cross, she noticed a sports car on Marshall slow and turn right onto Petree. (38 TRT 7325, 7414.) After the light changed, Santiago crossed the intersection and was walking along the sidewalk when she noticed appellant walk out of the apartment parking lot and pass her on the sidewalk. (38 TRT 7326, 7344.) As appellant passed by, she glanced at his face and he appeared to be looking at her. (38 TRT 7328.) After passing her, appellant came up behind her, grabbed her left shoulder, put a knife to her throat, and told her she was going with him and if she screamed he would cut her throat. (38 TRT 7326, 7329-7330.)

He took her to a car standing in the driveway of the apartment parking lot which had the driver's door open and the engine running, and forced her inside through the driver's door. (38 TRT 7331-7332, 7417.) The car was a dark sports car -- a 280Z or that type -- with louvers on the rear window, a California license plate, and sheepskin seat covers. (39 TRT 7359-7361.)[12/] Appellant put the knife on the dashboard near the steering wheel, used his left hand on the steering wheel, and put his right arm around her shoulder with his hand on her neck. (38 TRT 7332, 7334.) He made a u-turn in the parking lot and turned out of the lot onto Petree. (38 TRT 7335.) He drove more than 15 minutes to a house. (38 TRT 7336.) Along the way, Santiago asked appellant why he was doing this and he replied he had been sent by her boyfriend to scare

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12. Santiago remembered the license plate as having three letters and three numbers or vice versa. (39 TRT 7363, 7419.)

her. When she told him he must have the wrong person because she did not have a boyfriend in San Diego, he said he would check it out. (38 TRT 7336-7337.) She could see appellant's face in the rear-view mirror. (38 TRT 7337.)

When they arrived at the house, appellant took her over the console and out the driver's door, then up the stairs to the front door. (38 TRT 7338-7339.) Appellant walked her to a room where he tied her hands, then took her to another bedroom where he put her on a bed and told her to stay. (38 TRT 7340, 7342.) The lights were on in the house and she had no trouble seeing appellant's face. (38 TRT 7341.) He left her in the bedroom, but returned and asked if she had cigarettes, and took some cigarettes out of her purse. (38 TRT 7342.) He put her face-down on the bed and told her not to move. When she lifted her head to cough, he came back into the room and began choking her and she lost consciousness. (38 TRT 7343-7344.)

The morning of June 9, Janice Melton and Davene Gibson were taking a walk. They had left their homes in the Mt. Helix/Casa De Oro area of San Diego around 6:30 a.m. (17 TRT 2996-2997, 3012-3013.) During their walk, they were on Calavo Drive, approaching the intersection of Calavo and Lyons Drive when they saw a woman lying in the brush off the roadway. When the woman moved, they could see blood on her face. (17 TRT 2998-2999, 3014, 3023.) They ran to a local house and called 911, then returned to the woman. (17 TRT 2999, 3015-3016.) The woman, Jodie Santiago, had no clothing below her waist, had blood on her face and down the front of her, and made gurgling or gargling sounds. (17 TRT 3000-3001, 3017-3018, 3048.)

Santiago was taken to Grossmont Hospital, where Dr. Charles Geiberger, a vascular and trauma surgeon, was working in the trauma unit and performed emergency surgery on Santiago when she arrived. (17 TRT 3032-3034; 20 TRT 3679-3680, 3683-3684.) Santiago's neck was cut above the Adam's apple, dividing the larynx above the vocal cords, and was cut to the bone. (20

TRT 3685.) The cut was between the thyroid cartilage and above the hyoid bone. (20 TRT 3687.) The small arteries and left external jugular vein were severed, but the carotid artery, the right external jugular vein, and both internal jugular veins were not injured. (20 TRT 3686, 3707.)[13] The cut reached to the membrane at the back of the throat which overlays the vertebral column, leaving approximately 2mm. (20 TRT 3686.) The cut would have most likely hit the vertebrae at the C-3 or C-4 level. (20 TRT 3691.) The neck injuries were caused by a sharp cutting instrument. (20 TRT 3687.) Two small skin "tags" at the edges of the cut indicated some movement of the cutting instrument; i.e., there was not a single continuous cutting motion, but instead, there was a sawing or carving motion. (20 TRT 3692; 37 TRT 7057, 7062, 7065-7066.)

Santiago also had a bruise below the neck laceration which was caused by compression-pressure and could have been caused by a smooth constricting band-type ligature. (20 TRT 3694; 37 TRT 7037; see also 17 TRT 3050.) The skin behind her ears on either side of the back of her head was split approximately 4 inches long and through the scalp, and there was a skull fracture below each skin split which went all the way through the bone and across the skull, and was caused by "quite a bit of force." (20 TRT 3695-3696, 3715.)

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13. There are two internal and two external jugular veins, and two carotid arteries. (20 TRT 3706.)

Appellant owned a 1983 Datsun 280ZX, which was first registered to him in 1983,[14] with a vehicle license plate of CMCINC2[15] at a residence address of 9101 Valencia Street in Spring Valley.[16] (17 TRT 3097-3104; Exh 150 [DMV printout].) The 280ZX was black with a gold stripe. (17 TRT 3132; 19 TRT 3430.) Appellant loved that car. (19 TRT 3432.)

The Daily Californian, a newspaper with circulation in Spring Valley, ran an article on the Santiago attack on June 11, 1984. (17 TRT 3141-3144.)

Two days later, June 13, appellant traded in his 280ZX on a 1984 Toyota pickup truck. (17 TRT 3080-3082.) Richard Adler was with appellant when he traded in the 280ZX. (19 TRT 3430-3431.)[17] Adler helped appellant remove the sheepskin seat covers from the 280ZX prior to leaving the car with the dealership. (17 TRT 3084; 19 TRT 3433.) They put the sheepskin seat covers in the Toyota pickup and appellant also transferred the personalized license plates to the Toyota pickup. (17 TRT 3107-3112; 19 TRT 3433-3434.)

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14. The registration was issued August 8, 1983. (17 TRT 3102.) However, the registration issue date does not reflect the purchase date, other than the year. (17 TRT 3114.) The personalized, reflectorized license plates for the 280ZX were issued July 19, 1983. (17 TRT 3109.)

15. Appellant had worked in the carpet cleaning business (see footnote 8, *supra*) and in March 1982, he and Frank Clark started their own carpet cleaning business called Carpet Maintenance Company (CMC). (20 TRT 3734-3735.) The "CMCINC2" personalized license plate on Appellant's vehicles stood for "Carpet Maintenance Company, Incorporated, 2." (21 TRT 3774.)

16. Appellant resided in Normal Heights in central San Diego in September 1981, and began looking for a house in Casa De Oro/Spring Valley area where he wanted to live. (10 TRT 3735-3737; see footnote 7, *supra*.) He moved to the Spring Valley area in early 1983. (21 TRT 3770.)

17. Appellant told Adler he(appellant) was disenchanted with the car before the trade-in and Adler understood appellant was having insurance and financial problems with the car. (19 TRT 3481, 3493.) Appellant also told Frank Clark he was having trouble with the payments on the 280ZX. (21 TRT 3774.)

Vehicle registration for the Toyota pickup was issued to appellant on August 8, 1984, at the address 10104 Casa De Oro Boulevard in Spring Valley. (17 TRT 3109.)

Appellant's 1983 280ZX was subsequently sold to Michael George. (17 TRT 3121-3122.) Santiago identified photographs of the car as looking like the car in which she was abducted. (39 TRT 7361.) She expressed some uncertainty because she did not remember whether appellant's car had a stick shift as she did not recall appellant shifting gears as he drove the car. (39 TRT 7362.) However, on November 27, 1985, San Diego District Attorney Investigator William Green borrowed George's 280ZX and, with a female passenger, drove from the site of Santiago's abduction in the parking lot of her brother's apartment complex to appellant's residence at 10104 Casa De Oro Boulevard without having to shift gears. (40 TRT 7647-7650.) Greene drove the entire way in second gear, making all stops, using his left hand to steer and keeping his right hand in his pocket, and, with one exception, never exceeded the speed limit. The trip took 17 minutes and though he drove on the freeway part of the way, he never exceeded 46 miles per hour. (40 TRT 7652-7653, 7669, 7663.)

When George purchased appellant's 280ZX, it did not have sheepskin seat covers or a rear window louver. (17 TRT 3123, 3132.) However, George cleaned a glue-like substance from around the rear window of appellant's car. (17 TRT 3129.) One type of after-market rear window louver for a 1983 280ZX installed with a clip and adhesive on the glass; once that type of louver is removed, there is nothing left on the car. (40 TRT 7639-7643.) Additionally, two of appellant's neighbors when he lived on Casa De Oro Boulevard in Spring Valley in the summer of 1984 remembered his 280ZX as having a rear window louver. (40 TRT 7618-7620, 7682-7684.)

Following her release from the hospital, Santiago returned to Seattle and continued treatment. (38 TRT 7369.) She returned to San Diego in December 1984 and identified appellant in a photographic lineup. (18 TRT 3188, 3195-3199; 39 TRT 7371-7372.) With the assistance of detectives, she attempted to retrace the route taken from her brother's apartment to the house, but was unable to remember it. (18 TRT 3190-3192; 39 TRT 7372-7373.) The next morning, she made a sketch of the house floor plan and, when driving with detectives, saw and identified appellant's house. (39 TRT 7374-7375.)

The November 20, 1984, Kidnapping And Murder Of Anne Swanke (Counts Eight And Nine)[18]

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18. The jury was unable to reach a verdict on the October 23, 1984, murders of Rhonda Strang and three-year-old Amber Fisher (counts six and seven). (26 CT 5563-5573; 64 CT 14232-14240.) Those charges were dismissed on the motion of the prosecutor following imposition of the death penalty. (26 CT 5678; 70 CT 15658.)

On the morning of October 23, 1984, between 9:00 and 9:30, Gregory Fisher left his three-year-old daughter Amber at the home of Rhonda Strang on his way to work. (19 TRT 3393-3395.) He had known Mrs. Strang since high school. (19 TRT 3393.) When he returned to the house after finding Amber's toys in his car, Mrs. Strang already had the front door locked; she was very security conscious. (19 TRT 3399-3400, 3429.) The bodies of Strang and Fisher were discovered in the Strang house by Rhonda's five year old daughter who ran to a neighbor's house. Members of the local fire department were dispatched and arrived around 1:30 p.m. (18 TRT 3201, 3209; 19 TRT 3402-3403.)

Appellant knew Mrs. Strang through her brother, Richard Adler, who had known appellant since 1981, lived with appellant in his 10104 Casa De Oro house in Spring Valley in 1984, and worked for appellant at his carpet and upholstery cleaning business. (19 TRT 3423-3424, 3454, 3456; 21 TRT 3775.) Mrs. Strang had been considering a divorce from her husband and had frequent contact with appellant (one to two times a week) in the latter half of 1984. (19 TRT 3449, 3498; 20 TRT 3567; 21 TRT 3777.)

Anne Swanke attended a sorority function on November 19, 1984, after

On October 22, 1984, appellant reported to the San Diego County detention facility at Descanso. (20 TRT 3631, 3635.) Appellant had a 48-hour commitment on a drunk driving conviction and appellant worked that day, which gave him credit for 24 hours. (20 TRT 3633, 3636.) At the end of the day, appellant told the work release deputy that he had a large carpet job the next day (October 23) and asked to have his next day reassigned, which it was, to October 25. (20 TRT 3637-3638.) Appellant did not report to Descanso on October 23, but reported October 25. (20 TRT 3639-3641.)

Records from appellant's business showed no large carpet job on October 23. (21 TRT 3785.) In fact, the business was "shaky" in October 1984. (21 TRT 3778.) Profits were down, appellant was rarely at work, and appellant was drawing out "quite a bit of money." (21 TRT 3778.) Appellant was moody and had an explosive temper. (21 TRT 3779.) The morning of October 23, appellant telephoned Frank Clark and said he was not admitted at Descanso due to illness. Appellant did not go into work that day. (21 TRT 3794.)

The defense presented evidence that Rhonda Strang had made several telephone calls sometime between June and August 1984, to a member of the San Diego County Narcotics Task Force in which she stated her concern over her husband's cocaine usage and identified the name and address of her husband's supplier. (47 TRT 8801-8812.) It was stipulated that during a search of the named supplier's home on November 26, 1984, almost six grams of cocaine and a triple-beam balance scale was seized. (56 TRT 10646.) Additionally, several witnesses testified to Rhonda's fear of her husband, incidents of violence by her husband against her, her infidelity, and her attempts to document his drug use. (49 TRT 9169-9173, 9180-9183, 9191-9195; 50 TRT 9459-9469, 9475-9388, 9492-9515; 54 TRT 10076-10077, 10089-10096, 10219-10230; 55 TRT 10447-10455; 56 TRT 10633-10640, 10687-10688.) Lawrence Torkelson, a San Diego County Sheriff's deputy, testified that he interviewed Rhonda's daughter, April LaFollette, the day she discovered her murdered mother and April said she had heard Rhonda and Robert in an argument the night before. (56 TRT 10645-10645.)

In rebuttal, William Ralls testified he was employed by Strang Heating and Air Conditioning in 1984, a company owned by Robert Strang's father. (57 TRT 10889.) On the date of the Strang-Fisher murders, Ralls was supervising a job site where Robert was working. (57 TRT 10890-10891.) Robert arrived at the job site being at 8:00 or 8:30 a.m., stayed all day, and left the job site at 3:30 p.m. (57 TRT 10899-10892, 10897.)

which she visited her boyfriend, Gregory Oberle, at his apartment on the corner of Linda Paseo Road and College Avenue, near San Diego State University. (24 TRT 4439.) She arrived around 7:00 p.m. and left for home between 12:30 and 1:00 a.m. on November 20. (24 TRT 4441, 4443.)[19] Sometime before leaving, she mentioned to Oberle that she was low on gasoline. (24 TRT 4441.)

Appellant and Frank Clark worked at their carpet cleaning business on November 19. (21 TRT 3796.) After work, the two men went out and drank; Clark called his wife about 8:00 p.m. to tell her they were going out. (21 TRT 3797; 24 TRT 4377.) They also used methamphetamine. (21 TRT 3797.) Clark and appellant arrived at Clark's Mission Valley condominium around 10:00 to 10:30 p.m. (21 TRT 3797; 24 TRT 4377.) Clark's wife, Cecilia, was home watching a movie on television, Fatal Vision, part two. (24 TRT 4377.)[20] The two men sat with her through the end of the movie and commented on it. (24 TRT 4378.) After the movie ended at 11:00 p.m., they watched the news and the beginning of the Johnny Carson show. When Cecilia went to bed at midnight, appellant was still there. (24 TRT 4381.) Clark asked appellant to stay the night, but appellant declined and left after midnight in his truck. (21 TRT 3806-3807; 24 TRT 4382.) Clark was in bed around 12:30 a.m. (24 TRT 4382.)

Gayle Graham worked at a Shell gas station on Jackson Drive, near the intersection of Jackson and Fletcher Parkway, in La Mesa. (24 TRT 4455-4456.) Sometime after midnight, Swanke walked into the station with a gas can

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19. Swanke was expected home that evening around midnight, but never arrived. (24 TRT 4431.)

20. The movie, Fatal Vision, was aired on a local San Diego television station in two parts; part one was aired November 18, 1984, from 9:00 to 11:00 p.m., and part two was aired November 19, 1984, also from 9:00 to 11:00 p.m. (24 TRT 4422-4427.)

and purchased gasoline, then left on foot after making her purchase. (24 TRT 4457-4458.)

In November 1984, Richard Leyva lived on Bucklin Avenue in La Mesa. (24 TRT 4547; Exh. 121.) On November 19, he had visited a friend in Spring Valley. (24 TRT 4548.) On his way home around 1:15 or 1:30 a.m. on November 20, he stopped in the eastbound left turn lane of Fletcher Parkway, waiting for the light to turn northbound onto Jackson Drive. (24 TRT 4552-4554.) As he waited at the red light, he noticed a car parked facing north at the curb on Jackson, just north of Fletcher Parkway. (24 TRT 4555; 25 TRT 4597.) There was someone bent over at the left rear of the car and it appeared the person was putting gasoline in the car. (24 TRT 4555-4556.) Leyva also noticed a second vehicle parked behind the first. (24 TRT 4556.) He did not remember whether the second vehicle was a car or a truck, but recalled the two vehicles were relatively similar in size. (25 TRT 4598.)

As he made his left turn and approached the parked cars, Leyva noticed that the second vehicle had an unusual combination of letters. (24 TRT 4558.) He recalled license plate to be "TNCCNC" or "CNCTNC" or possibly "CNCINC," and a number, as the letters made him think of the phrase "tin can." (24 TRT 4562; see also 25 TRT 4625.) He also thought the license plate was light-colored like license plates from Oregon or Illinois. (24 TRT 4562.)[21/] As he passed the vehicles, he noticed the silhouette of two people who appeared to be in an embrace; one person was taller than the other. (24 TRT 4558-4560.)[22/]

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21. The license plates on appellant's 1984 Toyota pickup, CMCINC2, were reflectorized. (17 TRT 3107-3112; 19 TRT 3433-3434.)

22. Swanke was 5'7" tall. (24 TRT 4431; but see 27 TRT 4916 [Swanke autopsy - 5'5 ½"].) According to the information on appellant's driver's license, he is 6'1" tall. (14 TRT 2540, 2544-2545.)

La Mesa Police Officer Charles Drake responded to the area of Jackson Drive and Fletcher Parkway in the early morning hours on November 20, and located Swanke's Dodge Colt. (25 TRT 4620-4621.) A flashlight, gas tank top, and car keys were on the trunk lid; a gas can was on the ground; and a wallet with Swanke's identification was on the passenger seat. (25 TRT 4623-4624, 4628.)

Appellant called work and spoke to Frank Clark the morning of November 20, around 7:00 to 7:30 a.m., saying he had gone to a bar after leaving Clark's condo, been hit with a beer mug, and needed to take a week off work. (21 TRT 3807.) That same morning, Richard Adler, who lived with appellant, noticed fresh scratches on appellant's face - on his forehead and cheeks. (19 TRT 3435-3436; Exhs. 192 and 192A; 20 TRT 3579-3582, 3597.) Adler had not seen the scratches on November 18, when he previously had seen appellant. (19 TRT 3446.) Adler told appellant he looked like he had been run over by a truck. (19 TRT 3447.) Bill and Vicky Johnson and their child also lived at appellant's house and Vicky Johnson noticed and commented on the scratches on appellant's face that morning. (19 TRT 3447.) When Adler asked what had happened, appellant said he had been hit in a bar fight. (19 TRT 3453.)

Frank Clark saw appellant the following Friday, November 23. (21 TRT 3809-3810.) Clark also noticed the scratches on appellant's face, which were about 4 inches long, extending from his eyelid to his chin, and were just beginning to heal. (21 TRT 3810-3811.)

Clark and appellant met with William McCarthy and John Storms, representatives from PennySaver where appellant placed advertising, on Friday, November 23. (21 TRT 3812; 37 TRT 7087-7088, 7108.) McCarthy and Storms also noticed the scratches on appellant's face. (37 TRT 7088-7092; 7109-7111, 7113.)

James McNelly resided in Spring Valley and was out for a walk in the hills near his home on the morning of November 24, 1984. (25 TRT 4653-4654.) At about 9:00 a.m., in a rough, rocky, steep, remote area below a vehicle turnaround in a fire road, he discovered Swanke's body. (25 TRT 4658-4660.) The body had a dog choke chain around the neck. (25 TRT 4660; see also 4708; 27 TRT 4997-4998 (Exh. 211 L, M); 28 TRT 5075.) McNelly went home and called 911, then returned to the body with the police. (25 TRT 4660, 4664.)

Swanke's body was not far from appellant's residence on Casa De Oro; approximately 2 miles. (25 TRT 4701-4704; 26 TRT 4834.) Except for socks, the body was nude from the waist down. (25 TRT 4705.) The shirt and sweater vest were cut up the middle. A pair of blue pants and a comb were located near the body; the button and zipper on the pants were intact and the pants had been cut along the zipper to the crotch area. (25 TRT 4706; 28 TRT 5079-5080, 5083-5084.) A pair of brown loafer shoes was scattered farther up the hill. (25 TRT 4708; 28 TRT 5076-5078.) It appeared the body had been there a matter of days; there were insect larvae on the body. (25 TRT 4713, 4731, 4753.) There was a severe cut to the throat. (25 TRT 4707.)

The Swanke autopsy occurred November 25. (26 TRT 4853.) The cause of death was hemorrhage due to extensive lacerations to the neck. (27 TRT 4915.) The neck wound was a large gaping wound from one side to the neck to the other. (26 TRT 4866-4867.) Skin "tags" on the sides of the wound indicated seven strokes on the left side and four strokes on the right, and indicated a stroking or sawing action of the blade. (26 TRT 4866-4869; 27 TRT 4975-4976.) The wound cut the neck muscles around the larynx (voice box), the larynx itself, the esophagus, and the carotid vessels and jugular veins on both sides of the neck. (26 TRT 4870.) The cut extended through the thyroid cartilage, slightly above the vocal cords, and across the esophagus. (26

TRT 4871.) There were marks on the cervical vertebrae in two areas: between C-2 and C-3, and behind the larynx, between C-4 and C-5. (26 TRT 4872; 27 TRT 4974.) The front of the vertebrae and the connective tissue which holds the backbone together had been struck. (26 TRT 4873.) The cutting instrument was medium to heavy in weight, with a thick blade and relatively long; three to four inches. (26 TRT 4867.)

There were brush marks on parts of the body as though it had been dragged. (26 TRT 4854.) Scratches on the buttocks and thighs which were caused right before or right after death could have been caused by falling or dragging over the terrain where the body was located. (26 TRT 4859, 4863.) The position of Swanke's body when recovered was consistent with lividity in her legs. (26 TRT 4855-4856; 27 TRT 4889, 4968.) Lividity in the chest indicated she had also laid on her chest. (26 TRT 4856.)

Marks on either side of her neck were consistent with a dog choke chain being pulled tightly and upward around the neck, as might occur had she been walked down hill with a person behind her using force on the choke chain. (26 TRT 4864-4866.) There was a bite mark on her tongue with a small amount of blood seepage which indicated it occurred very shortly before death. (27 TRT 4905, 4910.) The tongue injury could have been caused by gasping for air while being choked by the dog chain. (27 TRT 4911.)

There was some decomposition on the right side of the body. (27 TRT 4909.) The cool, rainy weather between the time of Swanke's disappearance and the discovery of her body would have limited decomposition and preserved the body. (27 TRT 4897-4901, 4908, 4947, 4949, 4988-4992 [Exh. 241].) Insect larvae on the body indicated a period of time had passed between death and discovery of the body, and the weather and temperature would have also affected the larvae activity. (27 TRT 4903-4905, 4955.) Based on the presence

of maggots and dehydration of the eyes, it was estimated Swanke had been dead 24 to 48 hours or more. (27 TRT 4962, 4988.)

The dog chain was removed from Swanke's neck prior to the autopsy. (18 TRT 3235, 3242; 27 TRT 4997-4999; 28 TRT 5081-5082 [Exh. 190].) Additionally, Swanke's fingernails were clipped and collected. (27 TRT 5001; 28 TRT 5084.)

San Diego Sheriff's Deputy Craig Henderson talked to appellant's wife, Shannon Lucas, in December 1984. (25 TRT 4733.)[23/] Deputy Henderson showed Shannon Lucas the dog choke chain which had been recovered from Swanke's neck. (25 TRT 4733.) Upon seeing the dog collar, Shannon Lucas was visibly shaken, stared at the choke chain and said "'that's, um, one of Duke's. . . .'" (25 TRT 4734-4737; Exhs. 212, 213.) Duke was appellant's dog. (37 TRT 6956.)[24/]

Swanke's fingernail clippings, five nails from each hand (Exh. 215), were sent to an independent lab, Serological Research Institute (SERI). (28 TRT 5127-5131; 30 TRT 5507, 5531.)

Appellant's truck was searched at the San Diego County Sheriff's garage on December 17, 1984. (28 TRT 5097; 36 TRT 6877.) Recovered during the search were a buck fillet knife (28 TRT 5098-5099 [Exh. 223]) and two pieces of cord (28 TRT 5099 [Exh. 224]). The passenger seat (Exh. 225) was covered with a sheepskin seat cover (Exh. 226). (28 TRT 5101-5102.) The seats and

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23. Appellant and Shannon Lucas were married November 8, 1983. (21 TRT 3771.)

24. Patricia Rutan, who had lived next to appellant on Valencia Street in Spring Valley, had taken care of appellant's dog when she was 14 or 15. (37 TRT 6955-6956.) She testified the dog choke chain taken from Swanke's body was similar to Duke's chain in several respects (the loop and buckle, and the "lines in each little link"), though she remembered Duke's chain to have been longer. (37 TRT 6958-6959.)

seat covers were seized. (29 TRT 5353-5354.) There was a stain on the passenger seat cover which was tested and gave a positive presumptive result for blood. (28 TRT 5117-5118.)

Blood samples were taken from appellant, his wife Shannon Lucas, Anne Swanke, and Jodie Santiago. Blood stains were then created and the samples and stains were forwarded to SERI (18 TRT 3243-3244 [appellant's blood sample collected; Exh 191]; 27 TRT 5013-5014 [Swanke blood sample taken at autopsy (see also 28 TRT 5213); Exh 231]; 28 TRT 5104-5106 [Exhs. 227(blood vials of appellant and Swanke), 235 (Swanke blood (see also 28 TRT 5225-5226)), 228 (Swanke blood stain)]; 5108-5109 [Exh. 229 (Shannon Lucas blood sample)], 5113 [Exh. 231 (appellant's blood stain)]; 30 TRT 5502 [Exh 236 (Santiago blood sample)].) The passenger seat cover, a sample of the seat cover stain, as well as an unstained portion of the seat cover were also sent to SERI. (28 TRT 5121-5123, 5134; 30 TRT 5527, 5531-5532, 5551 [evidence/exhibits received at SERI].)

Test results on the blood samples and stains, seat cover stain, and Swanke fingernail clippings were summarized on Exhibit 245. (30 TRT 5550; see also 30 TRT 5705-5707.)

The stain on the sheepskin seat cover was ABO blood type O, a PGM subtype of 2-1-, an ADA type 1, an EAP type "B", an AK type 1, transferrin type C, an HP type 2-1, and had GM allotypes 1, 3, 11, 23. (30 TRT 5602-5606, 5618-5619.) The ABO blood type O of the sheepskin seat cover excluded appellant and Shannon Lucas as potential donors because both their ABO blood types were A. (30 TRT 5583-5584, 5603; 31 TRT 5728.) The PGM subtype 2-1- excluded Jodie Santiago as a donor of the stain because her PGM subtype was 1+. (30 TRT 5594, 5603-5604; 31 TRT 5727.) However, Anne Swanke could not be excluded as a donor of the blood stain on the sheepskin seat cover because she matched all of the ABO blood and enzyme

typing for the stain. (30 TRT 5587 [ABO type O], 5591 and 5594 [PGM subtype 2-1-], 5596-5597 [ADA type 1, EAP type B, AK type 1], 5598 [transferrin type C], 5600 [HP type 2-1], 5603, 5606, 5616 [GM allotypes 1, 3, 11, 23]; 31 TRT 5728-5729.)

While the test results do not strictly identify the particular donor, they will identify whether a particular individual can be included or excluded. (30 TRT 5524-5525.) The particular types for an included individual can be compared to population frequency tables which identify the frequency of individual marker types in the population. (30 TRT 5525-5526.) Population frequency tables are broken down into four main groups: Caucasian, Black, Asian, and Hispanic/American Indian. (31 TRT 5734.) In the Caucasian population, only approximately 1 in 4,794 have the genetic marker types found in both the sheepskin seat cover stain and the blood of Anne Swanke. (31 TRT 5735.) This combination of markers are found in approximately 1 in 5,875 Blacks, and 1 in 444 Hispanic/American Indians. (31 TRT 5736; see Exh. 247.)

Two of the left hand fingernail clippings from Anne Swanke (labeled L2 and L4) tested as ABO type A and PGM subtype 2+1+. (30 TRT 5607.) Appellant (and his wife, Shannon Lucas) had the same types and could have donated the blood under those two fingernails. (30 TRT 5583 [appellant ABO type A], 5594 [appellant PGM subtype 2+1+], 5609.) The blood on these fingernail clippings could not have come from Anne Swanke. (31 TRT 5738.)[25/] Two other fingernail clippings from Anne Swanke, one from each hand (labeled L1 and R4) tested positive for GM allotypes 1, 2, 3, 11, and 23, the same as appellant, making him a potential donor. (30 TRT 5616, 5622.) Based on the blood characteristics in the fingernail clippings R4, L1, L2, and

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25. In a third fingernail clipping (R1), the blood types were consistent with only Anne Swanke. (30 TRT 5607-5609; 31 TRT 5737.)

L4 which match appellant, only approximately 1 in 69 Caucasians, 1 in 547 Blacks, and 1 in 197 Hispanic/American Indians would share the same combination. (31 TRT 5742-5743.)

Appellant's Casa de Oro Boulevard home was searched pursuant to a search warrant on December 16, 1984. (19 TRT 3525; 28 TRT 5085-5086; 36 TRT 6875, 6878.) Among the items recovered during the search were a black Buck knife sheath for a folding knife (16 TRT 2795; 28 TRT 5089 [Exh. 219]), a box labeled Buck Knife and special model 119 (28 TRT 5093 [Exh. 221]), a Buck Knife and sheath (28 TRT 5094 [Exh. 222]), and a 4-5' long piece of white cord (28 TRT 5092 [Exh. 220]). The sheath (Exh. 219) was manufactured before 1981, for a model 112 Buck knife. (37 TRT 6968.) The amount of wear on the belt loop showed a lot of use on a belt. (37 TRT 6971.) The "checking" (i.e., drying out) on the top of the sheath indicated it had been extensively exposed to the weather during wear. (37 TRT 6972.) The blade of a model 112 was approximately 4 1/4". (37 TRT 6967.)

Similarities In The Throat Slashing Injuries

Dr. Robert Bucklin, a forensic pathologist, performed the autopsies on Rhonda Strang and Amber Fisher. (37 TRT 6979-6983.) He also examined the photographs and reports from the autopsies of Anne Swanke, Suzanne Jacobs, Gayle Garcia, and the photographs of the injuries to Jodie Santiago. (37 TRT 7001.) He noted general similarities to all the neck wounds: the wounds extended through the same general plane of the neck; the wounds went through the larynx or between the larynx and the hyoid bone; the carotid arteries and jugular veins were partially or completely severed; and all the wounds appeared to be caused by a sharp cutting instrument. (37 TRT 7002.) Dr. Bucklin had performed autopsies since 1941. (37 TRT 7002.) He had seen one similar pattern in an autopsy in Texas, caused by a linoleum cutting tool and had never

seen any similar wounds while working in the San Diego County Coroner's Office. (37 TRT 7003.) In Dr. Bucklin's opinion, the neck wound injuries suffered by the victims stood apart from other throat injuries he had seen in the previous 40 years. (37 TRT 7008.)

Dr. Charles Geiberger performed emergency surgery on Jodie Santiago when she was delivered to the hospital emergency room. (20 TRT 3679-3683.) He examined the photographs and reports of the autopsies on Suzanne Jacobs, Colin Jacobs, Gayle Garcia, Rhonda Strang, Amber Fisher, and Anne Swanke. (37 TRT 7058.) He noted several similarities between the adult wounds: skin tags; the same entry point between the top of the hyoid cartilage and the hyoid bone; all went to the same depth; the ligature mark on Santiago's neck, the irregular mark on Strang's neck, and the chain found around Swanke's neck;[26] and all the wounds were caused by a sharp instrument. (37 TRT 7058-7059.) He thought the Santiago and Swanke wounds look like "twin cuts" due to their similarities. (37 TRT 7062.) He testified the ligature mark on Santiago's neck was consistent with the cord recovered in the search of appellant's residence (Exh. 220). (37 TRT 7078.)

Dr. David Katsuyama performed the autopsies on Suzanne and Colin Jacobs, and Anne Swanke. (38 TRT 7177.) He also reviewed the photographs of the other victims. (38 TRT 7177.) He noted that all the wounds: were in the same general area; approached the backbone; and cut through the larynx. (38 TRT 7178.) All the wounds were similar in depth and use of the same type of weapon. (38 TRT 7179.) He was of the opinion that all the wounds were "quite similar." (38 TRT 7179.) He could recall no specific instance of any similar case. (38 TRT 7180.)

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26. Dr. Geiberger acknowledged there were no ligature marks on Suzanne Jacobs and Gayle Garcia. (37 TRT 7074.)

DEFENSE

INTRODUCTION

Appellant mounted a vigorous defense, challenging on cross-examination virtually every aspect of the prosecution's case, including witness accuracy and reliability. Particular evidence presented by the defense relating to counts upon which the jury acquitted appellant or was unable to reach a verdict is mentioned in the preceding footnotes which discuss generally the prosecution case on those counts.

In addition, the defense presented evidence on each of the counts which resulted in conviction.

A. The Jacob's Matter

John "Shorty" Smith was driving to California in early 1980 when he met Johnny Massingale hitchhiking and offered Massingale a ride to California. (41 TRT 7813-7815.) Massingale initially declined, saying he was wanted for murder in California, but relented and agreed to accompany Smith. (41 TRT 7816-7817.) Massingale told Smith that he (Massingale) had cut someone's head off – or something of that nature – and later mentioned the name "Anne." (41 TRT 7818.)

Once in California, Smith picked up another hitchhiker, Jimmy Joe Nelson. (41 TRT 7819, 7855.) As Nelson and Massingale rode in the back of Smith's van, Massingale told Nelson that he (Massingale) had met a woman named Sue Ann while out drinking in San Diego in the spring of 1979, gone to her house or apartment, "made out" with her on the couch, and slit the woman's throat and killed her little boy when the little boy bothered them. (41 TRT

7821, 7864, 7866-7877, 7896.)[27] Massingale said there was blood all over. (41 TRT 7900.) Massingale had a folding-style buck knife which he carried in a "holster." (41 TRT 7820, 7897.)

When the trio arrived in Hollywood, Massingale apparently prostituted himself to several patrons of a homosexual bar and later declined to leave the next morning with Smith and Nelson when Smith began driving home to Kentucky. (41 TRT 7822, 7824, 7828-7829, 7863, 7898.) Massingale gave Nelson some toiletries and clothing when he decided not to go with them. One of the clothing items was a silk shirt with scratch marks and a stain that looked like blood. (41 TRT 7869-7871, 7884-7887, 7890.)

Nelson was arrested in Alabama on December 6, 1980, by Detective Sergeant Harold Phillips of the Chickasaw Police Department. (41 TRT 7752-7753.) Nelson was driving a vehicle taken during a homicide in Texas, which had occurred between August 20 and 24, 1980. (41 TRT 7753, 7765-7766, 7788-7791.)[28] Nelson assisted the authorities in locating the other Texas homicide suspects and told them about Massingale's statements. (41 TRT 7754-7754, 7766, 7791-7792, 7795, 7807, 7868-7869, 7872.) That information was passed on to the authorities in San Diego. (41 TRT 7755, 7765, 7781, 7783.)

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27. Nelson was uncertain whether Massingale said he and the woman drank while together. (41 TRT 7865, 7879-7880.) It was stipulated that blood taken during the autopsy of Suzanne Jacobs was tested for alcohol and yielded a 0.04 blood alcohol level. (41 TRT 7749-7750.)

28. Nelson ultimately pleaded guilty to manslaughter in the Texas homicide case and was serving a prison term with the Texas Department of Corrections at the time he testified for the defense in this case. (41 TRT 7850-7851.) He claimed he was present during the Texas killing of Williams Calvin Toups, which was committed by David Woods whom he (Nelson) met and joined while traveling with Smith. (41 TRT 7829-7830, 7902.)

San Diego Police received information about Jimmy Joe Nelson's statement from Texas Ranger Pedro Montemayor in December 1980, and Nelson was subsequently interviewed by Detective David Ayers. (41 TRT 7792; 42 TRT 7996-8000; 45 TRT 8542-8543.) Ayers got Smith's card, and Massingale's last name was obtained in an interview of Smith by a Cincinnati, Ohio, detective on April 30, 1981. (42 TRT 8002, 8006, 8008; 45 TRT 8549, 8559-8560.)

Massingale had been contacted on August 15, 1980, in San Diego, and cited for hitchhiking on the freeway by California Highway Patrol Officer Robert McLean. (42 TRT 7956-7957, 7960.) Massingale was shabbily dressed and had a fixed blade knife, with a blade of approximately 6 to 8 inches, which he carried in a sheath. (42 TRT 7958.) Massingale was arrested for vehicle theft on August 25, 1980, in Riverside County by California Highway Patrol Officer Curtis Honeycutt. (42 TRT 7962-7966.) The vehicle theft was reported out of Los Angeles and involved a victim from Hollywood. (42 TRT 7967.) Massingale also visited the San Diego residence of Deborah Chapin around December 1988, when his wife was staying with Chapin. (44 TRT 8329-8330; 45 TRT 8536-8537.)

When San Diego Police obtained Massingale's fingerprints from the Riverside arrest, it was discovered that the partial fingerprint on the Love Insurance note had dissipated and no photograph of the print could be located. (42 TRT 8009-8010, 8014.)

Detectives Green and Ayers went to Harlan County Kentucky in March 1984 to interview Massingale. (42 TRT 8034-8035; 45 TRT 8561.) They met Massingale on March 18, 1984, at a Kentucky State Police post, where Massingale was brought by Kentucky State Police Detective Denny Pace. (42 TRT 8036-8037; 45 TRT 8465, 8472, 8474.) During their five-hour unrecorded interview, Massingale said he had been in San Diego for three

weeks in the early summer of 1979, but denied any participation in the Jacobs' murders. (42 TRT 8044, 8104, 8106; 45 TRT 8591.) Massingale told Ayers and Green that he did not work in San Diego, he walked around residential areas and had been to a mission, and he was picked up hitchhiking by "Shorty" Smith. He went to Hollywood with Smith and separated from Smith there. He denied knowing Nelson and denied ever carrying any kind of knife other than a pocket knife. (42 TRT 8057-8059, 8064-8065; 45 TRT 8567, 8475-8477, 8585.)

After the interview with Ayers and Green, Massingale was taken from the post by Detective Pace to return him to jail. (45 TRT 8480.) However, on that trip, Massingale asked to talk with Pace without Green and Ayers. (45 TRT 8480.)[29] Massingale asked Pace what he should do and what could happen to him. (45 TRT 8484-8485.) Pace testified he advised Massingale that the crimes could result in the death penalty and to tell the truth, but not admit to anything he did not do. (45 TRT 8484-8485.) When Massingale assented to having Pace speak with Green and Ayers, they returned to the post. (42 TRT 8071, 8073, 8089, 8106-8107; 45 TRT 8486.) Massingale was interviewed at that time by Pace and Trooper Howard for a couple of hours, without Ayers and Green. (42 TRT 8073, 8089, 8105, 8108; 45 TRT 8487.)

During that interview, Pace told Massingale that Green and Ayers knew Massingale carried a knife, knew Nelson, and had told Nelson about killing a boy in a bathroom. (45 TRT 8488.) Massingale said, "I am guilty," and said he had lied to Green and Ayers. (45 TRT 8488.) Massingale said he knew Nelson, had given him a black shirt, and told him he cut a woman, named Sue Ann, almost cutting her head off. (45 TRT 8488.) Massingale said he was in

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29. Pace had known the Massingale family and was familiar with Massingale. Massingale had a reputation for not being honest. (45 TRT 8468-8469.) Essentially, Massingale was a liar who would say anything to get out of a jam. (45 TRT 8503-8504.)

San Diego in the summer of 1979 and met a woman named Sue Ann in a bar and went to her house. He sat on her couch and pinched her leg. She responded by "smacking" him and told him to get out. He was on acid and went crazy. The little boy said to not hurt his mommy and Massingale cut them both with a dagger he carried in a sheath on his belt; he cut the boy in the bathroom. He washed up in the bathroom or kitchen and went out the back door. (45 TRT 8489, 8491.) He heard a dog barking when he left and saw a blue dune buggy in the driveway. He said the house was white, the woman was about 27 and the boy was about 5. He got rid of the knife and his clothing in Mexico and got more clothing at the Salvation Army. (45 TRT 8490.) Pace then advised Green and Ayers that Massingale had confessed. (42 TRT 8089.)

Massingale was interviewed twice the next day. Both interviews were tape-recorded. The first interview was with Pace and Massingale, and the second interview was with Massingale, Ayers and Green, with Pace and Howard present. (42 TRT 8089, 8105, 8110; 45 TRT 8492.)[30/] Massingale admitted the murders and acknowledged knowing Nelson. (42 TRT 8091-8093.)

Massingale was called as a witness during the prosecution's case-in-chief. (5 TRT 658.) He testified that he made up his confession. (5 TRT 690.) In sum, Massingale testified he had been pressured by the Kentucky and San Diego authorities into confessing by intimidation and threats of the death penalty, and only repeated information about the murders which had been given to him by the officers. (5 TRT 689-693, 746, 753-764, 786-788, 862, 867-874, 878.) He admitted riding with Smith and Nelson, but denied bragging about

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30. The tape-recorded interview with Pace on March 19, 1984, was played for the jury. (5 TRT 792-795.) The tape-recorded interview with Ayers and Green was also played for the jury. (5 TRT 807-810.)

killings. He testified he only carried a pocket knife and had never carried a knife over two inches. (5 TRT 695-697, 702-706, 717-718, 722-724, 728.)

Green testified he did not provide Massingale with any details of the Jacobs' killings. (42 TRT 8038-8039.) He made no promises, offers or threats and neither did Ayers. (42 TRT 8041, 8066, 8091.) Massingale was advised of, and waived his *Miranda* rights. (42 TRT 8040.) Their first interview with Massingale was terminated when Massingale asked for an attorney. (42 TRT 8071.) Ayers and Pace also denied ever threatening Massingale, promising him anything, or providing him with any details of the murders, though both acknowledged telling Massingale he could get the death penalty for the murders. (45 TRT 8492, 8497, 8500, 8507, 8587, 8589, 8597.)

When Peggy Harris spoke with San Diego Police Department Detective William Green, she described the vehicle she had seen in the Jacobs' driveway only as a maroon sports car. (42 TRT 7970-7971.) Around December 1988, Green showed Harris a single photo of a 1974 MGB, which she identified as the type of car she had seen in the driveway. (42 TRT 7972-7973, 7976-7977, 7982.) However, Mrs. Harris had brought up the car's identity as an MG in the summer of 1988. (42 TRT 8104.) About a week later, Harris arranged the placement of the vehicle shown in Exhibits 8, 9, 10, and 11 in order to demonstrate the vehicle position on the driveway. (42 TRT 7972-7975, 7982.)

Jeanette Robertson, a neighbor of the Jacobs, testified she drove by the Jacobs residence around 9:00 am, again around 11:00 am, and a third time around 11:45 am. (53 TRT 9906-9909.) She did not notice any cars in the driveway on any of those occasions. (53 TRT 9907-9910.)

A defense criminalist opined that Suzanne Jacobs could not have had a blood alcohol level of 0.04 at the time of her death if she had only consumed a glass of wine the night before her death, but acknowledged that her blood alcohol represented only slightly more than one drink in her system at the time

of her death. (44 TRT 8314-8326.) A defense pathologist, Dr. Cyril Wecht, also testified that it would be impossible for a single drink, imbibed 10 to 15 hours before death, to result in a blood-alcohol level of 0.04 at the time of death. (50 TRT 9455.)

Michael Ebert, who read meters for San Diego Gas and Electric, read the meter at the Jacobs' residence on May 4, 1979, shortly after noon. (44 TRT 8287-8288.) He heard the dogs barking as they usually did when he read the meters at the house. (44 TRT 8289.)

Detective Green had information on the shoe print in the Jacobs' residence and went to a sporting goods store where he found a hiking boot with a similar pattern. (42 TRT 7987-7988.) He learned from a shoemaker that the particular sole could be put on any type of shoe and was widely used on boots. (42 TRT 7990.)

A defense investigator contacted Edward Fairhurst (the fire captain who first responded to the 9-1-1 call) about the boots he wore to the Jacobs' residence. (43 TRT 8167-8169.) Fairhurst had thrown the boots away by that time, but he said a photo of the shoe pattern from the Jacobs' residence was similar to the sole pattern on his boots. (43 TRT 8171.) The investigator also contacted the shoe business where Fairhurst had his shoes repaired. (43 TRT 8171-8172.) David Daywood, the shoe repair shop owner where Fairhurst did business, testified that he re-soled Fairhurst's boots in April 1979 with Vibram soles and heels, similar to those in Exhibit 665. (43 TRT 8173-8176.)

George Jackson, the manufacturing manager at Precision Metal Products, testified that he started at that company as a furnace operator in 1978 and recalled appellant who was also employed as a furnace operator. (45 TRT 8429, 8431, 8433-8434.) As a furnace operator, Jackson wore coveralls and boots provided by the company, which had a locker room for changing. (45 TRT 8435-8437.) The forging process employed several lubricants and

produced steel beads as castoff, all of which made the shop floor, the employee coveralls, and the employee boots extremely dirty. (45 TRT 8431-8432, 8438, 8443, 8450-8453, 8456.)

Dennis Smith testified he managed apartments in Santee in the early 1980's, where appellant's sister, Kathy Graves, was a tenant. (43 TRT 8207.)[31/] During the time he was the manager, he purchased a purple MG Midget from appellant's mother, Patricia Katzenmaier.[32/] (43 TRT 8209.) He painted the car red. (43 TRT 8211.) He got the car running in 1986 and sold the car to Robin Keith. (43 TRT 8216.) Mr. Katzenmaier testified appellant's mother owned an MG Midget which Mr. Katzenmaier described as purple in color, not maroon, and did not have a rack on the back. (46 TRT 8633-8634, 8640.) The car did not run from August 1980 until it was sold to Dennis Smith, except for two days just before Halloween 1981. (46 TRT 8632, 8635-8637.) Patricia Katzenmaier testified she purchased a used MG midget in late 1975 or early 1976. (47 TRT 8900-8901.) She testified the car was a bright purple in color and did not have a luggage rack. (47 TRT 8902-8904.) The car had some type of problem and was not running from March through May 1979. (47 TRT 8906.) Curt Andrewson, who knew appellant and his mother, testified he had seen her car, which he described as purple, in the garage with the engine apart in late 1979 or early 1980. (55 TRT 10404-10407.)

On May 7, 1981, San Diego Police Officer Sandra Angotti responded to a radio call to check a vehicle in the 4600 block of Bancroft as possibly

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31. The tenant was also referred to as Kathy Lucas and Smith identified a woman in court as the tenant, who identified herself as Katherine McEvoy. (43 TRT 8207.) This was appellant's sister, although her first name is spelled with a "C" in places; the variation in the last names arises from marriages. (46 TRT 8646, 8650; see also 47 TRT 8863, 8917.)

32. Patricia Katzenmaier married Steven Katzenmaier in 1981. (46 TRT 8632, 8638.)

related to a murder. The radio call was the result of a telephone call to the police from a person who had heard a news broadcast about the murders. (46 TRT 8615, 8620.)[33/] The car was a black over maroon convertible MGB and when Angotti had the license plate run, she learned that the registered owner was a lady who lived on Bancroft. (46 TRT 8617-8618.)

David Oleksow, a questioned documents examiner for the San Diego Police Department, examined the Love Insurance note (Exh 510) on several occasions and compared it to a variety of handwriting by appellant. Oleksow could neither identify appellant as the writer of the note, nor exclude him. (48 TRT 8974-8993.)[34/]

Kenneth Clarence testified that Massingale stayed at the San Diego Rescue Mission, located at 527 Fifth Street in San Diego, sometime in 1979. (50 TRT 9471-9474.)

B. Santiago Attempted Murder

A defense investigator tracked the ownership of appellant's 280ZX after he traded it in on his truck at the Toyota dealership. (47 TRT 8780.) The car

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33. Jeannette Robertson, who lived around the corner from the Jacobs, was home when the Fire Department arrived on the day of the murders. (48 TRT 9019.) She spoke with police detectives and learned, either from the detectives or the media, of the interest in a maroon sports car. (48 TRT 9020.) On May 7, 1984, she saw a maroon sports car, which she thought was a Fiat, driving by the Post Office about two and a half blocks from her home, and called the police reporting the license plate number, 756 LMG. (48 TRT 9020-9022.) Her call was taken by George Simpson, who made a note of the information. (48 TRT 9023-9024.)

34. However, on cross-examination, Oleksow testified he found appellant showed excellent similarities to the Love Insurance note and was probably responsible for writing it. (48 TRT 8994.) He noted that his examination was made difficult by the discoloration of the note and the limited amount of writing on the note. (48 TRT 8987.)

was sold by the Toyota dealership to a Datsun dealership, where it was purchased by Michael George. (47 TRT 8781.) The investigator photographed the car at Michael George's apartment complex, the Timbers on Petree in El Cajon. (47 TRT 8781.) The investigator examined the car, which was black with gold trim, and found no damage around the back window or any signs of attachments or louvers. (47 TRT 8783-8784.)

Santiago was shown the photographs and had an opportunity to view the car during the preliminary hearing. (47 TRT 8782, 8793-8795.) During cross-examination, Santiago acknowledged seeing the photographs and the car, and testified she did not recognize the photographs or the car. (39 TRT 7479-7480.) Three of appellant's former employees, Mitchell Hoehn, Dennis Adair, and Loren Linker, testified they worked for CMC in 1984 and were familiar with appellant's black 280ZX. Each said the car did not have louvers on the back window as described by Santiago. (53 TRT 9896-9898, 9911-9915, 9973-9977.) Each also said they had been to appellant's Casa de Oro house around the summer of 1984 and described a weight set and a barbecue on the front porch, items not mentioned by Santiago (53 TRT 9899-9901, 9913, 9977-9978.)[35/]

Loan records on appellant's 280ZX and Toyota truck indicated appellant's monthly car payment was reduced from $412.23 to $287.11 when he traded in the 280ZX on the Toyota. (54 TRT 10078-10083.)

Loren Linker and his wife testified that appellant arrived at the Linker residence on June 8, 1984, with Loren Linker, sometime after dark. (53 TRT 9955-9961, 9979.) Loren Linker said he and appellant arrived around 9:00

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35. Linker also remembered a lawnmower on the front porch. (53 TRT 9978.)

p.m. and appellant stayed about 3 hours, leaving around 11:00 p.m. to midnight. (53 TRT 9980, 10004-10005.)[36]

When Santiago identified appellant's house on December 15, 1984, she had been driven by the house two times the previous evening without making an identification, and one time prior to making the identification that day, also without making an identification. (48 TRT 8999-9002, 9009.)[37] While driving past the house the fourth time, prior to Santiago making an identification, someone in the car said something like, "this house" or "what about this house," at which point, Santiago identified the house. (48 TRT 9009-9010.)[38]

The deep vaginal swabs taken in connection with the examination of Santiago revealed the presence of sperm cells and acid phosphatase, which indicated the presence of seminal fluid. (47 TRT 8766-8771.) In the opinion of Dr. Phillip Miller, an emergency room physician familiar with use of rape kits, the presence of sperm cells and acid phosphatase indicated sexual intercourse had occurred within minutes, or hours, or within one to two days. (47 TRT 8875-8880.)

Santiago was seen at the hospital on June 14 and 16, 1984, by Dr. Heywood Zeidman, a psychiatrist. (48 TRT 8963-8968.) Santiago was depressed, guarded, had psychomotor retardation (moved and spoke slowly), clutched a teddy bear, and was possibly suffering from post-traumatic stress disorder (PTSD). (48 TRT 8968-8970.) Dr. Zeidman felt mental functioning

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36. However, Mrs. Linker said appellant left in the evening and it was not early or late when he left. (53 TRT 9961.) She said to her early means 5:00 - 6:00 p.m., and late means 11:00 p.m. (53 TRT 9966.)

37. Santiago had told Detective Fullmer, in a prior telephone conversation, she would recognize the house if she saw it. (48 TRT 9002.)

38. That day, however, Detective Fullmer drew a diagram of the exterior walls of the house and Santiago drew and/or directed the drawing of the interior walls. They had not been inside the house. (48 TRT 9013-9015; Exh. 176.)

tests should be performed, but Santiago was discharged before he was able to follow up. (48 TRT 8970.)

Santiago received counseling on her return to Seattle by Lucy Berliner, a social worker at the sexual assault center of Harbor View Medical Center, starting August 14, 1984. (54 TRT 10107-10110.) Berliner diagnosed Santiago as suffering from PTSD. (54 TRT 10110.) She referred Santiago to Dr. Wendy Freed. (54 TRT 10114.)

Santiago was a patient of Dr. Wendy Freed, a psychiatrist, following her return to Seattle. (48 TRT 9027-9028.) Santiago was seen 11 times between November 1984 and April 1985. (48 TRT 9028-9037.)[39/] Dr. Freed diagnosed Santiago as having PTSD and major depression. (48 TRT 9042.)[40/] However, by the end of February or the beginning of March 1985, although Santiago still had symptoms of PTSD, Dr. Freed also began seeing the beginning of recovery in Santiago. (48 TRT 9060, 9081.)

Dr. Sheldon Zigelbaum, a physician and psychiatrist specializing in PTSD, described the potential negative effects of PTSD and closed-head trauma on memory. (54 TRT 10137-10183.)

C. Anne Swanke Murder

Loren Linker and Kenneth Nolte testified that Nolte came from Arizona to San Diego on November 19, 1984, to visit Linker, and Nolte stayed the night at the Linker residence. (53 TRT 9927-9932, 9987-9988.) They both said that

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39. Santiago made only eleven of twenty-two appointments (48 TRT 9040), although one of the appointments she missed was when she was in San Diego testifying and another was due to a misunderstanding about the time of the appointment. (48 TRT 9032, 9033, 9079.)

40. Santiago displayed most, but not all the symptoms of PTSD listed in the Diagnostic and Statistics Manual (DSM). (48 TRT 9043-9055.)

sometime after they had gone to bed (Nolte said it was 11:00 p.m. to 1:00 a.m.), Frank Clark and his wife arrived at the residence and stayed a few hours; the Clarks had been drinking and were intoxicated. (53 TRT 9933, 9989.)

William Johnson worked for appellant's carpet cleaning business in 1983 and 1984. (49 TRT 9199-9200, 9241-9243.) He and his wife, Vicky, and their son moved into appellant's house on Casa de Oro Boulevard during the first week of November 1984 and they celebrated Thanksgiving at the house with appellant. (49 TRT 9200-9201, 9206, 9243, 9245.) Vicky Johnson noticed scratches on one side of appellant's face on Wednesday morning before Thanksgiving, when appellant was leaving the house to go fishing with Rick Adler. (49 TRT 9207.) Appellant said he had gotten hit in a bar. (49 TRT 9226.) Vicky Johnson had seen appellant the day before (Tuesday) and he did not have the scratches at that time. (49 TRT 9208.) William Johnson saw the scratches Wednesday night after appellant returned from fishing. (49 TRT 9245-9246.)

Peggy Fisher, a veterinarian, testified she euthanized appellant's dog in April 1984. (55 TRT 10401-10402.)[41/] James Boyd, general manager for Hartz Mountain Pet Supplies, identified Exhibit 591 as one of their dog chains and said Exhibit 190 was consistent. (56 TRT 10570-10571.) He also testified to the number of Hartz Mountain dog chains of similar chain weight that were sold in California in 1984, and that other companies also sold similar dog chains. (56 TRT 10572-10587.)[42/] A defense investigator was able to find

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41. However, on cross-examination, she testified that the collars and leashes of euthanized dogs were returned to the owners. (55 TRT 10403.)

42. On cross-examination he testified that Exhibit 591 was a 28 inch chain and Exhibit 190 appeared to be about 1" longer; Hartz Mountain did not make a 29" dog chain. (56 TRT 10591.)

Hartz Mountain dog chains similar to Exhibit 190 in several stores in San Diego. (57 TRT 10795-10799.)

Hermann Schmitter, a defense forensic serologist from Germany (51 TRT 9630-9632) evaluated the serological results summarized in Exhibit 245. (51 TRT 9630-9632, 9637) He testified that based on inadequate testing procedures he would not report test results for the sheepskin stain ABO or the fingernail ABO test results. (51 TRT 9640-9646, 9713.) In his opinion there were no reportable results in the GM and KM marker tests. (51 TRT 9661-9662; 52 TRT 9712.) He opined that the EAP marker result was not properly reported as "B's" and should have been reported as a combined factor, "B/BC," which enlarged the population statistics. (51 TRT 9682-9683.) He claimed that the Swanke HP results were not as indicated. (51 TRT 9687.) He would not have accepted the AK marker test results. (52 TRT 9713-9714.) He disagreed with appellant's reported PGM subtype and PGM type, and Shannon Lucas's HP result. (52 TRT 9720-9723.)[43] The testimony of a special agent in charge of serology at the F.B.I. lab in Washington was presented by stipulation. (57 TRT 10789.) The F.B.I. lab procedures varied from those employed by SERI. (57 TRT 10789-10790.)

The defense also presented the testimony of two criminal defense attorneys involved in the Kenneth Derrell Williams capital case[44], who had

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43. On cross-examination, Schmitter acknowledged that it was his first time testifying in the United States, his first crime evaluation from the United States, he had not seen the lab where the prosecution tests were performed or seen the actual plates from the tests, and his dispute with several of the test results was not that they were wrong, but that the testing procedure made the results unreliable. (52 TRT 9735-9736, 9740, 9769-9770.) For example, he did not contend the sheepskin stain was not ABO type "O," but testified that the test result should not have been reported. (52 TRT 9780.)

44. See *People v. Williams* (1989) 48 Cal.3d 1112.

worked with Brian Wraxall, the head of the SERI lab[45], in that case and were of the opinion that Wraxall was not honest. (55 TRT 10408-10411, 10427-10429.)

Charles Merritt, a criminalist with the San Diego County Sheriff's Department and an expert on hair comparison, found two hairs on Swanke's body (one from a pubic combing and one from her left hip) were different from Swanke's pubic hair and also did not match appellant's pubic hair. (56 TRT 10717-10727.) However, he testified that the lack of a match was not an exclusion. (56 TRT 10728.) John Simms, a San Diego Police Department criminalist and hair comparison expert, reached similar conclusions and also found the hairs did not match samples from Swanke's boyfriend. (56 TRT 10734-10739.) However, Simms also noted that the hair from Swanke's hip was a transition hair and not very useful for comparison purposes. (56 TRT 10744.)

Latent fingerprints found on the windows of Anne Swanke's car, the gas tank cover, and the gas car were not made by appellant. (57 TRT 10784-10785, 10787.) The latents which were identified were made by Swanke or Michael Quinn of the La Mesa Police Department. (57 TRT 10785.)

Robert Martin testified that in November 1984 he was a security guard assigned to work at the US Elevator Plant in Spring Valley (below the location where Anne Swanke's body was recovered). (56 TRT 10671-10672, 10674.) On November 22, he was making rounds during his midnight to 7:00 a.m. shift and heard dogs barking, then noticed car lights on the hill behind the plant. (56 TRT 10672-10673.)

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45. Wraxall presented the serological results obtained by SERI during the prosecution's case.

D. Dissimilarities In The Throat Slashing Injuries

Dr. Cyril Wecht, a pathologist, testified that he had examined the testimony, autopsy reports, court pathology exhibits, and some crime scene photographs on the murders and attempted murder. (50 TRT 9369-9382.) He found no clear-cut pattern to the throat injuries in the seven cases which would support a pathologist opinion that all cases were caused by one person. (50 TRT 9393.) He found several significant and relevant differences between the cases. (50 TRT 9394-9397.) He also testified that the wounds were not carbon-copies of one another. (50 TRT 9397-9399.) He also found the only evidence of use of ligature strangulation in the case of Santiago. (50 TRT 9402.)

PROSECUTION REBUTTAL

Two close friends of Suzanne Jacobs, Bunnice Jacobs (no relation) and Deborah Watts-Gaydos, testified that Suzanne was not known to frequent bars alone and meet men. (57 TRT 10811-10822.)

According to a report written by William Green, a detective working on the Jacobs murders, on the day of the murders he examined the boots of Fire Captain Fairhurst and his crew and determined they were different from the pattern on the foot prints in the Jacobs house. (57 TRT 10871-10873.)

Because appellant was a non-secretor, he could not be ruled out as contributing the seminal fluid and sperm found on the two deep vaginal swabs from Santiago. (57 TRT 10862-10868, 10869.)

Sheriff's Deputy Nancy Zuniga stayed the night with Santiago when she (Santiago) returned to San Diego on December 14, 1984, to view a photographic lineup. (57 TRT 10899, 10932.) The next afternoon, Zuniga was given a ride home. Accompanying her were Santiago and Detectives Fullmer and Fisher. (57 TRT 10900-10901, 10933.) On the way, Fullmer drove past

appellant's house on Casa de Oro Boulevard and as the car drove past the house, Santiago looked intently at the house. (57 TRT 10934.) Fullmer made a u-turn and drove past the house again, slowing when Santiago asked him to. (57 TRT 10935-10936.) Santiago identified appellant's house as the house she had been taken to, listing the things about the house which she recognized, including its color, the concrete steps, and the circular driveway with a tree. (57 TRT 10950-10951.) No one in the car had directed Santiago's attention to the house prior to her identifying it. (57 TRT 10915, 10919, 10936-10937.)

PENALTY PHASE

PROSECUTION CASE

By way of stipulation, the prosecution presented Exhibit 271, which consisted of true and accurate court documents from the court file on appellant's August 16, 1973, conviction of rape while armed with a knife. (67 TRT 12579.)

DEFENSE CASE

Appellant was born in the Philippines, when his father was stationed there in the Navy. (67 TRT 12658; 69 TRT 13043-13044.) Appellant's father was described by appellant's sister and brother as a very cold, unsupportive man, who picked on the children; first on appellant's older sister, then on appellant. (67 TRT 12660, 12740.) Appellant's father had a temper and showed it around the children, using profanity and committing acts of destruction to the family house. (69 TRT 13045, 13049.)

Appellant suffered from asthma as a child and had a problem with bed-wetting. (67 TRT 12660; 69 TRT 13044.) Appellant's father got after him for

the bed-wetting. (69 TRT 13045.) He also made appellant mow the lawn when appellant was suffering from asthma. (69 TRT 13046.)

Appellant's mother got a job when he was 5 years old and worked evenings, so the children's father would be with them. (69 TRT 13048.) Apparently unbeknownst to the mother, appellant's father ruled the dinner table like a drill sergeant and would punish any violation of his rules with a hit to the head of the offender. (67 TRT 12661, 12742-12743.) On one occasion, when appellant's sister vomited salad at the dinner table, her father made her eat it in front of the other children. (67 TRT 12662.) Appellant's father would also strike the children with belts and telephone cords. (67 TRT 12662.) Appellant's father chased after him once with a 2 x 4. Finally, when appellant was 16 or 17 the beatings apparently stopped. (67 TRT 12662.)

Several of appellant's childhood friends and neighbors testified to the coldness and lack of feeling on the part of appellant's father. Curt Andrewson described appellant as starved for affection from his father, yet he never got it. (67 TRT 12600.) Appellant's father spent most of his weekends hunting and fishing, without the family. (67 TRT 12601; 69 TRT 13047.) The one time his father took him hunting, appellant was very excited. (67 TRT 12601.)

Martin Lantry, another childhood neighborhood friend, described appellant's father as always negative toward appellant. (67 TRT 12610.) According to Corrine Douhit, another childhood neighborhood friend, appellant was on his own most of the time and told her about abuse his father would inflict on his mother. (67 TRT 12651-12653.)

Appellant had a paper route growing up and was regarded as a good worker. (67 TRT 12602, 12610, 12613-12614, 12667.) Appellant was like a father to his younger brother. (67 TRT 12742.)

Appellant's parents separated when he was around 15 and appellant convinced his mother to give his father another chance. (69 TRT 13049.) But

she later left him again for good after trying to reconcile twice. (67 TRT 13049.)

Many of appellant's friends and family testified that appellant was kind, caring, helpful and generous, and good with children. Appellant watched over Andrewson's niece and showed affection to her. (67 TRT 12605.) When Mitch Hoehn came to San Diego he got a job with appellant; when he lost his residence, appellant let Hoehn move into appellant's residence as appellant had done for other workers. Appellant hosted barbecues for his friends. (67 TRT 12615-12619.) Appellant gave Bill Johnson a job, let Bill, Vicky and their child move in his house, and gave Bill and Vicky Johnson money for medication when their child was sick. (67 TRT 12622-12625.) Appellant was good with the Johnson's son and with Shannon Lucas' son, and concerned for the safety of the children. (67 TRT 12625-12626.)

Mark McEvoy, appellant's brother-in-law, and Catherine McEvoy, appellant's sister, testified appellant was very good with her daughter and a good influence on her, as well as being a help to McEvoy and a best friend to his sister. (67 TRT 12641-12644, 12662, 12665, 12772.) Appellant took his sister's son fishing and helped when she and her first husband had troubles. (67 TRT 12719-12720, 12727.) Appellant was also good with his brother's children and took his brother and the children in at one time. (67 TRT 12744.)

Appellant also helped Suzanne Herrin with her problems from her divorce and he was always nice to her daughter, Christine Jones. (67 TRT 12731-12733, 12737-12738.)

All of appellant's friends and family asked that appellant be given a life sentence. (67 TRT 12606, 12612, 12620, 12629, 12646, 12654, 12670, 12721, 12725, 12728, 12734, 12738, 12745, 12773; 69 TRT 13050.)

Attorney Gilham represented appellant in his 1973 rape case which resulted in a conviction. Gilham did not believe appellant was guilty of the

rape. (67 TRT 12704-12705.) Appellant was sent to Atascadero State Hospital by the California Youth Authority following his conviction. (67 TRT 12759.) Loyal Tallchief, appellant's unit supervisor at Atascadero for the first 6 months, testified appellant had no behavior problems, was elected to the inmate council, and became ward chairman. He also participated in a treatment program and seemed to gain insight into his relationship with his father and self-esteem. (67 TRT 12754-12755.)[46]

Clinical and forensic psychologist Alvin Marks diagnosed appellant under standards from three different editions of the Diagnostic and Statistics Manual (DSM), concluding with the DSM IIIR diagnosis of a personality disorder not otherwise specified. (67 TRT 12775-12780.)[47] He indicated appellant's problems of early life included a typical dysfunctional family of great severity. (67 TRT 12782.) Appellant picked up his father's hatred of women, but also loved women and raged inside at women and at his father. (67 TRT 12786-12787; 69 TRT 13033.) Also because of his father, appellant had a great fear of men and distrust of authority, though he was able to get along with men in an institutional setting. (67 TRT 12788, 12790; 68 TRT 13036.) Dr. Marks would expect appellant to obey jail authority and work within it. (68 TRT 12835; 69 TRT 13037.) Appellant had difficulty expressing his feelings but expressed remorse over the death of his wife, Shannon, and for the families of the victims in this case (though not admitting the offenses). (67 TRT 12794; 68 TRT 12836; 69 TRT 13038.)

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46. Although appellant's mother and siblings visited him while he was at Atascadero, his father never did. (68 TRT 12825; 69 TRT 13049.)

47. Dr. Marks testified that a personality disorder is a life-long maladaptive pattern of behavior (i.e., behavior destructive to self or others) where personality traits are inflexible and work against the person. (67 TRT 12781; 68 TRT 12829.)

Dr. Marks testified that appellant was not an antisocial personality, but admitted he had not reviewed the material from appellant's commitment at Atascadero. (69 TRT 13029, 13031.) (It was stipulated that appellant was diagnosed, pursuant to the DSM, by psychiatrist R. M. Shumann at Atascadero as antisocial personality, severe; alcoholism, habitual excessive drinking; and sexual deviation, aggressive sexuality; with a "very guarded" prognosis (69 TRT 13025)).

Craig Haney, a professor of psychology at the University of California at Santa Clara, testified to his studies of the prison environment. (68 TRT 12928-12929.) He described security conditions in California prisons which held LWOP prisoners (68 TRT 12942-12945), living conditions for those prisoners (68 TRT 12946-12951), prison society (68 TRT 12952), prison rules and punishment (68 TRT 12954), and factors in an inmate's prison adjustment (68 TRT 12956-12963).

Louis Nelson, a retired warden who spent time in his career from 1967 to his retirement in 1974 at San Quentin, testified that wardens prefer life prisoners because they settle down and help settle down new, and younger inmates, and also perform valuable work assignments. (67 TRT 12677-12679, 12688-12691.) He described security at San Quentin, the cells occupied by inmates, the "lifer's club," and the inmate council, which facilitates communication between the inmates and the administration. (67 TRT 12694-12698.) While there were exceptions, he maintained that the best indicator of how an inmate will perform is past prison conduct. (67 TRT 12699, 12701.)

PROSECUTION REBUTTAL

Laura Stewart, appellant's neighbor, testified that appellant and his wife Shannon had a violent relationship. (69 TRT 13076-13078.) They were constantly fighting out in the yard, awakening neighbors in the mornings with

cars racing on the street, and sheriffs and paramedics responding. (69 TRT 13078.) She had seen appellant hit Shannon a couple of times. (69 TRT 13078.) On one occasion when Shannon hit a pole in the driveway while driving a truck, appellant pulled her out of the truck by her hair and she yelled at appellant not to hit her. (69 TRT 13079.) When she was in the truck, appellant had yelled to someone to "get the chain" and said "I am going to get her." (69 TRT 13079-13080.) On another occasion when Shannon came to her house to use the telephone, she noticed that Shannon had a red mark from being hit and her hair was messed from being pulled. (69 TRT 13080.)

Sheriff's deputy Scott Kleinhesselink testified that during a search of appellant's cell he found a large plastic baggie of pruno, an inmate-made alcoholic beverage made from fruit sugar and bread (which contributed yeast). (69 TRT 13112-13113.) Deputy Kleinhesselink testified appellant's possession of pruno was a major jail rule violation. (69 TRT 13114.) Deputy Michael Barletta also testified to finding pruno in appellant's cell during another search and that appellant received two weeks loss of privileges as punishment for the major violation. (69 TRT 13123-13126.) It was stipulated that appellant's cell was searched and pruno was found a third time by Deputy Seitz, and appellant was punished. (69 TRT 13143.)

Deputy Mark Profeta testified he searched appellant's cell on an occasion when appellant was out to court and discovered a spear-like weapon, 4'11" long, and burned and sharpened at one end; appellant was again punished for a major violation. (69 TRT 13144-13148.)

DEFENSE SURREBUTTAL

Clifford Powell, a retired Sheriff's Deputy with 32 years experience, the last 15 years of which was as Assistant Sheriff for detention facilities, testified that pruno was not uncommon in jails, could be a major or minor violation

depending on the facts, and the facts of appellant's possession appeared minor. (70 TRT 13253-13256.) However, he acknowledged that problems were caused by intoxication in jails. (70 TRT 13259.)

Young Lee testified that he was an inmate housed in the tank where appellant was housed when Deputy Kleinhesselink found the spear-like weapon in appellant's cell. (70 TRT 13242-13243.) He testified that the inmates in the tank used a wooden handle from a squeegee or brush, with a burned end, to adjust the television which could not otherwise be reached from their cells. In fact, it was only from appellant's cell that the television could be reached with the handle. (70 TRT 13244-13245.) Lee requested and obtained another handle after the one in appellant's cell was seized. (70 TRT 13246.)

A defense investigator visited the tank and photographed an assistant positioned in appellant's cell, reaching the television with a stick they found in the cell. The television could not be reached by the assistant from any other cell, and the Sheriff's deputy who was present when the photographs were taken did not seize the stick they found in the tank. (70 TRT 13260-13264.)

ARGUMENT

INTRODUCTION

Unlike the typical opening brief, which generally sets forth the procedural history, the factual presentation at trial, and a chronological presentation of issues, appellant has chosen to segregate his discussion of the facts of the crimes and most of his guilt-phase issues by incident, which in many instances results in repeated presentation of the same issue under separate incidents. (See, e.g., 2A AOB 139-221 [challenging cross-admissibility and consolidation of Santiago and Jacobs cases under Jacobs case heading], 3 AOB 998-1000 [challenging cross-admissibility and consolidation of Santiago and Jacobs cases under Santiago case heading].) Because it needlessly confuses and multiplys issues, respondent will not follow appellant's lead.

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DISCOVERY, NOR DID IT ERR IN DENYING APPELLANT A HEARING ON HIS JURY COMPOSITION CHALLENGE BASED ON HIS OFFER OF PROOF WHICH FAILED TO MAKE A PRIMA FACIE SHOWING OF A VIOLATION OF THE FAIR CROSS-SECTION REQUIREMENT

Appellant contends the trial court erred in denying his motion for discovery of jury composition information and in rejecting his motion challenging the jury composition based on his offer of proof. He asserts those errors denied him his constitutional right to a jury drawn from a representative cross-section of the community. (1 AOB 25-40.) The trial court did not abuse its discretion in denying the discovery motion because appellant failed to make a particularized showing supporting a reasonable belief that underrepresentation existed in the jury pool or venire. The trial court also did not err in denying a

hearing on appellant's jury challenge motion based on his offer of proof which failed to show a prima facie violation of the fair cross-section requirement.

A. Proceedings In The Trial Court

On August 8, 1985, in case CR 73093, the superior court ordered the San Diego County Jury Commissioner to provide appellant's attorneys with access to the July 15, 1985, qualified jurors list and all related materials and data,[48] and permit a questionnaire to be distributed to prospective jurors on August 19, 26, and 28, 1985.[49] (1 CT 158-160.) The information was provided, and the questionnaire was distributed and results obtained. (10 CT 2106 [DA representation that information provided]; 2126 [questionnaire form with results].)

A similar order was made on November 25, 1985, requiring access to the December 1985 and January 1986, qualified jurors lists and related material and data, and permitting distribution of the same jury questionnaire to prospective jurors on December 2, 9, and 18, 1985, and January 6, 13, and 15, 1986. (10 CT 2128-2130.) The information was again provided, and the questionnaire was distributed and results obtained. (10 CT 2106, 2132.)

On June 30, 1986, in case CR 75195, the superior court ordered the assistant jury commissioner to permit appellant's counsel to examine qualified juror lists, certified juror lists and juror pay cards for the preceding 12 months. (10 CT 2135.) That access was provided. (10 CT 2107.)

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48. Access was to include a hard copy of the list, access to summons collected from jurors on the list, access to written excuses from jurors on the list, the names and addresses of jurors who provided written excuses, and the names and address of jurors who did not appear.

49. The questionnaire sought information on the prospective jurors' age, residence, ethnicity, income, prior jury experience, sex, and whether they would receive their regular salary during jury service.

A motion for discovery of additional jury information was filed in both cases on September 26, 1986. (10 CT 2061.) This motion required 33 items of discovery from the jury services coordinator. (10 CT 2063-2068.) The DA's opposition was filed October 23, 1986. (10 CT 2105.) Appellant's reply was filed October 28, 1986. (10 CT 2200.)

At the conclusion of the hearing on the defense motion, defense counsel withdrew his request for 14 items (1, 2, 3, 6, 10, 11, 12, 13, 14, 15, 19, 20, 29 and 30; 46 PRT [50] 8537-8539, 8541-8542, 8543-8547, 8549) and conceded that 14 items did not exist (7, 8, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28, 32, and 33; 46 PRT 8542, 8546-8550). Defense counsel also modified the request for the remaining items to a time period of one year. (46 PRT 8540.) Those items which remained were 4, 5, 9, 18, and 31. (46 PRT 8550-8551.)[51] After hearing

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50. "PRT" refers to the Reporters Transcript of the pretrial and in limine hearings.

51. Those items were:

> 4. The qualified jury lists as defined by CCP section 193.2(g) or the weekly or monthly list of persons to whom jury summons are sent. . . .
>
> 5. A list of those persons who reported for service pursuant to summons for each period described in item 4 above.
>
> 9. A list of those persons excused or excluded when the list of potential jurors is reduced from item 4 above to item 5 above and the reasons for each such exclusion.
>
> 18. The current procedures or policies for the preparation of the master jury list pursuant to CCP section 204.5.
>
> 31. The names and designation of the computer program used to implement jury selection in San Diego County including, but not limited to, the name or designation of the computer program designed to ensure implementation of the random

argument from counsel, the court (Judge Orfield) denied the discovery motion. (46 PRT 8582-8583.)

On November 19, 1986, the defense submitted another request for an order for jury information. (39 CT 8391-8395; 50 PRT 6-8.) The proposed order requested that the defense be permitted to submit a questionnaire to potential jurors on November 24, and December 1, 3, 8, and 15, and have access to the list of qualified jurors, the summons issued, and information on people who did not appear for jury duty or were excused. (39 CT 8393-8385; 50 PRT 31-32.) The defense contended that the previous questionnaires were out of date. (50 PRT 33.) On the DA's uncontradicted representation that the request for access to information was considered and denied in the previous hearing by Judge Orfield, the court (Judge Kennedy) refused to reconsider that request. (50 PRT 35, 52.) After hearing testimony from Deputy Jury Commissioner David Norwood (50 PRT 48-51), the court granted the defense request to submit a questionnaire to potential jurors on the dates indicated. (39 CT 8393-8395; 50 PRT 52.) The questionnaires were submitted as ordered. (58 PRT 1376.)

On March 10, 1987, appellant requested another order for discovery of juror information. (45 CT 9968-9972; 79 PRT 4231.) According to defense counsel, "[i]t is identical" to the request filed on November 19, 1986. (79 PRT 4173.) The proposed order requested that the defense be permitted to submit a questionnaire to potential jurors on March 23 and 30, and April 1, 6, 13, 15, and 20, 1987, and have access to the list of qualified jurors, the summons issued, and information on people who did not appear for jury duty or were excused. (CT 9968-9970.) However, the defense agreed to the court denying access to the list of qualified jurors. (79 PRT 4236.) After reviewing the prior

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selection process and the source for that program. (10 CT 2064-2067.)

rulings (by Judge Orfield and Judge Kennedy) and citing Code of Civil Procedure section 170[52] and the lack of any new or additional justification for the previously denied request, the court (Judge Hammes).[53] modified the proposed order to permit the juror questionnaires and delete the other juror information (CT 9968-9969; 79 PRT 4239-4243.) However, the judge also noted that if "you find something different to persuade me otherwise, you may certainly attempt to do so. . . ." (79 PRT 4243.)

On June 13, 1988, the trial court heard argument on the need for an evidentiary hearing on appellant's challenge to the jury composition. (250 PRT 25635.) The defense represented that in addition to the evidence already before the court in previous filings, it would present evidence that in surveys conducted in January and February of 1988, 10.7% of the persons reporting for jury duty were Hispanic. (250 PRT 25638.) The defense also represented that it would present expert testimony that 16.4% of the persons listed on the jury master list (prepared from lists obtained from the DMV and the Registrar of

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52. While the Reporter's Transcript has the judge citing and quoting Code of Civil Procedure section 170, it appears the judge was paraphrasing from Code of Civil Procedure section 170.3, subdivision (b)(3) (see 71 PRT 2965), which provided:

> In the event that grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge.

The subdivision was later renumbered subdivision (b)(4), where it currently appears.

53. Prior to this hearing, Judge Kennedy had been disqualified from the cases.

Voters) had Hispanic surnames. (250 PRT 25639.) However, after excusing persons who were not citizens or did not speak English well enough to serve on a jury, 14% of the jury master list was made up of persons with Hispanic surnames. (250 PRT 25639.) The defense indicated that the 1980 county population figures showed Hispanics over the age of 18 as 12.3 %, but their expert believed the current figure was more consistent with the master list percentage (i.e. 16.4%). (250 PRT 25640.)[54/] The defense also offered to prove that the federal court did not experience the same disparity, and that the federal court payments to jurors was greater than the county. (250 PRT 25641.)

As to youth as a cognizable group, the defense represented that it would present evidence of a 2/3 disparity between the composition of 18-to-24 year olds in the general population and in the persons appearing for jury duty. (250 PRT 25642.)[55/] It also offered testimony of another expert concerning a survey conducted to determine the existence of attitudinal differences between youths and the general population. (250 PRT 25643-25649.)

The trial court ruled, based on the defense offer of proof, that there was an insufficient showing of underrepresentation of Hispanics. (250 PRT 25666-25667.) While concluding that there was a showing of underrepresentation of persons in the 18-to-24 year age group (250 PRT 25696), the trial court ruled,

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54. However, the defense later agreed with the trial court that the comparison it was making was between the percentage of eligible Hispanic jurors on the master list and the percentage of Hispanics among the persons who appeared for jury duty, and that the percentage of jury eligible Hispanics in the general population was "unknown." (250 PRT 25653.)

55. The defense later referred specifically to figures from exhibits included in the prosecution's supplemental points and authorities (57 CT 12420-12473) showing a 1980 census figure of 22.7% for persons 18-24, compared to 9.1% of persons in that age group in persons who appeared for jury duty in March and April 1987(57 CT 12451), as well as adjusting those figures (22.1% and 8.4%, respectively) for citizenship and English (57 CT 12471). (250 PRT 25694.)

based on the defense offer of proof, that persons in that age group are not a cognizable group. (250 PRT 25709-25711.)

B. The Trial Court Did Not Abuse Its Discretion In Denying Discovery

> It is uncontroverted that '[i]n California, the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution

(*Taylor v. Louisiana* (1975) 419 U.S. 522, 530 [42 L.Ed.2d 690, 698, 95 S.Ct. 692]) and by article I, section 16 of the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258, 272 [148 Cal.Rptr. 890, 583 P.2d 748]).' (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 740 [263 Cal.Rptr. 503, 781 P.2d 537].) (*People v. Jackson* (1996) 13 Cal.4th 1164, 1194.)

In seeking discovery of information necessary to show a prima facie violation of the fair cross-section requirement, a defendant is not required to make a prima facie case of underrepresentation. Instead, a defendant is required to make "a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as a result of practices of systematic exclusion." (*Ibid.*)[56] A trial court's ruling on a discovery motion is subject to review for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 953.)

Appellant contends Judge Hammes erroneously denied the motion because she deferred to Judge Orfield's previous ruling under Code of Civil Procedure section 170, and Judge Orfield erred in previously denying the

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56. This standard for discovery appears consistent with this Court's general requirements for obtaining discovery which were used by the trial court; i.e., specificity in describing the information sought and a plausible justification for disclosure. (See *People v. Jenkins, supra*, 22 Cal.4th 900, 953; *People v. McPeters* (1992) 2 Cal.4th 1148, 1171.)

motion.[57] However, Judge Orfield did not abuse his discretion in denying the motion.

In challenging Judge Orfield's ruling, appellant relies on the results of the two surveys conducted by defense expert Dr. Kaplan, conducted in August 1985, and in December 1985/January 1986, and on the opinions of defense expert Dr. Butler. Drs. Kaplan and Butler were two of several witnesses testifying in the hearing on appellant's jury discovery motion. (43 PRT 8027-46 PRT 8583.) At the conclusion of that hearing, the trial court not only denied the discovery motion, but found that Dr. Butler "could not state with any degree of certainty the reasons for his recommendations" and Dr. Kaplan's "statistics seem to waffle . . . depending upon how you look at them . . . and it seems that his estimations tend to favor the side that he is employed by. . . ." (46 PRT 8583.) The trial court also found that the amount of material requested was "extremely voluminous" and would take a substantial period of time to gather and analyze. (46 PRT 8582.) The trial court noted that the jury commissioner's compliance with the three prior orders required a "very substantial amount of work" and "[n]othing has been shown in any of these studies which would indicate that further and a deeper study should be made." The trial court's findings are fully supported by the record of the hearing on the motion.

In the two jury surveys conducted at the defense request (August 1985 and December 1985/January 1986), jurors were asked their ethnicity and if they had not indicated Hispanic, whether they were of Hispanic origin or

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57. However, as the chronology indicates, appellant skipped a step. Judge Kennedy heard the renewed motion after it had been denied by Judge Orfield and refused to reconsider it absent changed circumstances, which were not presented. However, Judge Kennedy did permit the defense to submit the questionnaire to the new jurors. (50 PRT 32.) Judge Hammes reviewed the rulings of both Judge Orfield and Judge Kennedy, and followed Judge Kennedy's order under Code of Civil Procedure section 170. (79 PRT 4242.)

background (questions 4 and 5). (See 10 CT 2126, 2132.)[58] In the jury commissioner's compilation of the results for both questions, 7.8% of the jurors in the first survey indicated they were Hispanic and 9.5% of the jurors in the second survey indicated they were Hispanic, with the overall Hispanic representation at 8.96%. (46 PRT 8485-8490.)[59]

However, as Geraldine Stevens, the coordinator for jury services, testified, one cannot tell how many of the surveyed jurors were Hispanic simply from the answers to questions 4 and 5. (43 PRT 8114.) In both surveys, a substantial number of jurors who should have answered question 5, did not. (46 PRT 8497-8498, 8500.) Thus, in the first survey, Dr. Kaplan found that in answer to question 4 (ethnicity), 6% of the jurors indicated Hispanic. Thus, 94% of the jurors (i.e., approximately 565) should have answered question 5, but 41% did not. According to the jury commissioner's results, there were 203 jurors who should have answered question 5, but did not answer. In the second survey, the jury commissioner counted 1153 questionnaires in which 78 jurors indicated Hispanic in response to question 4, leaving 1075 jurors who should have answered question 5. However, only 597 did answer question 5, leaving 478 jurors who should have answered question 5, but did not. (46 PRT 8502; see 10 CT 2132.)

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58. Question 4 asked:

In which one of the following groups are you: White; Hispanic; Asian; Amer. Indian; Other.

Question 5 asked:

IF YOU DID NOT CHECK HISPANIC IN Q. 4: Are you of Hispanic origin or background (Mexican, Cuban, Puerto Rican, South or Central American?)

59. In Dr. Kaplan's results, both jury surveys indicated 8% Hispanic. (44 PRT 8276, 8278, 8281.)

As Dr. Kaplan conceded, whether the percentages obtained from the survey were accurate required an assumption that all of the jurors who should have answered question 5, but did not (681 jurors), were not Hispanic. (46 PRT 8498.) As the prosecutor pointed out in his argument, if one were to apply the percentage of Hispanics in the jurors who did answer question 5 (4.7%) to those who failed to answer question 5, that would add 32 Hispanics and raise the juror composition to 10.8%. (46 PRT 8562-8563.)[60/]

Appellant's figures for the Hispanic composition of the county are equally, if not more, malleable. Dr. Butler testified that according to the 1980 census, Hispanics constituted 14.74% of the San Diego County population. (44 PRT 8314.) Similarly, Dr. Kaplan testified that the Hispanic population for San Diego County according to the 1980 census was "approaching 15 percent." (44 PRT 8273.) From the 1980 figures, Dr. Butler projected the 1985 Hispanic population at 17.25%. (44 PRT 8315-8316.) However, both defense experts conceded that the census figure did not represent and was, in fact, higher than the jury-eligible Hispanic population. (44 PRT 8287, 8290, 8377-8380.) Neither expert had any data demonstrating the 1985 jury-eligible Hispanic population. (44 PRT 8287, 8406.) Indeed, Dr. Butler conceded that he did not know if there was underrepresentation of Hispanics in San Diego juries. (44 PRT 8406-8407.)

However, Dr. Butler had participated in an Orange County case in which population projections had been made. (44 PRT 8389-8390.) Similar to San Diego County, according to the 1980 census, Hispanics were 14.8% of the Orange County population. However, those Hispanics who were 18 years of age or older and citizens accounted for only 8.6% of the Orange County

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60. It is interesting to note that when arguing his jury composition motion before the trial court in 1988, appellant represented that the composition of persons showing up for jury duty was approximately 10.7% Hispanic. (250 PRT 25638.)

population. (44 PRT 8395.) Additionally, when English proficiency was factored in, the Orange County Hispanic population dropped to 8.4%. (44 PRT 8396.) Dr. Butler made a number of population projections for the Orange County Hispanic population in 1985, using different models, and those projections ranged from 15.3% to 19.8%. (44 PRT 8390-8391.) However, Dr, Butler considered the method used to obtain the 19.8% figure to be arbitrary. (44 PRT 8402.) The population projection which Dr. Butler found "very reasonable" was 17.36%. (44 PRT 8403-8404.) Based on a general Hispanic population of 15.77%, which was one of the projections, Dr. Butler had calculated the 1985 Orange County jury-eligible Hispanic population as 9.07%. (44 PRT 8397-8398.)

The evidence presented by appellant in support of the discovery motion demonstrated very little about either the composition of San Diego juries or the composition of the county population, and failed to make "a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as a result of practices of systematic exclusion." (*People v. Jackson, supra,* 13 Cal.4th at p. 1194.) Indeed, despite having the opportunity to examine the coordinator for jury services, appellant developed no evidence of an improper feature or manipulation of the jury selection process. It was appellant's position that merely by showing a disparity, he was entitled to have that disparity remedied. (See 250 PRT 25659.) But as this Court has said, a defendant "cannot establish a prima facie case of systematic exclusion of Hispanics merely by presenting statistical evidence of underrepresentation in the jury pool, venire, or panel." (*People v. Ayala* (2000) 23 Cal.4th 225, 256.) A defendant "must show that any underrepresentation 'is the result of an improper feature of the jury-selection process.'" (*Ibid.*, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1160.) In the discovery the defendant must make "a particularized showing supporting a reasonable belief that underrepresentation

in the jury pool or the venire exists as a result of practices of systematic exclusion." (*People v. Jackson, supra,* 13 Cal.4th at p. 1194, underlining added.) Not only did appellant fail to make a particularized showing supporting a reasonable belief that underrepresentation of Hispanics existed in the jury pool or venire, he also failed to make a particularized showing supporting a reasonable belief that any such underrepresentation existed as a result of practices of systematic exclusion.

Moreover, in conformance with the prior orders of August 8, 1985, and November 25, 1985, appellant had already been given the qualified jury list, the summons of jurors who appeared for jury duty, the summons and affidavits of jurors who had been excused from jury duty, and the names and addresses of summoned jurors who did not appear, for seven different dates, from July 15, 1985, to January 15, 1986. (43 PRT 8101-8103, 8115-8116.) In addition, in conformance with the order of June 3, 1986, appellant had already been given the qualified juror lists, the certified lists, and the juror pay cards for a full year. (43 PRT 8121-8122.) A substantial amount of time had been expended in complying with those requests and the requested information promised to take even longer both to produce and to analyze. (46 PRT 8529-8531.)

Finally, appellant was not denied any further discovery. During the discovery hearing, appellant was permitted to elicit substantial information from the superior court coordinator for jury services Geraldine Stevens, from deputy jury commissioner David Norwood, and from county electronic data processing senior systems analyst Karen Kohlscheen, on the county jury selection process. (43 PRT 8027-8184; 44 PRT 8187-8236.) Judge Kennedy declined to reconsider Judge Orfield's ruling, but ordered that appellant be permitted to conduct further jury room surveys in November and December, 1986. (39 CT 8393-839.) Judge Hammes also ordered that appellant be permitted to conduct further jury room surveys in March and April, 1987. (45 CT 9968-9970.)

Additional surveys were also conducted in January and February, 1988. (250 PRT 25638.)

Under all the circumstances, it cannot be said that the trial court abused its discretion in denying the further requested discovery.

Appellant has also failed to show that he was prejudiced by the denial of the discovery motion. (*People v. Jenkins, supra,* 22 Cal.4th at p. 956 [defendant must show prejudice from the erroneous denial of discovery].) Appellant contends the denial prevented him from obtaining evidence necessary to fully meet his prima facie burden. (1 AOB 31.) However, the information he sought had been fully provided through the previous discovery orders. (Cf. 10 CT 2122-2124, 2128-2130, 2134-2135.) Despite having over a year's worth of qualified jury lists, certified jury lists, summons, excuse affidavits, and pay cards, appellant used none of that information to support his request for another year's worth of the same information. (See fn. 45, *supra*.) Appellant's claim of prejudice is nothing but speculation. Denial of the discovery motion did not deny appellant an opportunity to litigate an issue; he was simply denied the opportunity to conduct lengthy and burdensome discovery when he failed to show a plausible justification for doing so. Thus, his claim of constitutional error also fails.

Appellant also contends Judge Hammes abused her discretion by invoking Code of Civil Procedure section 170[61] as a basis for not re-visiting a ruling made by Judge Orfield. (AOB 32-33.) He contends that he had good cause to revisit the ruling because the previously supplied jury data was no longer relevant because it was too old and there was a new computer system being used to make the lists. However, neither of these points changes the fact that appellant did not use any of the allegedly outdated data to support his original discovery motion (his motion was supported only by the jury room

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61. See footnote 50, *supra*.

questionnaire surveys which he was allowed to update), he did not offer any new evidence, and he failed to show plausible justification for the requested discovery.

Appellant also contends Judge Hammes' reliance on Code of Civil Procedure section 170 demonstrates judicial bias because she declined to follow another ruling by Judge Kennedy applying *People v. Kelly* (1976) 17 Cal.3d 24, to handwriting experts. (1 AOB 33.) Appellant did not challenge Judge Hammes and, thus, his claim is waived. (*People v. Hernandez* (2003) 30 Cal.4th 835, 855; *People v. Davenport* (1995) 11 Cal.4th 1171, 1196; *People v. Downey* (2000) 82 Cal.App.4th 899, 910.) Moreover, the claim is not supported by the record.

Judge Hammes was assigned to hear both cases on February 9, 1987, after the disqualification of Judge Kennedy. (69 CT 15268.) Among the variety of motions which had been filed but not yet heard by Judge Kennedy prior to his disqualification was a defense motion filed December 11, 1986, challenging, inter alia, admission of handwriting expert opinion testimony under *Kelly*. (43 CT 9263-9280.) When raised before Judge Hammes on March 10, 1987, she pointed out the potential inapplicability of *Kelly*, depending on whether handwriting analysis was "a scientific test." (79 PRT 4095, 4098.)

During subsequent argument, the defense essentially conceded that handwriting analysis did not involve a new scientific technique, but was an improper area for expert testimony, which was subject to an objection under *Kelly*. (79 PRT 4107-4108.) However, as the trial court correctly pointed out, the validity of an area of expert opinion under Evidence Code section 801[62] is

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62. Evidence Code section 801, provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

not governed by *Kelly* unless it involves "a technique, process, or theory which is new to science and, even more so, the law" and "the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1157.) Thus, the trial court ultimately determined to place the burden on the defense to demonstrate that handwriting analysis was subject to *Kelly*. (88 PRT 5461-5464; 90 PRT 5467-5471.)

The issue was in this posture when, approximately a month-and-a-half later, the defense asserted that Judge Kennedy had previously ruled that the prosecution would bear the burden of proving that handwriting analysis meet the requirement of *Kelly*. (111 PRT 8115.) The transcript passage cited by the defense was to the prosecution's cross-examination of a handwriting expert presented by the defense during a *Hitch/Trombetta*[63] motion. (*Ibid.*, citing 53 PRT 614; see 53 PRT 602.) As Judge Hammes noted, the earlier ruling by Judge Kennedy was not a ruling on the motion (which had not yet been filed), but an evidentiary ruling, unlike her previous ruling which had followed briefing and argument, and which Judge Hammes found to be good cause under

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> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
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> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

63. *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413]; *People v. Hitch* (1974) 12 Cal.3d 641.

the statute. (103 PRT 8117.)[64] Thus, the factual basis for appellant's assertion of impartiality by Judge Hammes fails. Appellant's reliance on *Wardius v. Oregon* (1973) 412 U.S. 470 [93 S.Ct. 2208, 2212, 37 L.Ed.2d 82], is waived for having failed to raise it in the trial court (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 422), and is misplaced because the trial court applied the same statutory standard in both instances.

C. Appellant's Offer Of Proof Was Insufficient To Support His Request For A Hearing On His Jury Challenge Motion

> Under the federal and state Constitutions, an accused is entitled to a jury drawn from a representative cross-section of the community. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *Duren v. Missouri* (1979) 439 U.S. 357, 358-367 [58 L.Ed.2d 579, 583-588, 99 S.Ct. 664]; *People v. Howard* (1992) 1 Cal.4th 1132, 1159 [5 Cal.Rptr.2d 268, 824 P.2d 1315].) That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. (*People v. Mattson* (1990) 50 Cal.3d 826, 842 [268 Cal.Rptr. 802, 789 P.2d 983].) 'In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.' (*Duren v. Missouri, supra,* 439 U.S. at p. 364 [58 L.Ed.2d at pp. 586-587]; *People v. Howard, supra,* 1 Cal.4th at p. 1159.)

(*People v. Burgener* (2003) 29 Cal.4th 833, 855-856.)

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64. Moreover, the complete passage demonstrates that Judge Kennedy was not making a final ruling; he was simply ruling on the evidentiary objection and leaving the applicability of *Kelly* to handwriting to be resolved after the prosecution had an opportunity to address the issue in response to the defense motion. (53 PRT 613-614.)

As noted in the previous section delineating the trial court proceedings, the defense offered to prove an absolute disparity of 3.3% between Hispanics appearing for jury duty (10.7%) and jury-eligible persons with Hispanic surnames from the master list (14%). Judge Hammes concluded that this was an insufficient showing of underrepresentation of Hispanics. (250 PRT 25666-25667.)[65] That ruling was correct.

The 3.3% absolute disparity is "well within the tolerance accepted by this court . . . and by the lower federal courts." (*People v. Burgener, supra,* 29 Cal.4th at p. 860, citing *People v. Ramos* (1997) 15 Cal.4th 1133, 1156 [absolute disparity between 2.7 and 4.3 percent] and other cases; see also *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1068 [absolute disparity of 7.7% or less].)

While acknowledging the foregoing, appellant finds solace in this Court's recognition that the United States Supreme Court has not spoken on the limit of permissible disparity. (1 AOB 35, citing *People v. Burgener, supra,* at p. 856-857.) However, he fails to explain how the High Court's lack of specification supports his claim of error. The fact remains that this Court and the lower federal courts do not find a 3.3% absolute disparity sufficient.

Appellant next relies on three appellate court cases. (*People v. Alexander* (1985) 163 Cal.App.3d 1189; *People v. Buford* (1982) 132 Cal.App.3d 288; and *People v. Jones* (1984) 151 Cal.App.3d 1027.) Appellant's reliance is misplaced. In *Buford*, the disparity ranged from 3.7% to 7.3%. (*People v. Buford, supra,* 132 Cal.App.3d at p. 296.) The appellate court did not find that range to be adequate to meet the second requirement of

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65. Hispanics are a cognizable group. (*People v. Ochoa* (2001) 26 Cal.4th 398, 426.)

Duren[66] and, instead, applied those figures to a statistical significance test. (*Ibid.*) Using that test, the appellate court found the probability of those disparities resulting from chance to be "so small as to warrant the inference, in the absence of explanation, that the disparity results from systematic exclusion." (*People v. Buford, supra,* 132 Cal.App.3d at p. 297.) Thus, the *Buford* court combined the second and third requirements, and found both met by the statistical significance test, which this Court later said was error. (*People v. Morales* (1989) 48 Cal.3d 527, 546 ["Like the dissent in *Buford*, we believe that a prima facie case of systematic exclusion or underrepresentation of a distinctive class is not made merely by demonstrating that the county's race/class neutral jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw."].)

Like the *Buford* court, in *People v. Alexander, supra*, 163 Cal.App.3d 1189, the alleged prime facie showing of underrepresentation relied on expert opinion evidence that the 1.8% and 6.2% absolute disparities were not the result of chance. (*Id.* at p. 1199.) But *Morales* made it clear that such testimony is insufficient to establish either systematic exclusion or underrepresentation. (*People v. Morales, supra,* 48 Cal.3d at pp. 546.) Moreover, appellant's assertion that a 1.8% absolute disparity supports a prime facie showing for the second *Duren* requirement, is so far out of the mainstream as to justify overruling *Alexander* to the extent it supports such a claim.[67]

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66. *Duren v. Missouri* (1979) 439 U.S. 357, 358-367 [99 S.Ct. 664, 58 L.Ed.2d 579, 583-588].

67. In fact, the *Alexander* court essentially denuded the third requirement of systematic exclusion by finding that this Court's decision in *People v. Harris* (1984) 36 Cal.3d 36, held that systematic exclusion is shown when a disparity exists. (*People v. Alexander, supra,* 163 Cal.App.3d at p. 1198; *id.* at p. 1199.) But that is simply incorrect (*People v. Stansbury* (1993)

In *People v. Jones, surpa*, 151 Cal.App.3d at p. 1029, the same court which decided *Buford* further denuded the *Duren* requirements by implying that an absolute disparity of 3.9%, standing alone without even expert testimony on the chance that such disparity occurred at random, meets both the second and third requirements. (*People v. Jones, surpa*, 151 Cal.App.3d at pp. 1031-1032.) This Court's subsequent decisions in *Morales* and the other cases cited in this argument demonstrate the fallacy of that implication. (See also *People v. Bell* (1989) 49 Cal.3d 502, 527 ["[i]t does not appear that a disparity of [5 percent] renders the representation . . . less than fair and reasonable. . . ."]; *id.* at p. 528, fn. 15 ["It is far from clear, however, that a 5 percent disparity satisfies this element of the defendant's prima facie case under the second prong. We have found no jurisdiction that so holds."].)[68/]

Impliedly acknowledging the lack of evidence of a significant disparity, appellant claims the disparity might have been higher, but he was denied discovery needed to explore that possibility. (1 AOB 36.) The assertion falls short for several reasons. First, he concedes that the existence of a higher disparity was speculation, not an offer of proof. The trial court cannot be faulted for failing to hold a hearing simply because there was a speculative basis for finding in appellant's favor when the proffered evidence was insufficient. Second, to the extent appellant means to imply that an erroneous discovery

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4 Cal.4th 1017, 1061-1062) and for that additional reason, *Alexander* should be overruled.

68. In a footnote, appellant points to his expert's earlier testimony before Judge Kennedy in which he asserted that the then-current disparity (2.8%) was not a result of chance. (1 AOB 36, fn. 21.) However, as already pointed out, *Morales* made it clear that such testimony is insufficient to establish either systematic exclusion or underrepresentation. (*People v. Morales, supra,* 48 Cal.3d at pp. 546.)

denial was responsible for his deficient showing, the record demonstrates that is incorrect.

Appellant used the jury commissioner's master list[69] from the current year (1988) to obtain his base level percentage for jury eligible Hispanics (14%). (250 PRT 25638-25639.)[70] Appellant claims the jury eligible figure might been shown to be higher if he had access to current county population figures rather then 1980 census figures. However, none of his motions which are the subject of this issue sought county population figures. (10 CT 2063; 39 CT 8391-8395; 45 CT 9968-9972.) Appellant cites his counsel's statement that a current population sampling had been denied. (1 AOB 36, citing 250 PRT 25661.) However, appellant points to nowhere in the current record which evidences such a request having been made. In any case, defense counsel also told the trial court that in his expert's opinion the 16.4% Hispanics on the master list was consistent with the current population. (250 PRT 25640.)

The trial court also denied appellant an evidentiary hearing on his claim that 18-24 year olds were underrepresented. While concluding that the offer of proof supported a prima facie finding on the second requirement of significant disparity based on an absolute disparity of approximately 13.6%, the trial court concluded that appellant's offer of proof failed to show that the age group he chose was a distinctive group in the community (requirement one). (250 PRT 25709-25710.) The trial court's ruling was correct.

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69. Interestingly, appellant had requested access to the master list as part of his September 26, 1986, discovery motion (10 CT 2063 (item 3)), but withdrew that request after the hearing. (46 PRT 8539.)

70. Defense counsel represented that comparing the master list to a census program listing recognized Hispanic surnames, resulted in a finding that 16.4% of the master list had Hispanic names. (250 PRT 25638-25639.) He further represented that when that list is considered in light of those who are excused because they are not citizens or do not adequately understand English, the Hispanic portion of the master list is reduced to 14%. (250 PRT 25639.)

While this Court has yet to decide whether youth is a distinctive class, it has noted that the courts of appeal have rejected the claim a number of times. (*People v. Burgener, supra,* 29 Cal.4th at p. 856; see also *People v. McCoy* (1995) 40 Cal.App.4th 778, 783-784.) Groups which are recognized as distinctive are generally relatively large and well defined in the community, and contain individuals who have a common background or experience and because of that commonality share a distinct perspective. (*People v. England* (2000) 83 Cal.App.4th 772, 782.) Groups which are otherwise heterogeneous are not recognized as distinct merely because of general agreement on a particular matter. (*Ibid.*) Thus, a group which includes both men and women, married and single, some with children and some without, and diversity with regard to race, ethnicity, wealth and income, is not distinct. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1216; *People v. Nicolaus* (1991) 54 Cal.4th 551, 571, fn. 2.)

Cognizability is a question of fact for the trial court. (*People v. Henderson* (1990) 225 Cal.App.3d 1129, 1153, overruled on other grounds in *People v. Davis* (1994) 7 Cal.4th 797, 805, 810, fn. 2.) When the proffered evidence is the opinion of an expert, the trial court is not obliged to accept that opinion and may completely reject the testimony so long as its decision to do so it not arbitrary. (*People v. McCoy, supra,* 40 Cal.App.4th at p. 785.)

Appellant claims Judge Hammes erred in not holding an evidentiary hearing because his offer of proof was sufficient. However, he does not discuss that offer or Judge Hammes' findings which resulted in her decision that appellant could not prove youth was a cognizable group. A review of the offer in light of the law and Judge Hammes' findings demonstrates nothing arbitrary or erroneous in her ruling.

Appellant presented no evidence that the age group he chose (18 to 24 year olds) was not heterogeneous with respect to race, ethnicity, and sex. (See *People v. DeSantis, supra,* 2 Cal.4th at p. 1216.) Moreover, as Judge Hammes

concluded (250 PRT 25709-25710; see *id.* at 25697-25698), the age group appellant chose (18 to 24 years old) was arbitrary; i.e., the survey, which was appellant's primary evidence, did not demonstrate any homogeneity with respect to viewpoints. In addition to being arbitrary, the trial court also found that the survey did not demonstrate that the group held any distinct viewpoint. (250 PRT 25710.) Thus, in two respects, appellant failed to present evidence which demonstrated that youth, as he defined it, was a distinctive group.

Having failed to present in his offer of proof, evidence showing a substantial underrepresentation of Hispanics or that youth (18 to 24 years old) is a distinctive group, the trial court did not err in denying appellant an evidentiary hearing on his jury challenge motion.

While the trial court did not address the third requirement for a jury challenge, the record also demonstrates that appellant proffered no evidence of a systematic exclusion of either group. "The third prong requires defendant to show the state selected the jury pool in a constitutionally impermissible manner that was the probable cause of the disparity." (*People v. Ochoa, supra*, 26 Cal.4th 398, 427.) "A defendant cannot carry the burden of showing a systematic exclusion 'with nothing more than statistical evidence of disparity. One must, in addition, show that the disparity is the result of an improper feature of the jury-selection process.'" (*People v. Stansbury, supra*, 4 Cal.4th 1017, 1061-1062.) In *People v. Ramos, supra,* 15 Cal.4th at p. 1156, this Court said,

> The jury commissioner testified the master list is compiled by merging randomly selected names of registered voters and motor vehicle licensees, both of which lists are neutral regarding ethnicity and national origin. (Cf. *People v. Sanders* (1990) 51 Cal.3d at pp. 494-496 [sole reliance on voter registration list constitutionally permissible].) The criteria for jury disqualification and for granting exemptions, excusals, and deferments disregard such considerations as well. (See Code Civ. Proc., §§ 203, 204; Cal. Standards Jud. Admin., § 4.5.) Nor did defendant present any evidence the jury commissioner and his staff fail

to apply them evenhandedly based on written policies guiding their implementation.

The evidence proffered below included similar testimony. (250 PRT 25685-25686.) Gerry Stevens, the coordinator for jury services testified that the jury commissioner's office uses two source lists, one from the DMV and one from the Registrar of Voters, which are merged and then duplicates are removed. (43 PRT 8046; see also *id* at 8036.) The resulting list - at that time numbering in excess of 1.7 million names - is reduced by a random draw to a mater list of approximately 250,000 names for the San Diego County Superior Court judicial district. (43 PRT 8047.) From that master list, approximately 1000-1600 names, which make up the qualified lists, are randomly drawn and sent summons to appear each Monday and alternate Wednesdays. (43 PRT 8048-8052, 8063, 8218.) Summoned jurors may be excused, if they fill out the reverse of the summons, which contains and affidavit, with a valid reason; or deferred. (43 PRT 8058, 8071.) There was no evidence that the jury selection process was other than neutral regarding ethnicity, national origin, and age.

Appellant impliedly acknowledges his failure to offer any evidence of systematic exclusion by claiming he was denied such evidence when his discovery motions were denied. However, appellant fails to recognize that he substantially reduced the discovery request which was denied; he had over a year's worth of data from the jury commissioner's office which he did not present in support of his discovery motion, and during the hearing on his discovery motion he had a virtually unfettered opportunity to question the jury commissioner, the coordinator of jury services and a deputy jury commissioner, yet asked no questions concerning whether improper factors were used at any point in the process.

The reason for the failure appears during the argument before Judge Hammes when defense counsel told the trial court that once a disparity had been adequately demonstrated, "it is the problem of the county to, in effect,

rectify that disparity and make things equal." (250 PRT 25641; see also *id.* at p. 25659.) Thus, the defense failure was not from a denial of access, but from an incorrect position.

Having given the defense an opportunity to present their evidence unchallenged by cross-examination or rebuttal, the trial court did not err in denying the defense a hearing after correctly concluding that the proffered evidence was insufficient to make a prima facie case.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S RIGHT TO A FAIR TRIAL BY DENYING APPELLANT'S MOTION TO IMPOSE A PRIOR RESTRAINT ON THE RIGHT OF THE PRESS TO PUBLISH THE JURORS' NAMES

Appellant contends the trial court abused its discretion and violated his constitutional rights to a fair trial by denying his request to preclude the press from publishing the names and addresses of the jurors. (1 AOB 41-48.) Appellant's contention is both meritless and speculative. Because appellant presented the trial court with no evidence to find that his right to a fair trial would be impinged by publication, the trial court had no basis to impose a prior restraint on the press. Moreover, appellant points to nothing in the record which shows that juror information was published or which supports his conclusory claim of prejudice.

On June 22, 1988, appellant filed a motion to prohibit the media from photographing jurors, contacting jurors prior to the completion of the trial, and publishing the names of jurors. (19 CT 3982-3989.) Media opposition to the motion was filed July 18, 1988, and July 22, 1988. (60 CT 13352-13372; 61 CT 13378-13379.) The prosecution's opposition to the motion was filed July 19, 1988. (61 CT 13375-13377.) The motion was heard on July 25, 1988.

(253 PRT 26041.) The trial court denied appellant's motion to prohibit the media from publishing the names of jurors and made an order regarding media coverage. (253 PRT 26073; 61 CT 13383-13385.)

Out the outset, it should be noted that the defense motion did not involve a request to close any part of the voir dire proceedings. (253 PRT 26054 [defense agrees with trial court that there is no question about access except where jurors raise a privacy concern to particular questions]; see *Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501 [104 S.Ct. 819, 78 L.Ed.2d 629].) What the defense sought was to prohibit the media from publishing the names of jurors obtained by attending the voir dire; i.e. what counsel for the media termed ordering "my clients not to speak." (253 PRT 26053.)

In *Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539 [96 S.Ct. 2791, 49 L.Ed.2d 683], the Court said "prior restraints on speech and publication are the most serious and the least tolerable infringement of First Amendment rights" and also noted that "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings. . . ." (*Id.* at 559.) In judging the propriety of the prior restraint order, the Court was required "to determine whether, as Learned Hand put it, 'the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" (*Id.* at p. 562.) To make that determination, the Court "examine[d] the evidence before the trial judge" to determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." (*Ibid.*)

Appellant asserts that the trial court abused its discretion by failing to weigh the competing interests and simply upheld the First Amendment right

without any weighing of the risks to appellant's Sixth Amendment right to a fair trial. (1 AOB 43.) However, appellant's contention has only surface appeal by isolating the judge's ruling from the entirety of the hearing. When viewed in context, the trial court upheld the media interest because there was no evidence presented of any danger to appellant's right to a fair trial, the inadequacy of other measures, or the effectiveness of the proposed restraint.

In its opposition to the defense motion, the media pointed out the requirements of *Nebraska Press Ass'n*, and that the defense had presented no evidence which demonstrated any danger to appellant's fair trial rights due to the publication of the juror names. (60 CT 13363.) The media also pointed out that the defense had failed to demonstrate the inadequacy of other measures and there was no showing that the proposed order would accomplish the stated goal. (60 CT 13365-13366.) Those failures were reiterated, without contradiction, during the hearing on the motion. (253 PRT 26054.)[71] Thus, like the situation in *Nebraska Press Ass'n*, "the impact of such publicity on prospective jurors was of necessity speculative" and "the record is lacking in evidence to support" a finding that alternative measures would not have protected appellant's fair trial right. (*Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at pp. 563, 565.)

Both the defense and the media acknowledged that the trial court had a discretionary decision to make based on a weighing of competing constitutional interests. The problem for the defense was that it offered no evidence to support its claim that the prior restraint order was necessary to protect appellant's right to a fair trial by an impartial jury. Thus, the trial court was given nothing to weigh against the First Amendment right of the media. Its ruling does not reflect a failure to recognize the proper standards for making the

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71. The only proffer made by the defense was the evidence of pretrial publicity which had been presented in the change of venue motion. (See 253 RT 26048-26049.)

decision; it simply reflects the lack of any evidence to weigh in favor of imposing the requested order.[72]

Appellant asserts that two of the defense attorneys received death threats prior to trial. (1 AOB 44-45.) However, the letters to defense counsel were reported to the trial court on December 10 and 26, 1986, about a year-and-a-half before the motion. (22 CT 4760; 68 CT 15202 (referencing Exhibit L-20).) Moreover, on March 4, 1987, over a year before the motion was filed, when the trial court raised the issue of any security issues (77 PRT 3827), defense counsel mentioned the two letters, but also said that "at this point there's no cause for concern." (*Ibid.*) In any case, the letters were not offered in support of the motion for the prior restraint order.

Appellant also asserts that a juror received a death threat. (1 AOB 45.) While appellant correctly notes that this occurred well-after the trial court ruled on his prior restraint motion, he claims it demonstrates that the danger to appellant's fair trial right was real. However, appellant points to nothing in the record indicating that the jurors' names were published. Thus, it is entirely speculative to connect the threat to the trial. Indeed, appellant quotes the juror as telling the trial court that the threat "'surely had nothing to do with this trial . . . .'" (1 AOB 45, fn. 23, quoting from 68 TRT 12864.)[73]

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72. In *Nebraska Press Ass'n*, the Court said that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity and that the publicity "might" impair the defendant's right to a fair trial, but any conclusion as to "the impact of such publicity on prospective jurors was of necessity speculative . . . ." (*Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at pp. 562-563.)

73. Appellant also references an anonymous call to the court clerk accusing a juror of talking to appellant's mother and an incident in which a "courtwatcher" approached a juror and asked questions about testimony. (1 AOB 45, fn. 23, citing 108 CT 24221 and 24 TRT 4523.) However, these incidents illustrate what the United States Supreme Court described as the difficulty of assessing the probable efficacy of a prior restraint order.

Appellant asserts denial of the prior restraint motion violated his constitutional rights to a fair trial, impartial deliberations, and a reliable verdict. (1 AOB 46.) However, as already pointed out, denial of the motion was fully consistent with federal law. As the United States Supreme Court noted, "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." (*Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at p. 561.) Moreover, "pretrial publicity, even if persuasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." (*Id.* at p. 565.) Having failed to present any evidence that publication would harm his fair trial rights, there was no constitutional violation in denying his motion.

Apart from his failure to demonstrate any error by the trial court in denying his prior restraint motion, appellant's claim of prejudice is entirely speculative. Appellant highlights his inability to demonstrate prejudice by claiming structural error. In *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827, 144 L.Ed.2d 35], the Court said that "'most constitutional errors can be harmless,'" and that structural errors exist in "only a 'very limited class of cases.'" (*Id.* at p. 8.) Appellant points to nothing that would place his claim of a lack of a prior restraint order within that very limited class of cases. As previously noted, nothing in the record demonstrates that the jurors' names were actually published. Moreover, that speculation is compounded by the lack of anything in the record indicating that any of the jurors were actually impacted in any way by such publication, if it occurred. The one instance of an

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(*Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at pp. 565-567.) Whether the jurors' names were actually published by the media, the jury selection was open and any person, including "courtwatchers" could obtain the jurors' names merely by attending. Indeed, the "courtwatcher" incident appears entirely unconnected to any knowledge of the juror's name. (24 TRT 4523-4526.) There is simply no connection, besides speculation, between these incidents and publication of the jurors' names, if it occurred.

apparent threat (which occurred well after denial of the motion) was such that even the juror did not think it connected to the case. Appellant has simply failed to demonstrate that the lack of a prior restraint order had any impact on his case. Thus, there was neither error nor prejudice.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY ORDERING CONSOLIDATION OF CASES CR 73093 AND CR 79195

In several separate arguments, appellant contends the trial court erred and violated his state and federal constitutional rights by ordering consolidation of the charges in cases CR 73093 and CR 75195. He asserts that the crimes were not cross-admissible and that the joint trial prejudiced the guilt and penalty phase verdicts. (2A AOB 139-229, 3 AOB 998-1004, 4 AOB 1179-1185, 5 AOB 1314-1315.)[74] The cases were properly joined under Penal Code section 954, as all the charged offenses were of the same class. The trial court did not abuse its discretion is finding that the murders were cross-admissible and in ordering all the crimes tried in one proceeding, and the joint trial did not violate appellant's constitutional rights.

On December 12, 1986, the prosecution moved for consolidation of the charges in the two cases pending against appellant. (43 CT 9350-9453.) Appellant's opposition was filed January 8, 1987, and a supplemental opposition was filed January 20, 1987. (44 CT 9543-9575, 9579-9591.) On February 18, 1987, the trial court heard argument on the defense position that the consolidation motion was untimely and should be denied without a hearing

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74. Appellant's claim does not include the Garcia case, which resulted in a not guilty verdict, but does include the Strang/Fisher case, on which the jury was unable to reach a verdict.

on that basis. (72 PRT 2897-2957.) Following the argument, the trial court denied the defense request to deny the consolidation motion on the basis of untimeliness, although the denial was made without prejudice to renew the request on the basis of any evidence of prejudice to appellant due to the delayed presentation of the consolidation motion. (72 PRT 2975-2961; 69 CT 15272.)

An evidentiary hearing on the consolidation motion commenced February 23, 1987. (73 PRT 2999; 23 CT 4816; 69 CT 15273.) On June 6, 1988, the prosecution's motion to consolidate was granted. (24 CT 5211-5212; 71 CT 15679-15680.)

In granting the consolidation motion the trial court made a lengthy statement of findings and reasons. After rejecting the defense claim that consolidation should be denied due to untimeliness, the trial court stated:

> The question of cross-admissibility must be addressed first. It is a separate motion in itself by the People, and its resolution, after balancing the factors of prejudice, determines the outcome of the severance and consolidation motions.
>
> Under Evidence Code section 1101(b) evidence of other crimes may be admitted to show such factors as intent and identity; factors other than disposition to commit a crime.
>
> To show identity the charges offenses and the acts sought to be introduced must share sufficient similarities that a jury could logically infer that if the defendant committed the other crimes he probably committed the charged offenses.
>
> The specific test for analysis of the similarities was outlined in People v. Thornton at 11 Cal.3d page 756:
>
> > Only common marks having some degree of distinctiveness tend to raise an inference of identity and thereby invest other crimes evidence with probative value. The strength of the inference in any case depends upon two factors: one, the degree of distinctiveness of individual shared marks, and, two, the number of minimally distinctive shared marks.

As noted in People v. Harvey at 163 Cal.App.3d page 90:

> "Some marks may be so unusual or distinctive as to be like a signature. Very few of such marks - perhaps even one, if sufficiently unique - would be enough to allow the identity inference to be drawn."

Applying the Thornton-Harvey test to the instant cases I have grouped the similarities between all the Lucas cases according to distinctiveness. The following three factors I find to be minimally distinctive shared marks:

(1) The victims were all vulnerable. The seven victims included five young women and two children under five.

(2) All of the women were similar in appearance: they were all in their 20's or early 30's; they were all pretty, simply dressed, with slacks and shirts; all had brown hair.

(3) At the time of the initiation of the attacks each of the women was alone or with a small child; each was in a secluded place - either in a home or on a dark street.

The following two factors I find to be substantially distinctive:

(1) The crime scenes - including Strang-Fisher, Jacobs and Goff homes; Swanke car and place her body was found; the place where Jodie [Santiago] Robertson[75/] was found, and the condition of all the bodies - reveal no apparent evidence of motive for the murders. No apparent evidence of robbery, burglary, or vandalism; no questionable evidence of rape. Later investigation revealed no evidence that any of the victims was raped or, in the case of the children, sexually molested.

(2) Each victim suffered a massive throat slashing wound. Several pathologists and a surgeon testified regarding the uncommonness of throat cut homicides.

Dr. Robin testified that of the approximate 2,000 autopsies he had performed, about 100 of these were homicides, and, of the homicides, he had seen no throat slashing case prior to Garcia.

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75. See footnote 11, *supra*.

Dr. Katsuyama testified he had done approximately 15,000 autopsies. Of these, approximately 18 - - 800 were homicides, and of the 800 homicides approximately 25 were throat cutting cases where the neck cuts were the cause of death.

Dr. Bucklin testified that he had done approximately 20,000 autopsies in his career. Of these, approximately 2 to 3,000 were homicides. Of the homicides, he had seen 100 throat slashing case, or two to three throat cut cases per year.

I noted that these doctors gave very similar estimates regarding the percentage of homicide autopsies that they had done in their careers that involved throat slashing injuries. Throat slashings constituted only one percent of Dr. Robin's homicides; approximately three percent of Dr. Katsuyama's; and approximately four percent of Dr. Bucklin's cases.

While each witness admitted these were only estimates all come close together in terms of percentages and provides statistical evidence that throat slashing cases constitute only a very small percentage of homicides. This evidence must also be viewed in light of the San Diego County Coroner's evidence that of the hundreds of homicides in San Diego County in the last 20 years, a records search revealed only 36 throat cutting cause of death cases, including the victims in the Lucas cases.

I start from the finding therefore, as stated, that throat cutting cases are substantially significant in themselves.

The following shared mark I consider to be of signatory significance, significant enough almost by itself, and certainly strong enough in combination with the above factors, to lead to the conclusion that one perpetrator was responsible for all the Lucas case victims: that factor is the unique cut involved in the Lucas case throat wounds.

Each of the women suffered an ear to ear throat cutting. The horizontal line of each cut from the midpoint on the neck out to each ear was relatively straight and level. This line was no lower than the top of the thyroid cartilage, and no higher than just below the hyoid bone, a horizontal corridor of about one half inch in width measured vertically, on the necks of all the women. All the women's necks were cut back to or through the membrane immediately in front of the cervical vertebrae - essentially completely back to the backbone - at the level of the second

or third vertebra. Each cut was accomplished with more than one stroke of a sharp, rigid cutting instrument. All of the cuts traversed the area of the great vessels of the neck under both ears, severing at least one and sometimes all of the vessels.

The throats of both children in these cases, whose bodies were found close to two of the young women, were cut in a very similar fashion to the women, though with some variation. I don't find the variation significant in view of the common sense conclusion that the children were killed because they were witnesses. A small baby, too young to testify was left alive in the Strang-Fisher homicides.

This Court heard testimony from Dr. Bucklin comparing the Lucas case throat cuts to the throat cuts involved in the 29 other throat cut homicides in San Diego committed over the past 20 years. I was able to review the coroner's reports on most of these cases and compare the descriptions of wounds.

I noted that with the exception of the Jenkins and Amaya cases the others were all immediately and notably different from the Lucas cases primarily because of the number of wounds on the bodies consisting mainly of stabs and slashes. The Jenkins and Amaya cases are similar to the Lucas cases insofar as the neck slashes are the only major wound, but each neck wound is significantly different from the neck wounds of the Lucas case victims. Amaya's wound was primarily on the right side of her neck and went down to her chest; it did not extend back to the cervical vertebrae. Jenkins's wound was primarily on the right side of her neck, affecting only the area of the right side great vessels. It went through the cricoid cartilage and back to the cervical vertebrae, but to the fifth cervical vertebrae, putting it at least an inch below the level of the Lucas case wounds.

Additionally, it should be noted that the crime scene at Amaya's home revealed clear evidence of thievery; the Jenkins case involves a former husband who is now detained in federal custody after the federal prosecutor argued his connection to the Jenkins murder.

Dr. Geiberger, the surgeon who operated on Jodie [Santiago] Robertson, testified that when he fist saw Anne Swanke's neck wound in a picture, he immediately reacted by saying, "It looks like twin cuts."

Dr. Katsuyama testified that based on the very close similarities in location and extent of the Lucas case neck cuts, "one has to consider the possibility that one person may have committed them all."

Dr. Bucklin's testimony revealed that the Lucas case cuts share a combination of similarities not shared by any of the other San Diego throat cut cases over the past 20 years. He also testified that the Lucas cases were not so similar in his opinion that the would testify - nor would he expect any responsible pathologist to testify - that he wounds themselves suggest one perpetrator. Of note to this Court, he also said that he could not personally conceive of any two homicide injuries so similar that he would feel comfortable testifying the injuries themselves suggested one perpetrator.

Dr. Bucklin has a J.D. degree. He showed a strong personal conviction as to what pathologists should and should not testify to in a court of law, and I note that Dr. Katsuyama apparently does not share this philosophy. Dr. Bucklin expressed comfort only when simply describing wounds. His personal philosophy was summed up in his statement that it would be for someone else, looking at the injuries and at other factors in the crime, to draw the inferences of a single versus multiple perpetrators. This Court has done that, and I do not find my conclusions inconsistent with Dr. Bucklin's testimony.

I also make the following findings which support the cross-admissibility of all cases within each other for the purposes of showing identity and intent:

Setting aside for the moment the evidence of shared marks in all the Lucas cases that indicate a sole perpetrator, there are independent factors about each of the crimes which link David Lucas to each crime. It is the fact that Mr. Lucas is connected up through separate pieces of independent evidence to each of the crimes already linked together by signatory common marks that produces strong reliability in the identification.

In these cases, cross-admissibility of each of the crimes into the others is highly probative and necessary to the People's case. Each case adds an important element to the identification issue, and I believe that cross-admissibility of each of the cases in -093 and -195 is far more likely to enhance the truth-finding process that it is to detract from it.

This Court has, of course, also had to weigh the probative value from cross-admissibility against the prejudicial effects. I have taken into consideration all of the factors raised by the defense in their points and authorities, including:

The possible inflammatory nature of the other crimes; the possibility that David Lucas may want to testify in one case and not in another, or present a mental defense to one or more of the offenses but not the others; the greater publicity in the Swanke case; the effects of pre- and post-Prop Eight cases together; and the fact that some of these charges, if tried individually, and first in time before other cases, or after acquittals in other cases tried individually, would not be death penalty cases.

I found none of these factors, individually, or in combination, sufficient to outweigh the highly probative nature of the other crimes evidence. Each of these crimes individually is brutal and inflammatory in itself. The child victims, of course, add a dimension of magnitude in the horror of the crimes, but not such in this Court's opinion as to necessitate severance of these crimes from the others.

I have examined the pre- and post-Prop Eight law factor, and I believe that a jury can understand and apply different instructions to each case where necessary. If I find that under some new issue that that cannot be accomplished during trial, then the defendant will receive the benefit of the law most favorable to himself. This has already been done by way of stipulation between counsel to remove the 1973 prior from use as possible impeachment.

Regarding joinder of capital and non-capital crimes, defendant Lucas is charged with many murders and the probability of combinations creating capital offenses is great under any reasonable scenario of joinder or successive prosecution, and I cannot conclude that joining all the offenses together in one proceeding is substantially prejudicial.

I have viewed the media accounts of the Lucas cases that have been submitted to me. It is clear that the Swanke case has received the most publicity, and I rather suspect that if any juror is familiar with any name among the victims, it will be Swanke. Nonetheless, the media accounts are three to four years old at this time. There have been numerous highly publicized murder cases in the meanwhile in San Diego. The process of voir dire will tell us if a fair and impartial jury cannot be

obtained because of publicity effects on any one or more of the cases, and that will bear on a change of venue.

The defendant has also argued that he may wish to present testimony on one case but not on others, and that his ability to remain silent on one or more of the cases will be imperiled by joinder with the cases where he would testify. He also may have a mental defense with respect to one or more of the crimes but not others and he will be forced into a compromised position of inconsistent defenses by joinder. Again, I do not see that these possibilities for prejudice would substantially outweigh the probative value of the other crimes evidence.

Having determined the issue of cross-admissibility of all charges into each other, it would make no sense not to consolidate all of the charges for trial. Otherwise Mr. Lucas would be in the position of having the -093 charges subject to proof to a preponderance of [sic: at] the guilt phase of -195; possibly subject to proof beyond a reasonable doubt at a penalty phase of -195; and again subject to proof beyond a reasonable doubt at a second trial. I cannot see that he would be any more prejudiced by consolidation of the charges than by cross-admissibility. All counsel are well prepared to go to trial on all charges now, and I see no grounds for severance, having already weighed the prejudicial effects of joinder. All the crimes are of the same class and all, arguably, are connected together in the commission through the common marks discussed previously.

The defendant's motions for severance of charges within -195 and -093 are, therefore, denied and all charges are joined for trial.

(248 PRT 25503-25513.)

A. Law Governing Consolidation

"The law prefers consolidation of charges." (*People v. Ochoa, supra*, 26 Cal.4th 398, 423.) "Joinder and severance of different criminal charges against the same defendant are governed by [Penal Code] section 954."

(*People v. Maury* (2003) 30 Cal.4th 342, 391.)[76] Where the charged offenses are of the same class, joinder is proper under section 954. (*People v. Ochoa, supra,* 26 Cal.4th at p. 423.) A trial court's conclusion that two or more offenses are properly joined under section 954 is reviewed independently. (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.)

When the statutory requirements for joinder are met, a defendant can predicate error only upon a clear showing of potential prejudice. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) It is a defendant's burden to show prejudice. (*Ibid.*; *People v. Mason* (1991) 52 Cal.3d 909, 933.) The determination of prejudice is necessarily dependent upon the particular circumstances in each individual case. (*People v. Bradford, supra,* 15 Cal.4th at p. 1315; *People v. Balderas* (1985) 41 Cal.3d 144, 173.)

The trial court's decision as to whether separate trials are required in the interests of justice is reviewed for an abuse of discretion. (*People v. Alvarez, supra,* 14 Cal.4th at p. 188.) The trial court's discretion in refusing severance is broader than its discretion in admitting evidence of uncharged offenses since in weighing probative value against prejudicial effect, the beneficial results from a joint trial are added to the probative-value side, which requires a defendant to make an even stronger showing of prejudice than would be required in determining whether to admit other-crimes evidence in a severed

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76. Penal Code section 954 provides, in pertinent part:

> An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

trial. (*People v. Balderas, supra,* 41 Cal.3d at p. 173; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1284 ["The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence."].) An abuse of discretion may only be found when the trial court's ruling falls outside the bounds of reason. (*People v. Ochoa, supra,* 26 Cal.4th at p. 423; *People v. Bradford, supra,* 15 Cal.4th at p. 1315.)

This Court has developed criteria to guide evaluations of trial court decisions. Refusal to sever properly joined charges may be an abuse of discretion where: (1) evidence of the crimes would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case is joined with a "strong" case or with another "weak" case, such that a "spillover" effect might alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder turns the matter into a capital case. (*People v. Ochoa, supra,* 26 Cal.4th at p. 423.) However, the criteria "are not equally significant." (*People v. Bradford, supra,* 15 Cal.4th at p. 1315.)

The first step in assessing a defendant's claim of prejudicial joinder is to determine cross-admissibility because if evidence of the joined offenses would be cross-admissible in separate trials, "any inference of prejudice is dispelled." (*People v. Bradford, supra,* 15 Cal.4th at pp. 1315-1316; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) However, although cross-admissibility suffices to negate prejudice, this Court has never held that the absence of cross-admissibility was sufficient to demonstrate prejudice. (*People v. Bradford, supra,* at p. 1316; *People v. Mason, supra,* 52 Cal.3d at p. 934.)

B. Analysis

All nine charges arising from the five incidents were properly joined under Panel Code section 954 because all nine charges were the same class of offenses. (*People v. Maury, supra,* 30 Cal.4th at p. 392 [murder offenses belong to the same class of crimes]; *People v. Miller* (1990) 50 Cal.3d 954, 987 [murder and attempted murder are offenses of the same class]; *People v. Balderas, supra,* 41 Cal.3d at p. 170 [kidnapping and murder are the same class of offense]; *People v. Meneley* (1972) 29 Cal.App.3d 41, 51 [murder and kidnapping are the same class of offense].) Thus, joinder was proper unless appellant carried his burden to make a clear showing of potential prejudice. (*People v. Bradford, supra,*15 Cal.4th at p. 1315.)

After a lengthy evidentiary hearing, the trial court concluded that evidence of the various offenses would be cross-admissible on the issues of identity and intent in separate trials. The trial court's factual findings are amply supported by substantial evidence elicited during the hearing. The trial court's cross-admissibility ruling was not an abuse of discretion.

> Pursuant to Evidence Code section 1101, subdivision (b), evidence that a defendant has committed an offense, although inadmissible to demonstrate a defendant's disposition to commit crimes, may be received to establish, among other things, identity, intent, motive, or plan. To be admissible to demonstrate a distinctive modus operandi, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes.

(*People v. Bradford, supra,* 15 Cal.4th at p. 1316.)[77]

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77. The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

The trial court recognized three different categories of common marks to the five incidents: marks which were minimally distinctive; marks which were substantially distinctive; and one shared mark which was of signatory significance.

As to the first category (minimally distinctive marks), the evidence amply supported the trial court's factual findings. All the victims were vulnerable; the victims included five young women and two children. (73 PRT 3006 [Suzanne and Colin Jacobs]; 76 PRT 3501 [Gayle Garcia]; 79 PRT 4121 [Rhonda Strang and Amber Fisher]; 81 PRT 4482 [Jodie Santiago]; 85 PRT 5040 [Anne Swanke]. All of the women were similar in age, attractiveness, dress, and hair color. (73 PRT 3007 [Suzanne Jacobs was 31 years old]; 74 PRT 3103 [Suzanne Jacobs was 5'9" and about 120 pounds]; 75 PRT 3384-3385 [Exhs. 38-40 (Jacobs scene photos)], 3390 [Suzanne Jacobs had brown hair]; 74 PRT 3248 [Exhs. 5 and 6 (Gayle Garcia autopsy photoboards)]; 84 PRT 4922 [Exhs. 81-85 (scene photos of Gayle Garcia)]; 79 PRT 4190 [Exh. 57 (photo of Anne Swanke)]; 86 PRT 5104-5107 [Exhs. X, Y, and Z (scene photos of Anne Swanke)]; 81 PRT 4482 [Jodie Santiago testifies]; 82 PRT 4686 [Jodie Santiago was 34 years old]; 90 PRT 5530 [Rhonda Strang dressed in Levi's and a blouse]; 94 PRT 6128 [Exh. 105 (scene photo of Rhonda Strang)].

All the women were either alone or with small children, in a secluded place, either a home or a dark street. (73 PRT 3006-3015 [Suzanne Jacobs and 3-year-old Colin at home]; 76 PRT 3502-3504 [Gayle Garcia alone at Goff residence]; 79 PRT 4122, 90 PRT 5491, 5519 [Rhonda Strang and 3-year-old Amber Fisher at Strang home, along with an infant]; 81 PRT 4484 [Jodie Santiago alone on street around 10:30 p.m.]; 86 PRT 5063-5066 [Anne Swanke alone stopped past intersection after midnight].

The evidence also amply supported the trial court's factual findings as to the second category of common marks (substantially distinctive). None of the crime scenes displayed any evidence of motive for the murders. (75 PRT 3350-76 PRT 3410 [Jacobs crime scene description]; 81 PRT 4484-4488 [Jodie Santiago description of kidnapping]; 86 PRT 5148 [no sperm on slides from swabs of Rhonda Strang's mouth, vagina and anus]; 78 PRT 3956 [Rhonda Strang never let strangers in house], 3963 [always kept her doors and windows locked; 90 PRT 5488 [no sign of forced entry at Strang residence]; 88 PRT 5415 [Gayle Garcia's purse on bar with her ID and money]; 79 PRT 4146 [Anne Swanke wallet recovered at abduction scene], 4293-4294 [no vaginal tears and no sperm or high level of acid phosphatase detected in Anne Swanke].)

All of the victims suffered from the same injury: a slashing injury to the throat. (74 PRT 3245 [Gayle Garcia]; 79 PRT 4157 [Suzanne Jacobs]; 79 PRT 4168-4169 [Colin Jacobs]; 79 PRT 4196-4198 [Anne Swanke]; 84 PRT 4866-4867 [Jodie Santiago]; 86 PRT 5138-5139 [Rhonda Strang]; 86 PRT 5148-5149 [Amber Fisher].)

The evidence fully supported the trial court's finding that throat slashing homicides were uncommon. Dr. Harold Robin, who performed the Garcia autopsy, had never seen a similar injury. (75 PRT 3272.) The throat slashing injury to Garcia was the first Dr. Robin had seen in four years at the coroner's office, where he had performed approximately 100 homicide autopsies out of a total of approximately 2000 autopsies. (75 PRT 3314.) In more than 15,000 autopsies performed by Dr. Katsuyama (who performed the Suzanne Jacobs, Colin Jacobs and Anne Swanke autopsies), he had performed over 800 homicide autopsies. (80 PRT 4456.) Dr. Katsuyama had seen only 20-25 homicide autopsies in which a cutting neck wound was a cause of death. (80 PRT 4457-4458.) In the more than 20,000 autopsies performed by Dr. Bucklin,

he performed in excess of 3000 homicide autopsies. (87 PRT 5239-5240.) Of the homicide autopsies, he had seen 2 to 3 throat slashing homicides per year in his 46 years experience. (87 PRT 5238, 5242-5243.) Additionally, records of the hundreds of homicide autopsies from the San Diego County Coroner's Officer between 1966 and 1985 (98 PRT 6484, 6487, 6493, 6498), yielded only 26 throat slashing cases, which included the six murders charges against appellant. (98 PRT 6582 - 99 PRT 6640.)

Finally, the evidence fully supported the trial court's finding that the throat wound to each of the victims was uniquely similar. As the trial court found, all of the women suffered a relatively straight and level, ear-to-ear throat cutting. (74 PRT 3245 [Gayle Garcia]; 79 PRT 4157 [Suzanne Jacobs]; 79 PRT 4196-4197 [Anne Swanke]; 84 PRT 4866-4867 [Jodie Santiago]; 86 PRT 5138 [Rhonda Strang]; see also Exhibits 5 and 6 [photoboards].) The children suffered a similar wound. (79 PRT 4168 [Colin Jacobs]; 86 PRT 5149 [Amber Fisher].)

In each case, the women were cut at relatively the same location high on the neck. (75 PRT 3267 [Gayle Garcia - between the hyoid bone and the thyroid cartilage]; 79 PRT 4162-4163 [Suzanne Jacobs - through thyroid cartilage, below hyoid bone]; 84 PRT 4866 [Jodie Santiago - between thyroid cartilage and hyoid bone]; 86 PRT 5139, 5144 [Rhonda Strang - through upper thyroid cartilage and below hyoid bone].) The children were cut the same area. (79 PRT 4180 [Colin Jacobs - between hyoid bone and thyroid cartilage]; 86 PRT 5150 [Amber Fisher - slightly higher than Rhonda Strang].) All of the wounds were in the same relatively small area on the necks of the victims; spanning about ½". (75 PRT 3267-3269; 79 PRT 4180, 4201-4205; 84 PRT 4877; 86 PRT5153-5169.) All of the wounds extended to the cervical vertebra. (74 PRT 3245 [Gayle Garcia - cervical vertebra nicked]; 79 PRT 4158-4161 [Suzanne Jacobs - marks on connective tissue on and between vertebrae]; 79

PRT 4169 [Colin Jacobs - close to vertebrae]; 79 PRT 4179 [Anne Swanke - struck the vertebrae]; 84 PRT 4866 [Jodie Santiago - within 2 - 3mm of vertebrae]; 86 PRT 5139 [Rhonda Strang - cutting injury to vertebrae]; 86 PRT 5149 [Amber Fisher - cutting wounds to cervical vertebrae].)

Each wound was made by more than one stroke of a sharp rigid instrument. (75 PRT 3270, 3310 [Gayle Garcia - sharp, firm blade; a number of strokes]; 79 PRT 4163, 4171 [Suzanne Jacobs - sharp, moderately heavy blade; multiple strokes]; 79 PRT 4169 [Colin Jacobs - sharp blade; more than one stroke]; 84 PRT 4867-4868 [Jodie Santiago - sharp instrument; more than one stroke]; 86 PRT 5145, 5157 [Rhonda Strang - multiple cutting movements; sharp cutting instrument]; 86 PRT 5150, 5157 [Amber Fisher - at least two cutting movements; sharp cutting instrument].)

In each victim, one or more or the large blood vessels in the neck were severed. (74 PRT 3245 [Gayle Garcia - jugular veins and carotid arteries on both sides of neck]; 79 PRT 4157 [Suzanne Jacobs - vessels on right side and one on left side]; 79 PRT 4168 [Colin Jacobs - right carotid artery and jugular vein]; 79 PRT 4197-4198 [Anne Swanke - carotid arteries and jugular veins on both sides of neck]; 84 PRT 4867 [Jodie Santiago - external jugular on one side]; 86 PRT 5138 [Rhonda Strang - carotid arteries and jugular veins]; 86 PRT 5149 [Amber Fisher - carotid arteries and jugular veins].)

As the trial court noted, the pathologists who performed the autopsies and the surgeon who treated Jodie Santiago all noted the similarities of the wounds. (79 PRT 3267-3269, 3310-3311 [Dr. Robin]; 79 PRT 4201-4205 [Dr. Katsuyama]; 84 PRT 4877 [Dr. Geiberger]; 86 PRT 5158, 5161-5162, 5166, 5169 [Dr. Bucklin].) Moreover, Dr. Robin testified he had never seen the type of neck wound prior to the autopsy of Gayle Garcia (79 PRT 3272, 3314), Dr. Katsuyama testified that in view of the wound similarities one must consider the possibility that all the wounds were caused by one person (79 PRT

4260) and Dr. Geiberger testified that the Swanke and Santiago wounds looked like "twin cuts" (84 PRT 4880).

As the trial court noted, the unique similarity between the wounds was, itself, a sufficient basis for finding cross-admissibility. Among the hundreds of homicide cases surveyed for the years 1966 through 1985, only 26 involved throat-cut injuries and six of those were charged against appellant. (98 PRT 6501-6502, 6583.) Of those 26 cases, only the six charged against appellant, along with Santiago, shared the same distinctive characteristics. (98 PRT 6584-6639.) Nonetheless, all charged incidents shared the other common marks delineated by the trial court, making the combination of marks more than adequate to support the trial court's finding of cross-admissibility. (Cf. *People v. Carter* (2005) 36 Cal.4th 1114, 1148 [strangulation and location of bodies found to be highly distinctive].)

Appellant criticizes a number of the trial court's findings and conclusions, however, his criticisms do not withstand scrutiny. He first argues that the trial court's reliance on the vulnerability and being alone "did not make these victims unique." (2A AOB 204, 217; 3 AOB 998, 1001, 1003; 4 AOB 1179, 1182, 1184.) However, the trial court did not find, and case law does not require that each common factor make the crimes unique. The trial court concluded these two factors, for which appellant does not challenge the factual basis, were similarities shared by all the crimes and were "minimally distinctive." (248 PRT 25504; *People v. Bradford, supra,* 15 Cal.4th at p. 1316 [the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes].)

Appellant next argues that the women's appearance was of "minimal significance". (2A AOB 204, 217; 3 AOB 998, 1001, 1003; 4 AOB 1179, 1182, 1184.) Thus, he does not challenge the factual basis for the trial court's

finding and he concedes that the appearance factors were a shared characteristic of some distinctiveness. In *People v. Bradford, supra,* 15 Cal.4th 1229, this Court found that the victims being "young White females" was a similar, but not unusual or singular feature, properly considered together with other factors. (*Id.* at pp. 1316-1317.)

Appellant next challenges the trial court's factual finding of lack of motive and urges that even if there was a lack of motive, such a factor would not make the crimes unique. (2A AOB 204, 217; 3 AOB 998, 1001, 1003; 4 AOB 1179, 1182, 1184.) While he concedes there was no evidence of motive in the Jacobs case, he contends there was evidence of a sexual motive in the Santiago case, and evidence of a sexual motive in the Swanke case. (2A AOB 204, 217.)[78]

Appellant's contention suffers several deficiencies. As appellant concedes, there was no evidence of sexual assault of Suzanne Jacobs. (79 PRT 4155-4168 [Dr. Katsuyama's testimony about Suzanne Jacobs autopsy].) However, there was similarly no evidence of sexual assault of Jodie Santiago (84 PRT 4864-4871 [Dr. Geiberger testimony about Santiago treatment].) The closest the evidence came was Dr. Geiberger testifying he ordered a rape exam for Santiago. (84 PRT 4872.) In asserting evidence of a sexual motive in the Santiago case, appellant cites the trial testimony of Criminalist Randall Robinson. (2A AOB 204, citing to 3 AOB 786.) But the propriety of the trial court's ruling is based on the evidence before it, not what may have come later. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.)

There was also no evidence of sexual assault of Anne Swanke. (79 PRT 4293-4294 [per Dr. Katsuyama - no vaginal tears, no sperm on slides, no high

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78. Appellant makes no claim regarding whether there was evidence of a sexual motive in the Strang case (2A AOB 224-229) and does not discuss the Garcia case. However, the evidence before the trial court was that Strang and Garcia were fully clad. (79 PRT 4301 [Strang]; 80 PRT 4411 [Garcia].)

level of acid phosphatase].) Again, appellant points to trial evidence. (2A AOB 217, citing p. 215.) He also points to evidence before Judge Kennedy, who handled the case long before Judge Hammes was assigned. (*Ibid.*) (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1120.) Finally, he asserts an unidentified pubic hair was found on Swanke's body (citing 101 PRT 6880), which fails to suggest any basis for refuting the trial court's finding.

All three women had some clothing damaged or removed. (80 PRT 4412 [Suzanne Jacobs - shirt torn and bra broken]; 79 PRT 4263 [Swanke - naked from waist down]; 91 PRT 5768 [Anne Swanke - no clothing below waist, except socks].) While it might be appropriate to characterize that as evidence of "sexual overtone," as appellant does in his charts (see 2A AOB 130-131, 134-135), there remains, as the trial court found, no evidence of sexual assault and, thus, no motive for the murders.

Appellant's claim that lack of motive evidence is not so unique as to make the murders signature crimes, misses the mark. The trial court did not conclude that lack of motive was a mark of signatory significance; it found the lack of motive to be substantially distinctive. (248 PRT 25505.) As this Court undoubtedly knows from its review of capital and non-capital murders, a typical, if not almost invariable piece of evidence includes motive, whether dealing with felony-murder or premeditated murder. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1081 [motive is one of three factors commonly present in cases of premeditated murder].) Indeed, evidence of motive is addressed in its own jury instruction (CALJIC No. 2.51) which advises the jury that absence of motive may tend to show the defendant is not guilty. There is no basis for finding an abuse of discretion in the trial court's conclusion.

Appellant next challenges the trial court's finding that the throat wounds were of signatory significance.[79] He does not challenge the trial court's factual findings as to the common features of the wounds, he merely asserts that the doctors did not explicitly state the wounds were signatory. (2A AOB 204.) However, appellant cites no authority for his implicit assertion that a conclusion of signatory significance requires expert witness testimonial support. Indeed, the rule is that "[t]o be admissible to demonstrate a distinctive modus operandi, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes." (*People v. Bradford, supra,* 15 Cal.4th at p. 1316.)

While the doctors did not explicitly say the wounds were of signatory significance, Dr. Robin found the Garcia wound unique in his experience and similar in several respects to the wounds of the other victims (75 PRT 3267-3269, 3272); Dr. Katsuyama concluded, based on the similarity between the throat wounds, that one must consider the possibility that all of the wounds were caused by one person (79 PRT 4260); and Dr. Geiberger found the wounds to be similar in several respects and even concluded that the Swanke and Santiago wounds looked like "twin cuts." (84 PRT 4877, 4880.)

In challenging the trial court's finding, appellant discusses none of that testimony, but only looks to Dr. Bucklin, who testified he could not opine that one person committed the offenses and felt no one could reach that conclusion in a medically responsible manner. (2A AOB 204, citing 87 PRT 5232.) However, as the trial court noted in its consideration of Dr. Bucklin's testimony, Dr. Bucklin felt constrained by his position as a pathologist and his view that similarities in "anatomic substance alone" would never be sufficient to infer that

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79. Appellant does not challenge the trial court's factual finding and legal conclusion that throat cutting homicides were rare and constituted a substantially significant common mark. (248 PRT 25505-25506.)

one person committed similar crimes. (See 87 PRT 5233-5234.) The trial court also noted that was not the position of Dr. Katsuyama. (248 PRT 25509.) Moreover, Dr. Bucklin did not rule out the ability to draw a reasonable inference of a single perpetrator from the combination of the medical similarities and other non-medical facts. (87 PRT 5233-5234.) That is exactly what the trial court did. (248 PRT 25509.)

Appellant next contends the trial court "failed to consider" what he contends are substantial differences between the murders. (2A AOB 204, 218; 3 AOB 998, 1001; 4 AOB 1179, 1182.) Appellant points to nothing in the record which supports his view except the trial court's failure to expressly discuss the alleged differences. (See 2A AOB 205.) While the existence of dissimilarities between the offenses is a factor to be considered (*People v. Haston* (1986) 69 Cal.2d 233, 249, fn. 18), appellant points to no authority for his implicit assertion that the failure to expressly discuss alleged dissimilarities supports a conclusion of lack of consideration.

"It is presumed that official duty has been regularly performed." (Evid. Code, § 664; cf. *People v. Crittenden* (1994) 9 Cal.4th 83, 135 [trial court need not expressly weigh prejudice against probative value or even expressly state that it has done so].) In considering the cross-admissibility and consolidation issues, the trial court had reviewed pleadings which included explicit references to the consideration of alleged dissimilarities (see, e.g., 43 CT 9393, 9448) and heard considerable testimony regarding alleged dissimilarities (see, e.g., 75 PRT 3281-3296). In addition, in making its ruling, the trial court cited this Court's decision in *People v. Thornton* (1974) 11 Cal.3d 738. (248 PRT 25504.) In *Thornton*, this Court found the probative value of shared marks was not "significantly diminished by the presence of certain marks of *dissimilarity*." (*Id.* at p. 758, italics in orig; see also *ibid.* fn. 14, citing *People v. Haston, supra,* 69 Cal.2d at p. 249, fn. 18.) Nothing in the record undermines the presumption

that the trial court considered the alleged dissimilarities; indeed, the record supports the presumption.

Appellant asserts the trial court erred because dissimilarities precluded an inference of identity. While evidence of dissimilarities is a relevant factor in determining whether the probative value of the common marks is significantly diminished (*People v. Thornton, supra,* 11 Cal.3d at p. 758), "it is not a prerequisite for admission of other crimes evidence that the activities be identical. Rather the test is distinctive similarity." (*People v. Huber* (1986) 181 Cal.App.3d 601, 621.) As this Court recently held, "[t]o be highly distinctive, the charged and uncharged crimes need not be mirror images of each other." (*People v. Carter, supra,* 36 Cal.4th at p. 1148.) Differences go to weight not admissibility. (*Ibid.*) Moreover, it is important to keep in mind the difference between dissimilarities in the manner in which the perpetrator committed the crime (which might undermine an inference of identity or intent) and dissimilarities arising because of factors outside the perpetrator's control (such as how the intended victim reacted).

The evidence indicated that Suzanne Jacobs had an opportunity to, and did fight against her attacker before he could control her (75 PRT 3365, 3367; 76 PRT 3410) which would reasonably account for the additional stab wounds she suffered. On the other hand, there was no evidence that Gayle Garcia was able to fight back (76 PRT 3505), that Jodie Santiago had an opportunity to fight back (81 PRT 4484, 4488); that Rhonda Strang had an opportunity to fight back (90 PRT 5490); or that Anne Swanke had an opportunity to fight back (86 PRT 5066). Some of the victims had cuts on hands or fingers, but all that suggests is that they reached for the knife. Two of the adult female victims had children with them and the others did not. Two of the incidents occurred late at night and the others occurred in the daytime. While those differences describe something about the victims, they say nothing about the perpetrator.

Appellant sees dissimilarities where there were, in fact, similarities. Thus, appellant asserts that some victims were attacked in a home with children present while others were attacked outside of a home and transported by vehicle. However, as the trial court noted, the victims were all alone and relatively isolated which demonstrated a similarity in the victims' circumstances rather than a dissimilarity because it indicated the perpetrator preyed on women who were without anyone who might come to their rescue. While Anne Swanke and Jodie Santiago were transported and later dumped, their initial isolation was in public places, while Suzanne Jacobs, Rhonda Strang, and Gayle Garcia were isolated in the houses where they were left.

Appellant also cites some facts which simply do not undermine the probative value of the evidence on the issues of identity and intent, such as the different years in which the attacks took place.

The question is not whether appellant can point to differences, but whether there are dissimilarities which significantly diminish the probative value of the shared marks. (*People v. Thornton, supra,* 11 Cal.3d at p. 758.) Appellant's alleged differences do not undermine the probative value of the shared marks. Appellant's reliance on *People v. Bean* (1988) 46 Cal.3d 919, is misplaced. As this Court explained in *People v. Bradford, supra,* 15 Cal.4th 1229, the perpetrators of the two incidents in *Bean* carried out the burglaries and committed the murders in significantly different ways. (*Id.* at p. 1317.) In this case, appellant chose women with similar characteristics, in similar circumstances, and killed them in nearly identical fashion.

Finally, appellant contends the trial court erred in finding the Strang/Fisher incident cross-admissible and ordering consolidation because, he argues, there was no independent evidence that he committed those murders. (2A AOB 224-225; 3 AOB 1003; 4 AOB 1184-1185.) However, "complete cross-admissibility is not necessary to justify joinder." (*People v. Cummings,*

supra, 4 Cal.4th 1233, 1284.) Even had there been no evidence that appellant committed the Strang/Fisher murders, joinder would be proper because the similarity between the murders made the other crimes admissible to prove appellant's commission of the Strang/Fisher murders.[80/] Moreover, as the trial court expressly found, appellant was "connected up through separate pieces of independent evidence to each of the crimes." (248 PRT 25510.)[81/]

Despite the ample showing of cross-admissibility, it is also the case that because the charges were properly joined under the statute, even had there been no cross-admissibility, consolidation was proper because appellant failed to establish prejudice. (*People v. Bradford, supra,* 15 Cal.4th at p. 1317.)

As the trial court noted, each of the incidents were individually brutal. While the trial court recognized that the murders of the two small children added a dimension of brutality beyond that present in the murders of the women, it was not such as to prejudicially inflame the jury. Where, as here, the charged offenses are similar in nature and equally gruesome, none of the

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80. Indeed, appellant argues that the jurors who voted to convict appellant of the Stang/Fisher murders were likely influenced by consideration of the other charges of which appellant was convicted. (2A AOB 293, fn. 268.)

81. There was independent evidence of appellant's commission of the Strang/Fisher murders. There was no evidence of any force used by the assailant in gaining admission to the Strang residence. (90 PRT 5488.) The evidence established that Rhonda Strang was very cautious, kept her doors and windows locked and would not let strangers in her house. (78 PRT 3956, 3963.) She knew appellant, he had been to her house, she had been to appellant's office and often called appellant at work, and they may have been having an affair(77 PRT 3623-3624; 78 PRT 3953, 4058.) On the day of the Strang/Fisher murders (October 23, 1984), appellant was supposed to report at the Descanso Facility for a work release commitment, but had been excused the day before (October 22, 1984) because he claimed he had a large carpet cleaning job on the 23rd. (85 PRT 4969-4974.) However, appellant called his office on the morning of October 23, 1984, and told Frank Clark that he (appellant) had been refused at Descanso that morning due to illness. (77 PRT 3611-3612.)

offenses are more likely to inflame the jury against the defendant. (*People v. Bradford, supra,* 15 Cal.4th at p. 1317.) As this Court stated in *People v. Mason, supra*, 52 Cal.3d 909:

> [W]e have never adopted a rule that bars consolidation of multiple-murder counts simply because the defendant is alleged to have acted brutally in each. Instead, what we have held is that it may be error to consolidate an inflammatory offense with one that is not under circumstances where the jury cannot be expected to try both fairly. The danger to be avoided is "that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case" on another crime.

(*Id.* at p. 934.)

The trial court correctly recognized that none of the incidents could be characterized as strong or weak relative to the others. "[T]here are independent factors about each of the crimes which link [appellant] to each crime." (248 PRT 25510.)

The trial court also correctly recognized that "the probability of combinations creating capital offenses is great under any reasonable scenario of joinder or successive prosecution. . . ." (248 PRT 25511.) Here, as in *Mason*, there was no requirement that the People try either case first or, for that matter, had all five incidents been severed, in any particular order. (*People v. Mason, supra,* 52 Cal.3d at p. 934.) A conviction of murder in any incident would raise a prior murder conviction special in a subsequently prosecuted case. Additionally, of the two charged cases, both had a multiple murder special circumstance allegation, and both cases involved an incident in which two murders were committed (Strang/Fisher and Jacobs), which would raise a multiple murder special circumstance. As this Court stated in *Bradford*, when joinder gives rise to a multiple murder special circumstance allegation, "a higher degree of scrutiny" is required. (*People v. Bradford, supra,* 15 Cal.4th at p. 1318.) After more than a year of pretrial hearings, involving an extensive

and detailed presentation of evidence and argument, "[i]t is apparent that the trial court . . . scrutinized the evidence very closely." (*People v. Bradford, supra,* 15 Cal.4th at p. 1318.)

Beyond those criteria generally considered in assessing prejudicial joinder, the trial court also considered appellant's claimed prejudice from mixing pre-Proposition 8 cases with post-Proposition 8 case, but found the jury "would understand and apply different instruction to each case where necessary" and if the trial court found otherwise, appellant would receive the benefit of the more favorable law. (248 PRT 25511; see *Richardson v. Marsh* (1987) 481 U.S. 200 [107 S.Ct. 1702, 211 95 L.Ed.2d 176] [jury presumed to follow instructions]; *People v. Hill* (1992) 3 Cal.4th 959, 1011 [same].) The trial court considered the media attention to the cases and found that the most attention was devoted to the Swanke murder, but also found that the passage of three to four years since that publicity and the occurrence of other highly publicized murder cases in the meantime. (248 PRT 25511-25512.) The trial court reasonably concluded that any residual effects from the past publicity would be determined in voir dire and would bear on a possible change of venue. (Cf. *People v. Jenkins, supra,* 22 Cal.4th at p. 944.) The trial court also considered the possibility appellant might testify as to one or more, but not all of the charges, and might present a mental defense to some, but not all of the charges. (248 PRT 25512.) The trial court's determination that any possible prejudice did not outweigh the value of consolidation was reasonable. (*People v. Sandoval* (1992) 4 Cal.4th 155, 173 [unexplained claim of separate defenses insufficient to require severance].)

Both because cross-admissibility dispelled any possible prejudice and because appellant failed to demonstrate any basis for prejudice, the trial court did not abuse its discretion in ordering consolidation. Moreover, in light of the absence of prejudice, joinder of the charges did not violate appellant's right to

due process. (*People v. Sapp* (2003) 31 Cal.4th 240, 259-260, citing *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814] [misjoinder rises to a constitutional violation only if it results in prejudice so great as to deny a fair trial].)

While the propriety of a trial judge's ruling is assessed based on the evidence presented at the time of the motion (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1120), on appeal this Court also determines whether joinder actually resulted in a gross unfairness amounting to a denial of due process. (*People v. Valdez* (2004) 32 Cal.4th 73, 120.) The trial demonstrates that there was neither prejudice from any err in ordering consolidation nor a gross unfairness amounting to a denial of due process. The two incidents with the least amount of independent evidence connecting appellant to the crimes were the Garcia and Strang/Fisher murders. Unlike the other crimes, in those two incidents there was no eyewitness (Santiago), no handwriting (Jacobs), and no biological evidence (Santiago & Swanke). Although there was some independent evidence connecting appellant to Garcia and Strang/Fisher, those incidents were the most likely to be impacted by the cross-admissibility of the crimes. Yet, the jury acquitted appellant of the Garcia murder and failed to reach a unanimous verdict on the Strang/Fisher murders. (Cf. *People v. Johnson* (1971) 21 Cal.App.3d 235, 246; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 380 [if the defendant cannot be connected to the prior act, admission of evidence concerning it will not normally prejudice him].) Thus, there was neither prejudice nor a gross unfairness resulting from the consolidation in either the guilt or penalty phase.

IV.

THE TRIAL COURT DID NOT ERR OR VIOLATE ANY OF APPELLANT'S RIGHTS IN DECLINING TO HEAR THE ENTIRE TRIAL BEFORE RULING ON WHETHER THE PROSECUTION HAD MADE AN ADEQUATE SHOWING TO SUPPORT A FINDING OF CROSS-ADMISSIBILITY

Appellant contends the trial court violated various federal constitutional and state constitutional and statutory rights in declining to hear in excess of 130 defense witnesses proffered to contest the issue of cross-admissibility of the crimes in connection with the prosecution's motion for consolidation. In essence, appellant contends the trial court was required to preview the entire trial before empaneling the jury, in order to rule properly. (2A AOB 277-300; 3 AOB 1018-1019; 4 AOB 1198-1199; 5 AOB 1329-1331.) The trial court did not err or violate any of appellant's rights in declining to hear all the evidence that will be presented at trial before ruling on whether the prosecution had made an adequate showing to support a finding of cross-admissibility to permit consolidation. Moreover, appellant has pointed to no evidence he presented during trial which would have made a difference in the trial court's pretrial ruling.

Early in the cross-admissibility/consolidation motion, the defense contended that because the decision on consolidation involved a consideration of the impact of joining a strong case with a weak case, it would present 136 defense witnesses who would not testify on the issue of cross-admissibility, but would be offered on the strong case/weak case aspect of consolidation. (See, e.g. 73 PRT 3055.) The trial court initially appeared to accept the defense position and proceeded with the issue of cross-admissibility, reserving the question of consolidation until after the defense presented its witnesses. (73 PRT 3084.) However, as the hearing progressed, the trial court began to question the need for extended defense evidentiary presentation involving

affirmative defenses to the various charged offenses, when the normal procedure for handling consolidation motions was by way of offers of proof. (See 86 PRT 5129.) Indeed, the trial court indicated it would consider an offer of proof from the prosecution as to matters which did not require a legal ruling on the admissibility of the evidence relied upon in the proffer. (See 91 PRT 5699-5714.)

The trial court concluded that there was no legal basis for permitting the defense to present "affirmative factual evidence" or "weight evidence" (149 PRT 14037) "to prove or disprove various weights of the testimony." (149 PRT 14036; 149 PRT 14038 ["If the issue is that somebody's case may be weak or strong depending upon what the defense can produce affirmatively, I don't think it is an appropriate time to bring it in"]; 150 PRT 14210 ["impermissible to call in all defense witnesses on the strong-case weak-case issue"]; see 111 PRT 8238-8262.) However, the trial court was not

> precluding [the defense] from rebutting the throat slashings or from calling into question the credibility of a defense -- of a prosecution witness. I am simply saying I am not going to hear the entire case that the jury is going to hear and try the entire case that the jury is going to hear to make the decision on the consolidation motion.

(194 PRT 18714.)

The trial court contrasted its view of unnecessary affirmative factual evidence with evidence presented in challenges to the admissibility of prosecution evidence, such as *Kelly-Frye* witnesses on serology, which was entirely appropriate. (149 PRT 14037.)

> We begin by noting that appellant asserts for the first time on appeal that the defense witnesses were relevant to the issue of cross-admissibility as well as consolidation. (See 2A AOB 277-278.) In the trial court, the defense position concerning its 136 witnesses, was that these were witnesses who did not bear on the issue of cross-admissibility, but would be presented on the strong case/weak case aspect of consolidation. (See, e.g. 73 PRT 3055.) Thus, appellant's claim that the cross-admissibility

ruling was erroneous due to the exclusion of defense witnesses is forfeited. (Evid. Code, § 354, subd. (a).) Nonetheless, the trial court did not err in excluding the defense witnesses.

Cross-admissibility presents a question of evidence admissibility. Only relevant evidence is admissible and sometimes the relevance of evidence depends on the existence of a preliminary fact. (*People v. Lucas* (1995) 12 Cal.4th 415, 466.) Preliminary fact determinations governing admissibility of evidence are controlled by Evidence Code sections 400-406.

Evidence Code section 403 provides, in pertinent part:

> (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
>
> (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
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> . . . .
>
> (4) The proffered evidence is . . . conduct of a particular person and the preliminary fact is whether that person . . . so conducted himself.

To support admission of proffered evidence, the required statutory showing for preliminary facts is only "evidence sufficient to sustain a finding." (Evid. Code, § 403, subd. (a).) Exclusion of proffered evidence is required "only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.'" (*People v. Lucas, supra,* 12 Cal.4th at p. 466.) The trial court determination is only preliminary; the final determination involving credibility of testimony or probative value of evidence is a jury function. (*Id.* at pp. 466-467; see Evid. Code, § 406.[82]) The trial judge's function is merely

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82. Evidence Code section 406 provides:

to determine whether there is evidence sufficient to permit the jury to decide the question. (*People v. Lucas, supra,* 12 Cal.4th at p. 467.) "The judge cannot weigh the opponent's evidence and resolve the conflict against admissibility; this is the jury's function." (3 Witkin, Cal. Evid., Presentation at Trial, § 52, p. 85.)

In this case, the preliminary fact determination for cross-admissibility was whether there was a sufficient showing of similarity between the crimes to support a finding of identity. The defense never represented that its 136 witnesses were relevant to the preliminary fact determination. In fact, the defense position was that the trial court had to make credibility and weight determinations in order to assess the strong case/weak case aspect of consolidation. However, as the proceeding discussion demonstrates, the trial court's cross-admissibility determination is not dependent upon its view of how the jury would ultimately assess the weight and credibility of the evidence. For the same reasons, the trial court did not need to engage in a jury-style weighing in order to assess relevance and the balance of relevance against prejudice under Evidence Code section 352.

Appellant does not mention the statutory standard which the trial court uses for admitting proffered evidence, much less discuss its applicability to the issue. Instead, he claims numerous constitutional provisions required the trial court's full assessment of the relative credibility and weight of the entire trial evidence in making is admissibility determination. He is mistaken.

Appellant begins by asserting that a foundational prerequisite to cross-admissibility is evidence linking the defendant to the other crimes. (2A AOB 280). However, as noted in the previous argument, "complete cross-

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> "This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility."

admissibility is not necessary to justify joinder." (*People v. Cummings, supra*, 4 Cal.4th at p. 1284.) Moreover, none of the authorities which appellant cites, even address, much less support appellant's claim that the trial court must preview the trial evidence in ruling on the proffered evidence. In fact, in *People v. Thompson* (1988) 45 Cal.3d 86, the trial court admitted the other crimes evidence on the prosecutor's offer of proof. (*Id.* at p. 108.)

Appellant next argues that heightened reliability is required in capital cases and the standard of review applicable to sufficiency of evidence underlying a conviction applies to the preliminary fact determination. (2A AOB 281.) Again, however, none of the cases appellant cites involve a trial court's preliminary fact determination in assessing the admissibility of proffered evidence. Appellant then urges a state constitutional right to present evidence. (2A AOB 281, citing Cal. Const., Art. I, § 28, subd. (d).) However, the constitutional provision requires the admission of relevant evidence.[83/] The trial court's duty under Evidence Code section 403 is to assess the admissibility of proffered evidence by determining whether the evidence, if believed and credited by the jury is "sufficient to sustain a finding" of the preliminary fact. It is the jury's province, not the trial court's, to ultimately assess the credibility of the witnesses and the persuasive value of the evidence in light of all of the

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83. Section 28, subdivision (d), provides:

> Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

evidence presented at trial. Thus, defense evidence challenging the credibility of witnesses or the persuasive value of the proffered evidence is simply not relevant in determining its admissibility. (*People v. Lucas, supra,* 12 Cal.4th at p. 467; 3 Witkin, Cal. Evid., Presentation at Trial, § 52, p. 85 ["The judge cannot weigh the opponent's evidence and resolve the conflict against admissibility; this is the jury's function"].)

Next, appellant points to his rights to present evidence, to a fair hearing, to a "two-way street" for the prosecution and defense, to due process, to confrontation, to compulsory process, to counsel, to present a defense, to call witnesses, to his "day in court," to his right to be heard as encompassing the right to file motions, raising claims and issues, to be resolved in an evidentiary hearing, to reliability in a capital case, and to his state constitutional right to present evidence. In this roll call of rights, however, appellant cites no authority supporting his claim that any of these right were violated by the trial court's limitation of evidence in making its preliminary determination on the admissibility of evidence.

The preliminary facts determination under Evidence Code section 403 is equally applicable to prosecution and the defense proffered evidence; in neither case does the trial court make a jury-style determination of credibility or weight. The defense was permitted to raise the admissibility issue and the trial court held a hearing at which all the relevant evidence was presented and subjected to cross-examination. Moreover, the trial court's cross-admissibility determination was specifically conditioned on hearing and resolving questions of evidence admissibility, such as *Kelly-Frye*. None of appellant's due process rights were violated and, by ensuring that the proffered evidence was cross-admissible, the trial court ensured the reliability of the jury's consideration of that evidence after the jury assessed it for credibility and persuasive value.

Appellant's claims that his state constitutional right to present evidence was violated and the trial court abused its discretion by failing to consider all the material facts founders on the irrelevance of appellant's defense witness at this hearing. In judging admissibility, the judge cannot weigh the opponent's evidence and resolve the conflict against admissibility; this is the jury's function. (3 Witkin, Cal. Evid., Presentation at Trial, § 52, p. 85 .) Thus, the defense evidence was, at this hearing, not relevant.

Finally, in claiming prejudice, appellant does not argue that the trial court's cross-admissibility ruling was shown to be erroneous by evidence presented at trial but excluded at the hearing. Instead, he claims he was prejudiced by the cross-admissibility ruling itself. Nonetheless, as discussed in the preceding argument, appellant was not prejudiced by the joint trial. As appellant concedes, the jury rejected the prosecution theory that all the offenses were committed by one person. (2A AOB 277, fn. 264.) Although there was some independent evidence connecting appellant to Garcia and Strang/Fisher, those incidents were the most likely to be impacted by the cross-admissibility of the crimes. Yet, the jury acquitted appellant of the Garcia murder and failed to reach a unanimous verdict on the Strang/Fisher murders. (Cf. *People v. Johnson, supra,* 21 Cal.App.3d at p. 246; see also *People v. Carpenter, supra,* 15 Cal.4th at p. 380 [if the defendant cannot be connected to the prior act, admission of evidence concerning it will not normally prejudice him].)

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THERE WAS INSUFFICIENT FOUNDATION FOR ADMISSION OF THE DEFENSE EXPERT TESTIMONY DURING THE CROSS-ADMISSIBILITY HEARING

Appellant contends the trial court violated his constitutional rights and prejudicially erred during the hearing on cross-admissibility and consolidation,

in rejecting the testimony of a proposed defense expert on the ability of juries to follow limiting instructions. (2A AOB 301-306; 3 AOB 1020; 4 AOB 1200; 5 AOB 1332-1333.) The trial court did not abuse its discretion or violate appellant's constitutional right in excluding the proposed expert testimony because there was an insufficient foundation for its admission.

Dr. Stephen Penrod, an associate professor of psychology at the University of Wisconsin, was called to testify on behalf of appellant. (234 PRT 23950.) Dr. Penrod was offered as an expert on the effect of joinder on jury deliberation. (234 PRT 23974.) Dr. Penrod testified that his predominate research was in the area of jury decision-making and included studies on the effects of joinder of criminal charges. (234 PRT 23951, 23955.) However, other than in his previous testimony in the severance motion in this case before Judge Orfield, Dr. Penrod had not testified as an expert on joinder. (234 PRT 23987-23988.)

Dr. Penrod's first joinder studies resulted in an article published in 1982. (234 PRT 23955-23956; Exh. 731.) In these first two studies, the participants received written trial summaries which followed the general trial pattern (i.e., opening statements, examination and cross-examination of witnesses, closing arguments, and instructions). (234 PRT 23958.) There were four charges involved. (234 PRT 23996.) The participants in the studies were students. (234 PRT 23991.) The participants answered questionnaires after studying the written material. (234 PRT 23993.) There were no deliberations, or any trial presentation. (234 PRT 23993-23994.) Dr. Penrod found a joinder effect in those studies; i.e., there was a lesser likelihood of conviction when a charge was considered alone than when it was considered with other charges. (234 PRT 23959, 23986.)

In a second series of studies, which resulted in articles published in 1984, 1985, and 1986, Dr. Penrod sought to test several hypotheses on the

reason for the joinder effect; specifically whether jurors were accumulating evidence across charges, whether jurors were confusing evidence from several charges, whether jurors were making inferences about a defendant's criminality, and the effect of limiting instructions. (234 PRT 23961-23963; Exhs. 732, 733, 734.) The study used three criminal charges (assault, robbery and burglary), and three different types of evidence (circumstantial, eyewitness identification, and forensic). (234 PRT 23996, 24000.) The trials were enacted on videotape and the videotape was played for the participants, who were grouped in 6-member juries. (234 PRT 24011.) These studies involved both students and persons who had been called for jury service. (234 PRT 24001, 24011.) In the last study, the deliberation of the participants was videotaped and evaluated. (234 PRT 23967-23968.)

While a number of conclusions were reached about the relationship of several factors to joinder effect, none of the studies considered cross-admissibility as a permissive cause. (234 PRT 24024.) None of the studies were designed with cross-admissible crimes and, consequently, there were no instructions on permissible cross-admissible use of evidence. (234 PRT 24034.)

In concluding that the proposed testimony lack a sufficient relevant foundation, the trial court found that none of the studies involved cross-admissible charges and the studies did not sufficiently simulate real trials. (234 PRT 24036-24038; 235 PRT 24066-24068, 24070-24071, 24121, 24126.) The trial court also found the deliberation evaluators had an error rate of approximately 50%. (235 PRT 24127-24128.)

Evidence Code section 801 provides for the admission of expert testimony.[84/] However, Evidence Code section 720 limits the persons who can

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84. Evidence Code section 801 provides:

testify as an expert to those persons with "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).)[85] The qualification of an expert witness, including foundation requirements, rests in the sound discretion of the trial court, which is necessarily broad. (*People v. Ramos, supra*, 15 Cal.4th 1133, 1175.) "Absent a manifest abuse, the court's determination will not be disturbed on appeal." (*Ibid.*)

The two essential questions in assessing admissibility of proposed expert testimony are whether the witness have the background to understand and evaluate information on the subject and whether the witness has access and exposure to relevant data. (*Naples Restaurant, Inc. v. Coberly Ford* (1968) 259

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
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> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

85. Evidence Code section 720, subd. (a), provides:

> A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

Cal.App.2d 881, 883.) In this case, the trial court found in favor of the witness on the first question. (See 235 PRT 24121.) However, as to the second question, the trial court found that the studies upon which Dr. Penrod intended to base his opinion were not a sufficiently relevant basis for legal expertise in joinder. (235 PRT 24126.) The trial court noted that the Dr. Penrod acknowledged that the first studies demonstrated nothing more than what the trial court was already aware: that there was potential prejudice in joining offenses due to confusion, improper accumulation of evidence, and inferences of criminality. (235 PRT 12126.) The trial court also recognized that the degree of prejudice is dependent on the particular facts in a given case and the "real-life situation" of a trial, with all the accouterments thereof. (235 PRT 24126-24127.) The studies did not take into account the effects of a real-life trial. Moreover, the studies dealt only with joinder of unrelated cases with no cross-admissibility. (235 PRT 24127.)

The trial court's observations regarding that lack of relevance of the studies to the issue were similar to those expressed by the United States Supreme Court in *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137]. None of the study participants were actual jurors under oath, apply law to an actual case involving an actual capital defendant. (*Id.* at p. 171.) Considering similar studies purportedly demonstrating guilt-phase prejudice from death-qualification voir dire, the United States Supreme Court had "serious doubts about the value of these studies in predicting the behavior of actual jurors." (*Ibid.*; see also *People v. Carpenter, supra*, 15 Cal.4th 312, 371.) Similarly, here, only one study even attempted to simulate the process of jury deliberation and that study recognized a 50% error rate in the evaluator's ability to uniformly catalogue the "juror's" deliberative comments. Finally, none of the studies considered the effect of cross-admissibility of the charges. As this Court recognized in *People v. Ruiz* (1988) 44 Cal.3d 589, this Court

"[i]f the evidence were indeed cross-admissible . . . then any spillover effect would have been entirely proper." (*Id.* at p. 607.) Indeed, the very basis for cross-admissibility is the proper consideration of other crimes as evidence of guilt of the charged crime.

In light of the lack of relevant data upon which Dr. Penrod intended to rely in offering his opinion, the trial court's ruling was not an abuse of discretion and did not violate any of appellant's constitutional rights. (*People v. Ramos, supra,* 15 Cal.4th at p. 1175-1176; see also Argument IV, *supra*). Moreover, the court having essentially previewed all that data as well as having heard Dr. Penrod's conclusion in the context of his foundational testimony, and concluding that the studies were not sufficiently relevant to the joinder issue, appellant cannot demonstrate prejudice.

VI.

THE TRIAL COURT PROPERLY CONSIDERED THE CRIMES IN DETERMINING CROSS-ADMISSIBILITY AND CONSOLIDATION

Appellant contends the trial court prejudicially erred and violated his constitutional rights in its cross-admissibility finding and consolidation ruling by failing to consider each offense independently. (2A AOB 307-311; 3 AOB 1021; 4 AOB 1201; 5 AOB 1334-1335.) To the contrary, the trial court's ruling reflects its separate consideration of the evidence in each offense and comparison of that evidence to the evidence in the other offenses under the legal requirements for judging cross-admissibility.

Appellant relies on the trial court's cross-admissibility ruling (248 PRT 25503-25513, quoted herein at pp. 89-94, *supra*) in asserting the court did not independently consider each crime. (2A AOB 307-308.) He also contends, as he argued previously, that under *People v. Albertson* (1944) 23 Cal.2d 550,

independent review is required to prevent improper bootstrapping. (2A AOB 308,citing *id.* at p. 279.)

It is unclear what appellant means by "independent" review of each case. In this argument, he asserts the trial court is required to evaluate cross-admissibility on a case-by-case basis. However, he cites his earlier argument in which he contended that the trial court must find independent evidence of the defendant's commission of each crime. (2A AOB 280.) In any case, as previously noted, the trial court found there was independent evidence of appellant's commission of each crime. (248 PRT 25510.) Moreover, as previously discussed, "complete cross-admissibility is not necessary to justify joinder." (*People v. Cummings, supra*, 4 Cal.4th at p. 1284.) Additionally, while the trial court discussed its findings on all the cases, its factual discussion clearly indicates that it considered each case's factual matrix in comparison with the others. (248 PRT 25503-25513.) Appellant cites no authority for his implied assertion that the trial court's oral ruling must explicitly discuss each case independently. Appellant has simply not demonstrated any error in the trial court's assessment of the facts of each case.

VII.

APPELLANT WAIVED HIS CLAIM THAT THE TRIAL COURT IMPROPERLY "BOOTSTRAPPED" ITS IN LIMINE RULINGS AND THERE WAS NO IMPROPER "BOOTSTRAPPING"

Appellant contends the trial court improperly assumed unestablished findings to support its in limine rulings. Specifically, he contends the trial court assumed appellant's guilt of all the charged offenses in making its cross-admissibility/consolidation ruling, assumed all the charged offenses were cross-admissible on the Santiago case in making its eyewitness identification expert ruling, and assumed all the charged offenses were cross-admissible on the

Jacobs case in making its *Hitch/Trombetta* ruling.[86] He contends the error was prejudicial and violated his constitutional rights. (2A AOB 312-319; 3 AOB 1022-1023; 4 AOB 1202-1203; 5 AOB 1336-1337.) Appellant's claims of error are forfeited by having failed to object in the trial court. Moreover, appellant's claims are incorrect.

Appellant's first assertion of error – that the trial court assumed appellant's guilt in deciding the cross-admissibility and consolidation motion – is both inaccurate and ironic. The trial did no more than what appellant has argued it was required to do in deciding cross-admissibility; it considered and found that there was independent evidence in each case connecting appellant with the crimes. (248 PRT 25510;[87] cf. 2A AOB 279-280.) Additionally, appellant did not object to the trial court's ruling on this basis and forfeited the alleged error. (248 PRT 25510, 25514-25516.)

Next appellant contends the trial court assumed all the charged offenses were cross-admissible on the Santiago case in making its eyewitness identification expert ruling. Again, however, he did not object on the basis now asserted. (242 PRT 24900.) In any case, in its discussion of the eyewitness identification expert testimony, the trial court stated its view on the availability of evidence independently corroborating Santiago and added:

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86. While appellant argues generally that the trial court's in limine rulings were defective, the only rulings he specifically identifies are those set forth above.

87. "Setting aside for the moment the evidence of shared marks in all the Lucas cases that indicate a sole perpetrator, there are independent factors about each of the crimes which link David Lucas to each crime. It is the fact that Mr. Lucas is connected up through separate pieces of independent evidence to each of the crimes already linked together by signatory common marks that produces strong reliability in the identification."

then we add on top of that - - we have to add in all of the other cases which independently come in and begin drawing a picture that is absolutely very, very plain.

(242 PRT 24900.)

While the trial court's comments indicate it considered evidence of the other cases in assessing, in part, whether Santiago's identification was independently corroborated, the trial court later explained that it relied on that other-case evidence because it had tentatively concluded that the cases would be consolidated and had so advised the parties. (242 PRT 24903.) Defense counsel argued that the Santiago identification was a "classic one on one situation. We don't have more that one individual. We have a single individual, and this is where the court should be especially concerned." (242 PRT 24903.) The trial court responded:

"But, see, that's where we differ. We don't have a single individual. You have other cases that all point toward the same thing and which, *as I have told you - - and we're jumping the gun here a bit, but my tentative ruling has been and it hasn't changed to this moment that they would be consolidatable [sic] on the issue of identity*. So you really don't have a one case, one witness, one on one situation. That's where we're parting - - ."

(242 PRT 24903, italics added.)

Thus, although the trial court had not formally adopted its tentative ruling on the cross-admissibility/consolidation as a final ruling at the time of the eyewitness expert ruling, its tentative ruling did become its final ruling (248 PRT 25503-25513), and there was no improper "bootstrapping." For the same reason, any error in considering the other crime evidence was harmless. Indeed, had the trial court changed its mind on the consolidation issue, the defense could have requested it reconsider the eyewitness expert ruling in light of that change.

Finally, appellant contends the trial court improperly assumed all the charged offenses were cross-admissible on the Jacobs case in making its *Hitch/Trombetta* ruling. Again, however, appellant did not object on this basis and forfeited the claim. (247 PRT 25438.) Additionally, the trial court ruling came after it explained in the eyewitness expert ruling that it was considering the other crime evidence because it had seen nothing to change its tentative opinion. As noted above, the tentative opinion became the final opinion. Thus, there was neither improper "bootstrapping." In any case, if there was error, it was harmless. In including the other crimes in assessing constitutional materiality (see *California v. Trombetta, supra,* 467 U.S. at pp. 488-489), the trial court found that there was virtually no likelihood that the fingerprint would have been exculpatory, "particularly" in light of "the clear and unmistakable evidence of [appellant's] printing on the note." (247 PRT 25439.) It is clear that the focus of the trial court's constitutional materiality ruling was on the evidence matching appellant with the writing on the note.

VIII.

THE TRIAL COURT DID NOT ERR IN DENYING AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF PROSECUTORIAL VINDICTIVENESS BECAUSE THE ALLEGED VINDICTIVE ACTION - THE CONSOLIDATION MOTION - DID NOT INCREASE APPELLANT'S POTENTIAL SENTENCE

Appellant contends the trial court prejudicially erred in denying an evidentiary hearing on his allegations of prosecutorial vindictiveness in seeking consolidation. (2A AOB 320-330; 3 AOB 1024; 4 AOB 1204-1205; 5 AOB 1338-1339.) Since the alleged vindictive act -- the consolidation motion -- did not increase appellant's potential sentence, there was no basis for the claim and no need for an evidentiary hearing.

The prosecution filed a motion to consolidate cases CR 73093 and CR 75195 on December 12, 1986. (43 CT 9350-9401, 9402-9453.) On January 8, 1987, in case CR 75195, appellant filed an opposition to the consolidation motion, arguing that the motion was untimely, would involve an undue consumption of time, was beyond the jurisdiction of the trial court, and was in violation of Penal Code section 190.3. (44 CT 9543-9575.) Appellant filed supplemental points and authorities on January 2, 1987. (44 CT 9579-9591.) On May 24, 1988, appellant filed a motion which sought to recuse the District Attorney and deny consolidation on the basis of prosecutorial vindictiveness. (18 CT 3702-3824; 57 CT 12474-12596.) Specifically, appellant contended that the prosecution's consolidation motion was filed in retaliation for appellant's successful assertion of his speedy trial right in CR 75195. (18 CT 3709-3777; 57 CT 12481-12549.) The prosecution's response was filed June 2, 1988. (18 CT 3909-3930; 58 CT 12671-12693.)[88] Appellant's reply was filed June 6, 1988. (19 CT 3931-3973; 58 CT 12791-12833.)

In the hearing on the motion, appellant contended that a hearing was required on issues of fact raised in the pleadings. (248 PRT 25459.) The trial court denied the request for an evidentiary hearing, ruling that the facts:

> are not really in dispute. [To] [t]he extent that there have been some factual disagreements, I think those have all been cleared up by the transcripts that have been placed by - - quotations from the transcripts that have been placed into the points and authorities. What is really in dispute is the characterization of what has occurred in the course of these proceedings. . . .

(248 PRT 25460.)

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88. Inasmuch as appellant's motion sought recusal of the District Attorney's office, the Attorney General filed its response to the recusal request on June 2, 1988. (18 CT 3899-3908; 58 CT 12695-12704.)

In its ruling on the motion, the trial court stated:

> The defense has alleged twelve separate grounds for recusal of the District Attorney's office from the Lucas cases.[89/] Grounds one, two, and three are based on alleged misuse of legal procedure in order to gain tactical advantage over the defendant through a consolidation motion.
>
> I have examined each allegation, and I find that indeed the prosecution has made very technical use of the law, apparently to counteract similar procedures by the defense. It is clear to the court that through technical maneuvering the defense reversed the original trial order of the two Lucas cases. The People wanted to preserve the order of the trials. Several motions and counter motions, including those which disqualified Judge Kennedy on both cases, have resulted in the present posture of this case.
>
> I cannot conclude, however, that the prosecution has acted vindictively. None of the motions were legally improper, and I do not see what Mr. Lucas's rights have been impaired in any way during the procedures undertaken by both sides."

(248 PRT 25461.)

The basis for a due process claim of prosecutorial vindictiveness was summed up by the United States Supreme Court in *United States v. Goodwin* (1982) 457 U.S. 368 [102 S. Ct. 2485, 73 L.Ed.2d 74]: "while an individual certainly may be punished for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." (*Id.* at 372, fn. omitted.) The application of this due process right to an assertion of prosecutorial vindictiveness arose from a series of cases beginning with *North Carolina v. Pearce* (1969) 395 U.S. 711 [89 S.Ct. 2072, 23 L.Ed.2d 656], where the Court held that due process "requires that 'vindictiveness [by a judicial officer] against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.'"

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89. See 18 CT 3705-3708 and 57 CT 12477-12480.

(*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1524-1525, quoting *North Carolina v. Pearce, supra,* 395 U.S. at 725; see also *Blackledge v. Perry* (1974) 417 U.S. 21, 25-26 [94 S.Ct. 2098, 40 L.Ed.2d 628].) While increased punishment following conviction upon retrial after a successful appeal is not entirely prohibited by the federal due process clause, a presumption of vindictiveness arises due to the realistic likelihood that the increased sentence resulted from vindictiveness. (*Blackledge v. Perry, supra,* 417 U.S. at p. 27.)

In *Blackledge v. Perry*, the Court concluded that when the "central figure is . . . the prosecutor," due process required "a rule analogous to that of the *Pearce* case." (*Ibid.*) Thus, in *Blackledge v. Perry*, a presumption of vindictiveness in violation of due process arose where the prosecution, which had originally charged the defendant with a misdemeanor, indicted the defendant on felony charges when the defendant exercised his statutory right to trial *de novo* after being convicted of the misdemeanor, which annulled the misdemeanor conviction and required retrial. "[B]y 'upping the ante' through a felony indictment, the prosecutor's actions raised a presumption that the motivation for the increased charges was to punish the defendant for exercising his right. (*Blackledge v. Perry, supra,* 417 U.S. at p. 28.)

Thus, a federal due process claim of vindictiveness, whether by a judicial officer or a prosecutor, arises in situations where the defendant is subjected to increased punishment for his criminal act after exercising a right or was subjected to increased exposure to punishment by way of additional or increased charges after exercising a right. (See *United States v. Goodwin, supra,* 457 U.S. at 370-371 [prosecutor obtained felony indictment after defendant demanded right to jury trial on charges which had originally been filed as misdemeanors]; *Bordenkircher v. Hayes* (1978) 434 U.S. 357 [98 S.Ct. 663, 54 L.Ed.2d 604] [prosecutor threatens to bring additional charges carrying significantly increased potential punishment against accused who refused to

plead to original charge].) The state constitutional due process guarantee "also prohibits *increased charges* motivated by prosecutorial vindictiveness." (*In re Bower* (1985) 38 Cal.3d 865, 876-877, italics added [defendant charged with more severe crime after he moved for mistrial]; *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 368 [prosecution added felony convictions as sentence enhancements after defendant declined plea bargain and demanded retrial following mistrial]; *People v. Edwards* (1991) 54 Cal.3d 787, 826-827 [prosecution adds special circumstance allegation after defendant demands right to counsel, refuses extradition, and refuses to talk to police]; *People v. Michaels* (2002) 28 Cal.4th 486, 514-515 [prosecutor adds special circumstance after defendant's attempt to plead to charged murder].)

In this case, all of the charged offenses which were proposed to be consolidated existed in the two informations long before the prosecution sought consolidation. The prosecution's consolidation motion neither added nor increased charges, and the proposed consolidation did not increase appellant's sentence exposure. Regardless of the prosecution's motivation for seeking consolidation, the punishment ultimately imposed was based on appellant's crime, not on his assertion of a statutory or constitutional right. Appellant's due process right to be free of prosecutorial vindictiveness was not implicated by the consolidation motion. Since the challenged prosecutorial action did not implicate vindictive infliction of increased exposure to punishment, the trial court's denial of an evidentiary hearing was not error.

IX.

THE TRIAL COURT DID NOT ERR IN INCLUDING A CAUTIONARY INSTRUCTION ON THE PROPER CONSIDERATION OF EVIDENCE OF MULTIPLE CRIMES IN ITS PRELIMINARY INSTRUCTIONS TO THE JURY

Appellant contends the trial court prejudicially erred and violated his constitutional rights by including in its pre-testimony instructions, an instruction on the proper consideration of evidence of multiple crimes. He asserts the cautionary instruction constituted an improper judicial comment on the evidence and gave undue and prejudicial emphasis on other crimes evidence. (2A AOB 231-236; 3 AOB 1006-1007; 4 AOB 1186-1187; 5 AOB 1317-1318.) To the contrary the instruction was fair and balanced; there was neither improper judicial comment nor undue and prejudicial emphasis.

As part of its pre-testimony instruction, the trial court instructed the jury:

> As you know, each of the counts charged against [appellant] states a distinct offense. At the end of trial you will have to decide each count separately. In deciding each count of murder separately, however, you will be able to consider evidence of the other murder counts, but in a limited way. When you consider any one murder count, the evidence on other murder counts, if believed, may not be considered by you to prove that [appellant] is a person of bad character or that he has a disposition to commit crimes, but you may consider evidence on the other counts to determine whether a characteristic method exists in the commission of other offenses that is similar to the method used in the commission of the offense under consideration.
>
> Your determination of that question in accordance with the final instructions given to you may affect your decision on such issues as identity, motive, or intent of the perpetrator.
>
> For the limited purpose for which you may consider other count evidence, you must weigh it in the same manner as you do other evidence in the case.

A more detailed instruction on the use of the other count evidence will be given to you with the final instructions.

(1 TRT 13-14.)[90]

Appellant claims the instruction improperly emphasized other crimes evidence to the exclusion of other evidence. In the first place, the trial court's pre-testimony instructions did not exclusively address other crimes evidence; the instructions also included factors applicable in evaluating lay and expert witness testimony. (1 TRT 11-12.) The instruction also did not improperly emphasize other crimes evidence. Appellant's reliance on *People v. Salas* (1976) 58 Cal.App.3d 460, is misplaced. As this Court has described it, the *Salas* case held:

> that, because the defendant there was charged with robbery with the specific intent to inflict great bodily injury (§ 213), it was error for the trial court to expressly instruct the jury that the circumstantial evidence instruction embodied in CALJIC No. 2.02 applied to proof of the specific intent for the crime of robbery, without also expressly instructing that it applied to proof of the specific intent to commit great bodily injury. (58 Cal.App.3d at pp. 474-475.)

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1144, fn. 49.) In *Salas*, the appellate court said the jury might have concluded the rules specified in CALJIC No. 2.02 did not apply to the great bodily injury intent. (*People v. Salas, supra,* 58 Cal.App.3d at pp. 474-475.) Appellant has pointed to no other evidence to which the cautionary provisions of the trial court's instructions should have been applied. *Salas* simply has no application to the trial court's instruction.

Appellant also claims the instruction was an improper comment on the evidence and he asserts the instruction incorporated the prosecution theories

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90. The instruction was a modification of the then-existing version of CALJIC No. 2.50 [Evidence of Other Crimes]. (CALJIC No. 2.50 (5th ed. 1988 bound vol.).)

while excluding the defense theories. However, appellant points to no authority, nor has respondent found any authority, supporting the implied assertion that a jury instruction can constitute judicial comment on the evidence. To be sure, the instruction, like may instructions, addressed particular items of evidence, but it did so by presenting legal principles applicable to that evidence. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1136 [a judicial comment may address matters of fact; an instruction may not].)

Even if the instruction were construed as a comment on the evidence it was not improper. While judicial comment on evidence is constitutionally sanctioned, such comment must be "accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1218.) The privilege of judicial comment may not be used to withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*Ibid.*) Judicial comment is evaluated on a case-by-case basis and is judged by its content and the circumstances in which it was made. (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.)

Although appellant claims the instruction was unfair because it incorporated the prosecution theory while excluding the defense theory, the plain language of the instruction does not support his claim. While the instruction permitted the jury to consider similarities between the offenses to decide if a characteristic method was being used, it neither endorsed such a finding nor discouraged a contrary finding; the determination was simply left to the jury. Similarly, the instruction permitted the jury to consider the existence of a characteristic method, if it so found, in assessing identity, motive, and intent. Again, however, the instruction neither suggested nor discouraged any particular finding; indeed, it plainly left the weight to the determination of the jury under all of the instructions which would be given at the conclusion of

the trial. In fact, the instruction very clearly admonished the jury that evidence of multiple crimes may not be used to find appellant was a person of bad character or had a disposition to commit crimes. Such cautionary instructions are beneficial to the defense. (See *People v. Frye* (1998) 18 Cal.4th 894, 959 [CALJIC No. 2.17 is a cautionary instruction the effect of which is beneficial to the defendant]; *People v. Bolin* (1998) 18 Cal.4th 297, 327 [CALJIC Nos. 2.06 and 2.52 are cautionary in nature and benefit the defense].) There is simply no support in the language of the instruction for appellant's claim of unfair prosecutorial bias.

Likewise, the circumstances point to no impropriety in giving the instruction. As the trial court pointed out during the discussion on the instruction, the trial would be lengthy and the jury would be assisted in knowing the proper and limited use of the multiple counts as well as the overlapping evidence. (309 PRT 36655.) Moreover, the trial court found that the voir dire would have led the jury to the erroneous belief that there was absolutely no cross-consideration permissible and the instruction corrected that misconception. (309 TRT 36673.) It is a proper judicial function for the court to clear up possible jury confusion. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 74.) The fact that the instruction was limited to particular evidence did not make it improper. A judge may properly restrict his or her comments to portions of evidence or the credibility of a single witness. (*People v. Proctor* (1992) 4 Cal.4th 499, 542.)

Neither the content nor the circumstances support any inference of impropriety in the multiple count instruction. Moreover, in light of the neutral nature of the instruction, the acquittal on the Garcia count and the inability to reach a verdicts on the Strang and Fischer counts, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

X.

THE MULTIPLE COUNTS INSTRUCTION DID NOT FAIL TO REQUIRE THE JURY TO FIND APPELLANT COMMITTED THE OTHER COUNTS AS CIRCUMSTANTIAL EVIDENCE AND OTHER COUNTS EVIDENCE WAS NOT REQUIRED TO BE PROVED BEYOND A REASONABLE DOUBT

Appellant claims the modified other-crimes instruction on the jury's consideration of evidence of multiple counts was prejudicially erroneous and violated his constitutional rights because it failed to require the jury to find that appellant committed any other count before using his commission of that other count as circumstantial evidence that he committed the count under consideration. (2A AOB 237-251; 3 AOB 1008-1009; 4 AOB 1188-1189; 5 AOB 1319-1320.) In a separate, but related argument, appellant contends the standard by which the jury must determine appellant's commission of other counts should be beyond a reasonable doubt. (2A AOB 275-276; 3 AOB 1016-1017; 4 AOB 1196-1197; 5 AOB 1327-1328.) The instruction adequately advised the jury to find appellant committed any count before using it as circumstantial evidence and the beyond-a-reasonable-doubt standard does not apply.

In addition to the other-crimes, and multiple count instruction given in the pre-testimony instructions (1 TRT 13-14; see text in Argument IX, *supra*), the trial court instructed the jury with the following modification of CALJIC No. 2.50.

> Evidence has been introduced in this case of more than one count of homicide. As you have been instructed, each count charged must be decided separately. However, you may, if you so choose, use evidence from other counts together with any count under consideration for certain limited purposes.
>
> Other counts evidence may be used by you, if you so choose, for the purpose of determining whether such evidence tends to show the

identity of the person committing the crime charged in the count under consideration. You may also consider whether such evidence tends to negate the inference of identity of the person committing the crime charged.

You may consider whether or not the evidence as to other counts tends to show a characteristic method, plan, or scheme in the commission of criminal acts similar to any method, plan, or scheme used in the commission of the offense in the count then under consideration. Whether or not the evidence shows such a characteristic method, plan, or scheme is a matter solely for your determination.

If you should find a characteristic method, plan, or scheme, you may also consider whether or not such clear connection exists between the one offense under consideration and the other offense or offenses of which the defendant is accused, that it may be logically concluded that if the defendant committed the other offense or offenses, he also committed the crime under consideration.

You may also consider other counts evidence together with the count under consideration to determine whether there existed in the mind of the perpetrator an intent which is a necessary element of the count under consideration or whether such intent may have been absent in some of all of the offenses charged.

You may also consider other counts evidence together under the count under consideration to determine whether there existed any common motive for the crime or crimes charged or whether then evidence established different motives.

Other counts evidence is a form of circumstantial evidence. Therefore, you must weigh such evidence in the same manner and subject to the same rules as I previously provided to you regarding circumstantial evidence. You must decide the weight, if any, to which other crimes evidence is entitled.

It is a matter solely for your determination as to whether or not any common scheme, plan, or method applies to some, all, or none of the counts. You may find that the other crimes evidence may apply to some of the offenses, but not to others.

You are cautioned that evidence of other counts cannot be used to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.

(65 TRT 12197-12199.)[91]

The correctness of jury instructions is determined from the entire charge, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 987.) Instructions should be interpreted so as to support the judgment if they are reasonably susceptible to such interpretation. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1112.) Jurors are presumed to be intelligent and capable of understanding instructions and applying them to the fact of the case. (*People v. Lewis* (2001) 26 Cal.4th 334, 390.)

Contrary to appellant's claim, the other counts instruction did not excuse the jurors from finding that appellant committed the other counts before considering that evidence on any count under consideration. In the first place, the instruction itself specifically advised the jury such evidence may be considered if it "tends to show [or negate an inference of] the identity of the person committing the crime charged in the count under consideration" by demonstrating a characteristic method, plan, or scheme. (65 TRT 12198.) The instruction further specifically advised the jury that such characteristic method, plan or scheme may be considered on identify if there exists "such clear connection" between the offenses "that it may be logically concluded that if the defendant committed the other offense or offenses, he also committed the crime under consideration." (65 TRT 12198, emphasis added.) The underlined language above clearly called upon the jury to determine whether appellant

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91. While the pre-testimony instruction did not go into as much detail, it expressly told the jury that a more detailed instruction would be given with the final instructions. (1 TRT 14.)

committed the other-crimes counts before using evidence of said counts for the purpose of establishing appellant's identity.[92]

The instruction also specifically advised the jury that other crimes evidence was a form of circumstantial evidence, subject to the trial court's circumstantial evidence instructions. (65 TRT 12199.) Those circumstantial evidence instructions advised the jury that such evidence "proves a fact from which an inference of the existence of another fact may be drawn" and "an inference is a deduction of fact that may logically and reasonably be drawn." (65 TRT 12187.)

Although appellant contends the instruction permitted the jury to rely on the other counts if all they had was a suspicion he committed them (2A AOB 247), the circumstantial evidence instruction plainly precluded the jury from relying on anything less than a logically and reasonably drawn inference. Thus, both the instruction and the circumstantial evidence instruction required the jury to find appellant had committed the other counts before relying on that evidence as proof of his commission of the count under consideration.

Appellant contends the instruction was erroneous by failing to require the other counts be proven beyond a reasonable doubt before being used a circumstantial evidence. However, this Court has clearly and correctly rejected that position. (*People v. Carpenter, supra,* 15 Cal.4th at pp. 380-382.)

In any event, in light of the Garcia acquittal and the inability to reach a verdict on the Strang and Fisher murders, any error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

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92. In discussing the proper consideration of other counts evidence, the prosecutor stressed the underlined language. (62 TRT 11813-11814.)

XI.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE PRELIMINARY FACT NECESSARY TO SUPPORT AN INFERENCE OF IDENTITY FROM CROSS-ADMISSIBLE COUNTS

Appellant contends the trial court prejudicially erred and violated his constitutional rights by failing to instruct the jury that before relying on cross-admissible evidence it must find that the cross-admissible counts shared "signature-like" similarities. (2A AOB 252-259; 3 AOB 1010-1011; 4 AOB 1190-1191; 5 AOB 1321-1322.) To the contrary, the trial court adequately instructed the jury on the proper foundational requirements for drawing an inference of identity from similar crimes.

Relying on Evidence Code section 403, subdivision (c)(1), appellant contends the trial court was required to instruct the jury that it must disregard the cross-admissible counts unless it found that the cross-admissible counts shared marks demonstrating a unique and distinct signature of the perpetrator. When the relevance of admitted evidence depends on the existence of a preliminary fact, Evidence Code section 403, subdivision (c)(1), requires the trial court on request to instruct the jury "to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist."

However, the trial court did instruct the jury with a modified version of CALJIC No. 2.50. The trial court's instruction is quoted in Argument X, *supra,* and it told the jury, among other things, that "[o]ther counts evidence may be used by you, if you so choose, for the purpose of determining whether such evidence tends to show the identity of the person committing the crime charged in the count under consideration"; "[y]ou may consider whether or not the evidence as to other counts tends to show a characteristic method, plan, or scheme in the commission of criminal acts similar to any method, plan, or

scheme used in the commission of the offense in the count then under consideration"; and "[i]f you should find a characteristic method, plan, or scheme, you may also consider whether or not such clear connection exists between the one offense under consideration and the other offense or offenses of which the defendant is accused, that it may be logically concluded that if the defendant committed the other offense or offenses, he also committed the crime under consideration." (65 TRT 12197-12199, underlining added.)

The trial court also gave the jury a further instruction on factors in determining whether a characteristic method, plan, or scheme existed:

> In considering the possible existence of a characteristic method, plan or scheme involved in the commission of any of the offenses charged, you may look to factors of similarity and dissimilarity between the offenses. You may look to the distinctiveness of marks of similarity and/or dissimilarity.
>
> Factors of similarity that are not distinctive may yield little worth in determining whether two crimes reveal a common method, plan, or scheme. On the other hand, factors of similarity that are highly distinctive or unique may be of value.
>
> If there are no shared unique or highly distinct marks of similarity between crimes, or if there are only marks of dissimilarity, in inference of common method, plan, or scheme does not arise and such crimes would be of no evidentiary value in determining the identity of the perpetrator.

(65 TRT 12199-12200, underlining added.)

The gist of appellant's instructional complaint seems to be the failure of the trial court's instruction to include use of the term "signature" in describing the degree of similarity sufficient to support a finding of a characteristic method. (See underlined language in footnote 254 at 2A AOB 254.) However, he points to no case making such language an instructional requirement. In fact, this Court has not always used "signature" in discussing similarities necessary to support admission of other crimes evidence on the basis of modus

operandi and has used it as simply an additional means of describing common marks which are sufficient to support admission of other crimes evidence.

In *People v. Bradford, supra,* 15 Cal.4th 1229, this Court stated that "[t]o be admissible to demonstrate a distinctive modus operandi, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes." (*Id.* at p. 1316.) This Court made no mention of signature or signature-like similarities in describing the preliminary fact necessary for admission of modus operandi evidence. In *People v. Ewoldt, supra,* 7 Cal.4th 380, this Court stated:

> The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Miller, supra,* 50 Cal.3d 954, 987.) "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (1 McCormick, *supra*, § 190, pp. 801-803.)

(*Id.*, at p. 403.) Thus, this Court has described common marks as being "like a signature" when they are "sufficiently distinctive so as to support the inference that the same person committed both acts." (*Ibid.*)

Given the apparent equivalence between "signature-like" and "sufficiently distinctive as to support the inference that the same person committed both acts," there appears no basis for complaint where, as here, the trial court instructions used language similar to the latter terminology rather than the former. This conclusion is reinforced by the additional instruction in which the jury was told that an inference of a characteristic method, plan, or scheme is dependent upon the existence of distinct similarities and undermined by dissimilarities, and that in the absence of unique and highly distinctive shared similarities, no inference of a characteristic method, plan or scheme would arise and there would be no evidentiary value.

In any event, in light of the Garcia acquittal and the inability to reach a verdict on the Strang and Fisher murders, any error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

XII.

APPELLANT WAIVED HIS CLAIM THAT THE OTHER COUNTS INSTRUCTION WAS INADEQUATE TO ADVISE THE JURY ON THE DEFENSE THEORY AND, IN ANY CASE, THE INSTRUCTION WAS NOT ERRONEOUS

Appellant claims the modified other-crimes instruction (CALJIC No. 2.50) on the jury's consideration of evidence of multiple counts was prejudicially erroneous and violated his constitutional rights because it presented the prosecution theory on consideration of multiple counts and failed to present the defense theory that if the jury had a reasonable doubt as to appellant's guilt of one charged crime, evidence of a common modus operandi between the charged crimes could be viewed as a basis for finding reasonable doubt as to the other charged crimes. (2 A AOB 260-269; 3 AOB 1012-1013; 4 AOB 1192-1193; 5 AOB 1323-1324.) Appellant waived the claim of error by failing to request a modification of the modus operandi instruction to included the allegedly missing aspect. Moreover, the instruction was not erroneous and did not violated any of appellant's constitutional rights.

Appellant claims the trial court's instruction on consideration of other counts evidence[93] was one-sided by advising the jury it could consider evidence of a modus operandi as evidence of appellant's identity while failing to advise the jury it could consider evidence of modus operandi a basis for finding reasonable doubt as to appellant's identify if it determined someone other than

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93. The instruction is set forth in Argument X, *supra.*

appellant committed one of the crimes. Appellant has not shown, nor has respondent found any place in the trial record where the defense requested that the instruction by expanded to included this "defense theory." A defendant may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the defendant has requested appropriate clarifying or amplifying language. (*People v. Hill, supra*, 3 Cal.4th 959, 997, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see also *People v. Jenkins, supra,*22 Cal.4th at p. 1020; *People v. Johnson* (1993) 6 Cal.4th 1, 52.)

Contrary to appellant's claim, the instruction permitted the jury to consider whether evidence of a modus operandi as to all counts inculpated or exculpated appellant. Appellant concedes that the second paragraph of the instruction told the jury it could consider other counts evidence for the purpose of determining whether such evidence "tends to show the identity of the person committing the crime" or "tends to negate the inference of identity of the person committing the crime." (65 TRT 12198.) The instruction also advised the jury that if it found a characteristic method, plan, or scheme common to two or more of the charged offenses, it could consider whether or not "such clear connection exists between the one offense under consideration and the other offense or offenses of which the defendant is accused, that it may be logically concluded that if the defendant committed the other offense or offenses, he also committed the crime under consideration." (65 TRT 12198.) The same consideration would naturally apply should the jury conclude that some one other than appellant committed the other offenses.[94/]

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94. Without discussion or citation to authorities, appellant says the instruction undermined the burden of proof beyond a reasonable doubt by informing the jury of its sole discretion in making findings and the clear connection between offenses which must exist before an inference of identity arises. The point is waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

In any case, there was no error as the instruction was not slanted in favor of the prosecution nor did it arbitrarily limit the jury's consideration of evidence. The failure of the defense to request amplification or modification to include this "defense theory" is completely understandable because it was not a theory of the defense that one perpetrator committed the charged offenses. The defense vigorously challenged cross-admissibility in pretrial hearings and at trial, and contended there was third party evidence for almost every incident and the third party perpetrators were all different. (61 TRT 11589.) The instruction gave both sides of the cross-admissibility issue. Thus, appellant's reliance on *People v. Moore* (1954) 43 Cal.2d 517, is misplaced. In *Moore*, the major issue in the claim of self-defense was whether the decedent was the initial aggressor. The trial court gave instructions which cast the issue from the prosecution's viewpoint and refused instructions from the defense viewpoint. That imbalance, along with other instructional errors, in a closely balanced case was found prejudicial. (*Id.* at pp. 524-527, 530-531.) In this case, the instruction neither favored the prosecution nor disfavored the defense on the relevant contested issue; i.e, whether a characteristic method of killing existed, such as to support an inference of identity. The instruction was neutral with respect to the cross-admissibility issue, permitting the jury to make appropriate findings, but only under strictly limited conditions.

Appellant's due process claim is also without merit. Appellant's reliance on *Cool v. United States* (1972) 409 U.S. 100 [93 S.Ct. 354, 34 L.Ed.2d 335], as support for his claim that an instruction slanted in favor of the prosecution

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In any case, the instructional language told the jury nothing more than that it was up to the jury whether to make any findings and that any inference of identity required a clearly connected characteristic methodology. Moreover, the instruction told the jury that any findings made on the basis of a characteristic method were circumstantial evidence subject to the instructions governing circumstantial evidence. Nothing in the instruction undermined the beyond-a-reasonable-doubt standard.

violates due process, is misplaced. *Cool* is simply an application of the due process rule that a state may not recognize as relevant and competent the testimony of a certain category of witness but arbitrarily bar use of testimony by that same kind of witness by the defendant. (*Gray v. Klauser* (9th. Cir. 2002) 282 F.3d 633, 646.) Nothing in the instruction placed a prosecution witness off-limits to the defense. Moreover, as noted above, the instruction fairly dealt with both sides of the cross-admissibility issue, and it was not a defense theory that all of the crimes were committed in a characteristic method by someone other than appellant. Thus, there was no constitutional violation.

Appellant also claims the instruction was an impermissible judicial comment by drawing the jury's attention to specific facts and implying a proper conclusion to be drawn. However, the instruction was limiting in nature, designed to preclude the jury from using evidence improperly by limiting its consideration of cross-admissible evidence to a proper purpose. While the instruction necessarily described the proper and limited use of cross-admissible evidence, it did not impermissibly direct the jury to make drawn any particular inference. (*Cf. People v. Mincey* (1992) 2 Cal.4th 408, 437 [argumentative instruction invites jury to draw an inference favorable to one side].) It permitted the jury to consider similarities between the offenses to decide if a characteristic method was being used, but neither endorsed such a finding nor discouraged a contrary finding; the determination was simply left to the jury. Similarly, the instruction permitted the jury to consider the existence of a characteristic method, if it so found, in assessing identity, motive, and intent. Again, however, the instruction neither suggested nor discouraged any particular finding; indeed, it plainly left the weight to the determination of the jury. It was neither an improper judicial comment nor an argumentative instruction. (*People v. Mendoza* (2000) 24 Cal.4th 130, 180-181.)

Finally, in light of the defense theory and evidence of different third party perpetrators, the Garcia acquittal, and the inability to reach a verdict on the Strang and Fisher murders, any error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

XIII.

THE TRIAL COURT DID NOT ERR IN FAILING TO REQUIRE JURY UNANIMITY ON CROSS-OFFENSE SIMILARITY BEFORE CONSIDERING SUCH EVIDENCE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by failing to instruct the jury that it must be unanimous as to cross-offense similarity before considering evidence of other crimes as evidence of identity. (2A AOB 270-274; 3 AOB 1014-1015; 4 AOB 1194-1195; 5 AOB 1325-1326.) Appellant is wrong; there is no unanimity requirement for facts supporting a finding of identity.

The jury unanimously agreed that appellant committed the offenses of which he was convicted. Appellant does not contend otherwise, nor does he suggest that the instructions were somehow deficient in requiring unanimity. Instead, he contends the jurors might have disagreed on the similarity of the offenses, thereby permitting some, but not all, to rely on offense similarity as circumstantial evidence of identity. However, in the context of multiple theories of murder, this Court and the United States Supreme Court agree that a jury need not unanimously agree on the theory of first degree murder, even when the different theories are supported by different facts. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 1024-1025.) "[T]he jury need not unanimously agree 'on the precise factual details of how a killing occurred under one or the other theory occurred in order to convict defendant of first degree murder.'" (*Id.* at p. 1025.) "'Plainly there is no general requirements that the jury reach

agreement on the preliminary factual issues which underlie the verdict.'" (*People v. Jenkins, supra,* 22 Cal.4th at p. 1025., quoting *Schad v. Arizona* (1991) 501 U.S. 624, 631-632 [111 S.Ct. 2491, 2497, 115 L.Ed.2d 555].)

Appellant's argument is at least two steps removed from the multiple theory position. He proposes that the jury must unanimously agree not only that appellant was the perpetrator (which it did), but also agree on the preliminary facts which support an inference of identity. There is no such requirement, nor any error in failing to impose one.

XIV.

LOSS OF THE FINGERPRINT ON THE LOVE INSURANCE NOTE DID NOT VIOLATE DUE PROCESS BECAUSE THE FINGERPRINT HAD NO APPARENT EXCULPATORY VALUE AND THERE WAS NO BAD FAITH INVOLVED

Appellant contends the trial court prejudicially erred in failing to exclude evidence of the Love Insurance note based on the failure to preserve a fingerprint on the note. (2A AOB 333-353.) Because the fingerprint had no apparent exculpatory value when it was lost and the failure to preserve the fingerprint was not in bad faith, the trial court did not err in excluding evidence of the note.

As part of a trial brief filed November 19, 1986, appellant sought a sanction for, *inter alia*, the loss or destruction of the Love Insurance note. (38 CT 8334-8360.) The prosecution's opposition was filed December 4, 1986. (42 CT 9168-9201.)[95/]

Testimony presented during the pretrial hearings established that San Diego Police Department Homicide Detective Gary Gleason was part of the

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95. Additional pleadings were filed by both the prosecution (56 CT 12360--12363) and appellant (56 CT 12364-12368; 57 CT 12597-12650).

homicide team which arrived at the Jacobs residence after the murders were discovered by Mr. Jacobs. (75 PRT 3348-3349.) Among other observations, Det. Gleason observed a scrap of pink, folded paper on a pink throw rug which was on the bathroom floor. (75 PRT 3375.) Based on blood in the bathtub and on the bathroom floor, the child-size bloody footprints leading from the bathroom northbound in the hallway to Colin's body in the master bedroom, and the blood on the tops of Colin's shoes, Det. Gleason concluded that Colin had been attacked in the bathroom. (75 PRT 3363-3365, 3370-3371, 3374, 3390; 76 PRT 3408.)

San Diego Senior Evidence Technician Patrick Stewart worked with Det. Gleason in photographing and collecting evidence at the Jacobs residence. (74 PRT 3126-3128.) Stewart photographed the piece of paper on the throw rug (Exh. 1), and also unfolded it and photographed each side (Exh 2 A&B). (74 PRT 3143-3144; 75 PRT 3376; 76 PRT 3437.) On one side of the note were written the words "Love Insurance" and "280-1700." (74 PRT 3145; see 3 TRT 457-458.)[96] The writing was not that of Suzanne, Colin, or Michael Jacobs. (73 PRT 3016.) Stewart collected the note and delivered it to the police department evidence room. (74 PRT 3149, 3155; 76 PRT 3436.)

Subsequently, Det. Gleason submitted a written request to have the note subjected to ninhydrin to develop fingerprints, photographed, and retained. (74 PRT 3156; 76 PRT 3468.)[97] Stewart sprayed the note with ninhydrin on May 11 and some kind of latent fingerprint image developed. (74 PRT 3157.) Stewart did not photograph the note at that time, but sent the note to Det.

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96. Love Insurance was an insurance agency handling automobile insurance for assigned risk or problem drivers. (74 PRT 3217-3218.) In May 1979, Love Insurance ran radio ads. (74 PRT 3233.) An insurance policy for appellant was started on July 7, 1979. (74 PRT 3220-3226.)

97. At the time it was seized, there were no visible fingerprints on the note. (74 PRT 3157.)

Gleason, so that Gleason could take the note to the department latent print examiner, Leigh Emmerson. (74 PRT 3159-3160; 75 PRT 3331.)[98] Emmerson examined the note to determine whether there were any latent prints of value on it. (75 PRT 3334.)[99] Emmerson observed 5 or 6 points of identification in the latent. (75 PRT 3335.) Emmerson put the note back in its envelope and put it with the case in the latent print section, and notified the detective of his findings. (75 PRT 3335.) He also advised the detective to have the note photographed by an evidence technician because the latent raised by ninhydrin would fade and disappear in time. (75 PRT 3336-3339.) A photograph of the latent would have been adequate to make a comparison of the latent with known fingerprints of a suspect. (75 PRT 3345.)

When Det. Gleason learned that Emmerson had identified the latent as having value for purposes of elimination, Gleason made no additional request to have the note photographed because, although he was aware that latents raised by ninhydrin would disappear with time, he had requested the note be subjected to ninhydrin and photographed in his initial request, and he believed the required photography had already been accomplished. (76 PRT 3474, 3481, 3497-3498.) As expected, the latent faded and disappeared. (74 PRT 3165.) Later attempts to re-raise the latent were unsuccessful and obliterated the writing on the note. (See 74 PRT 3151-3152, 3166, 3168, 3376, Exhibit F.)

Although it is better for making a handwriting comparison to have the original questioned document, John Harris, a questioned documents examiner,

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98. Stewart testified it was customary to photograph the note after the latent print examiner determined it contained a latent print of value. (74 PRT 3203-3204.)

99. Emmerson testified that a patent print was "of value" if it had sufficient points to identify the maker or, if not, if it had sufficient points to eliminate a potential maker, which he indicated required three or more. (75 PRT 3333.)

was able to make a comparison of the photographs of the writing on the note with appellant's known writing and concluded appellant was the writer. (111 PRT 8122-8135, 8143, 8156.) He so testified during the trial. (13 TRT 2270-2274, 2277-2278, 2306-2307, 2379-2385.) Additionally, Emmerson testified at trial that based on his recollection of the characteristics of the latent, appellant could not be eliminated as having made it. (10 TRT 1817.)

Relying on *California v. Trombetta, supra,* 467 U.S. 479, the trial court found the latent fingerprint had no apparent exculpatory value and denied appellant's request for sanctions. (247 PRT 25438-25440.)

In *Trombetta*, the Court held that the constitutional duty to preserve evidence is limited to "evidence that might be expected to play a significant role in the suspect's defense." (*Id.* at p. 488.)

> To meet this standard of constitutional materiality [citation omitted], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

(*Id.* at p. 489.)

As to evidence which did not have apparent exculpatory value at the time it was destroyed, the Court later held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [109 S.Ct. 333, 102 L.Ed.2d 281].)

On review of the trial court's ruling, this Court determines "whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling." (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

Although the trial court's ruling preceded the decision in *Arizona v. Youngblood* by several months, the trial court found "no animus or bias on the

part of the persons responsible for failing to preserve the partial print on the Love Insurance note." (247 PRT 25441.) Indeed, there was no evidence or argument presented in support of bad faith. All of the evidence demonstrated the failure to photograph the latent fingerprint was the result of a misunderstanding. Appellant appears to concede that lack of bad faith by making no argument under *Arizona v. Youngblood.*

Moreover, the evidence was uncontested that the fingerprint was, at most, "potentially useful" (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58) and not apparently exculpatory. In claiming apparent exculpatory value, appellant relies on Emmerson's testimony that there were sufficient points of identification to make an exclusion. (2A AOB 342.) However, Emmerson did not testify that the latent fingerprint appeared to exculpate appellant; it could not have as appellant was not a suspect at that time. Simply because a piece of evidence – here, a latent fingerprint – can be used to eliminate a potential suspect does not equate to apparently exculpatory value. A latent fingerprint could be exculpatory or incriminatory, depending on the suspect. Here, had the fingerprint been preserved, appellant might have matched all five points, even if that were insufficient for the expert to declare an identification. As it turned out, based on his recollection of the characteristics of the latent, Emmerson could not eliminate appellant as having made it. (10 TRT 1817.)

In *People v. Medina* (1990) 51 Cal.3d 870, a bottle at the murder scene, from which a latent fingerprint was lifted, was lost or destroyed and this Court stated, "the investigating officer likewise could not know at the time the prints were taken whether, or to what extent, the Perrier bottle's print matched defendant's prints." (*Id.* at p. 893.) This Court rejected a claim for an instructional sanction "for the mere negligence in failing to preserve evidence whose exculpatory value was unapparent to the officers when their omission occurred." (*Id.* at p. 894.)

Similarly, in *People v. Johnson* (1989) 47 Cal.3d 1194, this Court rejected a *Trombetta* claim based on the loss of two fingerprints on a catalog raised with ninhydrin. After the fingerprints had been found and photographed, an FBI fingerprint specialist used silver nitrate in an apparently unsuccessful attempt to raise additional fingerprints. However, the silver nitrate washed out the latents which had been raised by ninhydrin. (*Id.* at p. 1234.) At the time the specialist used the silver nitrate, he did not know there were prints to be compared with those found on the catalog. (*Ibid.*) This Court held that the "catalog did not have exculpatory value that was obvious at the time of the test . . . ." (*Id.* at p. 1235.)

Although the lifted latent in *Medina* and the latent photographs in *Johnson* were reasonably available comparable evidence, thereby failing the second prong of the *Trombetta* test, this Court found the latent fingerprints in each case were not apparently exculpatory evidence under the first prong of *Trombetta*.

Apparently sensing the failure of his *Trombetta* claim,[100] appellant urges relaxation of the standards in a capital case because the lost evidence impaired the reliability of the guilt and penalty determinations. (2A AOB 343-344.) However, whether there was any impairment is simply a matter of speculation. As the United States Supreme Court stated:

> [w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.

(*Arizona v. Youngblood, supra,* 488 U.S. at pp. 57-58, quoting *California v. Trombetta, supra,* 467 U.S. at p. 486.)

Whether in a capital or non-capital case, divining the import of materials which are permanently lost and the impact of that loss on the trial reliability

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100. Appellant conceded the speculative nature of his claim in the trial court. (247 PRT 25433.)

remains treacherous and speculative. Due process is only violated by the destruction of apparently exculpatory evidence or the bad faith destruction of potentially exculpatory evidence. Neither occurred here.

Appellant also contends the trial court should have given favorable jury instructions requested by the defense. (2A AOB 344-345.) While the trial court in *Arizona v. Youngblood* gave such an instruction (*Arizona v. Youngblood, supra,* 488 U.S. at p. 54.), "[n]othing in *Youngblood* suggested the instruction was required." (*People v. Cooper* (1991) 53 Cal.3d 771, 811.) As this Court also noted in *Cooper*, under *People v. Zamora* (1980) 28 Cal.3d 88, "an adverse jury instruction may be a proper response to a due process violation," however, in this case, as in *Cooper*, "there was no such violation." (*People v. Cooper, supra,* 53 Cal.3d at p. 811.) "The trial court was not required to impose *any* sanction, including jury instructions." (*Ibid.*)[101]

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101. Appellant also relies on Evidence Code section 413 as support for his jury instruction request. Evidence Code section 413 deals with a party's failure to explain or deny evidence and provides:

> In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence of facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

However, there was no "willful suppression of evidence" and the inadvertent loss of the fingerprint was explained.

XV.

THE TRIAL COURT DID NOT ERR IN ADMITTING PHOTOGRAPHS OF THE LOVE INSURANCE NOTE OVER APPELLANT'S AUTHENTICATION OBJECTION AND THE ERRONEOUS FAILURE TO INSTRUCT THE JURY TO DETERMINE THE ISSUE OF THE PHOTOGRAPHS' AUTHENTICATION WAS HARMLESS

Appellant contends the trial court prejudicially erred by failing to make a preliminary ruling on the authenticity of the photographs of the Love Insurance note and in denying his request for an instruction directing the jury to determine authenticity. (2A AOB 348-353.) The trial court is presumed to have made the preliminary ruling and any failure to do so was harmless as there was ample evidence of authenticity; the trial court's failure to give an instruction on the jury's duty to determine authenticity was harmless.

During the pretrial motions, the defense filed a trial brief challenging the admissibility of the photographs of the Love Insurance note on the basis, inter alia, of lack of authenticity. (51 CT 11217-11228.) The prosecution filed a response. (53 CT 11572-11574.) The photographs of the front and back of the Love Insurance note were marked during trial as People's Exhibits 22A and 22B. (4 TRT 455-456.) Detective Gleason identified the photographs as depicting both sides of the pink note found in the Jacobs bathroom. (4 TRT 457-458.) The photographs were later similarly identified by Evidence Technician Stewart, who also testified he took the photographs of both sides of the note in the Jacobs bathroom. (8 TRT 1360-1361; 9 TRT 1511.) When offered, the defense objected to admission of the photographs on the basis of "existing objections in the record." (5 TRT 655.)

When the admissibility of a writing depends upon its authenticity, the proponent of the writing has the burden of producing evidence sufficient to sustain a finding that the writing is the writing that the proponent claims it is.

(Evid. Code, §§ 403, subd. (a)(3), 1400.) Under Evidence Code section 250, a writing includes any record created by means of photography.[102/]

> The proper standard is that of preponderance of the evidence. In other words, the trial court must determine whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence.

(*People v. Marshall* (1996) 13 Cal.4th 799, 832.)

In contending that the trial court failed to make the proper determination for admission of the photographs, appellant relies on the trial court's comment almost five months later, during the jury instruction discussion. (5 TRT 655-656 [admitted January 10, 1989], 60 TRT 11437 [instruction denied May 31, 1989].) In refusing defense instructions on authentication, the trial court stated, "I don't believe that authentication and those authentication codes in the Evidence Code apply to the Love note." (60 TRT 11437.) The trial court's comment in refusing a jury instruction almost five months after admitting the evidence does not overcome the presumption that the trial court properly considered the preliminary fact determination in admitting the evidence. (Evid. Code, § 664.) Indeed, what appears to be the trial court's handwritten note at

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102. Evidence Code section 403, subdivision (a)(3), provides:

> The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
>
> . . .
>
> (3) The preliminary fact is the authenticity of a writing;

Evidence Code section 1400 provides, in pertinent part:

> Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is. . . .

the bottom right corner of defense instruction number 73, acknowledge's the prosecution's authentication burden to support admission. (65 CT 14554 ["Peo must authenticate Love Note b4 test'y from photos"].)

Even if the trial court failed to make the preliminary fact determination in admitting the evidence, the error was harmless because there was sufficient evidence for the jury to find authenticity by a preponderance of the evidence. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Detective Gleason and Evidence Technician Stewart, who took the photographs, both testified that the photographs (Exhs. 22A and 22B) depicted the two sides of the unfolded note. (Cf. *People v. Marshall, supra,* 13 Cal.4th at p. 833 [detective's testimony about reconstructing bed and identifying photographs, along with witness's identification "ample"]; *People v. Garcia* (1988) 201 Cal.App.3d 324, 329 [witness and detective's identification of photograph of police artist sketch adequate].) Appellant argues there were differences between the note and the photographs. (2A AOB 350, citing 51 CT 11224.) However, neither his pleading nor any evidence established a difference between the note and the photographs; appellant simply argued there were possible differences. Even if his speculation had been grounded in any evidence, the existence of a possible conflicting inference "goes to the weight rather than the admissibility." (*People v. Garcia, supra,* 201 Cal.App.3d at p. 329.)

Although the photographs of the note were properly admitted, because the defense requested an instruction pursuant to Evidence Code section 403,[103] the trial court should have instructed "the jury to determine whether the

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103. Although during the discussion of jury instructions, the defense offered several instructions concerning authentication, appellant cites only two in support is his claim of instructional error. (2A AOB 350, citing 65 CT 14554 [defense no. 73] and 66 CT 14639 [defense no. 32 in second packet].) The trial court refused both instructions. (60 TRT 11437 [refusing no. 73], 11471 [refusing no. 32].)

preliminary fact [authentication] exists and to disregard the proffered evidence [the photographs] unless the jury finds that the preliminary fact does exist." (Evid. Code, § 403, subd. (c)(1).) Again, however, the error was harmless.

Appellant argues that the error violated his federal constitutional rights by "[r]emoving authentication from the jurors' consideration." (2A AOB 350.) However, appellant cites nothing in the instructions which advised the jurors to accept the photographs as authentic. The error was the failure to explicitly advise the jury to consider whether the photographs were authentic before relying on them. Thus, the error was state law error subject to harmless error analysis under *People v. Watson, supra,* 46 Cal.2d at p. 836.[104/]

The Assembly Committee on Judiciary Comment to Evidence Code section 403, states, in pertinent part:

> Frequently, the jury's duty to disregard conditionally admissible evidence when it is not persuaded of the existence of the preliminary fact on which relevancy is conditioned is so clear that an instruction to this effect is unnecessary. For example, if the disputed preliminary fact is the authenticity of a deed, it hardly seems necessary to instruct the jury to disregard the deed if it should find that the deed is not genuine. No rational jury could find the deed to be spurious and, yet, to be still effective to transfer title from the purported grantor.

Similarly, here, no rational jury would not have relied on the photographs as evidence identifying appellant without first concluding that the photographs accurately presented the hand printing on the note. (See *People v. Marshall, supra,* 13 Cal.4th at p. 833-834.) Thus, any error was harmless.

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104. Appellant also contends the error violated the 14th Amendment by arbitrarily denying his state created right. (2A AOB 351.) However, "[m]ere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [112 S.Ct. 475, 481-484, 116 L.Ed.2d 385].)" (*People v. Carpenter, supra*, 15 Cal.4th 312, 393.)

XVI.

APPELLANT FORFEITED HIS CLAIM THAT PHOTOGRAPHS OF THE LOVE INSURANCE NOTE WERE NOT CERTIFIED AND, IN ANY CASE, BECAUSE THE PHOTOGRAPHS WERE NOT OFFERED TO PROVE THE CONTENT OF THE NOTE, THE BEST EVIDENCE RULE AND ITS EXCEPTIONS FOR SECONDARY EVIDENCE WERE NOT A PROPER BASIS FOR EXCLUSION

Appellant contends the trial court prejudicially erred in admitting the photographs of the Love Insurance note because the photographs were not certified in accordance with Evidence Code section 1551. (2A AOB 354-359.) Appellant waived this claim by failing to object to admission of the photographs on this basis. Moreover, because the photographs of the note were not offered to prove its content, neither the best evidence rule nor any of the rule's exceptions for secondary evidence, including section 1551, were implicated in its admission.

As noted in Argument X, *supra*, at the time the photographs of the Love Insurance note (Exhs. 22A and 22B) were offered, the defense objected to admission of the photographs on the basis of "existing objections in the record." (5 TRT 655.) The photographs were admitted over objection. While the defense had made several challenges to the photographs in the pretrial hearings, appellant has not pointed to any pretrial challenge based on certification and respondent has found none. It was not until the jury instruction discussion, almost five months after admission of the photographs, that appellant objected to the photographs on the basis of lack of certification. (59 TRT 11339, reiterated at 60 TRT 11438.)

A challenge to the admission of evidence is not preserved for appeal unless the defendant made a specific and timely objection. (Evid. Code, § 353, subd. (a); *People v. Anderson* (2001) 25 Cal.4th 543, 586; *People v. Pride*

(1992) 3 Cal.4th 195, 239-240 [claim waived on appeal where motion to strike came three days after evidence admitted]; *Quality Wash Group V, Inc. v. Hallak* (1996) 50 Cal.App.4th 1687, 1698 [where no objection, consideration of secondary evidence of written agreement proper]; *Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal.App.3d 811, 817.)

Regardless of the forfeiture, the trial court did not err in admitting the photographs. Evidence Code section 1551 provides:

> A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself if, at the time of the taking of such film or electronic recording, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

Section 1551 is a restatement of former Code of Civil Procedure section 1920b. (2 Witkin, Cal. Evidence (3d ed. 1986) Documentary Evidence, § 951, p. 902.) When adopted as part of the Evidence Code in 1965, it was placed in Article 3 (Photographic Copies of Writings), Chapter 2 (Secondary Evidence of Writings), of Title 11 (Writings), following section 1550,[105] in which

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105. Evidence Code section 1550, currently provides:

> A nonerasable optical image reproduction provided that additions, deletions, or changes to the original document are not permitted by the technology, a photostatic, microfilm, microcard, miniature photographic, or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if the copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of that business. The introduction of the copy, reproduction, or enlargement does

California restated its earlier adoption of the Uniform Photographic Copies of Business and Public Records as Evidence Act. (*Id.*, at pp. 901-902; see Stats. 1965, c. 299, § 2, pp. 1348-1353.) The coupling of the two sections plainly indicates their applicability to the admissibility of photographic copies of business and governmental records over a "best evidence" (former Evid. Code, § 1500)[106] objection.

The uniform act was adopted to accommodate the modern trend toward use of photographic copies for record keeping by making the photographic records admissible without a showing of unavailability of the original, despite their being secondary evidence. (2 Witkin, *supra*, at pp. 901-902.) Another modern practice was to microfilm, then destroy original records. (*Id.*, at p. 902.) Because the intentional destruction of original records could be used to support a "best evidence" objection when a photographic copy was offered, section 1551 was intended to take photographs and microfilm enlargements of such records out of the best evidence rule. (*Ibid.*)

Thus, section 1551, like its companion sections, were enacted to allow the admission of secondary evidence of a writing, when such evidence would

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> not preclude admission of the original writing if it is still in existence. A court may require the introduction of a hard copy printout of the document.

A second version of section 1550 was enacted to become operative when the Secretary of State adopts uniform standards for storing and recording permanent and nonpermanent documents in electronic media. (Stats. 2002, c. 124 (A.B. 2033), § 2.)

106. Former Evidence Code section 1500, provides:

> Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of the writing. This section shall be known and may be cited as the best evidence rule.

otherwise be excluded under the best evidence rule; i.e., when offered to prove the contents of the writing. However, as the trial court found with respect to the Love Insurance note and the photographic copies, "We're not talking about the content of the writing. Content of the writing is not attempted to be proved. It's just the writing itself." (60 TRT 11437.) As Witkin explains:

> The reasons for the former rule are stated in the Model Code: '"Slight differences in written words or other symbols may make vast differences in meaning; there is great danger of inaccurate observation of such symbols, especially if they are substantially similar to the eye. Consequently there is opportunity for fraud and likelihood of mistake in proof of the content of a writing unless the writing itself is produced. Hence it should be produced if available."'

(2 Witkin, *supra*, at p. 883.)

There was no issue as to the meaning or proper interpretation of the writing on the Love Insurance note. The note, with its words and numbers, were simply circumstantial evidence. The words and the numbers on the note happened to correspond to the name and telephone number of an insurance agency, which advertised on the radio around the time of the Jacobs murders and which appellant later contacted for insurance. Additionally, the writing on the note was consistent with appellant's writing. Thus, the best evidence rule and its various exceptions and provisions for admission of secondary evidence to prove the content of writings, including Evidence Code section 1551, were simply inapplicable to the Love Insurance note and the photographic copies.

In any case, admission of the photographs was harmless as a more favorable result is not reasonably probable even had the photographs not been admitted. The contents of the note and its connection to appellant were established by expert opinion and circumstantial evidence unaffected by admission of the photographs.

XVII.

APPELLANT FORFEITED HIS CLAIM THAT THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION UNDER THE BEST EVIDENCE RULE AND, IN ANY CASE, THE BEST EVIDENCE RULE WAS NOT A PROPER BASIS FOR EXCLUSION OF THE PHOTOGRAPHS OF THE LOVE INSURANCE NOTE

Appellant contends the trial judge prejudicially erred in failing to exercise her discretion under the best evidence rule before admitting the photographs of the Love Insurance note, Exhibits 22A and 22B. (2A AOB 360-366.) Appellant forfeited the claim by failing to object to admission of the photographs on this basis and, in any case, the trial court was correct in concluding that the best evidence rule did not apply.

As noted in Argument XVI, *supra*, at the time the photographs of the Love Insurance note (Exhs. 22A and 22B) were offered, the defense objected to admission of the photographs on the basis of "existing objections in the record." (5 TRT 655.) The photographs were admitted over objection. While the defense had made several challenges to the photographs in the pretrial hearings, appellant has not pointed to any pretrial challenge based on the best evidence rule and respondent has found none. It was not until the jury instruction discussion, almost five months after admission of the photographs, that appellant mentioned the best evidence rule and then only in connection with requested instructions. (59 TRT 11338.) Having failed to timely object to admission of the photographs on the basis of the best evidence rule, the claim of error is forfeited. (Evid. Code, § 353, subd. (a); *People v. Morris* (1991) 53 Cal.3d 152, 204 [failure to object on best evidence grounds waived objection on appeal].)

As also noted in Argument XVI, *supra*, appellant's best evidence objection is without merit because the photographs of the note were not offered

to prove the content of the note. (Former Evid, Code, § 1500.)[107] There was no issue as to the meaning or proper interpretation of the writing on the Love Insurance note. The note, with its words and numbers, were simply circumstantial evidence which connected appellant to the Jacobs crime scene.

Appellant's reliance on *People v. Garcia, supra*, 201 Cal.App.3d 324, as support for his claim that the photographs were used to prove the content of the note because the handwriting expert compared the shape, formation, and style of the letters to appellant's known handprinting, is misplaced. The composite sketch in *Garcia* was a symbolic representation of the witness's description. Although presented in a manner other than written words, it was essentially the same as a written description. Thus, the photograph of the composite sketch was used to prove the content of the original sketch/writing. No such proof of content occurs here. The jury did not need to determine what meaning attached to the words and numbers on the Love Insurance note. The note was relevant because the words and numbers coincidentally corresponded to the name and telephone number of the insurance agency which had advertised on the radio at the time of the Jacobs murders and where appellant purchased insurance shortly afterwards. The words and numbers were also consistent with appellant's hand printing. Thus, appellant's best evidence claim is without merit, even had it not been forfeited.

Additionally, for the same reasons set forth in Argument XVI, *supra,* any error was harmless.

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107. See footnote 106 for the text of former Evidence Code section 1500.

XVIII.

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE PRINCIPLES CONTROLLING ADMISSION OF EXPERT OPINION BASED ON NEW SCIENTIFIC TECHNIQUES WERE NOT APPLICABLE TO AN EXPERT'S OPINION BASED ON HANDWRITING COMPARISON

Appellant contends the trial court prejudicially erred by denying a hearing under *People v. Kelly, supra,* 17 Cal.3d 24, on the admissibility of expert opinion based on hand printing comparison. (2B AOB 385-409.) The trial court did not err as the principles controlling admissibility of expert testimony based on a new scientific technique were not applicable. There was nothing new in a handwriting expert's reliance on a comparison of known writing to opine as to the authorship of questioned writing and such comparison does not involve a scientific technique.

In a trial brief filed December 11, 1986, appellant sought exclusion of "any testimony that the handwriting on the Love Insurance Note is that of the defendant." (43 CT 9263.) When raised before Judge Hammes on March 10, 1987, she pointed out the potential inapplicability of *Kelly*, depending on whether handwriting analysis was "a scientific test" or "scientific endeavor." (79 PRT 4095, 4098.) During subsequent argument, the defense argued that handwriting analysis did not involve a scientific technique, but was subject to an objection under *Kelly* simply because an expert was being proffered and all the defense had to do to force a hearing was object under *Kelly*. (79 PRT 4107-4112.) In light of the lack of controversy surrounding admissibility of expert handwriting comparison, its historical admission in court, and its codification in Evidence Code section 1418, the trial court ultimately determined to place the burden on the defense to raise a prima facie case of scientific dissension before imposing any obligation on the prosecution under *Kelly*. (88 PRT 5461-5464; 90 PRT 5467-5471.) The trial court reaffirmed its ruling prior to the

testimony of prosecution witness John Harris, a questioned documents examiner, that *Kelly* did not apply to expert testimony involving handwriting comparison. (111 PRT 8118.) However, the trial court permitted the defense to challenge the reliability of handwriting comparison "and it may be that it will go beyond weight and convince me that this should be an admissibility question." (111 PRT 8119; see also 147 PRT 13842-13843 [affirmative evidence not permitted, but if *Kelly* issue developed during examination of witness, trial court would "rethink" ruling].)

Under California law, when expert testimony is based on "a new scientific technique" the reliability of the method must be established, the witness furnishing the testimony must be properly qualified, and the proponent must establish that correct scientific procedures were used in the particular case. (*People v. Kelly, supra,* 17 Cal.3d 24, 30.) In *Kelly*, this Court reaffirmed its previous adoption of the "test for determining the underlying reliability of a new scientific technique" described in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013; i.e., general acceptance in the particular field in which it belongs. (*Id.*, at pp. 30-32.) The requirements set forth in *Kelly* are inapplicable to expert testimony based on handwriting comparison because handwriting comparison is neither new nor a scientific technique.

Handwriting comparison as a basis for determining authorship of a writing was not "new" when offered in appellant's pretrial hearing and trial. Handwriting comparison which identifies an author of a questioned document has been routinely admitted "for many years without any suggestion that it is unreliable under *Kelly/Frye*." (*People v. Pride, supra*, 3 Cal.4th 195, 239 [pointing to routine admission of hair comparison as demonstrating the method is not new]; see *People v. Hughes* (2002) 27 Cal.4th 287, 321; *People v. Ayala, supra*, 23 Cal.4th 225, 248; *People v. Sakarias* (2000) 22 Cal.4th 596, 612; *People v. Jones* (1996) 13 Cal.4th 535, 542; *People v. Neely* (1993) 6 Cal.4th

877, 885; *People v. Gallegos* (1990) 52 Cal.3d 115, 155; *People v. Allison* (1989) 879, 887.) Appellant has not cited, nor has respondent found, any California case applying the *Kelly* requirements to handwriting comparison.

Indeed, handwriting comparison as a basis of identifying the author of a questioned document has been long-recognized as an admissible basis for expert opinion. (Evid. Code, § 1418,[108] enacted in 1965 and based on former Code of Civil Proc., § 1944, enacted in 1872; *Spottiswood v. Weir* (1889) 80 Cal. 448, 449-450 [witness' opinion of authorship of disputed deed, based on comparison of writing, objectionable for the reason the witness was not an expert].) Recently, the Supreme Court of Florida found that

> Forensic handwriting identification is not a new or novel science. In fact, by the turn of the century expert testimony in the area of handwriting identification was permitted in thirty-seven states and 'was viewed as the obvious and necessary way to adduce proof about the authenticity of disputed writings.' Jennifer L. Mnookin, Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability, 87 Va. L.Rev. 1723, 1756 (2001).

(*Spann v. State* (Fla. 2003) 857 So.2d 845, 852.)

By the time of the *Frye* decision in 1923, "forensic handwriting identification had already established itself as a tool commonly used in court. Once established, handwriting identification experts were unchallenged as valid and acceptable experts for the majority of the twentieth century." (*Ibid.*)[109]

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108. Evidence Code section 1418 provides:

> The genuineness of a writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

109. As the Florida Supreme Court pointed out, appellant's reliance on federal cases using the federal standard are inapposite. (*Spann v. State, supra,* 857 So.2d at pp. 852-853.) The standards are different and *Kelly* does not

Accordingly, use of handwriting comparison as a basis for expert opinion "[can] fairly be characterized as 'routine' or settled in law." (*People v. Leahy* (1994) 8 Cal.4th 587, 606.)[110/]

Even without expert opinion, use of handwriting comparison is a well-established method of producing admissible evidence of the identity of the author of a questioned document. Questioned handwriting may be identified by a person familiar with the writing (i.e., comparison of a questioned document with the handwriting of a supposed writer of which the witness has personal knowledge) or by a comparison made by the trier of fact. (Evid. Code, §§ 1416, 1417.)[111/]

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apply. Moreover, the federal cases were decided years after the trial in this case.

110. Appellant attempts to distinguish handwriting comparison with hand printing comparison. (2B AOB 400-401.) However, the Law Revision Commission Comment to Evidence Code section 1418 states the section "applies to any form of writing, not just handwriting." Appellant points to no distinction in the law at the time of the hearing and trial in this case, and neither the parties nor the trial court suggested any basis for distinguishing comparison of hand printing from handwriting.

111. Evidence Code section 1416 provides, in pertinent part:

> A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer.

Evidence Code section 1417 provides:

> The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

Handwriting comparison is also not a scientific technique. While this Court has acknowledged that the definition of a "new scientific technique" is not clear, it is incorrect to apply that term to any discovery or invention since *Frye*. (*People v. Stoll, supra,* 49 Cal.3d at p. 1155.) Proper application has been narrowed based on the "'common sense' purpose, i.e., to protect the jury from techniques which, though 'new,' novel, or 'experimental,' convey a '"misleading aura of certainty.'" (*Id.*, at pp. 1155-1156.) Thus, "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*." (*Id.*, at p. 1157.)

As discussed, there is nothing about handwriting comparison, by an expert or otherwise, "which is *new* to science and, even more so, the law." (*Id.*, at p. 1156, italics in orig.) Additionally, neither the name (handwriting comparison) nor its description "provide some definite truth which the expert need only accurately recognize and relay to the jury." (*Ibid.*) [112] As this Court

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112. Appellant calls the method "handwriting analysis." (2B AOB 390.) He does not cite any pretrial or trial transcript locations where that terminology was used. Appellant also claims a handwriting expert claims to be able to determine the true author of a document, thereby creating an "'aura of certainty.'" (*Ibid.*) He does not tie that to any testimony. In fact, the testimony described less than absolute certainty in the result.

In pretrial hearing testimony, Harris described himself as an "examiner of questioned documents." (111 PRT 8119.) He testified he was requested by the DA's office to "examine some questioned writing as against some known writing" of appellant. (111 PRT 8122.) He also testified to his opinion, and described his "comparison" of the known and questioned writing, using exhibits which show "a basis of comparison." (111 PRT 8143, 8145-8146, 8148-8149.) On cross-examination, Harris testified he held his opinion with "reasonable certainty," but denied absolute certainty or the absence of room for error. (111 PRT 8152-8153.) He also acknowledged the existence of a variety of factors which can impact the ability to make an identification. He described instances in his experience in which people wrote in very plain fashion without anything identifying or unique about their writing, and indicated that he had no ability to distinguish them. (111 PRT 8155-8158.)

stated in *People v. Farnam* (2002) 28 Cal.4th 107, the approach to new scientific techniques "'is intended to prevent lay jurors from being unduly influenced by procedures which seem scientific and infallible, but which actually are not.'" (*Id.*, at p. 160, quoting *People v. Webb* (1993) 6 Cal.4th 494, 524.) As described in footnote 107, *supra*, there was nothing in Harris's testimony which presented the handwriting comparison as scientific and infallible. By describing his opinion as not absolute and being based on a comparison of the similarities between the writings, Harris invited the jury to critically assess his opinion by carefully considering the asserted similarities.

> The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. (*People v. Venegas* (1998) 18 Cal.4th 47, 80;see also *People v. Ayala* (2000) 24 Cal.4th 243, 281.)

Nothing in the testimonial description of the handwriting comparison depicted a process foreign to lay experience or difficult for jurors to evaluate. It is well within common experience for lay jurors to be able to identify their own handwriting or the familiar handwriting of a relative, friend, acquaintance,

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At trial, before the jury, Harris also described himself as an "examiner of questioned documents . . . also known as a handwriting expert." (13 TRT 2255.) He testified that he "compared" the known and questioned writing. (13 TRT 2278.) He also testified to his opinion, which he held with "reasonable certainty," and described the points of comparison which were the basis for his opinion. (13 TRT 2309-2315.) On cross-examination, he described being reasonably certain as being "satisfied in my own mind" but not absolutely certain. (13 TRT 2315-2316.) He also acknowledged, among other things, that an original is better for comparison (13 TRT 2326), there was limited writing on the questioned document for comparison (13 TRT 2347), and he had experience seeing signatures by people with the same last names in which the writing was ordinary with nothing unusual, making it very difficult to distinguish the writers (13 TRT 2355).

Thus, neither in name or description, was Harris's testimony presented as scientifically infallible.

or business associate. It is that ability to recognize writing that makes it particularly within the range of knowledge of lay jurors to be able to critically assess the handwriting expert's opinion.

The handwriting expert's opinion did not rely on any type of experiment, but instead simply involved a comparison of "'physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson.'" (*People v. Ayala, supra,* 24 Cal.4th at p. 281, quoting *People v. Webb, supra,* 6 Cal.4th at p. 524.) The reliability of that comparison "'is equally apparent and need not be debated under the standards of *Kelly*.'" (*Ibid.*)

In *Ayala*, the defendant contended *Kelly* applied to a radiologist's testimony that a bullet lodged below the victim's skin and visible in an X-ray was the same caliber as a .22 bullet taped to the victim's skin, also visible in the X-ray. (*People v. Ayala, supra,* 24 Cal.4th at pp. 280-281.) The jury in *Ayala* likely had little or no experience in examining X-rays, much less making relative size comparisons, as compared to the radiologist. Nonetheless, this Court found that "*Kelly* does not apply." (*Id.*, at p. 281.)

Here, it is common experience for jurors to have made handwriting comparisons. Indeed, the experience is so common, the jury's ability to make a handwriting comparison is statutorily sanctioned. (Evid. Code, § 1417.) The jury was not presented with an awe-inspiring scientific technique, test, process, or principle which they were incapable of evaluating. They were presented with a comparison between the letters and numbers on the Love Insurance note and the known handwriting of appellant. An expert based his opinion on that comparison, and the jurors were fully capable of reaching their own opinions, as well as critically assessing the credibility of the expert's opinion. The trial

court correctly rejected a *Kelly* challenge to the evidence because "*Kelly* does not apply here." (*People v. Ayala, supra,* 24 Cal.4th at p. 281.)[113/]

Even though the trial court did not err, we briefly note the lack of prejudice in appellant's claim of error. Despite appellant's roll-call lineup of asserted constitutional rights violations:

> The erroneous admission of expert testimony only warrants reversal of "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

(*People v. Prieto* (2003) 30 Cal.4th 226, 247, quoting *People v. Watson, supra,* 46 Cal.2d at p. 836.)

The claim of error is the admission of expert opinion based on handwriting comparison. Appellant never contended that *Kelly* prohibited admission of the Love Insurance note, prohibited an expert from drawing the jury's attention to the similarities between the writing on the note and on appellant's exemplars, or prohibited the jury from making its comparison. Indeed, in asserting his objection to the expert's testimony under Evidence Code section 352, appellant repeatedly conceded that the jury would be able to make its own comparison. (See, e.g., 147 PRT 13843-13844; see also 2B AOB 394 and fn. 342.) Thus, the most that could have been excluded was the expert's opinion. But, as the trial court found, based on "the graphic blow-up displays" of the writing in the note and appellant's exemplars, which were later presented to the jury, "without question" "the incredibly close match between the Love Insurance note printing and the exemplars from [appellant]." (247 PRT 25439-25440.)

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113. Without argument or discussion, appellant asserts the trial court was bound by the prior evidentiary ruling of Judge Kennedy. (2B AOB 405-406.) Thus, the claim is forfeited. Moreover, as discussed in Argument I, *supra*, there was no binding ruling.

In light of the conceded admissibility of the note and exemplars, and the expert pointing out the similarities between them, and the unquestionable "incredibly close match" between the writing on the note and appellant's exemplars, there is no reasonable probability of a more favorable result even had the expert's opinion been excluded.

XIX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING ON THE DEFENSE EVIDENTIARY CHALLENGE TO ADMISSIBILITY OF THE PROSECUTION HANDWRITING EXPERT TESTIMONY

Appellant contends the trial court erred in failing to consider his two experts' testimony and proffered proficiency studies in ruling on his objections under due process and Evidence Code section 352 to the handwriting expert's opinion. He further contends the trial court erred in refusing to permit defense counsel to test the handwriting expert's identification on cross-examination by conducting an experiment in which the expert would be asked to examine and compare additional handwriting. He claims the errors violated his constitutional rights and were prejudicial. (2B AOB 410-431.)

Appellant's challenge to the handwriting expert centers on his assertion that handwriting comparison did not meet the standards for admission under *People v. Kelly, supra,* 17 Cal.3d 24. While claiming an objection under Evidence Code section 352 and due process, the thrust of appellant's argument is a challenge to the reliability of expert handwriting comparison by claiming that reliability had not been demonstrated by scientific studies. As a challenge under *Kelly*, the trial court properly rejected it. (See Argument XVIII, *supra.*) As a challenge to the trial court's admission of the expert testimony, no abuse of discretion is demonstrated.

While ruling that handwriting comparison was not subject to a challenge under *Kelly*, the defense was permitted to challenge *in limine* admissibility of

the expert's testimony on the basis of Evidence Code section 352 and due process. (147 PRT 13843-13844; 180 PRT 17406-17410.) The defense presented the testimony of two witnesses, Mark Denbeaux, a law professor who described generally the historical treatment of expert opinion on handwriting (181 PRT 17414-17469), and Michael Saks, a professor at Boston College who had studied decision-making in the legal system and described the features of the scientific method (183 PRT 17486-17594). Neither witnesses claimed to be an expert in handwriting comparison (181 PRT 17418 (Denbeaux); 183 PRT 17490-17500 (Saks)) and the trial court found that neither defense witness was an expert in handwriting comparison. (184 PRT 17584 (Saks); see 247 PRT 25439 (both).) The defense also requested the trial court take judicial notice of reports of proficiency studies by an organization called Collaborative Testing Service, which purportedly examined handwriting experts. (183 PRT 17503, 17528, 17567.) The request was denied. (183 PRT 17568.) Finally, the defense indicated an intent to produce a witness from Collaborative Testing Service to provide foundation for admission of the proficiency test reports. (184 PRT 17624.) The trial court indicated it would require a detailed offer of proof connecting the test results to the expertise of the prosecution expert, Harris, before hearing the proposed witness. (184 PRT 17628, 17632-17634.)

"The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. (*People v. Ramos, supra,* 15 Cal.4th 1133, 1175.) "Absent a manifest abuse of discretion, the trial court's determination will not be disturbed on appeal." (*Ibid.*)

Appellant first argues that trial court erred in concluding that his witness, Professor Saks, was not qualified to testify as an expert on the reliability of handwriting comparison. (2B AOB 415-416.) However, appellant ignores the abuse of discretion standard which governs this Court's review, as well as the trial court's reasoning for its determination.

Prof. Saks, who had studied and taught scientific method, testified that his work had been almost exclusively studying decision-making in the legal system. (183 PRT 17491.) Prof. Saks later explained that his area of expertise (research methodology and statistics) equipped him to create proficiency studies (which are not "particularly complicated" (183 PRT 17506)), evaluate reliability and validity of any measurement device, and look at studies by others and understand what they have done. (183 PRT 17511.)

Prof. Saks had a lengthy list of research, teaching, and publications in the area of scientific methodology, and also asserted he had "reviewed everything I could possibly find" in the area of studies of handwriting comparison. (183 PRT 17500.) He claimed to have examined several sources "for information on whether documents examiners had evaluated their ability to do the work that they do." (183 PRT 17502.)

In considering the prosecution challenge to the adequacy of the foundational showing underlying Prof. Saks's proposed testimony on the unreliability of expert handwriting comparison, the trial court found that Prof. Saks was neither a practitioner nor a researcher in the field, but was "a third layer." (183 PRT 17514.) As the trial court explained the layers, there are people claiming expertise in the field by virtue of training and experience, "people who are engaged in the actual research into the direct empirical data on handwriting experts," and, with the offer of Prof. Saks, people who claim to have studied what the researchers had written. (183 PRT 17514.) This level of "expert" is "three layers removed" and getting into a lot of hearsay. (183 PRT 17514.) As the trial court explained, "The problem with that is we don't know whether what they [third layer "experts" like Prof. Saks] are picking up and the information they are gathering from this is the correct foundation, the correct base from which to operate." (183 PRT 17519.) "I don't have an expert in handwriting analysis who comes in and tells me, 'This is the correct

data base from which to work.'" (183 PRT 17519.) While Prof. Saks testified to the information he reviewed, "that doesn't tell me from an expert's position that that is the data base or that is the informational base from which one should work to draw any kind of conclusion." (183 PRT 17520.) As the trial court noted, had there been an expert in the field to identify the proper base of research and information, then Prof. Saks could critique that research as an expert in scientific methodology. (183 PRT 17519-17520.) As the trial court stated, without an expert in the field to properly identify the relevant data base, "it's hearsay." (183 PRT 17522.) The trial court sustained the prosecution's objection. (183 PRT 17522 ["I am not going to accept the third layer."].)

Appellant argues that "an academic who has devoted his or her efforts to a study of a field or technique should be able to offer the results of that study without having to first become a practicing purveyor of the technique." (2B AOB 415.) But the trial court did not require that Prof. Saks be a practitioner of handwriting comparison. The trial court impliedly held that either a practitioner or a researcher in the field would have sufficient familiarity with the relevant literature to competently identify it. Prof. Saks was neither; he was "a third layer" who had not demonstrated sufficient knowledge of the field to identify the relevant literature upon which to base his criticism.

In *Ramos*, this Court upheld the trial court's determination that "a professor or sociology and expert on prisons and prisoners" was not qualified "to explain the circumstances of incarceration at San Quentin prison that might prompt an inmate to possess a weapon in self-defense." (*People v. Ramos, supra,* 15 Cal.4th at p. 1174.) The relevant time period of the defendant's possession of the weapon was June and July 1984, but the expert's personal knowledge of the prison conditions ended at May 1983. (*Ibid.*) This Court found no abuse of discretion in the trial court's disqualification of the expert because the expert "lacked both sufficient personal knowledge" of the prison

conditions during the relevant time period and "and adequate basis for formulating a relevant expert opinion *notwithstanding his general qualifications.*" (*Id.* at p. 1175, italics added.) The expert "could only interpolate the likely conditions. (*Ibid.*)

Here, despite his expertise in scientific methodology, Prof. Saks lacked sufficient personal knowledge of the field to identify the relevant literature and, therefore, lacked an adequate basis for formulating an opinion.[114] There was no abuse of discretion nor were any of appellant's constitutional rights violated. (*People v. Ramos, supra,* 15 Cal.4th at pp. 1175-1176 [trial court exercise broad discretion in matters of foundational requirements consistent with constitutional principles].)[115]

Appellant also suggests the trial court erred in refusing to consider the proffered proficiency studies. (2B AOB 416.) Although several documents identified as proficiency studies were marked as exhibits, no foundation for their admissibility was laid, a point impliedly conceded by the defense in requesting the trial court judicial notice the documents. (183 PRT 17566, 17569.) Appellant makes no claim that the request for judicial notice was improperly denied. Moreover, the trial court did not foreclose admission of the documents should the proper foundation be laid and the relevance of the

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114. Appellant complains that Prof. Saks has been allowed to testify as an expert and has published in the field. (2B AOB 416, fns. 358 and 359.) However, all of the identified publications and testimony came well-after this hearing and any foundational basis for his testimony is not identified. Moreover, none of the cases in which Prof. Saks testified indicated that his qualifications were challenged as they were in this case or the showing which was made, if any, in support of his then-existing expertise.

115. As the trial court noted, the prosecution handwriting expert could be cross-examined on all the points the defense attempted to raise in challenging the admissibility of his opinion and "the trier of fact will not be misled here." (183 PRT 17578.)

documents to the expertise of the handwriting expert demonstrated. The trial court simply required an offer of proof of foundation and relevance, which was never forthcoming. (183 PRT 17569-17570; 184 PRT 17624-17628, 17623-17633.)

Appellant next contends the trial court erred in sustaining an objection to the defense request, during cross-examination, to have prosecution expert Harris examine "a piece of paper with handwriting bearing the words 'Love Insurance 281-1-704'" (Exh. 473) and determine whether the writer of that document is the writer of the Love Insurance note (Exh. 151). (148 PRT 13899-13900.)

As the trial court recognized, appellant was attempting to conduct an experiment, testing the expert's ability, by an in-court comparison. (148 PRT 13900.) Appellant contends that such in-court comparisons are appropriate. However, as his own authority notes "it is preposterous to expect [a handwriting expert] to obtain by brief inspection on the stand the necessary data for an opinion." (7 Wigmore, Evidence (3d ed. 1940) § 2011, p. 206.)

> Close measurements, detailed enlargement, and other expedients of the expert, may often require not only a length of time, but a quantity of apparatus and a degree of seclusion. For this reason the opportunity of extrajudicial study is often indispensable. (*Ibid.*)

Moreover, as this Court has stated, the admissibility of experimental evidence depends upon several foundational prerequisites and the proponent of the experiment bears the burden of production and proof that the experiment rests on adequate foundation. (*People v. Turner* (1994) 8 Cal.4th 137, 198; *People v. Bonin* (1989) 47 Cal.3d 808, 847.) The foundational requirements include relevance of the experiment; that the experiment was conducted under substantially similar conditions; and the experiment will not consume undue time, confuse the issues or mislead the trier of fact. (*People v. Turner, supra,* 8 Cal.4th at p. 198; *People v. Bonin, supra,* 47 Cal.3d at p. 847.)

In reaching his opinion, Harris compared the writing on the Love Insurance note with all of the numerous exemplars of appellant's known writing, which spanned several years. (111 PRT 8123, 8129-8135, 8217.) Harris indicated that it was important in making a handwriting comparison to have representative samples of the known writing, and further indicated that such samples should include due course writing and requested writing on paper of similar size to the questioned document. (111 PRT 8155.) Harris conducted his examination using a five power illuminated magnifier. (148 PRT 13856.)

In contrast to the nature and amount of exemplar material Harris used in identifying appellant as the maker of the writing on the Love Insurance note, appellant provided only one exemplar with limited writing – an apparent attempt at duplicating the Love Insurance note. (148 PRT 13899.) Additionally, there was no indication that Harris had a five power illuminated magnifier, nor was there any indication of the amount of time necessary to make a comparison. Thus, in attempting to test Harris's ability, appellant presented an experiment which would not be conducted under substantially similar conditions and appellant failed to demonstrate that the proposed experiment could be conducted without an undue time, if it could be conducted at all. Despite appellant's failure to present an adequate foundation for the experiment, the trial court did not rule out appellant's ability to present evidence of a comparison between his exhibit and the Love Insurance note. (148 PRT 13902.)

In light of appellant's failure to present an adequate foundation for the proposed comparison/experiment, the trial court did not abuse its discretion in sustaining the prosecution's objection.

Finally, for the reasons set forth in Argument XVIII, *supra,* i.e., the conceded admissibility of the note and exemplars, and the expert pointing out the similarities between them, and the unquestionable "incredibly close match"

between the writing on the note and appellant's exemplars, there is no reasonable probability of a more favorable result even had the prosecution's expert's opinion been excluded.

XX.

THE TRIAL COURT DID NOT VIOLATE EVIDENCE CODE SECTIONS 352 OR 1418, OR DUE PROCESS IN ADMITTING THE HANDWRITING EXPERT'S OPINION

Appellant contends the trial court prejudicially erred in admitting the handwriting expert's opinion on the authorship of the Love Insurance note under Evidence Code sections 352 and 1418, and due process. He claims the trial court erroneously shifted the prosecution's burden to show relevance of the opinion to the defense to show its absence. He also contends that the probative value of the opinion was low and several factors made the opinion unreliable. (2B AOB 432-437.) The trial court properly admitted the expert's opinion.

Appellant first contends it was the prosecution's burden to demonstrate the relevance of the expert opinion in the face of the defense objection and the trial court erred in shifting the burden to the defense. However, as the trial court noted there existed a lengthy historical and statutory basis for admission of expert opinion on handwriting. (79 PRT 4109 ["Handwriting experts have been used in courts for years. This is not - - you're attacking the Eiffel Tower now."] In fact, the defense continually confused the basis for its objection, wobbling back and forth between *Kelly* and lack of relevance, both of which were premised on the defense view that handwriting opinion by an expert must be proven reliable in the face of a *Kelly* objection. (88 PRT 5461-5463.) However, as the trial court correctly noted:

> Then you're attacking the - - probably the most well-received, most oft-received piece of expert testimony that's ever, ever been in a courthouse. . . . The reality is - - I've read the points and authority, and

> you're just attacking something so often received and so generally accepted that I think the defense if going to ultimately bear the burden of showing the Court otherwise, that it is not an area. . . . [¶] I can look back at just case law in this area on the use of expert witnesses on handwriting. And without even having an expert testify as to its reliability, it seems to me that it is so often received that it is one of those areas that simply passes the burden back to the defense immediately, without going through these machinations that we all know about.

(88 PRT 5463-5464.)

The trial court never improperly shifted the burden to support admission of the expert opinion. It simply recognized that admission of such expert opinion was long-standing and well-recognized, and, thus, relevant. The test of relevance is whether the evidence tends logically, naturally and by reasonable inference to establish material facts such as identify. (*People v. Heard* (2003) 31 Cal.4th 946, 973; *People v. Garceau* (1993) 6 Cal.4th 140, 177.) The trial court recognized that the opinion of a person, trained and experienced in handwriting comparison, that appellant wrote the letters and numbers on the Love Insurance note would logically, naturally, and by reasonable inference tend to establish appellant's identity as the maker of the note and, thus, his presence at the murder scene and identity as the murderer. The trial court correctly concluded it was the defense burden to overcome that clear relevance in order to support exclusion.

Next, appellant contends the probative value of the expert's opinion was low because lay persons could see the similarities between the writing on the note and appellant's exemplars. (2B AOB 434.) This point, even if accurate, would not undermine admissibility since it concedes relevance. Moreover, "California courts have not imposed a strict test of necessity." (1 Witkin, Cal. Evidence, Opinion Evidence, § 29, p. 558.) Evidence Code section 801, subdivision (a) requires that expert testimony be "related to a subject that is *sufficiently beyond common experience* that the opinion of an expert would

assist the trier of fact." (Italics added.) This Court has interpreted that language "to require exclusion of expert opinion '*only* when it would add *nothing at all* to the jury's common fund of information. . . .'" (*People v. Stoll, supra,* 49 Cal.3d at p. 1154.)

Appellant repeats his claim of lack of reliability to expert handwriting comparison opinion by pointing to the limited number of letters and numbers in the Love Insurance note, the words in the note were in printing rather than cursive writing, appellant may have been handcuffed when his exemplars, and the original of the note was not available. (2B AOB 434.) However, all of those points, to the extent they were valid (there was no evidence appellant was handcuffed when he made the exemplars (see 114 PRT 8568)), addressed the weight of the opinion, not its admissibility.

Appellant claims admission of the opinion violated Evidence Code section 352 and the federal constitution. (2B AOB 435-436.) However, neither here nor in the trial court has appellant ever articulated a basis for finding prejudice under Evidence Code section 352. The prejudice referred to in section 352 is evidence which uniquely tends to evoke an emotional bias against a party as an individual, while having slight probative value with regard to the issues. (*People v. Heard, supra,* 31 Cal.4th at p. 976.) Appellant points to nothing about the expert's opinion which would uniquely tend to evoke an emotional bias against appellant. To the extent the jury relied on the expert's opinion in finding appellant authored the writing in the Love Insurance note, it would certainly have been of assistance to the jury's determination of the identity of the murderer of the Jacobs victims. However, that would be a relevant, not a prejudicial, use of the evidence. (*People v. Coddington* (2000) 23 Cal.4th 529, 588 [prejudicial is not synonymous with damaging].)

Finally as set forth in Arguments XIX and XVIII, any error in the admission of the expert's opinion was harmless.

XXI.

APPELLANT FORFEITED HIS CHALLENGE TO ADMISSIBILITY OF THE HANDWRITING EXPERT COMPARISON BASED ON LACK OF THE ORIGINAL AND, IN ANY CASE, IT WAS NOT ERROR TO PERMIT THE COMPARISON

Appellant contends the expert handwriting comparison evidence (both comparison and opinion) should have been excluded because the original of the Love Insurance note was not used. (2B AOB 438-443.) Appellant forfeited his claim by failing to object on this ground in the trial court and, in any event, the claim is without merit.

Appellant, citing *Spottiswood v. Weir, supra,* 66 Cal. 525, claims the trial court erred in permitting the handwriting expert to use a photograph of the Love Insurance note to base his comparison and opinion. Appellant claims *Spottiswood* requires a handwriting expert to use only the original of a disputed document. Appellant appears to assert he presented this claim to the trial court in a trial brief. (2B AOB 438, citing 51 CT 11217-11228.) However, *Spottiswood* is not cited in the trial brief, which is addressed to authentication under the Evidence Code and section 352. To the extent appellant means to suggest his current claim is a challenge to the authentication of the note and the photographs of the note, that claim has been addressed in Argument X, *supra*. To the extent appellant means to suggest his current claim extends beyond authenticity, it is forfeited. Moreover, it is without merit.

In *Spottiswood*, this Court found error in the trial court permitting the expert witness to opine as to the identity of a disputed letter by relying, not on the letter, but on a press copy. (*Id.* at p. 529.) This Court said "It is essential that the document whose genuineness is sought to be proved should itself be produced." This Court explained that because comparison of a disputed writing with other proved or admitted writings is not regarded as evidence of the most

satisfactory character, and by some courts is entirely excluded. It would be adding vastly to the danger of such evidence, to permit evidence to be given from a comparison of genuine writings with a press copy of the writing whose genuineness is disputed. (*Spottiswood v. Weir, supra,* 66 Cal. 525.)

Needless to say, the handwriting expert in this case did not rely upon a press copy[116] and the *Spottiswood* case is of no assistance to appellant. Moreover, there was no dispute as to the genuineness of the Love Insurance note or what it contained; the defense simply asserted the photographs did not adequately depict all of the minute detail which might have appeared on the note. (See *People v. Atkins* (1989) 210 Cal.App.3d 47, 54-55 [Evid. Code § 1511 (admissible duplicates) reflects the development of accurate methods of reproduction.].) Thus, to the extent the claim is not forfeited it is without merit.

XXII.

HAVING FAILED TO OFFER HIS HANDWRITING "EXPERTS," THE PROFICIENCY STUDIES, AND THE IN-COURT TESTING OF THE PROSECUTION EXPERT AT TRIAL APPELLANT FORFEITED HIS CLAIM OF ERRONEOUS EXCLUSION

Appellant contends the trial court prejudicially erred by precluding the defense from presenting their two experts, Profs. Denbeaux and Saks, the proficiency studies, and in-court testing of the prosecution handwriting expert to the jury as a means of challenging the credibility of the prosecution expert's opinion. (2B AOB 445-451.) However, appellant points to no place in the record where he actually offered that evidence at trial. The *in limine* rulings

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116. Webster's Third New International Dictionary, Unabridged (2002) defines a press copy as "a copy of something written made on a copying press." (*Id.* at p. 1795.) A copying press is "an obsolescent device in which an original (as a letter) in copying ink is transferred in reverse by being pressed against an absorbent translucent sheet which is read from the reverse side." (*Id.* at p. 504.)

were made on the basis of defense challenges to the admissibility of the prosecution expert testimony; the trial court never made any ruling prohibiting presentation of the defense evidence to the jury to challenge the weight of the prosecution expert testimony. Thus, the claim of error is forfeited.

Evidence Code section 354 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
>
> (b) The rulings of the court made compliance with subdivision (a) futile; or
>
> (c) The evidence was sought by questions asked during cross-examination or recross-examination.

Appellant has not pointed to anywhere in the trial record where he indicated to the trial court his intent to offer his experts, the proficiency studies, or in-court testing to the jury as a means of challenging the credibility of the prosecution expert's opinion. Thus, there was no ruling by the trial court excluding any of this evidence at trial, much less an appropriate offer of proof.

Appellant seems to suggest he is excused from offering his evidence because it was offered and rejected in the course of the *in limine* hearing on the admissibility of the prosecution handwriting expert. But that hearing dealt with appellant's *Kelly*, due process, and Evidence Code section 352 challenges to admissibility of the prosecution evidence. Appellant's reliance on *People v. Morris, supra,* 53 Cal.3d 152, is misplaced. In *Morris*, this Court dealt with the sufficiency of an *in limine* challenge to proffered trial evidence to preserve the objection for appellate review, under Evidence Code section 353 when the

objection was not repeated at trial. (*People v. Morris, supra,* 53 Cal.3d at pp. 187-190; see *People v. Ramos, supra*, 15 Cal.4th 1133, 1171 ["A properly directed motion *in limine* may satisfy the requirements of Evidence Code section 353 and preserve objections for appeal"].)[117/] While appellant's *in limine* challenge preserved his *Kelly*, due process, and Evidence Code section 352 objections to the prosecution evidence, it did not fairly call upon the trial court to make a ruling on the admissibility of his evidence at trial. As this Court stated in *Stoll*, issues of the reliability and validity of an expert's tests may be thoroughly explored on cross-examination and in rebuttal by another expert of comparable background. (*People v. Stoll, supra,* 49 Cal.3d at p. 1159.)

Appellant also appears to seek to avoid his forfeiture by urging that the trial judge's "strong view that the field was 'unassailable'" rendered any offer of proof for trial purposes futile. (2B AOB 445, fn. 370.) However, the trial judge's comment was made in the context of appellant's motion *in limine* to exclude the prosecution handwriting expert opinion and did not purport to be a ruling on the admissibility of defense evidence to impeach the prosecution expert. (184 PRT 17625-17628.)

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117. Evidence Code section 353 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

Moreover, the trial court plainly indicated that its rulings were premised on an insufficient foundation or showing which could be cured. As to Professor Saks, the trial court's concern was that he was "three layers removed" (183 PRT 17514) from the field and did not have sufficient expertise with the field of handwriting comparison, either as a practitioner or a researcher, to identify the relevant literature upon which to base his criticism. (183 PRT 17519 ["The problem with that is we don't know whether what they (third layer "experts" like Prof. Saks) are picking up and the information they are gathering from this is the correct foundation, the correct base from which to operate"; "I don't have an expert in handwriting analysis who comes in and tells me, 'This is the correct data base from which to work.'"].) However, the trial court did not preclude the admissibility of Prof. Saks's testimony as an expert in scientific method. As long as there was an expert in the field to identify the proper base of research and information, Prof. Saks could critique that research as an expert in scientific methodology. (183 PRT 17519-17520.) Thus, the trial court clearly identified the foundational prerequisite necessary for admission of Prof. Saks' testimony, which was not forth coming either in the *in limine* hearing or in an offer of proof at trial.[118/]

The trial court also did not foreclose presentation of the proficiency studies, either in the *in limine* hearing or in trial. The trial court simply required an offer of proof of foundation and relevance, which was never forthcoming. (183 PRT 17569-17570; 184 PRT 17624-17628, 17623-17633.)

Finally, as to the in-court experiment in which the defense sought to test the prosecution expert, the trial court correctly found that the proposed experiment was not substantially the same as the manner in which the expert

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118. Appellant does not discuss the testimony of Prof. Denbeaux or explain how the historical treatment of expert handwriting comparison by the courts would be relevant to assessing the weight of the prosecution's expert witness testimony, nor does he point to any offer of proof in the trial court.

made the comparison which resulted in his identification. (148 PRT 13900.) The admissibility of experimental evidence depends upon several foundational prerequisites and the proponent of the experiment bears the burden of production and proof that the experiment rests on adequate foundation. (*People v. Turner, supra,* 8 Cal.4th at p. 198; *People v. Bonin, supra,* 47 Cal.3d at p. 847.) The foundational requirements include relevance of the experiment; that the experiment was conducted under substantially similar conditions; and the experiment will not consume undue time, confuse the issues or mislead the trier of fact. (*People v. Turner, supra,* 8 Cal.4th at p. 198; *People v. Bonin, supra,* 47 Cal.3d at p. 847.) While appellant proposed an experiment which was properly excluded due to lack of substantial similarity, he was not foreclosed from proposing a proper experiment or requesting the expert be ordered to conduct a properly constructed comparison. Appellant simply never made an offer of proof of the proper foundational requirements.

As set forth in Argument XIX, *supra*, the trial court correctly excluded the defense evidence during the *in limine* hearing. Nothing in those rulings precluded appellant, upon a proper showing from presenting his evidence to impeach the prosecution expert at trial. Thus, appellant forfeited his claim. Additionally, because the evidence was properly excluded and appellant made no offer to correct the deficiencies, exclusion of the evidence at trial would not have been erroneous.

XXIII.

BECAUSE FRANK CLARK HAD PERSONAL KNOWLEDGE OF APPELLANT'S HANDWRITING, THE TRIAL COURT DID NOT ERR IN ADMITTING HIS OPINION THAT APPELLANT WROTE THE LOVE INSURANCE NOTE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by permitting Frank Clark to testify at trial to his opinion that appellant wrote the Love Insurance note. Appellant claims there was no foundation of uniqueness to handwriting upon which to base an identification, there was no foundation for Clark's ability to make an expert comparison, the trial court failed to instruct the jury on the foundational requirements, Clark's opinion was not helpful, the statutory basis for lay opinion does not include hand printing, and Clark's opinion was more prejudicial than probative. (2B AOB 452-465.)

During his direct testimony, Frank Clark indicated that he had known appellant since 1980, worked with appellant in three carpet care businesses, and opened a carpet care business with appellant in March 1982. (20 TRT 3732-3735, 3738.) Clark identified numerous records of the businesses which contained appellant's writing. (20 TRT 3740-3748 [Exhs. 197 and 198]; 21 TRT 3780-3783 [Exh. 199], 3789-3790 [Exh. 200], 3792 [Exh. 201], 3819-3820 [Exh. 202].) When asked at the end of direct examination to look at the two photographs of the Love Insurance note (Exhs. 22a and 22B), the defense requested a hearing outside the jury's presence. (21 TRT 3826.) Following the hearing, in which the trial court heard and ruled against the defense objections, Clark examined the writing on the Love Insurance note and testified that in his opinion "it's [appellant's] writing." (21 TRT 3838.)

Appellant first complains that the prosecution failed to introduce foundational evidence demonstrating that handwriting is sufficiently unique to

permit identification of the writer. (2B AOB 455-456.) However, as appellant acknowledges (2B AOB 456, citing 2B AOB 385-389), he is merely restating his *Kelly* challenge to handwriting comparison testimony. As fully set forth in Argument XXIII, *supra*, appellant's *Kelly* challenge was properly rejected by the trial court.

Appellant next complains the prosecution failed to lay a foundation for Clark's ability to identify the limited writing on the Love Insurance note as appellant's writing. (2B AOB 456-458.) Appellant argues there was no evidence Clark ever observed appellant print the exact content of the note; the note was a limited quantity of block printing; Clark was not provided with exemplars; several years passed between Clark's last observation of appellant's printing and his testimony; and Clark was not qualified as an expert. As to the first four points, none of those were raised in the trial court and they are forfeited. (See 21 TRT 3827-3835.) Appellant raised Clark's lack of expertise in his objections, but as the trial court pointed out, Clark was not being asked to offer his opinion as an expert, but as a lay witness. (21 TRT 3831.) Evidence Code section 1416 provides:

> A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:
>
> (a) Having seen the supposed writer write;
>
> (b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
>
> (c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or

(d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

The only foundational requirement under Evidence Code section 1416 is "that the witness has personal knowledge of the handwriting of the supposed writer." (2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 11, p. 141.) The trial court found that Clark had the required personal knowledge. (21 TRT 3830.) That finding is fully supported by the evidence. Thus, appellant's remaining foundations complaints, as the trial court found (21 TRT 3831), were matters addressed to weight, not admissibility.

Appellant contends the trial court erroneously denied a jury instruction, pursuant to Evidence Code section 403, subdivision (c)(1), requiring the jury to determine the foundational requirement before accepting Clark's identification. (2B AOB 458-459, citing 65 CT 14551-14552.) However, the proposed instruction erroneously identified uniqueness of handwriting and validity of handwriting comparison as requisite foundational requirements. (65 CT 14551-14552.) Evidence Code section 1416 requires only "personal knowledge of the writing of the supposed writer" as a foundational requirement. Moreover, the foundational requirement under section 1416, is made by the trial judge and is binding on the jury. (Cal. Law Revision Comm. com., Deerings Ann. Evid. Code, § 403, p. 178 [judge decides witness's qualification under section 405]; *id.*, § 405, p. 186 [witness's qualification under section 1416 decided by judge under section 405].) Thus, the proposed instruction was erroneous and "[a] trial court may properly refuse to give requested instructions when they are . . . erroneous. . . ." (*People v. Turner, supra*, 8 Cal.4th at p. 203.) The trial court properly rejected the defense instruction.

Relying on Evidence Code section 800, appellant contends Clark's opinion was not helpful and should have been excluded on that basis.[119] (2B AOB 459-460.) However, section 800 "codifies existing law" and "the words 'such an opinion as is permitted by law' in section 800" make it clear that section 800 "does not make inadmissible an opinion that is admissible under existing law, even though the requirements of subdivision (a) and (b) are not satisfied." (Cal. Law Revision Comm. com., Deerings Ann. Evid. Code, § 800 (2004), pg. 6.) Admission of lay opinion based on personal knowledge of the handwriting of the supposed writer was permitted under existing law when Evidence Code section 800 was enacted (former Code of Civ. Proc., § 1943) and remained admissible under Evidence Code section 1416. There is simply no basis for excluding Clark's opinion under Evidence Code section 800.

Appellant next faults the trial court's reliance on Evidence Code section 1416 (see 21 TRT 3829) by asserting that the section permits lay opinion only on handwriting, not hand printing. (2B AOB 460-461.) Appellant relies on the Legislature's use of the term "handwriting" in section 1416 and its use of the term "writing" in section 1418 (see fn. 104 for text), to suggest that 1416 is limited to cursive writing and does not include printing. His reliance is misplaced.

In the comment to section 1418, the Law Revision Commission stated that the section applies to "any form of writing, not just handwriting" and notes

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119. Evidence Code section 800 provides:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony.

that the reason for this difference is the recognized ability of experts to identify typewriting specimens and other form of writing as accurately as handwriting. (Cal. Law Revision Comm. com., Deerings Ann. Evid. Code, § 1418 (2004), pg. 640.) The fact the Legislature expanded the basis for expert opinion to include mechanical and other non-human forms of communication or representation (see Evid. Code § 250 [defining writing]) provides no basis for limiting handwriting in section 1416 to the cursive style. Indeed, handwriting is not a technical legal term and is defined as writing in which the hand forms the letters with a writing implement or something written by hand. (Webster's Third New International Dictionary, Unabridged (2002) p. 1028.) Although in printing style, there was no writing on the Love Insurance note other than writing by hand; the trial court did not err in admitting Clark's opinion under Evidence Code section 1416.

Finally, appellant contends the trial court should have excluded Clark's opinion under Evidence Code section 352. He does not demonstrate any abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955 [appellate court applies abuse of discretion standard in review of trial court ruling under Evidence Code section 352].) The jury was fully aware that Clark was not represented as an expert, that he did not examine appellant's exemplars, and that his experience with appellant's writing was several years earlier and limited to business records. The jury was fully capable of assessing the weight to be attached to Clark's opinion based on these various factors. Moreover, appellant identifies no prejudice. The prejudice referred to in section 352 is evidence which uniquely tends to evoke an emotional bias against a party as an individual, while having slight probative value with regard to the issues. (*People v. Heard, supra,* 31 Cal.4th at p. 976.) Nothing about Clark's opinion would tend to evoke an emotional bias against appellant.

Inasmuch as there was no state law error in the admission of Clark's lay opinion, there was also no federal constitutional error. Moreover, in light of the "the incredibly close match between the Love Insurance note printing and the exemplars from [appellant]" (247 PRT 25439-25440), any error in admitting Clark's lay opinion was not prejudicial.

XXIV.

THE TRIAL COURT DID NOT ERR IN EXCLUDING THE HEARSAY STATEMENT OF ROCHELLE COLEMAN WHICH PURPORTEDLY IDENTIFIED DAVID WOODS AS THE WRITER OF THE LOVE INSURANCE NOTE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by precluding the defense from presenting the out-of-court statement of Rochelle Coleman, identifying the handwriting on the Love insurance note as that of David Woods. (2B AOB 466-476.) The trial court did not err in excluding the hearsay statement.

In an *in limine* hearing, Lieutenant Dolores Messick of the El Paso Texas Sheriff's Department testified that in 1980, as a deputy with the Hudspeth County Sheriff's Department, she interviewed Rochelle Coleman in connection with a homicide of a victim named Toups. (42 TRT 7928-7929.)[120/]

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120. Jimmie Joe Nelson, David Woods, and Rochelle Coleman were suspects in the Texas murder of William Calvin Toups, which occurred between August 20 and 24, 1980 in Texas. (41 TRT 7766, 7789.) Nelson had been hitchhiking in California when he was picked up by Joe "Shorty" Smith. (41 TRT 7819, 7855.) Johnny Massingale was with Smith, having been picked up hitchhiking earlier. (41 TRT 7815, 7855.) Massingale regaled Nelson and Smith with stories of the throat-slashing murders of a woman and her young son, he claimed to have committed. (41 TRT 7816, 7818, 7821, 7864.) When the they reached Hollywood, Massingale decided to stay, Smith decided to drive back to Kentucky, and Nelson stayed with Smith. (41 TRT 7828, 7863, 7898.) On the way back to Kentucky, Smith picked up other hitchhikers, apparently including Woods and Coleman. (41 TRT 7829.) At a later stop, Nelson, Woods, and Coleman left Smith and got another ride. (41 TRT 7830.)Nelson had been arrested on December 6, 1980, driving Toups' stolen van, and assisted law enforcement in locating Woods and Coleman. (41 TRT 7753, 7767.)

She was later asked by Texas Ranger Montemayer and San Diego Detective Ayers to interview Coleman about a homicide in San Diego in which the victims had their throats slashed. (42 TRT 7929-7930.) Coleman had declined to speak with Ayers and Montemayer. (42 TRT 7930.) Messick's second interview with Coleman was tape-recorded and the recording was transcribed. (42 TRT 7931-7932, Exhs. 660 [transcript], 661 [audiotape].) The trial court reviewed the transcript and listened to pertinent portions of the tape-recording. (42 TRT 7926, 7942-7945.) During the course of the interview, Coleman said that Woods mentioned killings other than Toups. (42 TRT 7934.) Also during that interview, Messick showed Coleman a photograph which was similar to a photograph of the Love Insurance note. (42 TRT 7934-7935.) Coleman opined that the writing on the note in the photograph belonged to Woods. (42 TRT 7935.) Prior to showing her the photograph of the note, Coleman at one point stated, "'But I know that that's his handwriting.'" (42 TRT 7940.) Coleman was calm throughout the interview and showed no change in demeanor when shown the photograph of the note. (42 TRT 7939.) Apparently by the time of trial, Coleman was dead. (42 TRT 7926-7927.) The trial court excluded the statement. (42 TRT 7949-7950, 7954.)

Appellant first claims Coleman's identification of the writing as Woods' was admissible as hearsay under the spontaneous statement exception. Evidence Code section 1240 provides:

Sometime after leaving Smith, Nelson, Woods and Coleman killed Toups. (41 TRT 7766, 7789.) Nelson was subsequently arrested in Alabama, driving Toups' van. (41 TRT 7752-7753.) After his arrest, Nelson told Alabama and Texas authorities about the San Diego murders which Massingale had described, but when first interviewed by San Diego Det. Ayers, Nelson said they were committed by Woods. (41 TRT 7754-7756, 7791-7792; 42 TRT 7882.) Nelson named Woods because Woods was falsely blaming Nelson for the Toups murder. (42 TRT 7882-7883.) The next day, Nelson told Ayers that it was Massingale who had admitted the San Diego murders. (42 TRT 7884.)

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

A trial court's ruling on the admissibility of a hearsay statement under the spontaneous statement exception is reviewed for an abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) The trial court's resolution of questions of fact underlying its determination are review for substantial evidence. (*Ibid.*) Whether a hearsay declarant spoke "under the stress of excitement" is a factual determination reviewed for substantial evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 540-541.)

In rejecting application of the spontaneous statement exception, the trial court concluded that Coleman was not under any stress of nervous excitement. (42 TRT 7950.) The trial court found that throughout the interview, Coleman's voice was "calm, cool, modulated" and her statements about the note were "right in line with all the other statements; just matter of fact and just an attempt to be informative." (*Ibid.*) As Lt. Messick testified, Coleman was calm throughout the interview and remained that way when shown the photograph of the note. (42 TRT 7939.) Moreover, by saying, "'But I know that that's his handwriting'" (42 TRT 7940) even before Messick showed her the photograph, Coleman implied that she had seen it before.

The trial court's factual finding that Coleman's statement was not made under the stress of excitement was fully supported by the evidence; indeed, there was no evidence of any stress or excitement at all. Thus, exclusion of the statement as hearsay was not an abuse of discretion.

Appellant next contends the statement was admissible for non-hearsay purposes; i.e., to show "that Woods' printing was sufficiently similar to the

Love Insurance note to cause Rochelle Coleman to believe that Woods authored the note" and her opinion was relevant to impeach the prosecution expert. (2B AOB 469-470.) He misses the import of Coleman's statement; both of his "nonhearsay" assertions rely on the truthfulness of her statement. Her identification of the handwriting is a statement of her opinion. (Evid. Code, § 1416.) Coleman's opinion would only be admissible as nonhearsay if it was relevant to some issue even if it was not her true opinion; i.e., Coleman was untruthful when she identified the handwriting as Woods'. No such relevant nonhearsay issue has been shown.

Finally, appellant relies on his constitutional right to present a defense. However, as this Court has stated:

> The United States Supreme Court has held that the constitutional right to present and confront material witnesses may be infringed by general rules of evidence or procedure which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness. However, the high court has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible. (See, e.g., *Michigan v. Lucas* (1991) 500 U.S. 145 [114 L.Ed.2d 205, 111 S.Ct. 1743] [preclusive effect of statutory notice-of-evidence requirement in rape case]; *Taylor v. Illinois* (1988) 484 U.S. 400 [98 L.Ed.2d 798, 108 S.Ct. 646] [sanction of preclusion for defense violation of discovery rules]; *Rock v. Arkansas* (1987) 483 U.S. 44 [97 L.Ed.2d 37, 107 S.Ct. 2704] [exclusion of accused's own testimony under state rule disallowing all hypnotically refreshed evidence]; *Green v. Georgia* (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150] [absolute state failure to recognize hearsay exception for declarations against penal interest]; *Davis v. Alaska* (1974) 415 U.S. 308 [39 L.Ed.2d 347, 94 S.Ct. 1105] [denial of cross-examination for bias based on state rule making evidence of juvenile proceedings inadmissible in adult court]; *Chambers v. Mississippi, supra,* 410 U.S. 284 [state rule precluding cross-examination of party's own witness]; *Washington v. Texas* (1967) 388 U.S. 14 [18 L.Ed.2d 1019, 87 S.Ct. 1920] [state rule precluding accomplice from testifying for defense]; but cf. *Delaware v. Van Arsdall* (1986) 475 U.S. 673 [89 L.Ed.2d 674, 106 S.Ct. 1431] [preclusion of cross-examination for bias, based upon individual assessment of

probative value against prejudice, violated confrontation clause].) (*People v. Cudjo* (1993) 6 Cal.4th 585, 611-612.)

In this case, there was no arbitrary exclusion of reliable evidence: the trial court did not preclude the defense from obtaining and presenting witnesses who were sufficiently familiar with Woods' writing to form an admissible opinion;[121] it did not preclude the defense from presenting exemplars of Woods' handwriting for the jury to examine; and, as noted in Argument XXII, *supra,* it did not preclude the defense from presenting the prosecution expert with sufficient exemplars and adequate opportunity to compare Woods' writing with the Love Insurance note.

> The general rule remains that "'the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'"

(*People v. Lawley* (2002) 27 Cal.4th 102, 155, citations and footnote omitted.)

The trial court simply ruled that an out-of-court opinion by an unavailable witness was hearsay and inadmissible. There was neither an abuse of discretion nor constitutional error.

Finally, any error was harmless as a more favorable result is not reasonably probable even had Coleman's hearsay statement been admitted.

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121. As the prosecutor aptly noted, there was no evidence that Coleman had sufficient personal knowledge of Woods' handwriting to support admission of her lay opinion, other than that which appeared in the hearsay statement itself. (42 TRT 7949.)

XXV.

THE TRIAL COURT DID NOT ERR BY REFUSING APPELLANT'S ERRONEOUS INSTRUCTION ON HANDWRITING COMPARISON EVIDENCE

Appellant contends the trial court violated state law and his constitutional rights by refusing an instruction which directed the jury to disregard handwriting comparison evidence which identified the writer unless it was shown that handwriting is unique to one individual and comparison is capable of proving uniqueness. (2B AOB 477-481.) Appellant is attempting to convert his *Kelly* objection to an argumentative jury instruction. The prerequisites under his instruction are not preliminary facts to admission of handwriting comparison evidence and the trial court did not err or violate appellant's constitutional rights in refusing the instruction.

Appellant offered an instruction which stated, in part:

> Before opinions based on comparative techniques may be offered in an attempt to prove an inference of identify, the following preliminary fact must be proved by the party offering the evidence:
>
> That the specimens or items compared are unique to one individual, and only one individual, and that the comparison method is capable of proving the uniqueness so as to give rise to a reasonable inference of identity without speculation or guesswork.
>
> . . . .
>
> Absent proof of the following specimens being unique to one individual, and only one individual, and that the comparison method being capable of proving uniqueness so as to give rise to an inference of identity, they may be considered by you only for the limited purposes of exclusion and negating an inference or identity:
>
> . . . .
>
> 3. Comparative analysis of hand printing.
>
> . . . .

(65 CT 14551-14552.)

The trial court denied the instruction. (60 TRT 11437.) The trial court noted the instruction was both argumentative and incorrect. (*Ibid.*)

Contrary to appellant's claim, uniqueness of handwriting is not a preliminary fact under either the expert or lay opinion statute. (Evid. Code, § 1416, 1418.) Moreover, as described in footnote 108, *supra*, there was no aura of certainty in the expert's opinion and certainly none was present in the opinion of the lay witness. Finally, although in an appropriate case, Evidence Code section 403, subdivision (c)(1),[122] requires on request, an instruction directing the jury to determine the existence of any preliminary fact necessary for admission under the section, the qualifications of a witness to give an opinion on whether a questioned writing is the handwriting of a particular person is a preliminary fact determined by the trial judge under Evidence Code section 405 and is binding on the jury. (Cal. Law Revision Comm. com., Deerings Ann. Evid. Code, § 403, p. 178 [judge decides witness's qualification under section 405]; *id.*, § 405, p. 186 [witness's qualification under section 1416 decided by judge under section 405]; *id.*, § 720, p. 388 [judge's determination that witness qualifies as an expert is binding on the jury].) Thus, no instruction was required, even if it had been properly requested.

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122. Evidence Code section 403, subdivision (c)(1), provides:

> (c) If the court admits the proffered evidence under this section, the court:
>
> (1) May, and on request shall, instruct the jury to determine whether the preliminary facts exists and to disregard the proffered evidence unless the jury finds the preliminary fact does exist.

XXVI.

THE FAILURE TO PRESERVE HAIR FOR POSSIBLE LATER ELECTROPHORETIC TESTING DID NOT VIOLATE DUE PROCESS BECAUSE THE HAIR HAD NO APPARENT EXCULPATORY VALUE AND THERE WAS NO BAD FAITH INVOLVED

Appellant contends the trial court prejudicially erred and denied his constitutional rights by failing to exclude evidence of the hairs found in Suzanne Jacobs' hand. He claims the hairs was not properly preserved for electrophoretic testing and thereby denied him the opportunity to perform tests which might have exculpated him. (2B AOB 482-484.) However, the hairs had no apparent exculpatory value at the time of the failure to preserve and there was no bad faith involved.

As part of a trial brief filed November 19, 1986, appellant sought a sanction for, *inter alia*, the failure to adequately preserve strands of hair recovered from the hand of Suzanne Jacobs. (38 CT 8334-8360.) The prosecution's opposition was filed December 4, 1986. (42 CT 9168-9201.)[123/]

Detective Gleason, the Jacobs crime scene detective, observed several blond hairs clutched in the right hand of Suzanne. (75 PRT 3390; see 8 TRT 1330-1331.) Those hairs were collected at the scene, placed in a container, and taken to the police lab. (75 PRT 3391-3392.) Hairs were also collected from Suzanne's body at the morgue. (87 PRT 5286; 102 PRT 6993; see 8 TRT 1342-1347.) The collected hairs were not refrigerated. (102 PRT 6996-6997.) There appeared to be tissue attached to the hair follicles. (102 PRT 6997.) In February 1979, a presentation was given by David Metzger, a hair examiner for the State of Illinois laboratory, and Fran Gadowski, concerning simultaneous determination of three genetic markers (PGM, ESD, and GLO) in the root

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123. Additional pleadings were filed by both the prosecution (56 CT 12360-12363) and appellant (56 CT 12364-12368; 57 CT 12597-12650).

sheath of human hairs. (143 PRT 13216.) Articles on electrophoretic analysis of hair root sheaths began appearing in approximately 1978. (150 PRT 15070-15071, 15073.) However, it would take time before a laboratory could begin using such a new procedure in casework. (150 PRT 15075.)

The trial court denied appellant's motion for sanctions for the failure to preserve the hairs for electrophoretic testing. (247 PRT 25443 ["I do not find that the Trombetta standard has been met"].) The trial court added that in light of the "infancy in 1979" of electrophoretic analysis of hair root sheaths, "we cannot fault the detectives for not having preserved the hair root sheaths" and "I don't think that there is any indication that there would have been exculpatory value." (247 PRT 25444-25445.) Thus, the trial court found that there was no bad faith in the failure to preserve the hair and there was no apparent exculpatory value in the hair.

As more fully detailed in Argument XIV, *supra*, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.) The trial court's findings that there was no bad faith and no apparent exculpatory value was supported substantial evidence; indeed, no evidence contradicted the trial court's ruling.[124/] (*People v. Roybal, supra,* 19 Cal.4th at p. 510 [on review of the trial court's ruling, this Court determines "whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to

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124. Appellant conceded there was no apparent exculpatory value in his trial brief. (38 CT 8342 [the hair specimens "could have been subjected to certain tests" the results of which might have excluded appellant; cf. *Arizona v. Youngblood, supra,* 488 U.S. at p. 56, fn. * ["The possibility that the semen samples could have excluded respondent if preserved and tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*."].) He impliedly concedes the absence of bad faith in his opening brief. (2B AOB 482.)

support its ruling"].) As there was neither apparent exculpatory value nor bad faith, the trial court did not err or violate appellant's constitutional rights in refusing a sanction.

Appellant claims he was entitled to a sanction regardless of his failure to meet the standards of *California v. Trombetta* and *Arizona v. Youngblood* because the inability to test the hair made his trial fundamentally unfair and impaired the reliability of the guilt and penalty verdict. (2B AOB 482-483.) Appellant does not point to anywhere in the trial record where he raised this novel argument and respondent is aware of none. It is forfeited. Moreover, in addressing the reasons for imposing a bad faith requirement for potentially exculpatory evidence, the United States Supreme Court stated its unwillingness to read the fundamental fairness requirement of due process as imposing on police an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance. (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.) The Court also noted in *California v. Trombetta*, that "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta, supra,* 467 U.S. at p. 489, fn. omitted.) Thus, there is no constitutional requirement that courts impose a sanction for the loss of "materials whose contents are unknown and, very often, disputed" (*California v. Trombetta, supra,* 467 U.S. at p. 486), when there is no apparent exculpatory value and no bad faith.

XXVII.

APPELLANT WAS NOT DENIED HIS RIGHT TO CONFRONTATION DURING HIS CROSS-EXAMINATION OF MASSINGALE BY TRIAL COURT ERROR OR LATE DISCOVERY

Appellant contends he was denied his statutory and constitutional rights to confront and cross-examine prosecution witness Johnny Massingale. He asserts the trial court erroneously precluded cross-examination of Massingale about bias arising from his financial interest in seeing appellant convicted. He also asserts his right to confront Massingale with facts contradicting his testimony was violated by two instances of untimely discovery by the prosecution. (2B AOB 485-507.) The trial court properly exercised its discretion in precluding cross-examination of Massingale about his civil suit since it was of minimal probative value in light of the judicial finding of innocence Massingale had obtained and Massingale's interest in not being criminally prosecuted, was fully presented to the jury. The prosecution disclosed impeachment evidence of Massingale's prior assault in a timely fashion. Appellant waived his claim that the prosecution did not timely disclose the identity of certain photographs shown to Massingale during a police interview and, in any case, there was timely disclosure.

A. Massingale's Financial Bias

The prosecution called Massingale as a witness to establish that Massingale was in custody from March through December 1984 (thereby demonstrating that Massingale could not have committed the Strang, Fisher, and Swanke murders, and the Santiago attempted murder). (5 TRT 686,

689.)[125] In the course of his direct testimony, Massingale testified he falsely confessed to the Jacobs murders because of pressure exerted by the authorities. (5 TRT 690.) He claimed he simply reiterated facts about the crimes which were given to him. (5 TRT 689.) Massingale also testified that he had previously falsely pleaded guilty to a crime in Chicago. (5 TRT 691-692.)

During cross-examination, the trial court sustained relevancy objections to defense counsel's asking whether Massingale's lawyer was present in court, whether Massingale was "trying to make some money out of your predicament," and whether Massingale was suing the county. (5 TRT 689-699.) During a break, defense counsel argued that Massingale had a "financial gain at stake, depending on the outcome of this trial." (5 TRT 711.) Defense counsel indicated Massingale had a pending civil action for $3 million and had his civil attorney present in court during his testimony. (5 TRT 711-712.) Defense counsel also indicated that in his tape-recorded statement with Kentucky State Police Detective Denny Pace (see 45 TRT 8465), Massingale indicated, with respect to the Chicago confession, that had he only gotten a good lawyer, he (Massingale) could have sued and gotten a million dollars. (5 TRT 711.)[126] Defense counsel argued that Massingale's civil suit would be benefitted by a conviction and an acquittal would disincline the county from making a settlement. (5 TRT 712-713.) However, as the trial court aptly noted, Massingale had already obtained a finding of factual innocence, reasoning that

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125. As more fully described in the Statement of Facts, *supra*, Massingale was arrested in March 1984 for the Jacobs murders after confessing to Kentucky and California law enforcement authorities.

126. Inasmuch as defense counsel's representations were not contested by the prosecution and were impliedly accepted by the trial court, appellant's request for judicial notice of the court records of Massingale's civil action (2B AOB 489, fn. 402) is unnecessary and irrelevant. For those reasons, respondent opposes the request for judicial notice. (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6.)

the factual innocence finding was essentially equivalent to a conviction of appellant as far as Massingale's civil suit was concerned. (5 TRT 713.) Having already obtained whatever benefit flowed from a factual innocence finding, the trial court concluded that the pendency of the civil action was "so remote" and "there is no connection." (5 TRT 714.)

Appellant contends the trial court's ruling was a violation of his right to confront Massingale with evidence of his financial bias in seeing appellant convicted of the Jacobs murders.

> """[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 1436, 89 L.Ed.2d 674] (Van Arsdall), quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318 [94 S.Ct. 1105, 1111, 39 L.Ed.2d 347].) However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*Van Arsdall, supra,* 475 U.S. at pp. 678-679 [106 S.Ct. at p. 1435] . . . .) California law is in accord. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 780 [248 Cal.Rptr. 126, 755 P.2d 310].) Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" (*Van Arsdall, supra*, 475 U.S. at p. 680 [106 S.Ct. at p. 1436]), the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' (*People v. Frye* (1998) 18 Cal.4th 894, 946 [77 Cal.Rptr.2d 25, 959 P.2d 183].)"

(*People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1051.)

In *People v. Lewis, supra,* 26 Cal.4th 334, this Court found no constitutional abuse of discretion in excluding evidence that three witnesses lived with the main prosecution witness (Prigdon) and lived off his Social Security benefits, where it had been shown that the witnesses lived in the

apartment which belonged to Prigdon and there was a somewhat familial relationship between them. (*People v. Lewis, supra,* 26 Cal.4th 26 Cal.4th at pp. 374-375.) In *People v. Williams* (1997) 16 Cal.4th 153, this Court found no constitutional abuse of discretion in limiting questions about the witness's financial support to periods of time he was housed by the government. (*Id.* at pp. 206-208.)

It was undisputed that Massingale had confessed to the Jacobs homicides, been arrested and held in custody, and was, at the time of his testimony, no longer facing prosecution for those murders, which had exposed him to the death penalty. While Massingale claimed his confessions were untrue and the product of coercion, the jury was well-aware that he had a particularly significant motive to maintain that position in order to avoid prosecution and the death penalty. As the trial court found, the alleged benefit to Massingale's civil suit by a conviction of appellant was of little additional benefit to the defense, particularly in light of the fact that Massingale had obtained a judicial declaration of innocence. Any marginal benefit to his settlement position was of little relevance and threatened a nitpicking war of attrition over a collateral issue. (*People v. Ayala, supra*, 23 Cal.4th 225, 301.)

Moreover, Massingale was subjected to a detailed and grueling cross-examination and re-cross-examination that spanned approximately 118 transcript pages (5 RT 693-764, 786-796, 802-822; 6 RT 856-857, 887-902.) During the cross-examination, the defense played the tape of the Massingale-Pace interview, in which Massingale apparently said he could have sued over his Chicago false confession. (5 TRT 711, 792-797.) His claim of a false and coerced confession was also disputed by several defense witnesses, including the law enforcement officers who took the confessions. (See Statement of Facts, *supra*.) Appellant has not shown that the prohibited cross-examination would have produced a significantly different impression of Massingale's

credibility (*People v. Carpenter, supra,* 21 Cal.4th at p. 1051) or that any error was prejudicial.

Appellant points to *People v. Easley, supra*, 46 Cal.3d 712, as supporting his right to cross-examine a witness on financial motives for his testimony. However, *Easley* involved an attorney who represented both a capital defendant accused of arson as a aggravating factor and the arson victim, who had a pending civil suit arising out of the arson. This Court found an adverse effect on conflicted counsel's performance in failing to cross-examine the arson victim about his financial motive. *Easley* simply did not address the propriety of a trial court's restriction on cross-examination where, as here, the jury already knew Massingale had a significant interest in maintaining his claim and the benefit to Massingale's civil case was "remote" and threatened to raise a war of attrition over whether the result of appellant's trial or the judicial declaration of innocence was the real basis for any benefit to his civil case.

Appellant also points to *Wheeler v. United States* (1st Cir. 1965) 351 F.2d 946, in which the court found error in prohibiting the defendant from asking the principal witness about having supplied the tip which led to the tax prosecution and his plan to claim the reward. (*Id.* at p. 947.) However, *Wheeler* involved a "direct financial benefit to the witness." (*United States v. Amabile* (7th Cir. 1968) 395 F.2d 47, 52, fn. 5.) Similarly, *Bowen v. State* (2001) 252 Ga.App. 382, 556 S.E.2d 252, involved refusal to allow the crime victim to be asked about her claim to the state's victim fund. There was no direct financial benefit to Massingale from appellant's conviction; at most, the defense speculated that Massingale might benefit in settlement negotiations, but he already had a judicial declaration of innocence. The trial court did not abuse its discretion or violate appellant's constitutional rights.

B. Discovery Of Police Report On Massingale's Domestic Violence

On Tuesday, January 10, 1989, during cross-examination, Massingale was asked to explain his reference in the taped statement to having a strong temper. (5 TRT 805.) Massingale said that if he gets hit by someone while drinking in a bar, he will hit back. (5 TRT 805-806.) He denied that he would hit a woman if struck and said, "I ain't going to hit no woman, no." (5 TRT 806.) He said, "no woman smacked me except my wife smacked me now." (5 TRT 806.) Massingale finished his testimony the next day, Wednesday, January 11, 1989. (6 TRT 903.)

On Tuesday, January 17, 1989,[127] defense counsel indicated that sometime after Massingale's testimony was completed, either Thursday or Friday, the prosecution provided a police report indicating Massingale had struck his wife and possibly another woman sometime around December 29, 30, or 31. (8 TRT 1153.) Defense counsel indicated the report showed Massingale had been "willfully dishonest" during his testimony, but he did not have the report in time to "use it on Mr. Massingale." (8 TRT 1153.) After reminding the trial court of Massingale's testimony, defense counsel suggested the new material was impeachment and the DA had a conflict of interest in investigating it. (8 TRT 1154.) After the trial court asked what the defense wanted from the court, defense counsel could not "really say it's a discovery violation" (8 TRT 1155), but "someone has a duty to have presented it" and claimed appellant was prejudiced by not being able to "effectively cross-examine Massingale on that point." (8 TRT 1156.) The trial court advised counsel that a discovery violation claim should be raised in a properly noticed formal motion. (8 TRT 1156.)

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127. Trial was in session on Thursday, January 12, 1989, but then adjourned until January 17. (7 TRT 839.)

Almost five months later, on May 9, 1989, the defense filed a motion seeking mistrial, exclusion of evidence, or other sanction for the violation of discovery orders including the alleged violation arising from the Massingale domestic violence report. (64 CT 14101-14111.) The same alleged violation was included in appellant's motion for a new trial, filed August 25, 1989. (67 CT 14872-14895.)

In the meantime, defense witness Deborah Chapin testified that on December 30, 1988, she was living on B Street in San Diego, and Betty Turner Massingale was staying with her. (44 TRT 8329-8330.) Chapin said that there was a gathering at her home that evening at which Massingale was present, got intoxicated and angry, and shoved her. (44 TRT 8333.) Chapin called the police and placed Massingale under citizen's arrest. (5 TRT 8333.) San Diego Police Officer Jonathan Smith testified as a defense witness that on December 30, 1988, he responded to Chapin's B Street residence on a domestic violence report. (45 TRT 8536.) Officer Smith contacted Massingale and received information from Massingale's wife. (45 TRT 8537-8538.) Defense witness William Turner testified he was at Chapin's residence on the evening of December 30, 1988, along with Massingale and Massingale's wife. (46 TRT 8692-8693.) After celebrating his birthday that evening with the others, Turner went to sleep on Chapin's couch. He was later awakened by noise and saw Massingale strike his wife in the stomach and throw her against the wall at least twice. (46 TRT 8694.) When Turner attempted to intervene, Massingale struck Turner. (46 TRT 8694.) Chapin called 9-1-1 and Massingale was later taken into custody. (46 TRT 8694.)

Hearings on appellant's discovery violation motion was held on May 9 and 17, 1989. (51 TRT 9590; 55 TRT 10331.) The prosecutor had difficulty remembering when the prosecution learned of the Massingale arrest report or how they learned about it, but believed it was around the time of Massingale's

cross-examination. It was the prosecutor's belief that the report was located and disclosed within a few hours. (55 TRT 10358, 10361, 10363-10364.) After checking with his investigator, the prosecutor indicated it was the investigator's recollection that the prosecution learned of the arrest report from the deputy city attorney who was handling aspects of Massingale's civil lawsuit. (55 TRT 10476.) The prosecutor indicated that they got the report and immediately turned it over to the defense. (55 TRT 10476.)

The trial court found that there had been no misconduct; that the prosecutor did not know of the arrest report until "very shortly" before the report was turned over to the defense. (55 TRT 10504.) The trial court also found no prejudice because Massingale was "thoroughly impeached and discredited on his testimony that he would never strike a woman." (55 TRT 10502.)

Appellant contents his due process right to discovery of favorable evidence was violated by the prosecution's untimely disclosure of the police report.

> Due process requires the prosecution to disclose exculpatory evidence that is material to the defendant's guilt or innocence, or to punishment. (*Kyles v. Whitley* (1995) 514 U.S. 419, 438 [115 S.Ct. 1555, 1567-1568, 131 L.Ed.2d 490]; *In re Sassounian* (1995) 9 Cal.4th 535, 543-544 [37 Cal.Rptr.2d 446, 887 P.2d 527].) This duty includes disclosure of material evidence impeaching prosecution witnesses. (*Kyles v. Whitley, supra,* 514 U.S. 419, 433 [115 S.Ct. 1555, 1565]; *In re Sassounian, supra,* 9 Cal.4th 535, 544.) Exculpatory evidence is material if it creates a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed. (*In re Sassounian, supra,* 9 Cal.4th 535, 544.)

(*People v. Seaton* (2001) 26 Cal.4th 598, 648.)

Appellant contends that the police report of Massingale's assault on his wife and Chapin was required to be disclosed because it impeached Massingale's testimonial claim that he did not strike women. (2B AOB 498-499.) He is right, as far as it goes; the report of the assault on the women

certainly impeached Massingale's testimonial claim. However, the report was disclosed.

Appellant contends the disclosure was untimely because he was not able to confront Massingale with it when he lied. But the report was not impeachment evidence until Massingale tendered on cross-examination what was arguably a lie. Appellant has not identified any basis for requiring disclosure other than impeachment of Massingale's testimonial claim. Thus, there was no due process duty to disclose the police report prior to Massingale's cross-examination. (Cf. *United States v. Elmore* (4th Cir. 1970) 423 F.2d 775, 778-779 [disclosure of pretrial statement of unavailable witness not required until testifying witness implicated unavailable witness in bribery scheme]; see also *LaMere v. Risley* (9th Cir. 1987) 827 F.2d 622, 624-625 [prosecution's notice of rebuttal witnesses not required under due process until defendant's alibi witnesses testimony made rebuttal witnesses relevant].) As soon as the prosecutor realized the impeachment value of the report, it was disclosed. Thus, there was no untimely disclosure.

Appellant argues that in order to avoid a sanction, disclosure must be made at a time when the disclosure would have been of value. (2B AOB 498, citing *United States v. Davenport* (9th Cir. 1985) 753 F.2d 1460, 1462.) However, as the Ninth Circuit explained, when determining whether a disclosure was timely enough to satisfy due process, the court considers the prosecution's reasons for late disclosure and whether the defendant had an opportunity to make use of the disclosed material. (*LaMere v. Risley, supra,* 827 F.2d at p. 625.) Here, no one, including the prosecution, had any basis for divining the impeachment value of the police report until Massingale testified on cross-examination and the prosecutor promptly disclosed the report as soon as he became aware of it and its impeachment value. Moreover, the defense

had an opportunity to make use of the disclosed material and did so by calling the witnesses to Massingale's assault.

Appellant claims his use of the impeachment witnesses was of minimal value, but the trial court found that Massingale was "thoroughly impeached and discredited." (55 TRT 10502.) Moreover, appellant's suggestion that he was deprived of having the jury observe Massingale's reaction to being confronted with the police report is both inaccurate and speculative. Although the defense did not have the report until after Massingale's testimony concluded, there was ample time left in the trial for the defense to recall or subpoena Massingale back to the stand. Moreover, whether and how Massingale might have reacted is simply speculation.

In light of the circumstances, there was neither an untimely disclosure nor prejudice.

C. Discovery Of Photographs Shown To Massingale During His Confession

As noted in subheading B., during his direct examination, Massingale admitted that he had previously confessed to the Jacobs murders, but claimed the confession was false and induced by improper threats and promises. (5 TRT 689-691.) In addition to claiming that he had merely repeated facts about the crimes which he was told by the officers, Massingale said he had been shown photographs of the crime scene. (5 TRT 667 ["They showed me a bunch of pictures"], 690 ["they showed me the pictures"], 691 ["photographs of the crime scene"; "There was a briefcase plumb full of pictures"].)

During cross-examination, Massingale said he had been shown two photos depicting Smith and Nelson when first interviewed by San Diego Detectives

Green and Ayers. (5 TRT 750.)[128] He also indicated that at one point when Green and Ayers were out of the room, Kentucky detective Pace removed a bundle of photographs from a briefcase and showed them to Massingale while describing the evidence against him. (5 TRT 818-820.) During re-direct, Massingale again testified that when interviewed by Green and Ayers, he was shown photographs of Smith and Nelson, and also a photograph of a woman. (6 TRT 871, 874.) He said he was shown a photograph depicting two palm trees in front of a house, similar to photograph C on Exhibit 4, and other photographs which he could not remember, but he was shown none of the photographs in Exhibit 4 and no photographs of people inside the house. (6 TRT 872-875.)[129]

During further redirect and re-cross, Massingale again indicated that at one point in the sequence of interviews, Ayers and Green were out of the room and Pace was present. Pace told Massingale that Ayers and Green were on the telephone. Pace then told Massingale he (Pace) would show Massingale some of what Ayers and Green had on Massingale. Pace then took a bundle of photographs out of a briefcase, which belonged to Green or Ayers, and began showing the photographs to Massingale. Among other things, the photographs depicted a bathroom, a kitchen, a note, and bloody walls. (6 TRT 883, 885-886, 888-890, 895-897.)

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128. Massingale was interviewed at the Kentucky State Police post by Green and Ayers on March 18. After the interview and while being driven back to the jail, Massingale spoke with Pace and Howard. Massingale was then brought back to the police post where he spoke with Pace and Howard again and confessed. The next day, Massingale confessed in a tape-recorded interview with Pace, and a tape-recorded interview with Green and Ayers. (42 TRT 8035-8071, 8089; 45 TRT 8474, 8480-8482, 8492, 8566.)

129. Photograph C in Exhibit 4 was one of several photos depicting the Jacobs residence. (1 TRT 144; 2 TRT 310.)

In his testimony as a defense witness, Detective Green testified that during the first interview of Massingale by himself and Ayers, Massingale was shown seven photos: one of Smith, one of Nelson, one of Massingale, and four from the Jacobs crime scene. (42 TRT 8058-8059, 8074, 8079-8080.) All of the Jacobs crime photos were numbered on the back, but without the original photos, which Green did not have, he was unable to identify which of the photos were the four shown to Massingale. (42 TRT 8081-8083.) However, he was able to testify that two of the four were of the outside front of the Jacobs house, the third was a full body view of Suzanne and the fourth was a full body view of Colin. (42 TRT 8086.) He also was able to testify that the photographs of the victims were taken where they were found, in the bedroom. (42 TRT 8087.)

In his testimony as a defense witness, Detective Ayers also testified that during the first interview Massingale was shown photographs of Smith, Nelson and himself, along with four Jacobs crime scene photos. (45 TRT 8577-8578.) The crime scene photos shown to Massingale were numbered 4, 6, 85, and 100. (45 TRT 8579.) Using the police photo list, Ayers indicated that photos 4-6 were views of the front and side yards, photos 85-88 were photos of Colin, and photos 97-100 were photos of Suzanne. (45 TRT 8580-8582.)

On cross-examination, the prosecutor marked four photos as Exhibits 261, 262, 263, and 264, and Ayers identified these four photos as the four photos, numbered 4, 6, 85, and 100, respectively, which were shown to Massingale. (45 TRT 8590, 8594-8595.) The four photos were admitted without objection and at the request of the defense, published to the jury at that time. (45 TRT 8596.)

Appellant claims his due process right to favorable evidence was violated by the prosecution's untimely disclosure of which photographs had been shown to Massingale during the first interview. He forfeited the claim by

failing to object on this ground in the trial court. moreover, the claim is without merit.

Appellant claims his defense counsel immediately objected to the alleged untimely disclosure. (2B AOB 502.) However, when the photographs were identified and offered, not only was there no objection at all, the defense indicated there was no objection and requested publication of the photographs to the jury. (45 TRT 8595-8596.) In discussions following the testimony of Detective Ayers, the prosecutor mentioned that he had obtained Exhibit 261 (photograph #4) from the court exhibit room where it had been held as an exhibit in the Massingale preliminary hearing. (45 TRT 8607.) Defense counsel said he was not provided with a copy of the order and also mentioned not being previously provided with information about the existence of the numbered photographs. (45 TRT 8607.) When the prosecutor disagreed with the latter representation, defense counsel went on to reassert that the defense had not been provided with a copy of the order used to obtain the exhibit – which the prosecutor then agreed to provide – and the defense should be noticed prior to any such future action, which the defense saw as an improper *ex parte* communication. (45 TRT 8608-8609.) The trial court indicated that questions regarding prior notification of judicial contact to obtain orders was a matter of discovery which should be discussed by the parties then brought to the court in a noticed motion. (45 TRT 8608-8609.)

In its motion for mistrial, exclusion of evidence, or other sanction, filed May 9, 1989, over two weeks after the photographs were admitted, the defense cited as the discovery violation, the prosecution obtaining an *ex parte* order for production of Exhibit 261 from the Massingale preliminary hearing exhibits, but made no mention of any failure to disclose the four photographs. (64 CT 14103, 14107.) In discussing the motion, the defense claimed that the

prosecution failed in its duty to disclose the location of the four photographs. (51 TRT 9610-9611.)

Thus, the first time the defense claimed a discovery violation based on the alleged failure to disclose the four photographs was two weeks after the photographs were admitted. The claim is forfeited. (*People v. Carpenter, supra,* 15 Cal.4th at p. 411 [*Brady* claim waived by failure to object].)[130/] Moreover, the claim is without merit.

In the subsequent hearing on the motion, the prosecution addressed the alleged discovery violation and also indicated that the four photographs had always been available to the defense; three of the photographs were in the prosecutor's office and the fourth was an exhibit in the Massingale preliminary hearing record. (55 TRT 10367-10369.) The trial court found that "both sides had access to all of those numbered photographs" (55 TRT 10504), but concluded the defense was unaware of their actual location and when that became clear the prosecution produced the photographs without notifying the defense in advance. (55 TRT 10505.) While the trial court concluded the prosecution's actions were "distasteful" "on a simply measure of courtesy" (55 TRT 10504), the court also found that there had been no prejudice because the prosecution's actions had "backfired" with the jury. (55 TRT 10505.)

Appellant again asserts the untimely disclosure of the four photographs violated due process by preventing him from confronting Massingale, during cross-examination, with the four photographs in order for the jury to see Massingale's reaction. However, it was not until the testimony of Detective Green, on April 18, 1989, long after Massingale had testified, that the matter of the location of the four photographs was raised and the prosecution produced those photographs on April 24, during the testimony of Detective Ayers. Thus,

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130. The defense made no specific mention of the four photographs in its motion for new trial. (67 CT 14870, 14875, 14879.)

the photographs were produced promptly after the matter was raised. The photographs were presented to the jury and , thus, appellant was not deprived of any impeachment value. Moreover, as with the police report, appellant could have recalled or subpoenaed Massingale back to the stand.

Moreover, the photographs were not material because they did not impeach Massingale or create a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed. (*People v. Seaton, supra,* 26 Cal.4th at p. 648.) Presumably, the defense wanted to produce the four photographs to demonstrate that Massingale could not have obtained all the detail on the crimes which he disclosed in his confessions from those photographs. However, Massingale never claimed to have learned all the facts of the crimes from the photographs shown to him by Ayers and Green. Massingale claimed he was shown numerous crime scene photographs by Pace, who went over all the evidence against Massingale. Thus, the four photographs did not impeach Massingale, the assertion that appellant was deprived of Massingale's reaction is speculative, and there is no reasonable probability of a more a favorable outcome even had the defense been able to display those photographs during its cross-examination of Massingale.

D. Conclusion

Appellant claims the cumulative effect of the allegedly improper restriction on cross-examination and the allegedly late discovery prejudiced his right to a fair trial. However, as demonstrated above there was no error in the restriction of cross-examination, and the defense was not precluded from using the report on Massingale's assault and the four photographs to challenge his credibility.

XXVIII.

THE TRIAL COURT DID NOT ERR IN DENYING AN ARGUMENTATIVE, INAPPLICABLE INSTRUCTION ON CONSCIOUSNESS OF GUILT

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing a modified version of CALJIC No. 2.03. Appellant claims the instruction, addressing consciousness of guilt arising from falsehoods, was appropriate in light of several lies by Massingale, and in denying the instruction the trial court denied appellant his constitutional right to instructions on his theory of the case and his due process right to the same instructions the prosecution would be entitled to in a prosecution of Massingale. (2B AOB 508-513.) The trial court did not err in denying the instruction which was argumentative, inapplicable, and did not involve the defense theory of the case.

As part of the defense requested instructions, the defense requested a modified version of CALJIC No. 2.03, as follows:

> If you find that a suspect of a crime made a willfully false or deliberately misleading statement concerning the crime or crimes for which he was suspected, for the purpose of misleading or warding off suspicion, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, but may strengthen inferences of guilt arising from other facts.
>
> The weight and significance of willfully false or deliberately misleading statements, if any, and any inferences of consciousness of guilt arising therefrom, are matters for your determination. However, inferences of consciousness of guilt arising from any such statements is a type of circumstantial evidence, and the circumstantial evidence instructions must be applied.

(65 CT 14497.) The trial court denied the instruction. (*Ibid.*)

In appropriate circumstances, a trial court may be required to give a requested instruction that pinpoints a defense theory of the case by relating the reasonable doubt standard of proof to particular elements of the charged crime or pinpointing the crux of the defense case, such as mistaken identity or alibi. (*People v. Bolden* (2002) 29 Cal.4th 515, 558, citing *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884, and *People v. Lucero* (1988) 44 Cal.3d 1006, 1021.)

The requested instruction does not relate the reasonable doubt standard to particular elements of the charged crimes and appellant does not argue otherwise. He contends he was entitled to the instruction because it was a theory of the defense that Massingale lied about certain facts out of a consciousness of guilt. (2B AOB 509.) To the contrary, the defense theory of the Jacobs murders was third party culpability, about which the jury was properly instructed. (65 TRT 12200-12201.)[131] Thus, he was not denied "an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 [108 S.Ct. 883, 99 L.Ed.2d 54] [defendant entitled to entrapment defense if supported by evidence even though denying guilt].)

To the extent the instruction focused on particular lies by Massingale, it was properly rejected as argumentative because it invited the jury to draw inferences favorable to the defense from specified items of evidence. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Although this Court has held that

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131. The third party culpability instruction provided:

> The defendant has presented evidence in this trial for the purpose of showing that a person or persons other than the defendant may have committed a crime or crime charged. [¶] If, after a consideration of the entire case, such third party evidence alone or together with other evidence raises a reasonable doubt whether the defendant committed a crime or crimes charged, you must give the defendant the benefit of that doubt and find him not guilty.

CALJIC No. 2.03 is not an improper pinpoint instruction when supported by evidence of lies by a defendant, the reason is that the instruction is cautionary in nature and thereby does not improperly endorse the prosecution's theory or lessen its burden of proof. (*People v. Boyette* (2002) 29 Cal.4th 381, 438-439.) In this context, the proposed instruction improperly pointed to particular evidence (lies by a suspect) and endorsed an inference favorable to one side.

Moreover, a trial court's instructional duty extends beyond general principles of law relevant to the issues and includes the duty to refrain from instructing on principles of law which are irrelevant and may confuse the jury or relieve it from making necessary findings. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) The proposed instruction directed the jury to consider a third party's guilt when the sole duty facing the jury was to determine whether appellant's guilt had been proved. As the trial court correctly found, by blending the two notions of guilt, the instruction imported an irrelevant concept (third party guilt) and would create tremendous confusion. (60 TRT 11407 [commenting generally on applying instructions geared toward defendants to third party suspects].)

Finally, even if the trial court erred in refusing the instruction, the error was harmless as a more favorable result is not reasonably probable had the instruction been given. (*People v. Gutierrez, supra*, 28 Cal.4th 1083, 1144-1145, citing *People v. Wharton* (1991) 53 Cal.3d 522, 571-572.)[132] As noted previously, this Court has approved use of CALJIC No. 2.03 because "'the cautionary nature of the instruction benefits the defense, admonishing the jury

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132. Appellant claims the failure to give the instruction violated various constitutional rights. However, the cases he cites which actually deal with the failure to give defense instructions, involve defense instructions on the defense theory of the case. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098 [failure to instruct on entrapment defense]; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739 [failure to instruct on lesser included offense].) As noted, the trial court instructed on the defense theory of third party culpability.

to circumspection regarding evidence that might be otherwise considered decisively inculpatory.'" (*People v. Boyette, supra,* 29 Cal.4th at p. 438, quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1214.) In this case, without the cautionary language of the proposed instruction, the jury was left with evidence this Court has recognized as "decisively inculpatory" in considering Massingale's alleged commission of the Jacobs murders, which could only have benefitted the defense.

In addition to being benefitted by the jury's uncautioned review of "decisively inculpatory" evidence of Massingale's lies, the jury was instructed that "evidence of the . . . nonexistence of any fact testified to be [a] witness" was a factor tending to disprove the truthfulness of the witness's testimony and a witness who is willfully false in one material aspect of his testimony is to be distrusted in others. (65 TRT 12192, 12194.) These instructions permitted the jury to infer from any "decisively inculpatory" lies by Massingale that his testimonial denial of commission of the Jacobs murders was also untrue.

XXIX.

THE TRIAL COURT'S INSTRUCTION ON THIRD PARTY SUSPECT EVIDENCE DID NOT UNDERMINE THE PROSECUTION'S BURDEN OF PROOF OR IMPOSE A BURDEN OF PROOF ON APPELLANT

Appellant contends the trial court's instruction on third party guilt was prejudicially erroneous and violated his constitutional rights by failing to expressly advise the jury of the relationship between evidence of third party guilt and the prosecution's burden of proof, and imposed a burden of proof on appellant to "raise" a reasonable doubt. (2B AOB 514-524; 4 AOB 1223-1225; 5 AOB 1310-1313.) Appellant's claim of error is foreclosed by the plain language of the instruction as well as the instructions as a whole.

The trial court instructed the jury on the proper consideration of evidence of third party guilt. (65 TRT 12200-12201.)[133] When reviewing a potentially misleading jury instruction, this Court inquires whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. (*People v. Ayala, supra*, 24 Cal.4th 243, 289.) In making this determination, consideration is given to the specific language of the challenged instruction and the instructions as a whole. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) However, a single instruction is not viewed in isolation, but must be evaluated in the context of the overall charge. (*People v. Mayfield* (1997) 14 Cal.4th 668, 793.) The ultimate decision on whether instructions are correct and adequate is determined by consideration of the entire charge to the jury. (*People v. Holt* (1997) 15 Cal.4th 619, 677; see also *People v. Reliford* (2003) 29 Cal.4th 1007, 1013.)

Appellant first contends the instruction was deficient because it failed to contain an express statement of the prosecution's burden of proof relative to third party guilt. He contends that such evidence would naturally raise an issue with the jury of who – appellant or the third party – was the perpetrator, thereby causing the jury to require proof of the third party's guilt. Whether such a natural inclination exists (appellant offers no authority for his claim), both the language of the instruction and the instructions as a whole leave no reasonable likelihood that the jury would misunderstand the prosecution's burden to prove appellant's guilt beyond a reasonable doubt.

The instruction explicitly told the jury that third party evidence was introduced for the purpose of showing that someone other than appellant committed the crimes, and appellant was entitled to the benefit of a reasonable doubt as to whether he committed the crimes. (65 TRT 12200.) There is no reasonable likelihood that the jury would fail to understand the prosecution's

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133. The text of the instruction is contained in footnote 131, *supra*.

burden in light of the express language of the instruction. Moreover, the trial court instructed the jury that appellant was presumed innocent, that the presumption placed on the prosecution the burden of proving appellant's guilt beyond a reasonable doubt, and that burden required the prosecution to prove beyond a reasonable doubt that appellant committed the charged crimes. (65 TRT 12189.)

Appellant next contends that by instructing the jury that evidence of third party commission of the crime was introduced "for the purpose of showing" that someone other than appellant committed the crimes and that appellant was entitled to the benefit of any reasonable doubt "raise[d]" by such evidence, the instruction improperly imposed a burden on him to show that someone other than himself committed the crimes and raise a reasonable doubt as to that showing. However, the "for the purpose" language did not imply that appellant was required to show anything; it simply directed the jury on the proper consideration of evidence of third party culpability which was before it. Moreover, the instruction did not imply that appellant had any burden of proof; it merely directed the jury to give appellant the benefit of a reasonable doubt raised by the evidence. As noted, the jury was also instructed on the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and the prosecution's burden to prove beyond a reasonable doubt that appellant committed the charged crime. (65 TRT 12189.)

Appellant contends use of language requiring the evidence "create" or "raise" a reasonable doubt can be interpreted as imposing a burden of proof on the defendant. (2B AOB 519-520.) Even if correct, the possibility of misinterpretation is not the standard for judging potentially misleading jury instructions. The issue is whether there is a reasonable likelihood of misapplication. (*People v. Ayala, supra,* 24 Cal.4th at p. 289.) Moreover, the instruction did not require anything, it simply directed the jury to give appellant

the benefit of a reasonable doubt arising from its consideration of the evidence. Appellant's reliance on memorandum decision in *People v. Branch* (1996) 637 N.Y.S.2d 892 [224 A.D.2d 926], is misplaced. While the court followed state law precedent in stating that the instructional language concerning whether the alibi testimony created a reasonable doubt could be interpreted as shifting the burden to the defendant, it was the instructions as a whole which failed to convey the proper standard. (*Ibid.*) This Court is, of course, also concerned with the instructions as a whole, and must determine whether there was a reasonable likelihood, not a possibility, of misapplication. Similarly, in *People v. Victor* (1984) 62 N.Y.2d 374 [465 N.E.2d 817], upon which the *Branch* decision relied, the court found the instructional language – which did not include raise or create – "viewed in its entirety" failed to adequately set forth the prosecution's burden to disprove alibi. (*Id.*, 465 N.E.2d at 819.)[134]

In light of the specific language of the challenged instruction and the instructions as a whole, there is no reasonable likelihood that the jury misunderstood the proper burden of proof.

XXX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO RECUSE THE SAN DIEGO COUNTY DISTRICT ATTORNEY

Appellant contends the trial court prejudicially erred in denying his motion to recuse the San Diego County District Attorney (DA) due to a conflict of interest arising from the prosecution of Massingale for the Jacobs murders. (2B AOB 525-528.) There was no abuse of discretion.

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134. Appellant also cites *People v. Hill* (1998) 17 Cal.4th 800, 845. Respondent finds nothing on that page of the *Hill* decision, or anywhere else in the decision, which addresses use of "create" or "raise" in the language of jury instructions.

On May 24, 1988, appellant filed a motion seeking, among other things, recusal of the San Diego County DA. (18 CT 3702; 57 CT 12474.) One basis for the recusal was an alleged conflict of interest arising from a civil lawsuit filed by Massingale. (18 CT 3707-3708, 3810-3814; 57 CT 12479-12480, 12582-12586.) The DA filed his opposition on June 2, 1988. (18 CT 3909; 58 CT 12671.)[135/] The trial court denied the recusal motion on June 6, 1988, finding that whatever effect Massingale's civil lawsuit had on the DA and the detectives in defending their involvement with Massingale "would only assist [appellant] in this case." (248 PRT 25464-25465.)

Penal Code section 1424, subdivision (a)(1) sets forth the standard for a motion to disqualify the prosecutor.[136/] The motion may not be granted unless

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135. The Attorney General filed a response to the recusal motion on June 2, 1988. (18 CT 3899; 58 CT 12695.)

136. Penal Code section 1424, subdivision (a)(1), provides:

> Notice of a motion to disqualify a district attorney from performing an authorized duty shall be served on the district attorney and the Attorney General at least 10 court days before the motion is heard. The notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. The district attorney or the Attorney General, or both, may file affidavits in opposition to the motion and may appear at the hearing on the motion and may file with the court hearing the motion a written opinion on the disqualification issue. The judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary. The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. An order recusing the district attorney from any proceeding may be reviewed by extraordinary writ or may be appealed by the district attorney or the Attorney General. The order recusing the district attorney shall be stayed pending any review authorized by

the evidence shows a conflict of interest that would render it unlikely that the defendant would receive a fair trial. The statute requires a showing that there is a conflict of interest and the conflict is so severe as to disqualify the district attorney from acting as prosecutor on the defendant's case. A conflict of interest exists whenever the circumstances evidence a reasonable possibility that the DA's office will not exercise its discretionary function in an evenhanded manner. However, the existence of a conflict of interest is insufficient unless the conflict is so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings. (*People v. Snow* (2003) 30 Cal.4th 43, 86; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833.) A trial court's ruling is reviewed for an abuse of discretion and any underlying findings of fact are reviewed for substantial evidence. (*People v. Green* (2004) 33 Cal.4th 536, 570.)

The gist of appellant's claim of a conflict of interest was his assertion that in defending against Massingale's civil lawsuit, the DA was required to take the position that its law enforcement personnel (Detectives Green and Ayers) had not acted improperly in obtaining Massingale's confession, which was at odds with the DA's position in appellant's case; i.e., that Massingale's confession was involuntary. This latter assertion fails. The issue in appellant's case was not the voluntariness of Massingale's confession, but its veracity.[137] (*People v. Thornton* (1974) 11 Cal.3d 738, 766-767, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [although weight and credibility of a confession remain considerations for jury, trial

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this section. If the motion is brought at or before the preliminary hearing, it may not be renewed in the trial court on the basis of facts that were raised or could have been raised at the time of the original motion.

137. In fact, the prosecutor argued that Massingale's confession was untrue. (62 TRT 11773.)

court's decision on voluntariness is final]; *People v. Page* (1991) 2 Cal.App.4th 161, 184-185.) Moreover, as the trial court found, to the extent the San Diego detectives testified they did nothing improper in obtaining Massingale's confession, that evidence benefitted appellant.

Even if the DA took conflicting positions on the voluntariness of Massingale's confession, there was no basis for recusal. In *People v. Millwee* (1998) 18 Cal.4th 96, this Court ruled that "a disabling conflict does not exist simply because the district attorney and the defendant have been adversaries in other legal proceedings, even where the defendant prevailed." (*Id.* at p. 123.) Here, it was Massingale and the DA who were allegedly adversaries in other legal proceedings, which did not involve appellant and which the trial court correctly found benefitted appellant.

Because appellant failed to present evidence supporting either of the two-part statutory test for recusing the DA, the trial court did not abuse its discretion in denying the motion.[138/]

XXXI.

BY FAILING TO OBJECT IN THE TRIAL COURT, APPELLANT FORFEITED HIS CLAIM THAT HE WAS DENIED A FAIR OPPORTUNITY TO LITIGATE THE RELIABILITY OF SANTIAGO'S IDENTIFICATIONS AND THE CLAIM IS WITHOUT MERIT

Appellant contends he was denied a fair opportunity to show that Jodie Santiago's identifications of appellant and his house were constitutionally tainted. He contends that because Santiago suffered from mental impairments which limited her recall, various contacts between Santiago and law

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138. In the midst of his argument, appellant asserts that the prosecutor made inconsistent arguments on modus operandi at appellant's two preliminary hearings. (2B AOB 526.) He did not raise that claim in his recusal motion. It is waived. (*People v. Turner, supra*, 8 Cal.4th 137, 163.)

enforcement were not adequately documented, and the trial court refused to permit him to solicit the testimony of the prosecutor or consider his identification experts, he was deprived of all the facts necessary to challenge the admissibility of Santiago's extra-judicial and in-court identifications. He asserts the deficiencies denied him various state and federal constitutional rights and require the convictions be reversed. (3 AOB 848-862.) Since he never objected in the trial court on the basis of Santiago's deficient memory or the allegedly inadequate records of contacts between law enforcement and Santiago, those bases for his claim of error are forfeited. Moreover, the claim is also without merit.

Appellant points to no place in the trial record where he raised the claim that inadequacies in Santiago's memory and the law enforcement records on Santiago contacts impaired his opportunity to challenge Santiago's identification. Evidence Code section 353, provides, in pertinent part:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion

By failing to object to the identifications in the trial court, appellant forfeited the claim. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) The claim is also without merit.

Appellant complains that Santiago's memory suffered as a result of the crime appellant committed. (3 AOB 848-849.) However, other than his standard parade of constitutional rights and authorities, none of which directly address the issue, he does not cite any authority supporting his implied assertion that a defendant has a constitutional right to identifications made by a victim with a completely intact memory. (See, *United States v. Owens* (1988) 484

U.S. 554 [108 S.Ct. 838, 841-843, 98 L.Ed.2d 951] [confrontation clause not violated by out-of-court identification when the identifying witness is unable, due to memory loss, to explain the basis for the identification].)

Appellant also complains that law enforcement did not adequately document their contacts with Santiago. (3 AOB 849-855.) Again, however, he cites no authority that law enforcement must document witness contacts in a particular manner or within a particular time. (See *People v. Fauber* (1992) 2 Cal.4th 792, 829 [no duty to tape-record entire interview of co-defendant who gave statement as part of plea bargain].) He seems to suggest some duty arising from *California v. Trombetta, supra,* 467 U.S. 479. However, appellant did not raise this claim under *Trombetta* in the trial court and it is forfeited. (*People v. Williams* (1997) 16 Cal.4th 635, 661.) In any case, as this Court indicated in *Fauber*, application of *Trombetta*, to witness interviews is questionable. (*People v. Fauber, supra,* 2 Cal.4th at p. 830.) Moreover, the constitutional duty to preserve evidence is limited to "evidence that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta, supra,* 467 U.S. at p. 488.)

> To meet this standard of constitutional materiality [citation omitted], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*Id.* at p. 489.)

As to evidence which did not have apparent exculpatory value at the time it was destroyed, the Court later held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." (*Arizona v. Youngblood, supra,* 488 U.S. at p. 58.)

Appellant demonstrates neither bad faith nor apparent exculpatory value. Additionally, all of the events were preserved in witness memories, notes or

reports. The fact appellant finds that preservation inadequate because there was no tape recordings or because there was some difference of recollection between witnesses does not amount to a constitutional deprivation.

Appellant complains that the trial court refused to permit him to call the prosecutor, Deputy District Attorney Dan Williams, as a witness. He asserts that because Williams was present and met Santiago at the Sheriff's homicide office on December 15 (the day after Santiago identified appellant in a photographic lineup and the day Santiago later identified appellant's house during a drive-by), what was said or done was relevant to whether Santiago's photographic identification was improperly reinforced or her identification of appellant's house was improperly suggested. (3 AOB 855-856.) However, what appellant fails to acknowledge is that Williams had previously testified to his limited recollection about the December 15 meeting and the trial court, pursuant to the agreement of the parties, reviewed that testimony. (239 PRT 24536-24539 [parties submit Williams' testimony from March 6, 1986 and July 23, 1986].)

In his March 6, 1986 testimony, Williams described his first contact with the Lucas case on December 14, when he was briefed on the case during a meeting at the DA's office and learned that appellant had been arrested and Santiago would be viewing a photographic lineup. (19 PRT 2481, 2483, 2485.) Williams also described a meeting at the sheriff's homicide office the next day, December 15, where he participated in obtaining telephonic search warrants (19 PRT 2474-2481).

In his July 23, 1986 testimony, Williams again described the first briefing he received on the case on December 14. (38 PRT 7227-7229.) Williams indicated that on December 15, at the sheriff's homicide office, he met Santiago. (38 PRT 7229-7230.) As to the photographic lineup, Williams indicated he "may have been" shown the lineup, but did not think he observed

Santiago look at it. (38 PRT 7231; see also 38 PRT 7232 ["It's possible" Williams saw the photographic lineup on December 15].) Williams did know that Santiago had made an identification from the photographic lineup and thought he learned that on December 15. (38 PRT 7235.) Williams testified he "may have" been aware on December 15, that Santiago had been driven by appellant's house that morning and did not make an identification. (38 PRT 7236.) Williams testified he was aware that the detectives planned to drive Santiago past appellant's house that afternoon when they drove Detective Zuniga home, and he learned of that plan "right before they left" with Santiago. (38 PRT 7236.) He also knew that the detectives "didn't say anything to [Santiago] about what they were doing." (38 PRT 7236.)

Beyond those limited recollections, Williams memory was sketchy at best. As to many questions about events on those two days, he either could not recall or could not say one way or the other. (See 38 PRT 7229-7233.) Williams explained that he had not taken notes regarding matters raised in the questioning, he had been given information about the case quickly, and his main interest was in the result of Santiago's viewing of the photographic lineup. (38 PRT 7234-7235.)

In the discussions of whether to permit appellant to call Williams to the witness stand again, as part of his challenge to Santiago's identifications, Williams indicated that his recollection was "much worse now" and he had nothing he could add to his prior testimony. (239 PRT 24532.) In light of Williams limited recollection, which had only gotten "much worse" in the intervening years, appellant has not demonstrated that the trial court's decision to deny appellant's desire to have Williams testify was an abuse of discretion or denied him a fair opportunity to challenge Santiago's identifications.

Finally, appellant contends the trial court refused to consider his eyewitness experts. (3 AOB 856.) However, he only offered one eyewitness

expert witness, Dr. Robert Buckout, who was allowed to testify over the prosecution objection. (188 PRT 17880A-18013.) Moreover, in pressing his pretrial challenge to the photographic lineup, appellant referenced Dr. Buckout's testimony three times without objection or any indication that the trial court refused to consider that testimony. (239 PRT 24556, 24560, 24578-24579.) The fact the trial court denied appellant's pretrial motion without mentioning appellant's expert (239 PRT 24586-24587), simply does not support his claim that the trial court refused to consider that testimony.[139/]

Besides two of the bases of complaint being forfeited, none of appellant's assertions are supported by the record and he was not denied a fair opportunity to challenge the admissibility of Santiago's identifications.

XXXII.

THE PHOTOGRAPHIC LINEUP IDENTIFICATION OF APPELLANT BY SANTIAGO WAS NOT THE PRODUCT OF AN UNNECESSARY AND UNDULY SUGGESTIVE PROCEDURE AND, IN ANY EVENT, SANTIAGO'S IDENTIFICATION OF APPELLANT WAS RELIABLE UNDER THE TOTALITY OF CIRCUMSTANCES

Appellant contends the trial court prejudicially erred and violated his constitutional rights to due process and Eighth Amendment reliability by denying his motion to suppress Santiago's pre-trial and trial identifications of him. (3 AOB 863-882.) The trial court did not err as the photographic lineup

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139. Appellant contends he also offered the testimony of Dr. Elizabeth Loftus in his challenge to the admissibility of the Santiago identification. (See 3A AOB 856, fn. 728 and *id.* at p. 832, fn. 710.) He is mistaken. By the time Dr. Loftus testified (i.e., well into the defense case – See 49 TRT 9281), the admissibility of Santiago's identification had long been decided. In fact, Santiago's identification was admitted as part of the prosecution case. (38 TRT 7344.) What the defense sought was to have Drs. Loftus and Buckout testify before the jury as to eyewitness identifications in general and factors of suggestibility in lineups. (See 49 TRT 9352.)

was not unduly suggestive and unnecessary and, in any case, Santiago's identification of appellant was reliable under the totality of the circumstances.

In a trial brief filed November 19, 1986 (38 CT 8279), appellant sought, inter alia, suppression of Santiago's identification of him on the basis that the pretrial photographic lineup identification of appellant by Santiago was the result of unnecessarily suggestive identification procedures. (38 CT 8315-8327.) The district attorney's opposition was filed December 29, 1986. (44 CT 9509.) On May 3, 1988, the trial court denied the motion:

> On the issue of the photo lineup, the law does not require a perfect lineup, only that it be a lineup that is a fair one, and that it not be impermissibly suggestive. That includes the actions of the persons that are administering the photo lineup.
>
> The lineup here is a good one. All the young men that were in the photos were of the same general type. They were all blondish, they all had moustaches, they were the same type of individual, approximately the same age.
>
> To the extent that [appellant] has focused on certain aspects of differences in treatment between [appellant's] photo and the others, such as the fact that [appellant's] photo was larger, or his face was larger within the photo, that it occupied the top center position, possibly, in the photo lineup, and that it may have been cut off at the top, depending on where it was placed at the time Jodie [Santiago] Robertson saw it, I find that these small factors of difference between them - - and they did not constitute impermissibly suggestive factors within the lineup.
>
> There was nothing from the testimony that leads me to believe that Mrs. [Santiago] Robertson's identification of [appellant] was tainted any way or suggested in any way by anything that was said or done by the deputies.
>
> In any event, regardless of all that, I think there is clear and convincing evidence that her identification is based in court not upon anything that occurred from the deputies, by news, or by the lineup itself but in fact is based on her independent recall of the appearance of [appellant]. And in particular one cannot ignore the very, very distinctive eyes that [appellant] has and her early-on description of those

> eyes, not to mention all the other corroborative factors that have been discussed by the court.

(239 PRT 24586-24587.)

The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. (*People v. Cunningham, supra,* 25 Cal.4th at p. 989; *People v. Ochoa* (1988) 19 Cal.4th 353, 412.) In deciding whether admission of identification evidence violates a defendant's right to due process, this Court determines:

> (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.

(*People v. Cunningham, supra,* 25 Cal.4th at p. 989.)

"If, and only if, the answer to the first question is yes and the answer to the second is not, is the identification constitutionally unreliable. (*People v. Ochoa, supra,* 19 Cal.4th at p. 412.)

To determine whether a procedure is unduly suggestive, this Court determines whether anything caused the defendant to stand out from the others in a way to suggest the witness should select him. (*People v. Yeoman* (2003) 31 Cal.4th 93, 124.) A procedure which suggests in advance of identification by the witness the identity of the person suspected by the police is unfair. (*People v. Ochoa, supra,* 19 Cal.4th at p. 413.) This Court has recently determined that the standard of review of a trial court's determination of undue suggestiveness is independent review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.)

Appellant cites a number of events prior to Santiago viewing the photographic lineup which he contends were impermissibly suggestive. (3 AOB 870-871.) He first suggests Santiago's ability to accurately remember was compromised by amnesia, head injury, and PTSD. However, the evidence he cites was presented at trial and was not before the trial court in deciding his suppression motion. (3 AOB 870, citing *id.* at pp. 792-798.) Moreover, none of the physical effects of the attack demonstrate any lack of ability on the part of Santiago to remember her attacker and, more to the point, nothing in Santiago's condition makes the identification procedure employed by law enforcement unduly suggestive.

Appellant says Santiago had an emotional need to have her attacker arrested and convicted. Again, however, this "need" does not make the identification procedure employed by law enforcement unduly suggestive. Indeed, it would be typical if not universal for a crime victim to want to see the perpetrator caught and punished.

Appellant says Santiago's participation in two composite drawings "raised the danger" of tainting her subsequent identification. However, he fails to demonstrate that there was any suggestiveness in the preparation of the composite drawings. The question to be resolved is not whether there is a possibility of suggestiveness, but whether there was, in fact, suggestiveness.

Appellant says the questioning process was suggestive because questions "may have" suggested specific facts. Again, however, the issue is not whether there was a possibility of suggestiveness, but whether impermissible suggestiveness actually occurred. Appellant cites no questioning, much less even one question, which suggested Santiago identify appellant.

Finally, appellant contends that by informing Santiago that a suspect was in custody and immediately having Santiago fly down to observe the photographic lineup, the police suggested the suspect would be in the lineup.

However, as this Court has reasonably observed, "[a]nyone asked to view a lineup would naturally assume the police had a suspect." (*People v. Carpenter, supra,* 15 Cal.4th at p. 368.) Moreover, here, as in *Carpenter*, "[t]he police said nothing suggesting [Santiago] should make a selection." (*Ibid.*)

Appellant also challenges the photographic lineup itself. (3 AOB 871-876.) He complains that various aspects of the photographs made his photograph suggestive. However, as the trial court found "these small factors of difference . . . did not constitute impermissibly suggestive factors within the lineup." (239 PRT 24586.) As this Court will observe by viewing the photographic lineup (Trial Exhibit 179A – see 18 TRT 3199 [appellant in top middle position]), appellant's eyes, hair, and moustache are not significantly different that the others in the lineup. All six photographs are of white males, generally of the same age, complexion and build, and all six generally resembled each other. Thus, appellant's photograph did not stand out. (Cf. *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [all individuals in the photographic lineup generally resembled each other]; see also *People v. Cunningham, supra,* 25 Cal.4th at p. 990 [same].)

Appellant complains that he is wearing a blue collared shirt in the photograph similar to the shirt Santiago described the assailant as wearing. However, any similarity between appellant's shirt and the assailant's shirt is of no consequence since there was six months between the assault on Santiago and her viewing of the photographic lineup. The same holds true for appellant's contentions about the alleged variations between the appearances of others in the lineup and Santiago's description of her assailant. Finally, appellant complains that his photo shows a closer view. However, this Court has stated that minor differences in image size, like minor differences in facial hair or background color do not render a photographic lineup impermissibly suggestive. (*People v. Cunningham, supra,* 25 Cal.4th at p. 990; *People v.*

Johnson, supra, 3 Cal.4th at p. 1217.) "There is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Indeed, simply because a suspect's photograph is much more distinguishable from the others in the lineup dose not render the lineup unconstitutional. (*Ibid.*)

Nothing in the lineup photographs or in the pre-lineup events "caused [appellant] to 'stand out' from the others in a way that would suggest [Santiago] should select him." (*People v. Yeoman, supra,* 31 Cal.4th at p. 124.) Thus, there was no unduly suggestive and unnecessary identification procedure and appellant's claim fails.

Although appellant failed to meet the first requirement of his claim, and "[o]nly if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification" (*Id.* at p. 125), the trial court also correctly found that Santiago's identification was reliable under the totality of the circumstances.

Santiago had more than an ample opportunity to see appellant's face during the assault. After taking control of Santiago on the street and putting her in his car, they rode together to appellant house which took approximately 15 to 20 minutes. (81 PRT 4486.) Santiago was able to see appellant's face the entire time because "[h]e was right next to me." (81 PRT 4486.) Because appellant had Santiago positioned between the two front seats with his arm around her neck, Santiago was in a position to observe appellant's face in the rear-view mirror. (81 PRT 4486; 82 PRT 4680.)

When they arrived at the house, appellant walked Santiago down a hall to a room where he tied her hands, then took her to a bedroom where he sat her on the bed. (81 PRT 4487.) Appellant left Santiago in the room for a time, but returned and asked her for cigarettes. (81 PRT 4487.) There was lighting in the

house which allowed Santiago to see appellant's face the entire time. (81 PRT 4487-4488.) Appellant did not make any attempt to hide his face either in the car or in the house. (81 PRT 4488.) While Santiago's attention may not have been entirely focused on appellant's face in the car, because she was also trying to remember the route which appellant drove, there was no evidence of any distractions from her opportunity to observe his face at the house. (*People v. Cunningham, supra,* 25 Cal.4th at p. 989 [totality of circumstances in judging reliability includes opportunity to observe assailant and degree of attention].)

Nothing about Santiago's descriptions of her assailant was shown to be inaccurate. On June 21, 1984, Santiago described her assailant as tall, approximately 6'2", blond hair, neat appearance, and approximately 25 to 30 years old. (91 PRT 5624-5625.) On June 26, Santiago provided a further description of her assailant as blond, having a moustache, in his late twenties, 6' tall, medium build, with collar-length hair. (91 PRT 5639.) On December 4, Santiago described her assailant as 5'10" to 5'11", 180 pounds, muscular build, neat in appearance, with blond hair falling from the middle of the head and "feathered," a moustache which did not extend past the lip, and eyes which "bugged out." (90 PRT 5615; 91 PRT 5656-5658, 5660.) While Santiago's description understandably varied in certain respects, appellant points to no facts demonstrating any facet of her descriptions was inaccurate. (*People v. Cunningham, supra,* 25 Cal.4th at p. 989 [totality of circumstances in judging reliability includes accuracy of victim's prior description].)

While it was six months between the assault and her identification, the multiple times Santiago was asked to describe her assailant, including preparation of two composite drawings, mitigated the natural loss of memory which might have otherwise occurred. Indeed, when she identified appellant in the photographic lineup, Santiago was certain. (81 PRT 4491; 82 PRT 4663; 88 PRT 5478; *People v. Cunningham, supra,* 25 Cal.4th at p. 989 [totality of

circumstances in judging reliability includes victim's level of certainty and lapse of time].)

Appellant ignores these facts and, instead, criticizes the reasons which the trial court relied on in finding Santiago's identification reliable apart from any suggestiveness in the identification procedure. However, it seems clear that the issue of reliability under the totality of the circumstances is an issue of law subject to *de novo* review. Moreover, "it is axiomatic that [this Court] review[s] the trial court's rulings and not its reasoning." (*People v. Mason, supra,* 52 Cal.3d at p. 944.) "If a ruling is correct on any theory sustainable under the record, it must be affirmed regardless of the considerations, which may have moved the trial court to its decision." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 65.)

The evidence in this case firmly supports the conclusion that the identification procedure was not unduly suggestive and Santiago's identification of appellant was reliable under the totality of the circumstances. There was no error in admitting Santiago's identification.

XXXIII.

APPELLANT FORFEITED HIS CHALLENGE TO THE PRE-LINEUP ADMONISHMENT WHICH IS ALSO WITHOUT MERIT

Appellant contends that Santiago was not adequately admonished prior to viewing the photographic lineup. He asserts the failure to adequately admonish Santiago violated his rights to due process and guilt and penalty reliability. He also asserts the inadequate admonishment, together with other factors set forth in his prior argument, made the photographic lineup procedure unnecessarily suggestive. (3 AOB 883-890.) Appellant forfeited the claim by failing to object in the trial court on this basis. In any case, the lineup admonishment does not have independent constitutional significance and is

only one of the various circumstances which must be examined to determine whether the lineup procedure was unnecessarily suggestive and unreliable.

Appellant concedes he did not object to Santiago's identification testimony on this ground. (3AOB 883, fn. 739.) Accordingly, he forfeited his opportunity for appellate review. (*People v. Cunningham, supra,* 25 Cal.4th at p. 989 [untimely objection forfeited challenge to identification testimony]; *People v. Wash* (1993) 6 Cal.4th 215, 244 [argument not advanced in trial court may not be raised on appeal].) Appellant seeks to avoid the forfeiture, claiming the issue is a pure question of law, citing *Hale v. Morgan* (1978) 22 Cal.3d 388, 394, and *People v. Brown* (1996) 42 Cal.App.4th 461, 471.) However, his very presentation of the issue on appeal demonstrates his faulty reasoning. The argument is presented as an independent due process and Eighth Amendment requirement for a lineup admonition to contain particular warnings. Yet, after discussing what should be in an admonishment, appellant argues the photographic lineup identification was improper (unnecessarily suggestive) under the totality of the circumstances. (3 AOB 889.) Moreover, appellant does not simply point to the pre-lineup admonishment as the basis for his claim, but apparently relies on various statements made to Santiago when her trip to San Diego to view the photographic lineup was arranged, as well as testimony during trial after the identification motion had been decided. (3 AOB 884-886.) He also suggests that there was conflicting evidence concerning some of the pre-lineup statements. (See 3 AOB 884, fn. 470, and accompanying text.) These varying factual bases take the issue out of a pure question of law.

In any case, the claim is without merit. Notably, appellant cites no authority holding that a pre-lineup admonition must convey particular warnings.[140/] As this Court has stated, "Due process requires the exclusion of

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140. During the pretrial hearings, Detective Fullmer read the following admonition to Santiago prior to showing her the photographic lineup:

identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable." (*People v. Yeoman, supra,* 31 Cal.4th at p. 123, underlining added.) While it is conceivable that one particularly egregious factual aspect in a case may result in an unnecessarily suggestive identification procedure, it is the overall identification procedures which are examined for unnecessary suggestiveness. Part of that overall identification procedure is the pre-lineup admonition. (See *People v. Johnson, supra,* 3 Cal.4th at p. 1218.) Appellant points to nothing suggestive in the pre-lineup statements or admonition, other than the fact that a suspect was in custody. However, as noted in the previous argument, any person asked to view a lineup would naturally assume a suspect was in custody. (*People v. Carpenter, supra,* 15 Cal.4th at p. 368.)

For a witness identification procedure to violate due process, the state must, at a minimum, suggest something to the witness. (*People v. Ochoa, supra,* 19 Cal.4th at p. 413.) A pre-lineup admonition, on the other hand, generally serves to neutralize or minimize the witness's natural expectations. There is simply no basis to penalize the state for failing to neutralize a witness's natural expectations, when it has not taken any steps to make the identification procedure unnecessarily suggestive. Even where an admonition might have been more effective at minimizing expectations, it would not cause the defendant to stand out from the others in a way that would suggest the witness should select him. (*People v. Carpenter, supra,* 25 Cal.4th at p. 990.)

> I am going to ask you to look at a group of six photographs. You should not infer anything from the fact that the photographs are being shown to you or that we have any suspect in custody at this time. Please look through the photographs and see if you can identify any of the individual pictures.

(90 PRT 5477.)

Appellant's criticisms of the admonition in this case are also unpersuasive. He says the admonition failed to advise Santiago of the importance of clearing innocent persons, of the changes in appearance which can occur over time, and that her attacker may or may not be in the lineup. (3 AOB 888-889.) However, she was asked to look at the photographs to see if she could identify any of the pictures and she was told not to infer anything from the fact that the photographs were being shown to her. Both of those admonishments adequately informed her not to select a picture of someone whom she could not identify and she may not see her attacker in the photographs. Why she needed to be told what everyone knows – that facial and head hair can be changed to alter appearance – is unclear, however, that admonition is generally unfavorable to suspects who oftentimes seek to change their appearance.

Thus, although appellant forfeited his challenge to the photographic lineup, it is also without merit.

XXXIV.

APPELLANT FORFEITED HIS CHALLENGE TO THE MANNER IN WHICH THE LINEUP PHOTOGRAPHS WERE PRESENTED, WHICH IS ALSO WITHOUT MERIT

Appellant contends that admission of Santiago's identification of him violated due process and the Eighth Amendment because the photographic lineup she observed was not administered by someone who did not know appellant was the suspect and she viewed all the photographs in the lineup at the same time rather than one at a time. (3 AOB 891-895.) The claim is forfeited because appellant did not challenge Santiago's identification on this basis in the trial court, and the claim is without merit.

As with his previous argument, appellant concedes he did not object to Santiago's identification testimony on this ground. (3AOB 891, fn. 752.) The claim is forfeited. (*People v. Cunningham, supra,* 25 Cal.4th at p. 989 [untimely objection forfeited challenge to identification testimony]; *People v. Wash, supra,* 6 Cal.4th at p. 244 [argument not advanced in trial court may not be raised on appeal].) It is also without merit.

As with his previous argument, appellant cites no authority supporting his claim that sequential photograph display by a person who does not know the suspect is constitutionally required. Appellant claims use of a "blind" administrator of the photographic lineup (i.e., a person who does not know who the suspect is) reduces the risk of inadvertent contamination. However, due process requires exclusion of identification testimony only if unnecessarily suggestive identification procedures were used, resulting in an unreliable identification. (*People v. Yeoman, supra,* 31 Cal.4th at p. 123.) The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. (*People v. Cunningham, supra,* 25 Cal.4th at p. 989.) Simply there may be a "risk" of contamination does not mean there was contamination, in fact. Of course, since it was appellant's burden to demonstrate the existence of an unreliable identification procedure, it was incumbent on him to present evidence of any contamination of Santiago's identification when the detectives displayed the photographic lineup. Appellant points to no such evidence. Indeed, there was none.

Appellant contends that a lineup in which the witness views the photographs sequentially rather than simultaneously, as in this case, reduced the risk of inaccuracy. However, due process is concerned with unnecessary suggestion leading to an unreliable identification. Factors which impact the accuracy of a witness's identification go to the weight of that evidence, not its admissibility. (*People v. Yeoman, supra,* 31 Cal.4th at p. 125 [witness's

decision to attend preliminary hearing where she observed defendant affects only weight, not admissibility].)

XXXV.

THE DUE PROCESS CLAUSE DOES NOT APPLY TO IDENTIFICATION OF PHYSICAL EVIDENCE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing to suppress Santiago's identification of appellant's house and sheepskin seat covers, as the product of an unnecessarily suggestive and unreliable identification procedure. (3 AOB 902-915.) Since Santiago did not identify appellant's sheepskin seat covers, there was nothing to suppress. In addition, as the trial court correctly concluded the due process clause does not apply to identification of physical evidence.

In his trial brief, filed November 18, 1986 (38 CT 8279), appellant sought, inter alia, suppression of evidence that Santiago had identified appellant's house and sheepskin seat covers, claiming that the identifications were the product of improper identification procedures. (38 CT 8328- 8331.) The trial court denied the motion, concluding that there was "absolutely no authority for the proposition that one could suppress identifications of objects in the same manner that you do a photographic lineup or of a live lineup." (238 PRT 24416.) The trial court was correct.

> There is no authority holding that a defendant's due process right to reliable identification procedures extends beyond normal authenticity and identification procedures for physical evidence offered by the prosecution.

(*Johnson v. Sublett* (9th Cir. 1995) 63 F.3d 926, 931; *Hughes v. State* (Miss. 1999) 735 So.2d 238, 261.)

Appellant argues that identification of physical evidence can be affected by the suggestiveness of the identification procedure. However, as the Arizona

Supreme Court explained, obvious differences between physical evidence and human beings make the jury fully capable of assessing the credibility of a witness's identification of an object when the suggestiveness of the identification procedure is revealed in direct or cross-examination. (*State v. Roscoe* (1984) 145 Ariz. 212, 700 P.2d 1312, 1224.)

Even applying the rule governing identification procedures, appellant's claim fails. As noted previously, Santiago never identified the sheepskin seat covers as the ones which were in her assailant's car. She testified that the seat covers from appellant's truck were similar to the seat covers in the assailant's vehicle; i.e., they were sheepskin or imitation sheepskin. (82 PRT 4676; see also 39 TRT 7361-7362; 40 TRT 7550.)[141/]

There was nothing unnecessarily suggestive in the identification of appellant's house. After arriving in San Diego on the evening of December 14, 1984, and identifying appellant in the photographic lineup (90 PRT 5475-5478), Santiago rode with Detective Fullmer, Henderson, and Fisher, between midnight and 2 am, to the scene of her abduction to see whether she could recreate the route taken after her abduction. (90 PRT 5479-5481; 91 PRT 5678-5679; 94 PRT 6076, 6132.) Santiago was unable to do so. (90 PRT 5480.) Sometime after Santiago lost her bearings (see 82 PRT 4666), Detective Fullmer drove on appellant's street (Casa de Oro Boulevard), past his house twice. (90 PRT 5480; 91 PRT 5679; 94 PRT 6097, 6132.) She did not identify appellant's house. (91 PRT 5679; 94 PRT 6098, 6133.)

The next day, after meeting with the detectives and the deputy DA at the Sheriff's homicide office, Santiago rode with Detectives Fullmer, Fisher, and Zuniga, in another effort to see if Santiago could identify any landmarks of her

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141. At the Sheriff's homicide office on December 15, prior to the second attempt to retrace the kidnapping route, Santiago was asked to view a vehicle which turned out to be a truck. (82 PRT 4668.) When she observed the truck, she was asked if she could identify the interior. (82 PRT 4675.)

abduction route. (90 PRT 5483; 94 PRT 6134.) In driving from the scene of the abduction to the scene where Santiago was found, Detective Fullmer again drove up Casa de Oro Boulevard. After driving past appellant's house, Detective Fullmer heard some conversation from the other occupants in the car, which caused him to make a u-turn and head back toward appellant's house, which was when he heard someone say, "'What about that house' or 'Something about that house'" and Santiago identified appellant's house. (90 PRT 5484-5485; 91 PRT 5687, 5689.)[142] Detective Fisher observed Santiago looking intently at appellant's house and she asked to have the car slow, at which point Detective Fisher asked if she recognized something. (94 PRT 6137, 6139.) Santiago began reciting features of appellant's house and asked to drive by it again, which they did. (94 PRT 6139.) The car turned once again to give Santiago another look. (94 PRT 6139.)

There was nothing unnecessarily suggestive in Santiago's identification of appellant's house. Though the party traversed appellant's street twice the night she identified appellant in the photographic lineup, they were trying to retrace the kidnapping route and had failed, it was dark, Santiago was from out of town and did not know the area, and there was no evidence Santiago was asked to, or even did, look at appellant's house either time they drove past. When the group drove past the next day when it was light, there was no evidence Santiago knew she was on the same street she had been on the night

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142. Detective Fullmer indicated this was the first pass of appellant's house. (91 PRT 5687; see 90 PRT 5484.) Detective Zuniga, though less detailed in her recollection, also seemed to indicate this was the first pass when Santiago mentioned the area looking familiar. (95 PRT 6293.) Detective Fisher, on the other hand, testified they had driven past appellant's house on the way to the recovery scene and he observed Santiago looking at appellant's house as they drove past. (94 PRT 6136.) He testified that it was on the return (second) trip down appellant's street that the conversation took place. (95 PRT 6136-6137.)

before. Whether they drove past appellant's house twice or three times, it was Santiago who called attention to appellant's house, which ultimately led to her identification.[143] Based on the evidence before the trial court, appellant failed to carry his burden to demonstrate the existence of an unreliable identification procedure. (*People v. Cunningham, supra,* 25 Cal.4th at p. 989.)

Inasmuch as there was neither a legal or factual basis to suppress Santiago's identification of appellant's house, or even an identification of appellant's sheepskin seat covers, the trial court did not err.

XXXVI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING DEFENSE EYEWITNESS IDENTIFICATION EXPERTS

Appellant contends the trial court prejudicially erred and violated his constitutional rights by exclu ding eyewitness identification experts from his jury trial. (3 AOB 916-933.) The trial court did not abuse its discretion or violate appellant's constitutional rights by excluding his eyewitness identification experts. While Jodie Santiago's identification of appellant was important evidence, her identification had independent reliability because it was substantially corroborated by other evidence.

Both during the pretrial motions and at trial, Jodie Santiago identified appellant as the person who kidnapped and attempted to murder her. (81 PRT 4489; 38 TRT 7344.) In an *in limine* motion filed December 9, 1987, the prosecution sought exclusion of eyewitness identification expert testimony on the issue of Santiago's identification of appellant. (16 CT 3365-3371.) That

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143. In her trial testimony, Santiago said that while traveling up a street, she saw a house which she felt she recognized, and asked to turn around and drive back slowly so she could make sure. She identified the house at that time. (39 TRT 7499.)

same day, as part of its *in limine* hearings, the trial court heard the testimony of defense witness Dr. Robert Buckout as a proposed defense eyewitness identification expert. (188 PRT 17880A-17886.) Ultimately, the trial court ruled that Dr. Buckout would not be permitted to testify on factors affecting eyewitness identification. (242 PRT 24897-24901.)[144]

During the trial, prosecution witness Emmet Stapleton testified that on the evening of December 7, 1981 (the day before Gayle Garcia was murdered), a person came to his house about an apartment rental he had listed in the newspaper. (38 TRT 7209-7211, 7214.) Stapleton identified appellant as that person. (38 TRT 7215.) Within the next day or two, after Stapleton read about the Garcia murder, he contacted the Sheriff's office and participated in making a composite drawing, although he was not satisfied with the result. (38 TRT 7218-7219.) Following appellant's arrest (December 1984), Stapleton saw appellant's picture on the television, recognized him, and called the Sheriff's office on March 14, 1985. (38 TRT 7220-7221; 48 TRT 9099.) Stapleton was shown a photographic lineup (Exhibit 257)[145] and he identified appellant. (38 TRT 7231-7232; 48 TRT 9100-9103.)

In response to Stapleton's identification testimony, the defense proffered defense witness, Dr. Elizabeth Loftus to testify about factors affecting Stapleton's eyewitness identification and also to testify about factors affecting the suggestibility of the photographic lineup viewed by Santiago. (49 TRT 9148-9149.) Following *in limine* testimony by Dr. Loftus and a review of the

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144. However, the trial court did not rule out Dr. Buckout being called to testify to factors affecting the suggestibility of the photographic lineup Santiago viewed. (242 PRT 24900, 24902.)

145. The photographic lineup shown to Santiago was Exhibit 179A. (18 TRT 3199; 39 TRT 7371.)

previous testimony by Dr. Buckout,[146] the trial court concluded that the proffered evidence was inadmissible because as to factors affecting eyewitness identification which were a matter of common sense because it was unnecessary; as to any factors which were not matters of common sense, they were not expert because there was no reliable basis for their opinions; and the area promised a "battle of experts" which the jury was ill-equipped to assess. (50 TRT 9358-9365.)

The decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion. (*People v. McDonald* (1984) 37 Cal.3d 351, 377.) In *McDonald*, this Court stated that expert testimony on eyewitness identification "will not often be needed and, in the usual case the appellate court will continue to defer to the trial court's discretion in this matter." (*People v. McDonald, supra*, 37 Cal.3d at p. 377, fn. omitted) This Court went on to describe the type of circumstances which would require a trial court to admit expert testimony on eyewitness identification:

> When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury. . . .

(*People v. McDonald, supra*, 37 Cal.3d at p. 377.)

More recently, this Court explained that while the complete absence of corroboration is not a requirement for admission of expert testimony on eyewitness identification, exclusion is justified in an eyewitness case "if there is other evidence that substantially corroborates the eyewitness identification

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146. The defense apparently no longer intended to call Dr. Buckout.

and gives it independent reliability." (*People v. Jones* (2003) 30 Cal.4th 1084, 1112.)

In its pretrial ruling, the trial court stated:

> But I see an enormous load of corroboration for Jodie Robertson-Santiago's - - Santiago-Robertson's testimony in this case. I am not going to detail all of it because it would take too long. I think the People have put it in their appendix.[147] I have written my own charts on the evidence that I have heard over a year and a half, and that determination of reliable other evidence has to be made by the court on this issue. . . .[¶] [Santiago's] identification of the car was generally correct, corroborated by the fact that [appellant] sold the car within four days with the sheepskin seat covers. Her identification - - her description of the house was generally correct. How many houses have a circular driveway with trees and the bushes and the solid corridor and going down the middle of the hallway with the livingroom on the left and the bedrooms on the right. All of that was described well before she saw it and would have been subject to any possible suggestion by the detectives in this case. And then we add on top of that - - we have to add in all of the other cases which independently come in and begin drawing a picture that is absolutely very, very plain.

(242 PRT 24898-24900; see also 49 TRT 9155 ["We have a lot of corroboration for [Santiago]. . . . She is corroborated in many, many different ways."].)

Appellant contends the trial court erred in relying on the corroboration of Santiago's identification by independent evidence as a basis for excluding the proposed expert testimony. (3 AOB 921-922.) However, the trial court described the absence of adequately corroboration as requiring admission of eyewitness expert testimony. (242 PRT 24898.) That is the holding of *McDonald*, where this Court stated that an abuse of discretion would exist in an eyewitness case if the identification was "not substantially corroborated by evidence giving it independent reliability." (*People v. McDonald, supra,* 37

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147. See 16 CT 3361 [appendix to prosecution's points and authorities in support of motion to exclude eyewitness identification expert testimony].

Cal.3d at p. 377.) In *Jones*, this Court reiterated that exclusion of eyewitness expert testimony is justified "if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability." (*People v. Jones, supra,* 30 Cal.4th at p. 1112.)

Appellant also complains that corroboration does not necessarily establish reliability. (3 AOB 922.) However, neither this Court nor the trial court relied simply on the existence of corroborative evidence. This Court required evidence which "substantially corroborated" the identification giving it independent reliability. (*People v. McDonald, supra,* 37 Cal.3d at p. 377; *People v. Jones, supra,* 30 Cal.4th at p. 1112.) In excluding the proffered expert testimony, the trial court found there was "an enormous load of corroboration" and the trial court referenced and described the variety of corroborative evidence which independently verified Santiago's identification. (242 PRT 24898.)

Appellant next complains that the trial judge should not be allowed to rely on disputed evidence as corroboration. (3 AOB 922.) In *Jones*, this Court implicitly rejected this assertion. It found adequate corroborative evidence in the testimony of two accomplices, one potential accomplice, a jailhouse informant, and an acquaintance of the defendant. (*People v. Jones, supra,* 30 Cal.4th at p. 1112.) This Court said "[i]t does not matter" that the accomplices' testimony required corroboration to support a conviction and "[n]either does it matter that all five witnesses could be impeached by proof of bias or prior inconsistent statements." (*Ibid.*) This Court looked at "the cumulative corroborative effect" to find independent reliability. (*Ibid.*)

Similarly, in *People v. Plasencia* (1985) 168 Cal.App.3d 546, the appellate court upheld exclusion of an eyewitness expert, finding that the victim's pretrial identifications (the victim could not make an identification at trial) were substantially corroborated by *Mirandized* statements of two of

defendant's fellow gang members in which they identified the defendant as a participant, even though those individuals repudiated their identifications at trial. (*Id.* at p. 555.)

In this case the trial court did not focus on the existence of some corroborative evidence. It relied on "an enormous load of corroboration" (242 PRT 24898) and that Santiago was corroborated "in many, many different ways." (49 TRT 9155.) In the end, it was this "the cumulative corroborative effect" (*People v. Jones, supra,* 30 Cal.4th at p. 1112), which the trial court properly relied upon.

Appellant complains that the trial court's discretionary decision must incorporate the weighing required under Evidence Code section 352, as well as a consideration of the totality of the circumstances. (3 AOB 922.) However, appellant points to no case holding that the discretion a trial judge exercises under *McDonald*, which arises from Evidence Code section 801, must incorporate the discretion required under section 352. Neither *McDonald* nor this Court's recent decision in *Jones*, imports 352 into the discretion the trial court exercises under 801. In any case, the trial court clearly invoked and relied on its weighing of probative value of the proffered expert testimony against the prejudicial effect of that testimony, considering all the circumstances, including the wide array of defense experts and witnesses aligned against Santiago. (242 PRT 24897-24898, 24900; see also 50 TRT 9363 [finding the time consumption and the difficulty for the jury to far out weigh the probative value].)

Appellant next contends the trial court erred in relying on evidence of the other counts in assessing corroboration. (3 AOB 922-924.) His contention that the trial court should not rely on disputed other counts evidence simply reiterates his complaint that the trial judge should not rely on disputed evidence, which, as previously explained, has been implicitly rejected. (*People v. Jones,*

supra, 30 Cal.4th at p. 1112; *People v. Plasencia, supra,* 168 Cal.App.3d at p. 555.) He also repeats his earlier contention that he was not given an adequate opportunity to contest the other offenses pretrial. However, as demonstrated in Argument IV, *supra*, appellant was not denied a fair opportunity to contest the admissibility of that evidence. Finally, appellant reiterates complaints that there errors in the cross-admissibility instructions and trial arguments. He does not explain why instructions and arguments which came well after the trial court's ruling made the ruling an abuse of discretion. Moreover, as demonstrated in Argument X, *supra*, there was no error.[148/]

Since the identification was substantially corroborated by evidence giving it independent reliability, the trial court did not abuse its discretion in excluding the proposed expert testimony.

Appellant also complains that the trial court erroneously found his experts were not, in fact, experts. (3 AOB 921.) While the trial court's exclusion of the proposed expert testimony was fully supported by substantial evidence corroborating Santiago's identification ruling, there was no abuse of discretion in the trial court's additional reasons for excluding the testimony.

Appellant relies solely on this Court's reference, in a footnote in the *McDonald* decision, to his two proposed experts as "nationally recognized experts" who had been permitted to testify in various cases. (*People v. McDonald, supra,* 37 Cal.3d at p. 365, fn. 10.) However, nothing in the footnote or in the remainder of the decision requires a trial court to forego a foundational showing for a proposed expert or discard its discretion in judging that showing.

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148. Appellant argues that the trial court misstated evidence in ruling on the motion (3 AOB 928-929.) However, these alleged misstatements were made prior to the trial court's eyewitness expert ruling and were not part of that ruling. He fails to allege any factual "misstatements" made in the context of the trial court's eyewitness expert ruling.

A trial court has broad discretion in assessing the qualifications of a proposed expert, including foundational requirements. (*People v. Ramos, supra,* 15 Cal.4th at p. 1175.) The competency of an expert in every case is relative and depends on the topic and fields of knowledge about which the person is asked to make his statement. (*Ibid.*; *People v. Kelly, supra,* 17 Cal.3d at p. 39.) In considering the qualifications of a proposed expert witness, the field of expertise must be carefully distinguished and limited. (*Ibid.*)

The trial court correctly ruled that a good number of topics which the proposed experts would testify about were matters which the jury would appreciate and understand simply as a matter of common sense and experience, and the experts' opinions would add nothing to that understanding. (*People v. McDonald, supra,* 37 Cal.3d at p. 367 [expert opinion properly excluded when it would add nothing to the jury's common fund of information].) Dr. Buckout testified that people in crime situations tend to significantly overestimate time. (188 PRT 17992.) Dr. Loftus testified that time estimates are generally longer than actual time. (49 TRT 9286, 9301.) However, the trial court properly found that the effect of stress on time estimates is so well-known as to be instilled in such cliches as "'time seemed to stand still.'" (50 TRT 9359.)[149]

Dr. Buckout said a victim's memory can be influenced during a composite drawing by the artist showing the victim particular facial characteristics (188 PRT 17931, 17983) and by successive questioning under circumstances in which the victim may feel an obligation to give more information than is remembered (188 PRT 17919, 17921, 17930). Dr. Loftus

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149. Moreover, the only time estimate Santiago made was for the time of the drive from the site of her kidnapping to appellant's house, which she said was more than 15 minutes. (38 TRT 7336.) William Green, a DA investigator, drove a car similar to appellant's, without shifting, from the kidnapping site to appellant's house on what he considered the most direct and easiest route. It took approximately 17 minutes. (40 TRT 7647-7652, 7670.) Thus, it does not appear that the jury was confronted with an uncorroborated time estimate.

testified that a witness exposed to post-event new information can have their memory contaminated and transformed by the new information from whatever source. (49 TRT 9286, 9293-9294.) However, the trial court properly found that "suggestibility from misleading information is simply common sense." (50 TRT 9359.)[150]

Dr. Buckout testified that the presence of a weapon tended to distract witnesses from other details. (188 PRT 17900.) However, the trial court properly found that "weapons focus is common sense" and has been a subject of cross-examination for "years and years." (50 TRT 9359.)

Dr. Buckout testified that there is a precipitous drop in memory after a day or so, then memory continues to drop over time. (188 PRT 17927.) Dr. Loftus testified that memory gets worse over time. (49 TRT 9304.) However, the trial court properly found that "[t]he effects of time on memory are common sense." (50 TRT 9359.)[151]

In other areas, where there was an apparent difference between lay perception and expert opinion, the trial court found a problem with the expert opinion in that it was based on fundamentally flawed studies, i.e., none of the studies involved actual crime victims. (50 TRT 9360-9361.) Dr. Buckout testified he had interviewed crime victims, but never studied them. (188 PRT 17913.) Dr. Loftus also relied on subjects viewing crime simulations, not real crime victims. (49 TRT 9305, 9314-9315.)

The studies upon which the experts relied were equally faulty. In a study purportedly demonstrating that stress lowered recall of details, the stressor

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150. Moreover, while Santiago participated in two composite drawings (39 TRT 7363-7366), there was no evidence of either artist showing or suggesting particular facial features to her.

151. Dr. Loftus agreed that the effect of time on memory was "common sense." (49 TRT 9304.)

was receiving an inoculation, which as the trial court pointed out, involved "weapon focus" on the needle and undermined any conclusion about the effect of stress alone. (188 PRT 17935; 50 TRT 9360.) Moreover, the subjects did not know their memory would be tested and had no motive to remember. (188 PRT 17952.) Dr. Buckout could not say whether the lab experiments actually replicated the stress experienced by actual crime victims. (188 PRT 17966.) Studies in general limited the amount of time the subjects were allowed to view the perpetrator to as little as 30 seconds up to no more than 10 minutes. (188 PRT 17950-17951.) In testing the suggestibility of photographic lineups, the subjects were people who had not seen the perpetrator and were asked to pick out the perpetrator by description. (188 PRT 17670-17671, 18003.) Dr. Buckout had no knowledge of the effect of Santiago's prior experience as a crime victim on her attention to appellant and her ability to remember his features, none of the studies recreated the amount of time Santiago was with appellant and able to view his face, and none of the studies tested the effect of suggestion in a photographic lineup on an actual witness.

As the trial court found, this area of cognitive psychology was relatively young and considerable uncertainty existed. (50 TRT 9361-9363; see 188 PRT 17948; see *People v. Wright, supra*, 45 Cal.3d 1126, 1142, fn. 13 ["The scientific studies on the psychological factors affecting eyewitness identifications are sufficiently experimental and open to debate that most courts are still reluctant to approve even the admission of expert testimony on the subject."].)

In light of the substantial corroboration which gave Santiago's identification independent reliability as well as the additional reasons that much of the proposed experts' testimony concerned factors which were matters of common sense, and as to the few factors which may not have been common sense, the lack of adequate support for the actual effect of those factors on

crime victims in general and Santiago in particular, the trial court did not abuse its discretion nor was there prejudicial error in exclusion of the defense proposed eyewitness experts.

XXXVII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY EXCLUDING SANTIAGO'S LAY OPINION ON WHETHER THE PHOTOGRAPHS IN THE LINEUP MATCHED HER DESCRIPTION

Appellant contends the trial court prejudicially erred and violated his constitutional rights by precluding the defense from soliciting Santiago's opinion on whether the filler photographs in the photographic lineup matched her descriptions of the perpetrator. (3 AOB 934-937.) The trial court did not abuse its discretion or violate appellant's constitutional rights in sustaining the prosecution's relevancy objection.

During cross-examination, the defense questioned Santiago about the circumstances leading to her viewing the photographic lineup and making an identification. (39 TRT 7482-7484.) The defense then asked:

> None of the other people in the lineup fit the description given to law enforcement by you of the assailant other than [appellant]; isn't that right?

(39 TRT 7484.)

The trial court initially overruled the prosecution's objections except for vagueness and, after questioning Santiago about the position of appellant's photograph in the lineup (position two, top row middle), the defense asked Santiago:

> And with respect to, for instance, the individual in position number six, does that person resemble the description that you had given to law enforcement officers prior to December the 14th, 1984?

(39 TRT 7485.)

The trial court reversed its original ruling and sustained the prosecutor's relevancy objection. (39 TRT 7485.) In the subsequent discussion of its ruling, the trial court indicated that the question was irrelevant because comparing Santiago's previous descriptions with the photographs was something that anyone could do, including anyone on the jury and this really goes to argument. (39 TRT 7490.) When the defense indicated the purpose of the questions was to explore Santiago's identification process and elicit her reasons for excluding photographs other than appellant's. (39 TRT 7490-7491.) However, the trial court permitted that type of inquiry:

> Then, you can ask that. "Why did you exclude the others and pick this one? What is it about that - - this photo that made you pick this one out? What particular things made you pick this one out?"

(39 TRT 7491.) The trial court also permitted inquiry into why a particular photograph was not selected. (39 TRT 7492.)

The trial court also found that the attempt to solicit Santiago's opinion on whether the men in the lineup met her descriptions was misleading in that either answer to the question raised inferences not raised by the lineup itself, which, the trial court said, could be put up on the board and shown to the jury. (39 TRT 7493.)

As explained when the defense later asked for clarification, what the trial court excluded was Santiago's lay opinion on whether the photographs in the lineup matched her descriptions. However, the trial court permitted questions soliciting Santiago's reasons for making her identification. (39 TRT 7507, 7512, 7514-7515.)

An appellate court scrutinizes a decision to bar evidence as irrelevant for an abuse of discretion. (*People v. Alvarez, supra,* 14 Cal.4th at p. 201.) Moreover, the opinion rule expresses a fundamental theory of the law of evidence, i.e., that witnesses must ordinarily testify to facts, leaving inferences

and conclusions to the trier of fact. (1 Witkin, Cal. Evid. (4th ed. 2000) Opinion Rule, § 1, p. 528.) Lay opinion is permitted when rationally based on the witness's perception and helpful to a clear understanding of his or her testimony. (Evid. Code, § 800.)

The questions which the defense intended to pose to Santiago asked for her lay opinion on whether the photographs in the lineup matched her descriptions of the perpetrator. (See 39 TRT 7509-7510, 7513-7514.) There was nothing about Santiago's subjective assessment of the photographic lineup which was necessary to an understanding of her testimony. Indeed, as the trial court pointed out, the jury could examine the lineup photographs and the testimony concerning Santiago's descriptions and make its own determination. Nor was it relevant, as there was no showing that her subjective assessment had anything to do with her identification. As the trial court indicated, the defense was permitted to question Santiago on her reasons for identifying appellant's photograph as well as for not selecting any other photograph.

The trial court's ruling was not an abuse of discretion and because the jury was capable of assessing whether the photographs in the lineup matched Santiago's description, appellant was not prejudiced by not having Santiago's irrelevant, lay opinion. Moreover, exclusion of this evidence did not violated appellant's constitutional rights. (*People v. Lawley* (2002) 27 Cal.4th 102, 155, citations and footnote omitted.)

XXXVIII.

THE TRIAL COURT PROPERLY FOUND THAT SANTIAGO HAD NOT CONSENTED TO DEFENSE-PROPOSED TESTING AND DID NOT PREVENT THE DEFENSE FROM CONTACTING SANTIAGO

Appellant contends the trial court erroneously prevented the defense from obtaining neuropsychological testing of Jodie Santiago, who was willing to voluntarily submit to such defense testing. (3 AOB 938-950.) To the contrary, the trial court found, as a matter of fact, that Jodie Santiago had not voluntarily agreed to submit to the proposed defense testing and did not prevent the defense from obtaining evidence from a willing witness.

On July 14, 1986, the defense filed a motion in case CR 73093, seeking an order from the trial court requiring Santiago to submit to psychiatric and neurological examinations for the purpose of producing evidence on her competency and credibility as a witness. (8 RT 1725-1756.) The defense in case CR 751965 filed a similar motion on July 15, 1986. (31 CT 6858-6861.) The prosecution opposition was filed July 24, 1986. (31 CT 6862-6868.) In the course of her pretrial testimony on the consolidation and related motions, the following exchange occurred during the cross-examination of Santiago on March 24, 1987:

> Q. [by defense counsel] Ms. Santiago . . . [y]ou've previously waived your right to confidentiality with respect to statements that you made to your psychiatrist; isn't that correct?
>
> A. That's right.
>
> Q. Initially, in connection with the overall litigation of the case, you declined to do so; isn't that correct?
>
> A. Originally.
>
> Q. What, if anything, caused you to change your mind?

A. The fact that I have nothing to hide.

Q. In that regard, would you agree to voluntarily submit to a series of neuropsychological and psychological tests?

A. I don't see why not.

Q. With respect to the waiver of your privilege, do you recall whose idea it was?

A. Of the - - the waiver?

Q. Yes.

A. Mine.

Q. At some point in time did you become aware that there were persons involved in the litigation who were interested or perceived a need to review those documents?

A. I don't understand what you mean.

Q. At some point in time did Mr. Williams or someone from the defense contact you to indicate to you the belief or the feeling that it would be relevant to examine those documents that were prepared by those mental health professionals that had evaluated you?

A. Meaning the defense in the court?

Q. Either the defense, the court, the District Attorney's office, someone.

A. Yes, I have been made aware of that.

Q. By whom? Do you recall?

A. I believe it was Mr. Williams.

Q. Do you recall about when that was?

A. No, sir.

Q. Do you recall what Mr. Williams said to you in conjunction with the conversation that you had with him regarding the waiver of your privilege?

A. It was basically along the lines that you wanted to see the documents, the court wanted to review them, and it was up to me to decide whether or not I wanted to negate that privilege.

Q. Was any statements made to you that the prosecution may have perceived itself to be in trouble or at risk in some way if you failed to agree to waived the privilege?

A. I'm sorry. Say that again.

Q. Was any statement made to you by Mr. Williams, in connection with the conversation you just mentioned, that it was the prosecution's belief or Mr. Williams' belief that if you declined to waive you might in some way endanger the case?

A. No.

(82 PRT 4637-4639.)

Seizing upon Santiago's brief response that she did not see why she would not submit to testing, the defense urged the trial court, approximately four months after Santiago's testimony, to have the prosecution contact Santiago in order to facilitate the testing which the defense desired. (133 PRT 11611-11612.) After the prosecutor indicated he did not believe Santiago would be a willing participant, the trial court stated:

No. That was not my impression either. My impression from her testimony was she would do anything required of her to assist in the trial of the case, and I believe it's the court's decision whether she's going to be psychiatrically examined. [¶] So that will remain with the court and that issue is still to be argued; that's one of the motions still to be argued.

(133 PRT 11612.)

When defense counsel responded with the "defense view" that Santiago had indicated she would voluntarily submit to the proposed defense testing, the trial court replied:

> I disagree with you. . . . Miss Santiago made it very clear in her testimony that when she was even subpoenaed to these hearings that it was a traumatic experience for her to go through, and she also made it very clear in the context of the totality of her testimony that she would, despite the trauma to herself, subject herself to what ever was needed to further the interests of the trial. That's the way I read it.

(133 PRT 11612-11613.)

More than three months later, when the defense reiterated its view that Santiago indicated she would voluntarily submit to the proposed defense testing, the trial court reminded defense counsel that

> We disagree to the effect, I think, of what her statement was. I saw her statement as simply being an indication that if required to do anything to further the case along, she would do it. Not that she felt that she wanted to do it or that she was coming forward to say, "Yes, I will do it." I did not see that whatsoever, In fact, her other testimony with regard to the trauma she suffered when she even received the paper subpoena was sufficient to tell this court it's not something she, in essence, voluntarily would do. It's something she would acquiesce, if required to do so for court purposes. . . .

(177 PRT 16939-16940.)

The defense raised the point one more time in argument on the motion to compel Santiago to submit to testing. (239 PRT 24557.) At that time the trial court reiterated its finding:

> I do not find that Mrs. [Santiago] Robertson has volunteered willingly to take a psychiatric test. I think the evidence is clear that she is still very much traumatized by the continued court appearances and that these do affect her, and that any further examinations would not be done willingly by her, but in fact would only be done because she felt a duty to comply with whatever was required of her.

(239 PRT 24587.)

Appellant contends the trial court was wrong about Santiago's willingness to submit to the defense proposed testing and the defense was "never permitted to contact Santiago" to have her tested as she had agreed. (3 AOB 944, 948-949.) He is wrong on both counts.

Taking the latter assertion first, the trial court never precluded the defense from contacting Santiago and either clarifying her position or arranging the testing. The defense had wanted the trial court to "direct the People to contact Miss Santiago" so the defense proposed testing could be arranged. (133 PRT 11611-11612.) That is all the trial court declined to do.

During its argument on the compelled testing motion, the defense tried to make it sound as though the trial court ruled that the defense "should not be allowed to contact her and ask her to voluntarily participate," but the trial court never made such a ruling and appellant fails to demonstrate otherwise. Indeed, the defense had earlier indicated that it did not have Santiago's home telephone number, believed Santiago to be "somewhat hostile to the defense," and had chosen not to directly contact any victim. (133 PRT 11612-11613.)

As to appellant's claim that Santiago was willing to submit to the defense testing, appellant relies on her answer to a single question and her earlier waiver of her privilege to protect the confidentiality of her medical records. While her answer, taken by itself, appears to indicate her willingness to consent to the proposed testing, she was not advised that such testing was requested solely by the defense. (82 PRT 4638.) As the defense conceded, Santiago was "somewhat hostile to the defense." (133 PRT 11612.) Indeed, the defense recognized that Santiago would refuse a defense-only request, which is why the defense wanted the trial court to require the prosecution to contact Santiago and participate in arranging the testing.

Santiago had initially refused to waive her privilege as to her medical records. (82 PRT 4637-4638.) In ultimately deciding to waive her privilege,

she was aware not only that the defense wanted to see her records, but that "the court wanted to review them" (83 PRT 4639) and decided, in that context, she had "nothing to hide." (82 PRT 4683.)

Additionally, as the trial court noted, Santiago was very traumatized by the court appearances. Santiago testified that she had become very leery of going places alone, very cautious, and safety oriented. (81 PRT 4548.) She said she got "stressed out" every time she had to appear to testify. (81 PRT 4558.) She also said she brought a family member along with her to help her get through the ordeal of testifying and requested a deputy sheriff for protection when she came to testify. (81 PRT 4625-4626.)

The trial court's finding -- that Santiago's willingness to submit to testing only existed in the context of what the trial court requested or required -- was fully supported by the record. Moreover, the trial court did nothing to prevent the defense from contacting Santiago.

Additionally, even if the trial court was wrong about Santiago's willingness, appellant points to no prejudice. Appellant claims he was barred from obtaining relevant evidence on the reliability of Santiago's identification. However, the trial court's determination that Santiago would not willingly submit to the defense-proposed testing meant only that it would not direct the prosecutor to arrange the testing with Santiago. The defense was never precluded from contacting Santiago and arranging the testing. Moreover, what the defense-proposed testing would have revealed is nothing more than a matter of speculation. Thus, there was neither error nor prejudice.

XXXIX.

THE TRIAL COURT DID NOT PREVENT DEFENSE EXPERTS FROM TESTIFYING SPECIFICALLY ABOUT SANTIAGO'S ABILITY TO REMEMBER; THE DEFENSE SIMPLY NEVER PROFFERED SUCH TESTIMONY

Appellant contends the trial court prejudicially erred and violated his constitutional rights by precluding "defense experts from specifically testifying as to Jodie Santiago's ability to remember the events to which she testified." (3 AOB 951-956.) To the contrary, the record shows that the trial court precluded the prosecution from presenting the opinion of Santiago's psychiatrist on whether Santiago's memory suffered from the psychological conditions which arose from crimes she experienced. The trial court also indicated it was inclined to similarly preclude defense expert opinion on Santiago's memory, but expressly indicated it would rethink its position should the defense desire to present such testimony. The defense never tendered any such testimony, but expressly limited its expert to general testimony about the effects of the conditions Santiago suffered, which was admitted. There was no preclusion of any proffered defense expert testimony, nor any violation of appellant's rights.

In its ruling denying a defense motion to require Santiago to submit to neurological and psychological testing, the trial court concluded that its ruling did nothing to restrict presentation of evidence of "drug usage and psychological states and amnesia and so on." (239 PRT 24594.)

As part of its case at trial, the defense called Dr. Wendy Freed, a psychiatrist who treated Santiago beginning in November 1984 (several months after the crime). (48 TRT 9027-9037, 9041.) Dr. Freed diagnosed Santiago as having posttraumatic stress disorder (PTSD) and major depression. (48 TRT 9042.) In responding to one of several questions about the symptoms of PTSD, Dr. Freed stated that Santiago did not have psychogenic amnesia. (48 TRT

9049.) During cross-examination, the prosecutor asked Dr. Freed to define psychogenic amnesia, which she defined as forgetting or not remembering due to psychological reasons, and reiterated her opinion that Santiago did not have psychogenic amnesia. (48 TRT 9066.) However, when she went on to opine that Santiago's ability to remember everything that happened up to the point she was choked to unconsciousness was as good as anybody's, the trial court sustained a defense objection and struck that testimony. (48 TRT 9066.)

In the ensuing conference outside the jury's presence, the trial court stated, "We are either going to turn this into a battle of experts on whether Jodie [Santiago] Robertson can remember and tell the truth or we're not." (48 TRT 9067.) The trial court indicated that it preferred not to allow that "battle of experts" on whether Santiago could remember and was telling the truth. (48 TRT 9068.) The trial court indicated that if the defense intended to bring forward an expert on PTSD to testify about whether Santiago was testifying truthfully, "we better have it out now, because I am going to stop the People from doing it . . . . [b]oth sides do it or neither side does it." (48 TRT 9069.) However, the trial court also made it clear that the extent of Santiago's injuries "was in issue . . . everything to do with the extent of her injuries and what medications were prescribed for her was all part of this - - the question of the extent of her injuries." (48 TRT 9069.)

After a brief discussion of another issue, defense counsel indicated the defense intended to present a PTSD expert but not to challenge Santiago's memory, "[O]ur intent is to call an expert on posttraumatic stress disorder to educate the jurors to the overall ramifications, never once addressing the ultimate question as the court characterized it." (48 TRT 9075.) Indeed, the defense indicated that because the trial court had refused to order Santiago to undergo psychological and neurological tests, the defense expert had no basis to testify as to the condition of Santiago's memory. (48 TRT 9075-9076.) The

trial court indicated the defense would be required to make an adequate foundational showing before offering the expert. (48 TRT 9076.)

Subsequently, prior to the defense expert, Dr. Sheldon Zigelbaum, being called to the stand the issue was again addressed. (54 TRT 10057-10058.) Defense counsel indicated Dr. Zigelbaum was an expert on PTSD and "our intent was not to have him discuss anything specific to Miss Santiago, but to, in effect, lay out the foundation for posttraumatic stress disorder." (54 TRT 10058.) The defense intended Dr. Zigelbaum to testify about the various tests that can be done to assist in making a diagnosis of the conditions which Santiago suffered (54 TRT 10058-10059) and "what happens when an individual suffers from these types of things." (54 TRT 10061.)[152] The trial court concluded:

> So as long as you're just talking about having the doctor talk about the posttraumatic stress syndrome and some of the injuries that can occur and some of the things that can happen, I think that's permissible, and that is an explanation of the injuries and their possible effects. . . . If he's going to talk about posttraumatic stress syndrome and what effects there can be, I think that that is well within the ambit of talking about injuries. . . . The posttraumatic stress syndrome has certain diagnoses, including effects on memory. . . .

(54 TRT 10067-10068.) Defense counsel concluded, "He's not going to render any opinions about Jodie Santiago." (54 TRT 10068.)

As the exchanges between the trial court and counsel make clear, the defense did not intend to have their expert offer any testimony about Santiago's ability to remember. Indeed, the defense position was that their expert had no foundation to opine as to Santiago's memory because he had not tested her. What the defense proffered was expert testimony on the conditions which Santiago suffered and the effects such conditions might have on memory,

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152. After a discussion about the testing, the defense indicated it would not offer testimony on available testing. (54 TRT 10065.)

without indicating whether Santiago's memory was actually affected. The trial court imposed no restriction on the proffered defense expert testimony. Indeed, when the prosecution began to object during Dr. Zigelbaum's testimony, the trial court stopped the testimony, held an *in camera* hearing, and admonished the prosecution that it was

> going to allow him to talk all he wants to about everything connected to PTSD and all the possible things that can happen under PTSD. It's going to be for the jury to decide, based on all of the evidence they have heard and observing Jodie [Santiago] Robertson, whether they think these possibilities occur.

(54 TRT 10149.)

Since the defense never proffered any expert "specifically testifying as to Jodie Santiago's ability to remember the events to which she testified" (3 AOB 951), there was no preclusion of such testimony imposed by the trial court. Indeed, the trial court permitted the expert testimony which the defense proffered. Since there was no preclusion, there was no error, no constitutional violation, and no prejudice.

XL.

THE TRIAL COURT DID NOT PRECLUDE THE DEFENSE FROM EXPLAINING WHY ITS EXPERT HAD NOT TESTED SANTIAGO; THE DEFENSE SIMPLY NEVER OFFERED SUCH TESTIMONY

Appellant contends the trial court prejudicially erred and violated his constitutional rights by precluding the defense from presenting testimony from its PTSD expert on the reasons he had not conducted any testing of Santiago. (3 AOB 957-959.) However, the defense did not offer to have its expert testify as to the reasons for his failure to test Santiago. Thus, there was no evidence excluded.

As described in Argument XXXIX, *supra*, the defense requested, and the trial court denied, an order requiring Jodie Santiago to submit to

neuropsychological and neurological testing. During the defense case at trial, Santiago's psychiatrist, Dr. Freed testified to her diagnosis of Santiago as suffering from PTSD and major depression when she came to Dr. Freed. The defense also presented the testimony of Dr. Zigelbaum, an expert in PTSD, about the impact of PTSD and Santiago's other injuries on memory, however, Dr. Zigelbaum offered no opinion on Santiago's memory.

Thus, it is correct that there was no specific testing on Santiago for the defense expert to base an opinion of her memory.[153] However, it is incorrect to say, as appellant does, that the trial court "refused to allow the defense to explain to the jury why its expert did not conduct such testing." (3 AOB 957.) The defense never requested to present such an explanation, so there was nothing for the trial court to permit or refuse. Indeed, as delineated in Argument XXXIX, *supra*, what the defense did propose, at least initially, was to have its expert describe the type of testing which can be used to assist in a diagnosis. (54 TRT 10058-10059.) However, when the trial court observed that such testimony would potentially raise an unfair inference by failing to apprize the jury that the lack of such tests was because of a decision by the trial court, not because of any refusal by Santiago or the prosecution (54 TRT 10063-10065), the defense indicated it did not intend that inference and only wanted to suggest that a diagnosis made without such testing was not fully supported. (54 TRT 10065.) The trial court, under Evidence Code section 352, precluded the defense from presenting the evidence of available tests because whatever probative value might be, it was outweighed by prejudice and jury confusion. (54 TRT 10066.)

The trial court did preclude the defense from presenting evidence of available tests which could have been used in Santiago's diagnosis, but never

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153. Appellant has not challenged the trial court's ruling which denied his motion to require Santiago to submit to the defense-proposed testing.

prevented the defense from explaining to the jury why such tests were not conducted, simply because that was never offered. Since the trial court did not refuse any defense offer to explain why its expert did not conduct any testing of Santiago, there is no factual basis for appellant's claim, no error, no constitutional violation, and no prejudice.[154/]

XLI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING THE DEFENSE FROM CROSS-EXAMINING SANTIAGO ABOUT HER CONSENSUAL SEXUAL ENCOUNTER THE NIGHT BEFORE SHE WAS ATTACKED

Appellant contends the trial court prejudicially erred and violated his constitutional rights by excluding evidence that the night before she was kidnapped, Santiago met a man in a bar and spent the night with him. (3 AOB 960-966.) The trial court did not abuse its discretion or violate appellant's constitutional rights by excluding the evidence.

Jodie Santiago was abducted on the night of Friday, June 8, 1984. (81 PRT 4483; see also 38 TRT 7316.) The night before (Thursday), Santiago and her brother went to a Mexican restaurant where Santiago met Neil Reynolds. (81 PRT 4567-4568, 4608-4609.) Santiago and Reynolds left her brother at the Mexican restaurant, and went dancing. (81 PRT 4609.) Santiago spent the night at Reynold's apartment and he returned her to her brother's home in the morning. (81 PRT 4610-4611.)

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154. Appellant also argues the judge's exclusion was further exacerbated by an instruction which advised the jury to consider the foundation for an expert's opinion in assessing its weight. (3 AOB 957.) However, as explained above, the trial court did not exclude evidence of the expert's reason for failing to test Santiago; it was never offered by the defense. Thus, there was no absence of foundation for the defense expert's opinion and nothing the trial court did undermined the expert's testimony.

The defense sought, and the prosecution opposed, an *in limine* ruling permitting the defense to cross-examine Santiago in trial about meeting and spending the night with Reynolds. (242 PRT 24933.) The defense contended that the Reynolds incident was relevant to show that Santiago voluntarily left with her assailant rather than being kidnapped; i.e. that Santiago was the kind of woman who met men in bars and spent the night with them. (242 PRT 24933-24934, 24939, 24941, 25095-25096; see 67 CT 14884-14885 [appellant's new trial motion].)

The trial court noted that Santiago's sexual encounter with Reynolds might be relevant to explain the presence of semen and a sperm found on the vaginal swabs from Santiago's rape kit, but the details of how she came to be with Reynolds was "an attempt to discredit her as being a loose lady" and "irrelevant." (244 PRT 25095.)[155] The trial court ultimately ruled that Santiago's sexual relationship with Reynolds "would not be relevant to prove she picked up or was picked up by Mr. Reynolds or anyone else the night of the attack" and "[e]ven if there were some small probative value to this, it would be clearly and substantially outweighed by the prejudicial effects . . ." (244 PRT 25160.) However, the trial court also ruled that the defense would not be precluded from presenting evidence of the semen and sperm found in the rape kit in support of the theory that Santiago had been raped, which distinguished the attack on her from the other charged offenses. Further, the trial court ruled that if the defense offered that evidence, the prosecution would be permitted to present evidence of Santiago's intercourse with Reynolds to counter the defense theory, thereby opening the door to evidence of how their encounter occurred. (244 PRT 25161.)

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155. Neither Reynolds nor appellant could be excluded as donor of the sperm and Santiago herself could have contributed the ABO factor identified on the swab. (244 PRT 25090; see also 47 TRT 8765-8771, 8775-8776, 8778; 57 TRT 10862-10869.)

Appellant says that Santiago's conduct the night before her kidnapping was inadmissible to prove her conduct on the night of the kidnapping. (3 AOB 961 ["a character trait is not admissible to prove conduct on a specific occasion"].) He argues that the Reynolds encounter was admissible to impeach Santiago's credibility, but fails to explain how the encounter had any bearing on Santiago's credibility. Santiago's encounter with Reynolds was not criminal and did not reflect moral turpitude. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 295-296 [misdemeanor conduct admissible for impeachment if it reflects moral turpitude].) The only basis for finding Santiago's testimony about the kidnapping to be incredible was to find that she acted in conformance with her conduct on the night she met Reynolds, and voluntarily left Baxter's with her assailant. That, of course, would require the jury to base it's conclusion about her conduct on her character, which appellant admits would have been improper.

In any case, appellant is wrong about admissibility of character evidence. While Evidence Code section 1101, subdivision (a), generally applies to exclude evidence of character as proof conduct, Evidence Code section 1103, subdivision (a), permits a defendant to introduce evidence of the crime victim's character (including specific instances of conduct) to prove conduct in conformity with that character.[156/] The evidence was admissible under Evidence

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156. Evidence Code section 1101, subdivision (a), provides:

> Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Evidence Code section 1103, subdivision (a), provides:

Code section 1103, subdivision (a). Nonetheless, the trial court did not abuse its discretion in excluding the evidence under Evidence Code section 352.

The admissibility of character evidence under Evidence Code section 1103, subdivision (a), "is not without bounds, but is subject to the dictates of Evidence Code section 352." (*People v. Wright* (1985) 39 Cal.3d 576, 587.) The trial court did not abuse its discretion when it found that any probative value was small and was outweighed by the potential prejudice of having the jury being distracted by Santiago's failure to abide by traditional sexual moral values. While evidence of "specific instances of conduct" is a permissible form of character evidence, the Reynolds encounter represented only one such instance of Santiago's conduct.[157] Any inference of character arising from only one instance of conduct is necessarily weak.

On the other hand, the trial court recognized the prejudice of having Santiago degraded in the eyes of the jury, a point the defense also recognized. (See, e.g., 242 PRT 24943.) In light of the inherently weak probative value of the Reynolds encounter and the unavoidable prejudice such evidence would create, the trial court did not abuse its discretion in excluding the evidence in the manner it did. Moreover, the proper exclusion of this evidence under

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> In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:
>
> (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.
>
> (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

157. At one point, the defense represented that it had evidence of other similar instances of Santiago spending the night with a person she met in a bar. However, when pressed by the trial court, the defense backed off and indicated it would rely only on the Reynolds encounter. (242 PRT 24941, 24943-24944.)

Evidence Code section 352, did not violate any of appellant's federal constitutional rights. (*People v. Snow, supra,* 30 Cal.4th at p. 90.) Finally, because of the inherently weak probative value of the Reynolds encounter, a more favorable result is not reasonable had the evidence been admitted. Thus, any error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

XLII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT EXCLUDED CONTESTED EVIDENCE THAT TWO DETECTIVES WERE UNTRUTHFUL IN TESTIMONY IN ANOTHER CASE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by excluding from trial, evidence that two detectives involved in the Santiago investigation (Fullmer and Henderson), violated a criminal suspect's *Miranda* rights and lied under oath in another case. (3 AOB 967-993.) To the contrary, the trial court reasonably exercised its discretion to exclude ambiguous evidence of misconduct by the detectives, who were not critical witnesses at trial, and which would have taken considerable time to litigate. Because the trial court's ruling was not an abuse of discretion, it did not violate appellant's constitutional rights.

A. Procedural Background And Ruling

On March 2, 1987, the defense filed a motion seeking discovery of the San Diego Sheriff's Office personnel files on deputies Fullmer, Henderson, Fisher, and Hartman, based on events in another case, that of Evanna Cavanaugh. (45 CT 9784-9800.) It was alleged that the requested discovery would provide "instances of unconstitutional conduct on the part of these officers" and a judge in the other case found that Fullmer "lied under oath." (45 CT 9800.) Included in support of supplemental points and authorities filed March 11, 1987, was a partial transcript of proceedings on January 14, 1987, in *People v. Evanna Marie Cavanaugh*, San Diego County Superior Court no. CRN 10868. (45 CT 9896-9942.) On March 12, 1987, following a hearing on the motion, the trial court conducted an *in camera* review of the Sheriff's records and found one discoverable item – an investigation arising out of the

Cavanaugh case concerning Detectives Fullmer and Henderson. (80 PRT 4390-4391.)[158] The trial court ordered the Sheriff to prepare a list of witnesses from the investigation to turn over to the defense and prosecution. (45 PRT 4390.)

On March 25, 1987, the defense filed a supplemental motion for discovery of the Sheriff's investigative reports and conclusions from the *Cavanaugh* case. (46 CT 10050-10064.) Following a hearing on March 30, 1987, the trial court ordered that all of the investigative reports (excluding the conclusions) and interview tapes and transcripts would be provided. (85 PRT 4951-4953.)[159] Also included in the discovery were copies of transcripts used in the investigation (presumably transcripts of hearings in the *Cavanaugh* case which initiated the investigation). (88 PRT 5341-5342.)

On April 26, 1988, the defense indicated its intent to request that evidence from the *Cavanaugh* case be (1) considered by the trial court is ruling on *in limine* motions, (2) considered in support of a request to reopen a defense search and seizure motion, and (3) admitted as impeachment during the jury trial. (237 PRT 24374-24377.) The prosecution objected under Evidence Code section 352, noting that it would take "a long time to go through the entire *Cavanaugh* case" which would be "an undue consumption of this Court's time." (237 PRT 24374-24375.) The trial court responded to the objection by noting that it had "already read all that material" so it was "perhaps more important than this Court's consideration of the *Cavanaugh* material for purposes of my own rulings on *in limine* motions is consideration of the

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158. The reporter's transcript from the *in camera* hearing was sealed. (45 PRT 4390.) A copy of the Sheriff's records was filed under seal as Court Exhibit 1. (23 CT 4843.)

159. The excluded material is marked in Court Exhibit 1 with pencil. (85 PRT 4954.)

Cavanaugh material for the jury consumption." (237 PRT 24375.) The trial court put the issue over for briefing or further argument. (237 PRT 24378-24379.)

The matter came on for argument on May 2, 1988. (238 PRT 24402.) At that time, the defense agreed with the trial court that it was seeking to have the trial court consider the *Cavanaugh* material in its determination of the *in limine* motions and to present the material during the jury trial on the issue of the detectives' credibility and habit of violating defendants' constitutional rights. (238 PRT 24406.) As part of that position, the defense sought to present two witnesses – the internal affairs investigating detective (Lane) and another person (Susan Biery) whose role was not divulged on the record – to solicit the investigation results. (238 PRT 24403.) The defense noted, however, that by virtue of the *in camera* review, the trial court had already reviewed the entire *Cavanaugh* material, including the conclusions (238 PRT 24410), which the trial court later acknowledged. (238 PRT 24494.) Indeed, the trial court stated that it had read through all of the *Cavanaugh* investigation prior to hearing any *in limine* testimony from Fullmer and Henderson and "had that in my head" when it "heard them testify." (238 PRT 24494.) Thus, the request to have the trial court consider the *Cavanaugh* material in deciding the *in limine* motions was essentially a *fait accompli*.

However, as to admission of the material before the jury, the trial court concluded that the two detectives were "not the prime prosecution witnesses," they were "tangential witnesses" (238 PRT 24496), the evidence was ambiguous at best on showing deceit (238 PRT 24500, 24507), Santiago provided substantial corroborated evidence about her attacker prior to appellant becoming a suspect (238 PRT 24496-24497), and the minimal probative value was substantially outweighed by the undue consumption of time it would take to litigated the *Cavanaugh* case (238 PRT 24497-24498, 24507).

B. Argument

Appellant contends the *Cavanaugh* case material would have provided four specific instances of conduct by the two detectives relevant to their credibility: (1) Detective Henderson continued to question the murder suspect after she requested counsel; (2) Detective Henderson allegedly gave misleading testimony in *Cavanaugh* about what occurred after the suspect requested counsel; (3) Detective Fullmer allegedly gave false testimony about seeing a tape recorder in the suspect's purse when it was sitting on a counter in the residence where the murder occurred; and (4) Detective Fullmer allegedly gave false testimony about seeing the tape recorder's on-light when he moved the purse. (3 AOB 989-990.)[160]

Evidence Code section 787 prohibits admission of specific instances of a witness's conduct, other than felony convictions, to attack or support the witness's credibility.[161] However, that limitation was abrogated as to criminal

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160. Although not included in appellant's specification of erroneously excluded evidence (which is only evidence from the *Cavanaugh* case), in his section entitled C. Statement of Facts, appellant points to (1) the ruling that appellant's *Miranda* rights were violated during his interview with Henderson and Fullmer, and (2) "[a]t least two other cases involved blatant *Miranda* violations by these detectives. (See CT 9412.)" (3 AOB 980-981.) However, evidence of these additional acts was never offered *in limine* or at trial. They were merely offered in support of appellant's motion to discover the Sheriff's records. (45 CT 9911-9912.) The trial court may not be faulted for excluding evidence which was not offered. Moreover, there is no reference to any cases, much less two cases of blatant *Miranda* violations at CT 9412. (43 CT 9412.) Even presuming appellant meant to refer to 45 CT 9912, that is, again, part of appellant's discovery motion and references appellant's case and the *Cavanaugh* case, but no others.

161. Evidence Code section 787 provides:

> Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a

cases by the enactment of Proposition 8 on June 8, 1982. (*People v. Harris* (1989) 47 Cal.3d 1047, 1081; see also *People v. Ayala, supra*, 23 Cal.4th 225, 301.) Nonetheless, the constitutional enactment did not forbid excluding evidence which fell within the ambit of Evidence Code section 787 if a trial court properly ruled that the evidence should be excluded under Evidence Code section 352. (*People v. Ayala, supra,* 23 Cal.4th at p. 301.) Impeachment evidence other than prior felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation and trial courts should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value. (*People v. Wheeler, supra*, 4 Cal.4th 284, 296-297.)

Appellant contends the trial court abused its discretion in excluding the evidence because, he asserts, the credibility of Henderson and Fullmer was a central focus of the defense regarding the Santiago. His efforts to support his claim fail. Appellant says there was a dispute as to when he became a suspect, but points to a minor difference between Henderson and Fullmer, which occurred in their pretrial testimony and was never presented at trial. (3 AOB 984, fn. 810.) He also claims the defense sought to establish that appellant was a suspect months before the December lineup identification by Santiago. (3 AOB 985.) Again, however, the alleged contradictory evidence was not offered at trial, but was part of a pretrial suppression motion. (*Id.*, fn. 811.) Moreover, the cited portion of the defense submission – part of a statement of facts – provides no support for a claim that appellant was a suspect on October 26 (see 11 CT 2279, 2308-2311)[162] which explains why it was not offered at trial.

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witness.

162. At 11 CT 2279, the defense pleading indicates a newsman got a tip pointing to appellant. At 11 CT 2308-2311, the pleading describes a meeting between the detectives and members of Rhonda Strang's family the day after

Appellant claims the truthfulness of the detectives' testimony about their hospital contacts with Santiago was "crucial." (3 AOB 985.) However, he cites only one instance of contradictory evidence about Santiago's hospital statements by a hospital nurse at a pretrial hearing before Judge Hammes was assigned to the case (in which the nurse testified Santiago identified the brown Colt as the suspect's car), which was never presented at trial.

Appellant claims the detectives' testimony about the Seattle contact with Santiago and the December lineup identification was also "crucial" but cites no contradictory evidence whatsoever. There was no dispute that Santiago and the detectives went for a drink at the hotel bar after Santiago identified appellant in the lineup. (see 3 AOB 779.) Appellant concedes Fullmer's description of Santiago's identification as "immediate" was not presented to the jury, leaving the jury with Santiago's estimate of a couple of minutes. (see 3 AOB 778, fn. 581, 986, fn. 812.)[163/] There was no dispute that Santiago identified appellant in a photographic lineup on the night of December 14, and saw, but was not shown, the photographic lineup and did not make an identification, the next day at the Sheriff's office. (48 TRT 9005-9006; 49 TRT 9260.)

Appellant claims the detectives' credibility was crucial in determining if the photographic lineup was intentionally constructed in a suggestive manner. (3 AOB 986-987.) However, the admissibility of the lineup identification was litigated pretrial and determined objectively, not based on any suggestive

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her murder, in which several family members generally remembered appellant's name being mentioned and Rick Adler specifically remembered telling the detectives that he and appellant visited Rhonda Strang the night before the murders.

163. In footnote 812 (3 AOB 986), appellant asserts that the *Cavanaugh* evidence was relevant to the *in limine* eyewitness identification issues. However, as noted above, both the defense and the trial court recognized that the trial court "had [the *Cavanaugh* material] in my head" when it heard the detectives testify. (238 PRT 24494.)

intent.[164] The jury was also free to evaluate the suggestiveness of the lineup, based on an objective evaluation of the lineup.

Appellants points to conflicts in what happened during the driveby which resulted in Santiago identifying appellant's house. However, Detective Fullmer testified as a defense witness that while he was driving past appellant's house, someone said "this house" or "what about this house," after which Santiago identified the house. (48 TRT 9009-9010.) To be sure, Detective Fullmer's testimony was crucial to the defense because no one else in the car supported the view that someone pointed out appellant's house before Santiago identified it. (39 TRT 7499-7500 [Santiago]; 57 TRT 10913, 10915 [Zuniga], 10934-10935 [Fisher].) It was crucial to the defense that Fullmer's version of the driveby be believed, and not viewed as dishonest in his testimony.

To be sure, Detectives Fullmer and Henderson were involved in the Santiago case and provided testimony about the scene and the investigation. But, as the trial court correctly found, they were tangential to the main issue of Santiago's credibility. Appellant says the trial court was also wrong in finding Santiago corroborated in a variety of ways prior to appellant becoming a suspect. However, rather than disputing the corroboration, he merely points to a few aspects of Santiago's recollection which were not corroborated. (See 3 AOB 988.) Even at that, only her recollection of the licence plate – all numbers – was actually inconsistent with appellant's car. The lack of a computerized voice in the car could simply be that it was not working at that time. The evidence strongly supported the inference that appellant's car had louvers on his windows at the time of the abduction. Santiago's description of appellant's eyes as bulging was consistent and even if it came later in her contact with the police, it came before she know appellant was a suspect or anything about him.

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164. Moreover, the trial court had the *Cavanaugh* material in mind when it heard the detectives' pretrial testimony. (238 PRT 24494.)

Appellant faults the trial court for minimizing the *Cavanaugh* material as merely raising an eyebrow and finding that an undue amount of time would be consumed. (3 AOB 987, 989-990; see 238 PRT 24497.) But all he does is repeat his already refuted claim that the detectives' credibility was crucial. Moreover, appellant is simply incorrect in asserting that his evidence of misconduct could quickly and easily by proven.[165/]

The initial discovery consisted of a list of the witnesses. (80 PRT 4390.) When the defense sought discovery of the reports, their motion included a declaration listing 16 witnesses, which were "most" of the witnesses on the discovery list. (46 CT 10061-10063.) In the hearing on the defense request for the reports, the trial court stated that the materials in the *Cavanaugh* file consisted of "two volumes of files" resulting from the "long, lengthy investigation." (85 PRT 4950; see also 85 PRT 4954 [trial court noting that "there's an awful lot of pages" in the material].) In addition to the material from the *Cavanaugh* Sheriff's investigation, the parties were also provided with transcripts of the actual hearings in the *Cavanaugh* case which consisted of "several hundred pages." (88 PRT 5342.) Additionally, when the trial court indicated in its ruling that presenting the *Cavanaugh* material on appeal "would be to try the entire case, put on all of the evidence with all of the officers that were present, and it would take probably weeks to put all of that on" (238 PRT 24497), the defense did not refute that estimate in its response to the ruling. (238 PRT 24498, 24508.) Indeed, while appellant has attempted to neatly limit the *Cavanaugh* material to four points, nowhere in the trial court did the defense indicated it intended such a limited presentation. Moreover, it is naive to believe the inferences sought to be raised by the defense would not be

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165. At the time of the trial court's ruling (May 2, 1988), the pretrial motions in front of Judge Hammes alone had taken well over a year. (70 PRT (February 9, 1987).)

contested by the prosecution. In addition to challenging the inferences by litigating the entire *Cavanaugh* case, the prosecution would also be able to bring in character witnesses to support the detectives' credibility. (Evid. Code, § 790.)

Notably, in assessing the probative value of the *Cavanaugh* material, the trial court had not merely reviewed that material with an eye toward how a trier of fact might assess it in light of the quality and nature of the detectives' testimony, the trial court had actually acted as trier of fact in assessing the detectives' credibility in light of the *Cavanaugh* material as part of its *in limine* hearing. (238 PRT 24494.)

What the trial court realistically saw in assessing the impact of admission of this material was a lengthy, time-consuming and jury-attention-diverting nitpicking war of attrition over a collateral credibility issue. (See *People v. Ayala, supra,* 23 Cal.4th at p. 301.) Evidence Code section 352 gives the trial court broad power to prevent such occurrences. (*Ibid.*) There was no abuse of discretion. Because there was no abuse of discretion, there was also no violation of appellant's constitutional rights. (*Ibid.*) Finally, because, as the trial court found, the impeaching evidence was at best ambiguous and involved two tangential witnesses, whose testimony was, for the most part, uncontested or corroborated by other witnesses, any error was harmless.

XLIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN EXCLUDING EVIDENCE THAT PHOTOGRAPHS OF APPELLANT OTHER THAN THE ONE USED IN THE PHOTOGRAPHIC LINEUP WERE AVAILABLE FOR USE IN THE LINEUP

Appellant contends the trial court prejudicially erred and violated his constitutional rights by excluding evidence that there were several photographs

taken of him following his arrest, which could have been used in the photographic lineup, rather than the one that was used. He contends the other available photographs were less suggestive than the photograph used and the detective who assembled the photographic lineup intentionally selected a suggestive photograph. (3 AOB 994-997.) The trial court did not abuse its discretion or violate appellant's constitutional rights in excluding the evidence which was not relevant and was more prejudicial than probative.

A. Background

At trial, the defense called San Diego Sheriff's Deputy Frank Winter, who testified he pulled over appellant on December 13, 1984, and took him to the Lemon Grove Sheriff's substation, where he was asked to take photographs of appellant. (54 TRT 10122-10123.) After the defense asked to mark the photographs, the trial court, out of the jury's presence, inquired as to the relevance of the photographs, a point the prosecution raised in an objection. (54 TRT 10123-10124.) During the *in camera* hearing, the defense indicated it was relevant to show that there were other photographs of appellant available to use in the photographic lineup which were less suggestive than the photograph which was used. (54 TRT 10124-10125.)

However, the trial court ruled that whether the photographic lineup could have been better by use of another available photograph was "a different trial. That's not the trial we're doing here." (54 TRT 10126-10127.) The trial court ruled that the issues for the jury were whether the photograph used in the lineup was suggestive and how that impacted Santiago's identification of appellant. (54 TRT 10127.)

The defense argued that the lineup was inherently suggestive because of the selection strategy behind the photograph of appellant which was used in the lineup, but the focus "isn't [the detective who prepared the photographic line]

. . . [i]t's the identification by Miss Santiago." (54 TRT 10131; see also 54 TRT 10135 ["Our position is we are not trying to [show the detective is a bad cop] . . . all we are trying to show is that there is other photos taken"].) The trial court agreed that the defense could try to raise a reasonable doubt as to the reliability of Santiago's identification by showing a misidentification due to an unfair presentation, but concluded that whether other photographs were available was not relevant to that showing. (54 TRT 10132.) "If it wasn't fair and if it suggested to her the wrong person, then it wasn't fair, and it doesn't matter what he did." (*Ibid.*) "[Y]ou can't put [the detective] on trial separately when it doesn't affect that lineup as far as [Santiago] is concerned." (54 TRT 10133.) "Other wise, we are off talking about [the detective] and his motives that have no connection now to her final identification." (*Ibid.*) The trial court concluded that what was relevant was whether the photographs which Santiago did view were suggestive. If so, it made no difference whether there were better photographs or worse photographs which could have been used. (54 TRT 10134.)

B. Argument

The deferential abuse of discretion standard applies to review of a trial court's ruling on the relevance of proffered evidence. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123.) The trial court similarly enjoys broad discretion in ruling on the admissibility of evidence under Evidence Code section 352. (*People v. Lewis, supra,* 26 Cal.4th at pp. 374-375.) The trial court did not abuse its discretion in ruling that availability of the other photographs was irrelevant. As the trial court stated, the photographic lineup was before the jury and any suggestiveness which existed in the photographic lineup could be evaluated by the jury and used to weigh the reliability of Santiago's identification of appellant. (See *People v. Brandon, supra,* 32 Cal.App.4th at

p. 1053 ["The similarity in appearance of members of a photographic lineup, and the weight to be accorded such, are matters completely within the province of the trier of fact to resolve"].) Whatever motivated the detective in selecting the photograph for the lineup was irrelevant to the lineup's suggestiveness and Santiago's identification. Moreover, the trial court also found that raising the issue of other photographs and the detective's good or bad job of selecting the photograph for the lineup was "a different trial" (54 TRT 10126) which would send the jury "off again in the daisy fields." (54 TRT 10129.) Not only was there no probative value, the proffered evidence promised to confuse the jury and cause undue consumption of time. The trial court did not abuse its discretion on either basis.

Appellant does not quarrel with the trial court's reasoning, but, instead, argues that proof that the detective purposely chose a suggestive photograph for the lineup was relevant to show that Santiago had been led through the entire pretrial identification process particularly because of the "void" in the record as to what was said in many of the pretrial contacts with Santiago. (3 AOB 994.) However, that theory was not presented to the trial court. In fact, the defense explicitly indicated that the focus of the evidence was not the detective, but Santiago's identification of appellant. (54 TRT 10131.) Appellant's new theory on appeal is waived. (Evid. Code, § 354; *People v. Valdez* (2004) 32 Cal.4th 73, 108-109 [third party guilt theory of admissibility waived by defense counsel's statement]; *People v. Smith* (2003) 30 Cal.4th 581, 629-630 [basis for hearsay statement admissibility waived when not presented to trial court].) Moreover, appellant's new theory still demonstrates no probative value.

There were only two identification's Santiago made: the photographic lineup identification of appellant and the driveby identification of appellant's house. As the trial court found, any suggestiveness in the lineup was apparent from viewing the lineup and the detective's intent could not change that. It is

simply speculation to claim that a suggestive intent by the detective could have filled any evidentiary "void" in the pretrial contacts. The fact is, there was simply no evidence of any suggestiveness apart from that which may have existed in the photographic lineup. In contrast, any suggestiveness of the house identifications was well supported by actual evidence of multiple drivebys and Detective Fullmer's testimony that someone said something to Santiago about appellant's house prior to her identification.

Appellant's claim of error is waived and without merit. As there was no abuse of discretion in excluding the evidence of the other photographs, there was also no violation of appellant's constitutional rights. (*People v. Lewis, supra,* 26 Cal.4th at p. 375.)

XLIV.

THE TRIAL COURT DID NOT ERR IN ADMITTING BLOOD ANALYSIS EVIDENCE OVER APPELLANT'S *KELLY* OBJECTION

Appellant contends the trial court prejudicially erred and violated his constitutional rights by admitting results of ABO, electrophoresis, and immunoglobulin antibody testing. Specifically, he claims (1) the ABO test results failed prong 3 of *People v. Kelly, supra*, 17 Cal.3d 24, 30; (2) electrophoretic testing failed prong 3; and (3) immunoglobulin antibody testing failed prong 1 and 3. (4 AOB 1124-1145.) Appellant's prong three complaints raise issues involving weight, not admissibility and his prong on challenge is without merit.

> In *People v. Kelly* (1976) 17 Cal.3d 24 [130 Cal.Rptr. 144, 549 P.2d 1240] (*Kelly*), this court held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. (*Id.* at p. 30.) The second prong requires proof that the witness testifying about the technique and its application is a

> properly qualified expert on the subject. (*Ibid.*) The third prong requires proof that the person performing the test in the particular case used correct scientific procedures. (*Ibid.*) This court further held that proof of a technique's general acceptance in the relevant scientific community would no longer be necessary once a published appellate decision had affirmed a trial court ruling admitting evidence obtained by that scientific technique, "at least until new evidence is presented reflecting a change in the attitude of the scientific community." (*Id.* at p. 32.)

(*People v. Bolden, supra,* 29 Cal.4th at pp. 544-545.)

A trial court's decision on the first prong (general acceptance) is subject to limited *de novo* review. (*People v. Barney* (1992) 8 Cal.App.4th 798, 810.)[166] However, "if a published appellate decision in a prior case has already upheld the admission of evidence based on such a showing, that decision becomes precedent for subsequent trials in the absence of evidence that the prevailing scientific opinion has materially changed." (*People v. Venegas* (1998) 18 Cal.4th 47, 53; see also *id.* at p. 76.)

On the other hand, the third prong inquiry is "case specific." (*Id.* at p. 78.) The third prong assumes the methodology and technique is generally accepted and "inquires into the matter of whether *the procedures actually utilized in the case* were in compliance with that methodology and technique." (*Id.* at p. 78, italics in orig.) "The issue of the [third prong] inquiry is whether the procedures utilized in the case at hand complied with that technique." (*Id.* at 80.)

"[T]his part of the *Kelly/Frye* standard insures that the technique was performed reliably *in each particular case* before the evidence can be put to the trier of fact." (*People v. Reilly* (1987) 196 Cal.App.3d 1127, 1153.) What must

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166. "Ordinarily, the appellate court will confine its review to the record, independently determining from the trial evidence whether the challenged scientific technique is generally accepted. Occasionally, however, it may be necessary for the appellate court to review scientific literature outside the record." (*Ibid.*)

be shown under the third prong is that the test actually performed was the same test that was generally accepted. (*People v. Barney, supra,* 8 Cal.App.4th at p. 824 ["If it is not established that correct scientific procedures were used in the particular case, it cannot be known whether the test actually conducted was the one that has achieved general scientific acceptance"]; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1193 [defendant did not make third prong challenge when he failed to claim in the trial court that the expert did not to apply the procedure correctly in the particular case]; *People v. Venegas, supra,* 18 Cal.4th at p. 79 [whether specific steps in the proffered test procedure were in compliance with the long-standing and accepted methodology presents questions under the third prong].)

A trial court's decision on the third prong is subject to deferential review. (*Id.* at p. 82 [review of the trial record supports the trial court's determination]; see also *People v. Bolden, supra,* 29 Cal.4th at p. 548 [trial court resolves conflicts in evidence and it's implied finding on third prong upheld where supported by substantial evidence].)

A. *Kelly* Third-prong Challenge To ABO Testing

Appellant contends the trial court erred in concluding that ABO testing could not be subject to a challenge under *Kelly*. In its written opinion, filed March 27, 1989, the trial court stated:

> Considerable evidence was presented in this hearing on the correctness of scientific procedures employed during Absorption-Elution tests on aged blood evidence. After careful review of this evidence, this Court concludes that Absorption-Elution testing on aged blood evidence is not the proper subject of a Kelly-Frye hearing, and the correctness of the scientific procedures employed is therefore a jury question. Such testing is not a "new scientific technique", nor is it an old scientific technique under new consideration in the relevant scientific community.

(62 CT 13842.)

As appellant correctly points out, the trial court erred because even though a scientific technique is not new and is generally accepted, which fulfills the first two prongs of the *Kelly* test, the third prong remains. (*People v. Venegas, supra,* 18 Cal.4th at p. 78-80.) However, in asserting that the ABO testing in this case failed to meet the *Kelly* third prong, appellant relies on another error by the trial court, i.e., its conclusion that every step utilized by a lab, from receipt of evidence to recording of results, must meet the general acceptance requirement. (See 62 CT 13832-13833.) The alleged deficiencies in the ABO testing in this case went to weight, not admissibility.

The trial court properly recognized that case law limited the *Kelly* prong-three admissibility showing to "only those steps necessary to the performance of the new scientific test and not those steps that scientists employ as control measures against possible errors in production and reporting." (62 CT 13835.) Nonetheless, the trial court concluded that testimony in the hearing "clearly reveals that the scientific concept of 'correct scientific procedures' entails both the steps necessary to perform the test, and the steps necessary to control the testing and reporting errors." (*Ibid.*, underlining in orig.) The trial court then proceeded to analyze the third prong attack on the perceived basis of the scientific concept of correct scientific procedures rather that the correct legal basis.

Based on the trial court's erroneous conclusion, appellant asserts that the AOB testing by the sheriff's lab failed prong three because the lab notes do not, themselves, delineate the lab protocol for conducting the testing and the SERI ABO testing failed prong three because no confirming test was conducted and a mixed standard was used. (4 AOB 1131-1132.)

The third prong "assumes the methodology and technique in question has already met [the general acceptance] requirement." (*People v. Venegas, supra,* 18 Cal.4th at p. 78.) The prong three inquiry is "whether *the procedures*

actually utilized in the case were in compliance with that methodology and technique, as generally accepted by the scientific community." (*Ibid.*) If not established, "it cannot be known whether the test actually conducted was the one that has achieved general scientific acceptance." (*People v. Barney, supra,* 8 Cal.App.4th at p. 824; see also *People v. Pizarro* (2003) 110 Cal.App.4th 530, 557 [the proper scientific procedures are those that have been deemed generally accepted under the first prong].)

Thus, in *Venegas*, this Court stated that "[w]hether specific steps in the FBI's RFLP analysis . . . were in compliance with long-standing and accepted methodology, presents questions of correct scientific procedures properly considered under the third prong of the *Kelly* rule." (*People v. Venegas, supra,* 18 Cal.4th at p. 79.) Any shortcomings other than the failure to use correct, scientifically accepted procedures affects the weight of the evidence not its admissibility. (*Id.* at p. 80.)

Appellant does not cite to any evidence that the steps taken by the sheriff's lab personnel and the SERI personnel in performing the ABO absorption-elution tests were other than those steps in the generally accepted procedure. In fact, the evidence demonstrates that the ABO testing by the sheriff's lab and SERI was properly performed using correct scientific procedures.

Charles Merritt testified at trial that he was a criminalist with the San Diego Sheriff's crime lab. (28 TRT 5070.) He conducted AOB typing of blood from Anne Swanke (28 TRT 5104), Shannon Lucas (28 TRT 5112), appellant (28 TRT 5114), and a blood stain on the sheepskin seat cover from the passenger seat of appellant truck (28 TRT 5115-5123).[167] At the *Kelly* hearing, Merritt testified that he received training in ABO typing of wet and

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167. Swanke was type "O", Shannon Lucas was type "A", appellant was type "A", and the stain on the seat cover was type "O".

dried blood as part of his education and training. (149 PRT 13952-13957.) Merritt began actually performing ABO and other testing on casework in 1982. (149 PRT 13958.) He attended seminars which included ABO testing, regularly reviewed literature, and had previously qualified as an expert on ABO typing. (149 PRT 13959-13960.) Merritt described the ABO testing and results he obtained on the blood of Anne Swanke, Shannon Lucas, appellant, and the sheepskin stain. (149 PRT 13974-13986.) None of the steps taken by Merritt were challenged as inconsistent with proper ABO testing procedures.

Appellant argues that Merritt did not record the testing protocol in his lab notes. (4 AOB 1131.) But there is no evidence that detailing every step in the test procedure was a part of the AOB test procedure. Appellant's expert, Dr. Grunbaum, testified to his opinion that a detailed description of the test procedure should be made, but he did not testify that such steps were part of the ABO test procedure itself nor did he challenge the steps taken by Merritt in conducting the ABO tests. (212 PRT 20554-20558.)

Similarly, appellant's complaint that SERI did not do a second confirming test and used a mixed standard raises issues outside the scope of the *Kelly* prong three inquiry of whether the steps in the ABO test were properly performed. Appellant complains that there was no showing that the lack of a confirming test and use of a mixed standard were "deemed acceptable by a consensus of the scientific community." (4 AOB 1131-1132.) However, "[t]he *Kelly* test's third prong does not apply the *Frye* requirement of general scientific acceptance." (*People v. Venegas, supra,* 18 Cal.4th at p. 78.) Whether a confirming test was performed does not impact the steps properly taken in performing the ABO test. Similarly, whether a mixed standard was used does not change the fact that a standard was used in performing the ABO test. "The issue of the [third prong] inquiry is whether the procedures utilized in the case complied with that technique." (*Id.* at p. 81.)

At trial, Brian Wraxall testified that ABO testing was conducted by SERI analysts (30 TRT 5566) on blood from Jodie Santiago (30 TRT 5554, 5576), appellant (30 TRT 5581), Shannon Lucas (30 TRT 5581), Anne Swanke (30 TRT 5585), the sheepskin seat cover stain (30 TRT 5602), and fingernail clippings from Anne Swanke (30 TRT 5606-5607).[168] As part of the *Kelly* hearing, Wraxall testified to his educational background, training, and employment as a forensic serologist, described the ABO testing techniques used at SERI, and identified a chart (Exhibit 126) which summarized the SERI test results, including ABO testing. (105 PRT 7301, 7303-7308, 7329-7331, 7333, 7348; 107 PRT 7584-7586, 7617, 7626.)

Thus, the evidence demonstrated that proper scientific procedures were used, and appellant's complaints involve only questions of weight, not admissibility.

B. *Kelly* Third-prong Challenge To Electrophoretic Testing Based On Lack Of Double-reader Agreement

Appellant contends that the failure to demonstrate double-reader agreement of an electrophoretic result is a failure under the *Kelly* third prong and the availability of a photograph of the electrophoretic result is not a generally accepted substitute. (4 AOB 1132-1137.) His argument is premised on a faulty base. Like his challenge to ABO prong three, appellant's argument focuses not on whether the proper electrophoretic techniques were used, but on how the interpretation of the test results was accomplished. Thus, he argues "double-reader agreement was needed to limit the opportunity for reader bias to affect the call." (4 AOB 1132.) But the existence of reader bias and its

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168. SERI obtained the same typing results as the San Diego Sheriff's lab on Swanke, appellant, Shannon Lucas, and the sheepskin stain. (30 TRT 5583-5584, 5587, 5602.)

impact on credibility are matters well-within the ability of a jury to assess. This Court has noted that even readily apparent missteps in the prong three procedures themselves amount to merely careless testing affecting the weight of the evidence, not its admissibility. (*People v. Venegas, supra,* 18 Cal.4th at p. 81.)

Whether the electrophoretic result is read/interpreted by one or more readers does not examine whether the test itself was conducted with the scientific procedures which have resulted in its general acceptance. Use of a double read is part of quality assurance, which is the same for use of photographs. (119 PRT 9348, 9356; 127 PRT 10770.)[169] While it may be good as a matter of policy to require double-reader agreement (120 PRT 9591), use of a double-reader is not necessary for a reliable result. (127 PRT 10759.) Indeed, single serologist labs existed, which necessarily resulted in a single reader. (128 PRT 10800-10801.) The question under prong three is whether the electrophoretic test was run according to accepted methodology and procedures, not how many readers interpreted the test results.

Appellant claims that a crucial part of prong three is the procedure by which matches are called. (4 AOB 1132.) His reliance on *Venegas* is misplaced. The generation of autorads and the criteria for determining a match in then-existing RFLP DNA technology involved applying correct generally accepted scientific procedures for conducting the test itself. (See *People v. Venegas, supra,* 18 Cal.4th at p. 81.) In electrophoretic testing, the interpretation of the test results – i.e., reading and calling the gel plate – is a

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169. Calls for quality assurance measures are indicators that the scientific technique has achieved general acceptance. (107 PRT 7665, 7666.) While the adoption of such quality assurance measures (by general consensus or individual labs) may enhance the reliability of the result, they do not change the scientific procedures which are part of the generally accepted scientific technique. (132 PRT 11531.)

matter of experience of the reader. (116 PRT 8902; 119 PRT 9342.) That experience, as well as any alleged bias, the absence of double-reader agreement or the alleged inadequacy of photographs are all matters affecting the weight of the evidence, not its admissibility under prong three.[170]

C. *Kelly* Third-prong Challenge To Electrophoretic Testing Based On Failure To Follow Lab Protocol

Appellant contends that SERI's "failure to follow [electrophoretic] protocols" violated prong three because protocol deviation was not shown to be an acceptable procedure. (4 AOB 1137-1138.) However, this Court has made it clear that the third prong of the *Kelly* test "does not . . . cover all derelictions in following the prescribed scientific procedures." (*People v. Venegas, supra,* 18 Cal.4th at p. 81.) Shortcomings amenable to evaluation by jurors without the assistance of expert testimony, amount to only careless testing affecting weight not admissibility. (*Ibid.*) The electrical current run through an electrophoretic plate is, in effect, the engine which drives the movement of the various enzymes and proteins, and it is that movement across the plate which creates bands that are revealed when the plate is stained. (110 PRT 8062-8075.) It also creates heat which can increase diffusion, but is offset by use of a cooling plate. (*Ibid.*) Once the process is explained it is plain that shortcomings in the amount of current applied or the length of time it is applied can be evaluated by the jury and affects weight, not admissibility.

Moreover, even if the electrical current and time variations were matters of admissibility, appellant's argument ignores the trial court's findings:

> [T]he defense challenged SERI's variations from their protocols with respect voltage and time. While defense experts testified to the necessity

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170. Nonetheless, the trial court excluded electrophoretic test results in which neither an adequate photograph or preserved gel was available to support the reader's call. (62 CT 13841.)

> of strict adherence to protocols, none of the experts seriously disputed the fact that voltage and time requirements for electrophoretic runs hold permissible parameters of variation. Higher voltage and shorter running times can produce results comparable to lower voltages and longer running times. As long as proper standards are run on each plate and these turn out with good resolution and separation of bands, then the analyst can be assured the test was run properly. There was no evidence that either SERI or the San Diego Sheriff's Laboratory varied improperly from the protocols for voltage and time.

(62 CT 13841, underlining added.)

Indeed, appellant's own witness, Dr. David Sammons, acknowledged that he varied the electrophoretic voltage and testified that variation in the length of time the voltage is applied "is not as important." (189 PRT 18053.) Dr. Sammons explained that because of the controls which are part of the electrophoretic run, it is not required that the time protocol "be rigorously followed." (189 PRT 18053-18054.) Thus, Dr. Sammons agreed that "[i]n my laboratory," it is not important that the run be 200 volts for two hours and 20 minutes; it may be two hours and 15 minutes, and might be two and a half hours. (189 PRT 10854.) Of course, Dr. Sammons also testified that while variations of 15 minutes "don't make a difference," "[i]f you're talking, now, hours, it can make a difference." (189 PRT 10856.) Nonetheless, Dr. Sammons made it clear that "the way we have our protocols, we know where the limits of the slack is in the system." (198 PRT 18057.)[171/]

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171. As Dr. Sammons explained regarding the protocol for isoelectric focusing, which called for 14,000 volt hours, "how you can get 14,000 volt hours by any combination of time and volts, and in isoelectric focusing you end up at the same place." (198 PRT 18057.) However, he added "a caveat" that heat was another variable which would impact the plate development and prevent wide variations between plates which were being used for comparison. (*Ibid.*)

The evidence fully supports the trial court's finding that the SERI testing did not extend outside the range of acceptable variation and preclude admission under prong three.

D. The *Kelly* Third Prong Does Not Prohibit Expert Interpretation Of Test Results

Appellant claims that the expert electrophoretic test result interpretation in this case was substantially based on subjective criteria; that the legal and scientific community rejects expert interpretation which is based on subjective criteria; and that state law prohibits, and *Kelly* does not permit, admission of "subjective, unreliable scientific evidence." (4 AOB 1138-1140.)

Appellant's argument, like the argument addressed in sub. B, *supra*, founders on the fact that *Kelly* addresses the scientific acceptance of a new technique and whether the technique was correctly performed; it does not address the expert interpretation of the results of a scientifically accepted technique which was properly performed.

The single case which appellant claims requires "quantifiable 'match criteria'" as an essential prerequisite for admissibility under prong three is *People v. Venegas, supra,* 18 Cal.4th 47. (4 AOB 1138.) However, *Venegas* did not deal with electrophoretic testing, but with DNA testing with RFLP analysis. (*Ibid.*) The RFLP methodology, which was found in compliance with the *Kelly* prong one, produced autorads with bands reflecting base-pair sizes of forensic samples at particular DNA locations and compared the bands in order to determine whether the samples matched at those locations. (*Id.* at p. 79.) In *Venegas*, this Court ruled that the RFLP methodology was subject to a *Kelly* prong three challenge which required a showing (which was met in *Venegas*) that the laboratory performing the RFLP test used correct procedures for generating the autorads and determining a match, since those showing

depended almost entirely on the technical interpretations of experts. (*Id.* at 81.) Outside the scope of RFLP analysis, *Venegas* simply does not purport to impose any obligation regarding the basis upon which a qualified expert interprets the results of a properly-performed, scientifically-accepted technique.

Appellant also overstates the degree of expert subjectivity involved. Electrophoresis develops banding patterns on a gel plate corresponding to the enzymes or proteins that are being tested for. (See, e.g., 112 PRT 8299 [PGM type 2-1 band pattern described]; *id.* at p. 8300, 8302 [presence and number of bands determines the phenotype in the PGM system]; *id.* at p. 8304 [PGM type 1 and type 2 band pattern described]; *id.* at p. 8306-8307 [describing and demonstrating PGM banding patterns on gel plate].) It is correct that the "intensity" of the bands may vary. (112 PRT 8308.) It is also correct that whether an expert will "call" a particular result will vary with the intensity of the banding pattern and the experience of the analyst. (112 PRT 8308; 116 PRT 8896.) Thus, there are both objective and subjective components to reading a banding pattern. The banding pattern itself is plainly an objective indication of the phenotype. (119 PRT 9342-9343 ["The constraints of objective reality are that the pattern that you see on the plate is a real pattern"].) The subjective component "is knowing at what point in a stain pattern it becomes indeterminate; at what point you draw the line that says this pattern is no longer a typeable pattern." (119 PRT 9343.)

Juries are expected to make a credibility assessments of experts' opinions in a variety of fields on matters which the jury has no way of independently assessing, by taking into account relative expertise in the form of education, training and experience. The most obvious example is mental health experts who often come to opposite opinions on the basis of identical facts, and which the jury has no objective basis for crediting one and discounting the other, other than the degree of expertise. (*Cf. People v.*

Carpenter (1997) 15 Cal.4th 312, 406-407 ["'Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, *juries* remain the primary factfinders on this issue, and they *must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party.*' (*Ake v. Oklahoma, supra,* 470 U.S. at p. 81 [105 S.Ct. at p. 1095], italics added.)"] A jury's evaluation of the degree of expertise of an electrophoretic expert in making a call based on the banding patterns of a gel plate is similar to the evaluation which the jury must make is judging the opinion of a fingerprint expert is declaring a match based on latent print patterns; it is well-known that there are no set number of matching points, it is a matter of "subjective" expertise.

As this Court held in *Venegas*, the continuing viability of a *Kelly* prong three challenge to an RFLP DNA test result, unassailable under prong one, is based on the fact that whether proper procedures were followed in conducting the test may "depend almost entirely on the technical interpretations of experts." (*People v. Venegas, supra,* 18 Cal.4th at p. 81.) Passing a prong three challenge merely means the test results are admissible; they remain subject to the jury's weight assessment even though that assessment may "depend almost entirely on the technical interpretations of experts." (*Ibid.*)

Simply because an analyst's ability at interpreting a test result, which involves an element of subjectivity, is enhanced by training and experience, does not make the result unreliable or inadmissible, nor take it out of the realm of a jury's ability to judge.[172/]

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172. Moreover, the subjective aspect of electrophoretic gel plate interpretation simply does not, as appellant claims, result in different phenotype

E. *Kelly* Challenge To GM And KM Testing

Appellant claims admissibility of GM and KM test results was improper under prongs one and three. He asserts there was no showing under prong one that SERI's methodology was generally accepted, and the lack of unstained controls and photography of results failed prong three. (4 AOB 1140-1141.) However, case law upholding a *Kelly* prong one finding fatally undermines his prong one challenge, and, as with his other challenges, his prong three asserts do not undermine the prong three finding.

1. Prong One

SERI uses absorption inhibition to test GM and KM. (105 PRT 7353-7363.) Agglutination inhibition testing of GM and KM was found generally accepted in at least two cases. (*People v. Riel, supra*, 22 Cal.4th at p. 1192.) In *People v. Yorba* (1989) 209 Cal.App.3d 1017, the court concluded that "the record supports the trial court's conclusion that the scientific community accepts agglutination inhibition as a valid and reliable scientific technique" as applied to GM and KM testing. (*Id.* at p. 1025.) Moreover, in *People v. Morganti* (1996) 43 Cal.App.4th 643, the court found that the *Yorba* decision "establishes general acceptance of agglutination inhibition test performed in this case." (*Id.* at p. 659.) The agglutination inhibition test performed in *Morganti*

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opinions among differing experts. Where experts disagree on whether the band intensity is sufficient to make a call, the divergence is not on the type, but on whether the type is sufficiently identified; i.e., whether to make a call or not. (116 PRT 8896; see 165 PRT 15742-15742 [one analyst called a result 2-1, and the other did not make a call].) Appellant points to the different GC results for Amber Fisher as support for his claim of unreliable subjectivity. (4 AOB 1139, fn. 972.) He misses the mark. There was no variation between experts in the call of a specific run; there were simply several runs which resulted in two different potential GC phenotypes. (124 PRT 10175-10178.)

was the "'SERI slide rotation method'" by Gary Harmor (*id.* at p. 658), which was the same method used in appellant's case. (249 PRT 25584.)

The published decisions in *Yorba* and *Morganti* establish the general acceptance of the GM and KM absorption inhibition procedure in this case. (*People v. Riel, supra,* 22 Cal.4th at p. 1192.)

2. Prong Three

Appellant contends the failure of SERI to use unstained controls and photograph the test results rendered the GM and Km test results inadmissible under prong three. However, appellant cites no testimony or authority supporting his implied assertion that use of unstained controls and photographing results is part of the agglutination inhibition procedure. As with his earlier argument, he is simply confusing proper test procedures required for admission under prong three, with quality control measures going to weight. (See 249 PRT 25558 [double-read used to minimize error in recording result; actual testing error is relatively infrequent].) Appellant points to no impropriety in the agglutination inhibition procedures.

F. The Constitution Does Not Prohibit Expert Interpretation Of Test Results

In a reprise of his argument against admission of expert testimony based in part on subjective interpretation of test results, appellant claims the admission of such testimony violates the constitutional guarantees of due process, a jury trial, and heightened reliability in a capital case. (4 AOB 1143-1144.) Appellant does not cite, nor has respondent found any place where he raised the constitutional claim in the trial court; thus, it is forfeited. (*People v. Farnam* (2002) 28 Cal.4th 107, 165.)

However, for the reasons stated in subheading D., *supra*, simply because an analyst's ability at interpreting a test result, which involves an element of subjectivity, is enhanced by training and experience, does not make the result unreliable or inadmissible. (See *People v. Weaver* (2001) 26 Cal.4th 876, 930 ["We are unaware of any holding by the high court, and defendant cites none, requiring this court to modify its long-standing state-law-based rules governing the admissibility of evidence at the guilt phase merely because in a particular case the death penalty is a possible outcome."].)

XLV.

THE *KELLY* PRONG ONE ADMISSIBILITY STANDARD DOES NOT VIOLATE ANY OF APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends that use of general acceptance in the relevant scientific community as a test for admission of new scientific techniques violates the federal constitution. He contends the *Kelly* prong one admissibility standard unconstitutionally denied his right to a full and fair hearing on admissibility, prevents the trial judge from evaluating reliability of the proffered evidence, and allows the jury to consider objectively unreliable expert opinion. (4 AOB 1146-1152.) None of his assertions have merit.

Initially, we noted that appellant fails to point to anywhere in the record where he objected to the *Kelly* prong one standard on the basis now asserted. Thus, the claim of error is forfeited. (*People v. Farnam, supra,* 28 Cal.4th at p. 165.) Moreover, as this Court has noted, "the United States Supreme Court has never suggested that states are without power to formulate and apply reasonable foundational requirements for the admission of evidence." (*People v. Morrison* (2004) 34 Cal.4th 698, 724.)

Appellant argues the *Kelly* prong one standard undermines the trial judge's gate-keeping authority and bars relevant evidence. He is wrong on both

counts. The trial judge retains gate-keeping authority and relevant evidence is not barred. While the prong one standard evaluates the reliability of the new scientific technique by assessing whether the technique has been sufficiently established to have gained general acceptance in the particular field in which it belongs, it is still the trial judge who makes that determination. As this Court observed in *Leahy*, that admissibility determination is entirely consistent with the statutory language in Evidence Code section 801. (*People v. Leahy* (1994) 8 Cal.4th 587, 598-599.) Moreover, appellant points to no limitation on the evidence which may be presented in support of, or to refute, a finding of general acceptance.

Appellant's real argument is with this Court's retention of the *Kelly* prong standard, contrary to the rejection of that standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469]. (*People v. Leahy, supra*, 8 Cal.4th at pp. 593-604.) However, the United States Supreme Court only found that the *Frye* standard (*Frye v. United States, supra,* 293 F. 1013) had been superceded by the Federal Rules of Evidence. (*Daubert v. Merrell Dow Pharmaceuticals, Inc., supra,* 509 U.S. at p. 589; *People v. Leahy, supra,* 8 Cal.4th at p. 596.) Nothing in *Daubert* supports appellant's assertion of a constitutional requirement.

In appellant's case, where the prosecution, not the defense, was seeking to admit expert opinion based on a new scientific technique, appellant could only have benefitted by use of the *Kelly* prong one standard, because, as appellant acknowledges, use of general acceptance may be underinclusive by barring reliable evidence which is too new to have gained general scientific acceptance. The *Kelly* prong one standard is a more cautious formulation than simply submitting the matter to the trial court's discretion. (*People v. Leahy, supra,* 8 Cal.4th at p. 595; see also *id.* at p. 600-601 ["The critics of *Frye* focus primarily on its conservative nature: As previously noted, the doctrine

contemplates an undefined period of testing and study by a community of experts before a new scientific technique may be deemed 'generally accepted,' thus delaying the admissibility of evidence derived from the technique"]; *People v. Kelly, supra,* 17 Cal.3d at p. 31 [the primary advantage of the *Frye* test is its conservative nature, interposing a substantial obstacle to the admission of new scientific evidence].) The United States Supreme Court also recognized that the general acceptance standard was "uncompromising," whereas its evidentiary standard under *Daubert* was more flexible. (*Daubert v. Merrell Dow Pharmaceuticals, Inc., supra,* 509 U.S. at pp. 596-597.)

Appellant argues that use of the *Kelly* prong one standard violates his right to present a defense. His argument that the general acceptance standard is overinclusive by barring a challenge to the "inertia of consensus acceptance" (4 AOB 1148), is speculative and unsupported by any facts in the record. Moreover, appellant completely ignores that fact that the *Kelly* standard addresses only admissibility; appellant was still free to challenge the weight to be accorded that evidence by the jury. Similarly, his claim that the *Kelly* prong one standard undermines the reliability of the verdict fails because *Kelly* places a higher burden of demonstrating reliability than would be the case if admissibility were simply a matter of judicial discretion.

Even if not forfeited, appellant's argument fails to demonstrate either constitutional error or prejudice.

XLVI.

THERE IS NO SIXTH AMENDMENT RIGHT TO COUNSEL AT SCIENTIFIC TESTING OF BLOOD SAMPLES BY THE PROSECUTION BECAUSE SUCH TESTING IS NOT A CRITICAL STAGE OF THE PROSECUTION

Appellant contends he had a constitutional right to the presence of counsel at electrophoretic testing conducted by the prosecution. He contends

his attorney was not notified of the testing and such lack of notice violated his constitutional rights requiring reversal of his convictions. (4 AOB 1153-1159.) Because evidentiary testing by the prosecution is not a critical stage of the criminal proceeding, there was no right to the presence of counsel and no constitutional violation.

On May 5, 1988, appellant filed a trial brief in which he asserted, as he does on appeal, that various electrophoretic testing occurred after his arrest, but without notice to his counsel. (56 CT 12369-12386.) On August 11, 1988, the trial court concluded that the electrophoretic testing was not a critical stage in the proceedings and declined to exclude the results. (256 PRT 26433.)

In *United States v. Wade* (1967) 388 U.S. 218 [87 S.Ct. 1926, 18 L.Ed.2d 1149], the United States Supreme Court considered whether the Sixth Amendment right to counsel required an in-custody, post-indictment lineup be accompanied by notice to, and the presence of, defense counsel. Noting that its previous cases had "construed the Sixth Amendment guarantee to apply to ""critical"" stages of the proceedings" (*United States v. Wade, supra,* 388 U.S. at p. 224), the Court stated

> in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

(*Id.* at p. 226, fns. omitted.)

The Court went on to state that it would

> scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself [and] analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

(*Id.* at p. 227.)

Appellant contends that the electrophoretic testing was a critical stage of the criminal proceedings because there was a degree of subjectivity involved in the interpretation of the gel plate runs, those gel plates were not preserved, and the photographs of the gel plates were not an adequate method of preservation. (4 AOB 1157.) However, his argument is contradicted by the *Wade* holding and analysis.

In attempting to justify the absence of defense counsel from the lineup in *Wade*, the government likened the lineup to a preparatory step in gathering evidence, "such as systemized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like." (*United States v. Wade, supra,* 388 U.S. at p. 227, emphasis added.) Responding to that claim, the Court stated:

> We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

(*United States v. Wade, supra,* 388 U.S. at pp. 227-228.)

In fact, in later noting that legislative or regulatory directives could remove the basis for regarding lineup proceedings as a critical stage, the Court stated that "the more systematic and scientific a process or proceeding, including one for purposes of identification, the less the impediment to reconstruction of the conditions bearing upon the reliability of that process or proceeding at trial." (*Id.* at p. 239, fn. 30.)

Thus, the *Wade* decision itself rejected the claim which appellant's makes here; i.e., that scientifically analyzing appellant's blood and evidentiary material was a critical stage entitling appellant to the presence of counsel under the Sixth Amendment. Moreover, none of the reasons which the United States Supreme Court delineated for finding the lineup a critical stage are applicable here.

The Court voiced considerable concern about the "well-known" "vagaries of eyewitness identification" which was caused by "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." (*United States v. Wade, supra,* 388 U.S. at p. 228.) Here, in contrast, eyewitness identification is not involved, there are no vagaries involved in the electrophoretic process, and there is nothing inherently suggestive in the testing process. The only thing appellant can point to is the fact that although the existence of the diagnostic banding patterns are an objective basis for making a "call," there is a degree of subjectivity involved in making calls when the intensity of the banding pattern is not strong. But those points can be and were made in cross-examination.

The Court also noted the "common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may . . . for all practical purposes be determined there and then, before trial." (*Id.* at p. 229, fn. omitted.) There is simply no parallel in scientific testing of evidence.

The Court also noted the "serious difficulty in depicting what transpires at lineups and other forms of identification confrontations." (*Id.* at p. 230.) Here, in contrast, the steps in the testing process are extensively detailed in lab notes, records and reports. (110 PRT 8036-8045.)

Finally, the Court noted that available case information on lineup procedures demonstrated the existence of substantial prejudice to the accused

which needed to be revealed at trial, and strongly suggested the problems were wide-spread, but undetected. (*United States v. Wade, supra,* 388 U.S. at pp. 232-235.) Here, appellant points to no hidden prejudice to his right to a fair trial either in this case or any other case.

In *Gilbert v. California* (1967) 388 U.S. 263 [87 S.Ct. 1951, 18 L.Ed.2d 1178], the Court rejected the claim that taking handwriting exemplars was a critical stage of the criminal proceedings entitling the petitioner to assistance of counsel. (*Id.* at p. 267.) The Court found "minimal risk that the absence of counsel might derogate from [the petitioner's] right to a fair trial." (*Ibid.*) The Court noted that if an unrepresentative exemplar is taken, that fact can be brought out at trial and the accused can make an unlimited number of additional samples for analysis and comparison by both the government expert and defense experts. (*Ibid.*) Thus, the accused had the opportunity for meaningful cross-examination of the State's experts and presentation of his own experts. (*Ibid.*)

Similarly, here, not only were the testing procedures extensively documented, samples remained for retesting by the defense. As the defense conceded in their motion,

> Wraxall has testified that in cases where samples might be consumed, he in fact notifies the prosecution so that the prosecution might notify the defense of impending electrophoretic which might consume the sample. Indeed, Wraxall has permitted defense counsel's experts to observe the electrophoretic testing procedures and actually be given an opportunity to make calls as a results of those procedures.

(56 CT 12378.)

Moreover, the documentation demonstrated the existence of any failure at SERI of double read agreement. (See, e.g., 112 PRT 8386-8401 [report shows initial absorption elution test result on sheepskin was negative, then changed to type "O"], 8426-8427 [report shows PGM call by Wraxall and no call be DeHaan]; 117 PRT 8950-9053 [multiple electrophoretic runs in which

the final call changed the initial call].) Thus, even at the level of potential subjective error, appellant had substantial opportunity for cross-examination to test the very subjectivity he complains about.

The trial court correctly ruled that scientific testing of blood and evidentiary samples is not a critical stage of the prosecution. Thus, there was no violation of appellant's Sixth Amendment right to counsel.

XLVII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY EXCLUDING EVIDENCE OF ALLEGED THIRD PARTY CULPABILITY IN THE MURDER OF ANNE SWANKE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by excluding evidence of third party culpability in the murder of Anne Swanke. Specifically, he asserts the trial court improperly excluded evidence that (1) a former boyfriend made constant attempts to contact Swanke after their breakup; (2) the former boyfriend arrived at the Swanke residence at 7:00 a.m. on the morning of her disappearance wearing sunglasses and appeared to be nervous and fidgety; (3) the former boyfriend appeared at the Swanke house again at 7:00 p.m., had an unusual demeanor and would not look anyone in the eye; and (4) Swanke had been receiving crank telephone calls prior to her disappearance. (4 AOB 1160-1164.) The trial court did not abuse its discretion or violate appellant's constitutional rights by excluding the evidence.

A. Trial Proceedings

During cross-examination of Swanke's father, who had testified to her failure to return home as expected on the night of November 19, 1984, and

identified photographs of her car (24 TRT 4431-4432), the defense asked whether Swanke had been receiving some obscene phone calls before her disappearance. (24 TRT 4434.) Dr. Swanke responded, "I am not aware of any," however the trial court also sustained an objection on the ground of relevancy. (24 TRT 4434.)[173] The trial court also sustained a hearsay and relevancy objection to the defense asking Dr. Swanke whether he had expressed some concern to the F.B.I. about his daughter's former boyfriend. (24 TRT 4435.)

During subsequent *in camera* proceeding the defense made the following offer of proof:

> Your honor, as an offer, apparently Dr. Swanke indicated to the F.B.I. that he had some - - or, excuse me, that his daughter had expressed some concern about a former boyfriend, Jon Capasso, to him and that there had been a breakup between the relationship between Capasso and his daughter, and that Capasso had made constant attempts to contact her and that that made her afraid of him.
>
> In addition, apparently at 7:00 o'clock in the morning, to the surprise of his family, Capasso arrived at the Swanke house on 7:00 o'clock in the morning on November the 20th and he was wearing dark sunglasses. He appeared very nervous and fidgety, and he also visited the residence again at 7:00 p.m. on November 20th. And his demeanor was indicated to be very unusual at that time, and apparently Capasso would not look anyone in the eye.
>
> Those are the areas that I wished to get into.
>
> I had already indicated and the court sustained an object to the fact that there was also an indication that Anne Swanke had received phone calls earlier that were of an obscene nature from unknown female callers, laughing and then hanging up, but this other area is directly in relationship to the morning of the 20th and the evening of the 20th, relating to this individual, and I think that it's relevant to be able to bring this in. (24 TRT 4436.)

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173. The prosecutor objected on the grounds of hearsay and relevance. (24 TRT 4434.)

The trial court ruled that the evidence did not make Capasso a third party suspect and was, thus, irrelevant, misleading and confusing. (24 TRT 4436-4437.)

In cross-examination of the next prosecution witness, Gregory Oberle, who had testified to being Swanke's boyfriend and her visit the night of November 20 (24 TRT 4439-4442), defense counsel asked whether Swanke "indicated to you that she had been receiving crank calls." (24 TRT 4443.) The trial court sustained an objection. (24 TRT 4443.)

During an *in camera* hearing addressing defense questions about whether Oberle and Swanke engaged in sexual relations on the night of her visit (24 TRT 4444)[174], defense counsel indicated:

> Your Honor, I want to make it clear for the record, [the prosecutor] characterizes third party suspects as crank phone calls. As far as I'm concerned, the defense should be allowed to go into anything strange or unusual that was going on. The prosecutor was allowed to lay out information that was - - that everything was normal and everything was pleasant and the defense has information both from Mr. Oberle and Dr. Swanke indicating that there were crank phone calls going on at that period of time.
>
> Now, if that's third party suspect information, I don't know, you know. In my opinion it is not and doesn't go against the court's order.[175] It's relevant in indication what was happening - -

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174. Based on representations that there was a pubic hair found on Swanke's thigh which did not belong to Swanke and did not match appellant or Oberle (see also 56 TRT 10717-10746 [a hair on Swanke's thigh and a pubic hair from the Swanke pubic combing did not match Swanke, appellant, or Oberle]), the trial court permitted the defense to establish that Oberle and Swanke did not engage in sexual intercourse during her visit. (24 TRT 4447-4451.)

175. The trial court had ordered that any evidence of third party culpability be presented to the court prior to being presented to the jury. (24 TRT 4437.)

(24 TRT 4446.)

The trial court later ruled under Evidence Code section 352 that although bearing some relevance to whether life was normal for Swanke on the day she died, the relevance was substantially outweighed by the potential confusion to the jury and misleading the jury. (24 TRT 4468.)

B. Third Party Suspect Evidence

This Court is well-aware of the self-evident proposition that "[e]vidence that a third person actually committed a crime for which the defendant has been charged is relevant. . . ." (*People v. Yeoman, supra*, 31 Cal.4th 93, 140.) However, not all evidence of third party culpability is necessarily relevant and admissible. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) To be relevant, evidence of third party culpability must be capable of raising a reasonable doubt of defendant's guilt. (*Ibid.*)

> [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(*Ibid.*; *People v. Yeoman, supra,* 31 Cal.4th at pp. 140-141.)

Additionally, like all evidence, relevant evidence of third party culpability "is subject to exclusion at the court's discretion under Evidence Code section 352 if its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion." (*Id.* at p. 140.)

Appellant contends that several items of evidence of third party culpability were improperly excluded: (1) a former boyfriend made constant attempts to contact Swanke after their breakup; (2) the former boyfriend arrived at the Swanke residence at 7:00 a.m. on the morning of her disappearance wearing sunglasses and appeared to be nervous and fidgety; (3) the former boyfriend appeared at the Swanke house again at 7:00 p.m., had an unusual

demeanor and would not look anyone in the eye; and (4) Swanke had been receiving crank telephone calls prior to her disappearance. (4 AOB 1160.)

Beginning with the last item, the crank calls, appellant did not offer that evidence as evidence of third party culpability; he contended it was evidence refuting prosecution evidence that everything in Anne Swanke's life was normal and pleasant. Since appellant did not offer the evidence as third party culpability evidence, his claim of erroneous exclusion is forfeited. Moreover, it is unclear that appellant had any admissible evidence of crank calls.

Although the objection was sustained during cross-examination of Dr. Swanke, he responded to the defense question before the trial court's ruling, saying, "I am not aware of any." (24 TRT 4434.) When appellant broached the subject on cross-examination of Oberle, defense counsel asked whether Swanke indicated to him that she had been receiving crank calls. (24 TRT 4443.) Plainly, the call of the question was to elicit inadmissible hearsay, and appellant never suggested Oberle had personal knowledge of crank calls. Thus, appellant failed to proffer any admissible evidence that Swanke had been receiving crank calls.

Even apart from the basis lack of admissible evidence, the alleged crank calls were not connected directly or circumstantially to Swanke's abduction and murder. (*People v. Yeoman, supra,* 31 Cal.4th at p. 141; *People v. Hall, supra,* 41 Cal.3d at p. 833.) To the extent, appellant means to suggest the crank calls were connected to the other third party evidence and may have been made by Swanke's former boyfriend, defense counsel indicated the crank calls were made by "unknown female callers." (24 TRT 4436, emphasis added.)

Appellant's effort to justify admission of her former boyfriend's attempted contacts suffers from similar hearsay and relevance problems. It appears that any knowledge Dr. Swanke had of his daughter's fear of her former boyfriend and attempts by him to contact her was from her statements,

which were hearsay. (24 TRT 4436.) Again, apart from the lack of admissible evidence, there was no direct or circumstantial evidence connecting the former boyfriend with Swanke's abduction and murder.

The former's boyfriend's appearances at the Swanke house and his personal appearance and demeanor do not suffer from the hearsay problems of the other evidence, but still neither at the trial nor here on appeal has appellant offered any direct or circumstantial evidence connecting the former boyfriend with Swanke's abduction and murder.

This Court has ruled that mere motive or opportunity without more is insufficient raise a reasonable doubt and be admissible. (*People v. Yeoman, supra,* 31 Cal.4th at p. 140; *People v. Hall, supra,* 41 Cal.3d at p. 833.) Here, there was no direct or circumstantial evidence connecting the former boyfriend to the crimes, no evidence of opportunity, and no evidence of motive. Even taking all of appellant's proposed evidence without regard to the hearsay problems, the very most it shows is a former boyfriend still pining for Swanke after three years. (See 24 TRT 4439 [Oberle and Swanke had been dating for three years].)

The trial court's exclusion of the allegedly third party culpability evidence was not an abuse of discretion and did not violate appellant's constitutional rights. (*People v. Yeoman, supra,* 31 Cal.4th at p. 141; *People v. Hall, supra,* 41 Cal.3d at p. 834-835.)

XLVIII.

SHANNON LUCAS'S OUT-OF-COURT IDENTIFICATION OF THE DOG CHOKE-CHAIN WAS PROPERLY ADMITTED AS A SPONTANEOUS DECLARATION WHICH DID NOT VIOLATE THE MARITAL PRIVILEGE OR APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION

Appellant contends the trial court prejudicially erred and violated his constitutional rights by admitting his deceased wife's spontaneous identification of the dog choke-chain which was found around Anne Swanke's neck. He claims the statement was not admissible as an excited utterance, its admission violated his constitutional right to confrontation, its admission violated the marital privilege, and the trial court abused its discretion under Evidence Code section 352. (4 AOB 1165-1178.) The trial court did not err or violate appellant's constitutional rights by admitting Shannon Lucas's statement.

A. Trial Court Proceedings

In a written *in limine* memorandum, the prosecution sought admission of a statement by appellant's wife, Shannon Lucas, which she made during questioning by police on December 16, 1984, the day of appellant's arrest. (47 CT 10272-10275.) Anne Swanke's body was located on November 24, 1984. (91 PRT 5765.) In addition to her throat being cut, there was a dog choke-chain around her neck. (91 PRT 5768.)

Detectives Henderson and Fullmer met with Shannon Lucas on December 16, 1984, the day appellant was arrested, in a conference room at the sheriff's office. (92 PRT 5780-5781, 5804.) Their conversation was tape-recorded and the trial court listened to the tape recording of the interview. (92 PRT 5804, 5808,5812.) During the course of asking Shannon Lucas about their family pets, Detective Henderson opened the bag which contained the

choke-chain and drew it out of the bag. (92 PRT 5783.) Prior to that time, Shannon Lucas had been answering questions, and appeared cooperative and comfortable. (92 PRT 5831-5832.) However, when Detective Henderson removed the chain, Shannon Lucas' demeanor changed. She was in the midst of answering a question about her dogs' collars, broke off the answer, and seemed taken aback by the chain. (92 PRT 5832, 5834-5835.) She sat back, opened her eyes wider, and focused on the choke-chain. (92 PRT 5832, 5834.) She appeared stunned at seeing the choke-chain. (92 PRT 5834.)[176] She gasped, as though the wind were going out of her (25 TRT 4738) and said, "That's, um, one of Duke's. We had - - the kids used to - - my son and my sister's daughter used to play with that and they half choked Duke to death." (25 TRT 4737.)[177]

The trial court initially ruled that the statement was "clearly a spontaneous declaration." (99 PRT 6746)[178] However, the trial court also ruled the statement was inadmissible as lay opinion and under Evidence Code section 352. (100 PRT 6759-6760.) The trial court later changed its ruling and

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176. The choke-chain still had the hair that was on it when recovered from Swanke's neck. (93 PRT 5938-5939.)

177. Appellant had a dog named Duke. (37 TRT 6955-6956.)

178. After listening to the tape-recording of the interview, the trial court found that there was definitely a change in Shannon Lucas' tone of voice, that there was "an electric silence" after the chain was removed from the bag, followed by very quiet responses which indicated to the trial court that:

> if there ever was a spontaneous declaration, this is it. It was the kind of utterance that was not reflective. It just simply was the response to something that shocked her, and she saw it and she told it the way she saw it.

(99 PRT 6746.)

permitted introduction of the statement. (302 PRT 35217-35224; see also 1 TRT 2-3.)

B. Spontaneous Statement

Evidence Code section 1240 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

"A spontaneous statement is one made without deliberation or reflection." (*People v. Raley* (1992) 2 Cal.4th 870, 892.) However, to be admissible the spontaneous statement "must relate to an event the declarant has personally perceived." (*People v. Phillips* (2000) 22 Cal.4th 226, 235.) "A spontaneous declaration is admissible, despite its character as hearsay, because of its particular reliability as the immediate product of direct perception, before fading memory or the opportunity for fabrication has intervened." (*People v. Arias* (1996) 13 Cal.4th 92, 150.) A trial court's preliminary factual findings must be upheld if supported by substantial evidence. (*People v. Brown, supra,* 31 Cal.4th at pp. 540-541; *People v. Phillips, supra,* 22 Cal.4th at p. 236.) A trial court's decision to admit the evidence is reviewed for an abuse of discretion. (*Ibid.*)

In this case, Shannon Lucas' statement described her recognition of the dog choke-chain, was made spontaneously upon her observation of the choke-chain, and, as described by the trial court and Detective Henderson, was made while she was under the "stress of excitement caused by such perception." (Evid. Code, § 1240, subd. (b).)

Appellant challenges the trial court's finding that the display of the choke-chain was an exciting event. (4 AOB 1169.) He complains that because Shannon Lucas was unaware that the chain was used in the murder, there was no evidentiary support for the trial court's finding of a connection in Shannon Lucas' mind between the chain, the arrest, and the murder. He simply ignores the logical inferences flowing from the display of the choke-chain and Shannon Lucas' reaction to it. Appellant does not dispute that Shannon Lucas was aware that appellant had been arrested and was facing murder charges. It would be a reasonable, if not unavoidable, inference that she surmised her interview was because the authorities were investigating the murder. Moreover, as the trial court stated, the display of the choke-chain, an otherwise unexciting action, took on special and shocking proportions in Shannon Lucas' mind as demonstrated by her reaction to it. It is only reasonable to infer, as the trial court did, that the display of the choke-chain was an exciting event because Shannon Lucas made the connection between the murder and the choke-chain, which belonged on their dog, but was in the possession of the authorities. Because the trial court's factual finding is supported by the evidence, appellant's challenge must be rejected. (*People v. Phillips, supra,* 22 Cal.4th at p. 236.)

> The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance–how long it was made after the startling incident and whether the speaking blurted it out, for example–may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in this matter.

(*People v. Brown, supra,* 31 Cal.4th at p. 541; *People v. Raley, supra,* 2 Cal.4th at pp. 892-893.)

The trial court found, and the record supports the finding, that Shannon Lucas was in a state of shock caused by her viewing the choke-chain and her identification of the choke-chain was a spontaneous product of that shocked state. The trial court did not abuse its discretion in a finding the statement admissible as a spontaneous statement under Evidence Code section 1240.

Appellant also claims that the spontaneous statement was an inadmissible opinion, relying on *Catlin v. Union Oil Co.* (1916) 31 Cal.App. 597. (4 AOB 1167-1168.) However, merely because a spontaneous statement is, or contains an opinion, does not require its exclusion. As Witkin observes, "Excited utterances may be excluded on the basis that they are inadmissible opinions." (1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 176, p. 891, underlining added.) Thus, in *Catlin*, the deceased's spontaneous statement – otherwise admissible as part of the *res gestae* – included his inadmissible opinion that the fluid he used to fill his lamp was gasoline, not coal-oil. (*Catlin v. Union Oil Co., supra,* 31 Cal.App. at p. 610.)

However, lay opinion is not *per se* inadmissible. Evidence Code section 800 permits admission of lay opinion that is rationally based on perception and helpful to a clear understanding of the witness's testimony. (*People v. Miron* (1989) 210 Cal.App.3d 580, 583.) Where a witness's lay opinion would be excluded under section 800, it is also excluded when part of an otherwise admissible spontaneous statement. (*Id.* at p. 584.) Appellant points to no basis preventing Shannon Lucas from testifying that the choke-chain belonged to their dog, Duke. (1 Witkin, *supra*, Opinion Evidence, § 15, p. 543 ["Ownership is regarded as a matter of permissible opinion on which a lay witness may testify"].)

C. Marital Privilege

Evidence Code, division 8, chapter 4, article 4 [privilege not to testify against spouse] provides two privileges to a married person: (1) a privilege not to testify against his spouse in any proceeding (section 970)[179] and (2) a privilege not to be called as a witness by an adverse party in any proceeding to which his spouse is a party (section 971).[180] (Cal. Law Revision Com. com., Evid. Code, § 970.) Shannon Lucas was neither called as a witness nor did she testify at trial; by the time of trial, she was dead. (26 TRT 4833.)

Appellant criticizes the trial court's reliance on a 1922 case, but scrupulously avoids its ruling other than to point to a treatise on evidence in trials at common law. (4 AOB 1173-1175.)[181] He also fails to acknowledge the nature and purpose of the privilege, and who was the holder of the privilege.

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179. Evidence Code section 970 provides:

> Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.

180. Evidence Code section 971 provides:

> Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

181. Moreover, his criticism misses the point. In *First National Bank v. De Moulin* (1922) 56 Cal.App. 313, the husband's testimony, to which there was no objection by the defendant-wife, laid the foundation for admission of a letter the husband authored to a third party which impeached his testimony. Once the foundation was laid, admission of the husband's letter did not infringe any privilege because "[b]y making a husband or wife incompetent as a *witness* against the other, the code does not render inadmissible an extrajudicial statement that wither may have been made to a third party, if such statement be otherwise admissible." (*Id.* at p. 323.)

"[A] married person has a privilege not to testify against his spouse in any proceeding." (Evid. Code, § 970.) The privilege does not, by its terms, apply to hearsay statement by a married person. See *First National Bank v. De Moulin, supra,* 56 Cal.App. at p. 323.) Privileges are statutory creations and cannot be expanded by judicial interpretation. (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 895.) "The privilege belongs to the married person, not the spouse who is the party." (*People v. Lucas, supra,* 12 Cal.4th at p. 490.) "The purpose of the spousal privilege is to preserve marital harmony." (*People v. Sinohui* (2002) 28 Cal.4th 205, 213.) Shannon Lucas was the holder of the privilege, not appellant. Thus, even if her hearsay statement were subject to the privilege, only she could exercise it, which she did not. Moreover, since she was dead, there was no marital harmony to be preserved. For all these reasons, the trial court did not err in rejecting appellant's assertion of marital privilege.

D. Confrontation

Under this Court previous decision in *People v. Dennis* (1998) 17 Cal.4th 468, and the decision of the United States Supreme Court in *White v. Illinois* (1992) 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848, admission of Shannon Lucas's spontaneous declaration was not a violation of the Sixth Amendment right to confrontation. (*People v. Dennis, supra,* 17 Cal.4th at p. 529; *White v. Illinois, supra,* 502 U.S. at pp. 353-357.) However, in the recent decision in *Crawford v. Illinois* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the Court in essence overruled the legal basis for the decision in *White v. Illinois, supra,* and held that the confrontation clause was violated by admission of testimonial evidence unless the witness was unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford v. Illinois,*

supra, 124 S.Ct. at pp. 1370-1374.)[182] Thus, the Court delineated three key components of a confrontation claim: testimonial evidence, an unavailable witness, and no prior opportunity for cross-examination. (*Id.* at p. 1374.) It is undisputed that at the time Shannon Lucas's spontaneous statement was admitted at trial, she was unavailable, having died in May 1987. (26 TRT 4833.) However, her spontaneous statement was not testimonial evidence and appellant had a prior opportunity for cross-examination.

The United States Supreme Court noted that the Sixth Amendment right "applies to 'witnesses' against the accused–in other words, those who 'bear testimony.'" (*Id.* at p. 1364.) Likewise, testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. (*Ibid.*) The Court concluded that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Ibid.*) Thus, "statements taken by police officers in the course of interrogations are also testimonial. . . ." (*Ibid.*)

To be sure, under *Crawford*, all of what Shannon Lucas said to the police in response to their questioning was testimonial. However, her spontaneous statement, made in response to seeing her dog choke-chain in the custody of law enforcement investigating appellant on murder charges, was not a formal statement "knowingly given in response to structured police questioning" (*Id.* at p. 1365, fn. 4) and, thus, was not testimonial evidence under *Crawford.*

In any case, even if Shannon Lucas's spontaneous statement was considered testimonial evidence, appellant had a prior opportunity to cross-examine her. Shannon Lucas was subpoenaed as a witness and appeared at

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182. As this Court has noted, the United States Supreme Court has not said whether *Crawford* applies to cases like appellant's which was tried before it was decided. (*People v. Harrison* (2005) 35 Cal.4th 208, 239.)

appellant's preliminary hearing, at which time she asserted her marital privilege and declined to be called by, or testify on behalf of the prosecution against appellant. (CR 73093 VII PHT 1203-1204.) Her assertion of that privilege did not, however, make her unavailable to be called to testify by appellant when her spontaneous statement was subsequently admitted. (CR 73093 VII PHT 1307-1309.) Appellant had the right to call her and subject her to cross-examination. (Evid. Code, § 1203.) A person has no privilege to refuse to testify in favor of his or her spouse in a criminal proceeding. (*People v. Lucas, supra,* 12 Cal.4th at p. 490.)

Since appellant had a prior opportunity to cross-examine his wife as to her spontaneous statement, his Sixth Amendment right to confrontation was not violated.

E. Harmless

Any error in admitting Shannon Lucas's out-of-court spontaneous identification of the dog choke-chain was harmless under both the state and federal standards. Appellant was connected to the Swanke murder by an incredible confluence of circumstantial evidence, from his timely departure from the Clark residence, to the remarkable coincidence of the licence plate Leyba observed when he happened upon what turned out to the abduction. The serological evidence indicated the blood in appellant's vehicle was most probably Swanke's and the blood under Swanke's fingernails was probably appellant's. Coincidentally, noticable scratches appeared on appellant's face for all his friends to see that day after Swanke's abduction. Added to that, of course, was the remarkable similarity in which all of appellant's victims were murdered.

Shannon Lucas's identification of the dog choke chain added little if anything to this mix, especially in view of the evidence of commonality of this

type of choke chain and Rutan's recollection that Duke's chain, though similar was longer.

XLIX.

THE TRIAL COURT'S PRELIMINARY INSTRUCTIONS PROPERLY DESCRIBED THE JURY'S ROLES IN MAKING FACTUAL FINDINGS AND APPLYING THE LAW TO REACH A VERDICT; THE JURY WAS THOROUGHLY INDOCTRINATED THROUGHOUT VOIR DIRE ON THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT

Appellant contends the trial court prejudicially erred and violated his constitutional rights in giving preliminary jury instructions prior to the start of the evidence which did not properly describe the jury's duty, failed to include the presumption of innocence and the prosecution's burden of proof, and described the prosecution theory without describing the defense theory. (2A AOB 529-537; 3 AOB 1025-1027; 4 AOB 1206-1208; 5 AOB 1340-1342.) To the contrary, the jury was adequately instructed on its proper roles and thoroughly indoctrinated on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt.

In its preliminary instructions, the trial court advised the jury: that it was to act as the judge of the facts while the trial court would be the judge of the law; that in judging the facts it was to apply certain specified standards to the testimony of lay and expert witnesses; how to consider attorney objections and the trial court's rulings thereon; of the requirement that each juror reach his or her individual opinion on the defendant's guilt or innocence; that each count must be decided separately; of the limited basis for cross-count consideration of evidence; on note-taking and use of the jury notebooks; and on keeping an open mind during the case, and not discussing the case with anyone or making any independent investigation. (1 TRT 11-16.)

A. Jury's Duty

Appellant first complains that the preliminary instructions did not properly state the jury's duty. He asserts the jury was instructed that "the 'essence'" of its duty was to judge the facts and was not advised of its duty to determine whether the prosecution had carried its burden of proof. (2B AOB 531-533.)[183] Appellant has simply misread the trial court's preliminary instructions.

In describing the relative roles of the jury and the judge, the trial court instructed:

> Now that you have been selected to act as jurors in this case you will, in essence, be judges because you will be the judges of the facts and I will be the judge of the law. And at the conclusion of this case I will instruct you as to the law that is to be applied in this case.

(1 TRT 11.)

The instruction did not tell the jury that the essence of its duty was simply to judge the facts and it is not reasonably likely that the jury would have understood the instruction as so indicating. (*People v. Frye, supra,* 18 Cal.4th at p. 957 [purportedly erroneous instructions reviewed under reasonable likelihood standard].) Instead, the trial court told the jury that the role of the jury in determining the facts was, "in essence," like being a judge. The trial court also made it clear that the court's duty was to determine the law which "is to be applied in this case." The trial court's instruction made it clear that the jury had two duties; to determine the facts and to apply the law. That law, which would be given to the jury "at the conclusion of the case," included instructions on the presumption of innocence and the prosecution's burden of proof. (65 TRT 12189; *People v. Frye, supra*, 18 Cal.4th at p. 957 [under

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183. Because the argument is simply repeated in several volumes of the AOB, respondent will not cite beyond volume 2B in discussing particulars of the argument.

California law, correctness of jury instructions determined from entire charge of the court].) Thus, there was no error in describing the jury's role of acting like a judge in determining the facts and its role in accepting and applying the law given by the trial court in reaching a verdict.[184/]

Appellant's citation to *United States v. Pine* (3d. Cir. 1979) 609 F.2d 106, does not help his argument. In *Pine*, the trial court instructed the jury that the "basic question" and "basic task" confronting the jury was determining whether the government's witnesses or the defense witnesses were telling the truth, an instruction which impaired the requirement of proof beyond a reasonable doubt. (*Id.* at pp. 107-108.) Nothing in the trial court's preliminary instructions or elsewhere told the jury that it could resolve the case by deciding which side's witnesses were telling the truth. The preliminary instruction suggested nothing about resolution of the case from the factual determinations, except, of course, that the trial judge would be giving the jury the law which it would apply at the conclusion of the case. Nothing in the instruction impaired the presumption of innocence or the requirement of proof beyond a reasonable

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184. Appellant says other instructions reinforced the erroneous description of the jury's duties, but cites only the jury pamphlet given to prospective jurors and language from the concluding instructions concerning reaching a just verdict. (2B AOB 532-533.) In fact, as noted in the main text, the jury instructions as a whole, both preliminary and post-evidence, fully and correctly described the jury's role in judging the facts and deciding whether the presumptively innocent defendant had been proven guilty beyond a reasonable doubt. Indeed, the concluding instructions advised the jury that "[t]he purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict." The plain import of the "just and lawful verdict" language was to advise the jury that a verdict based on the instructions, including the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt was a "just and lawful verdict." Moreover, the jury pamphlet, given to prospective civil and criminal jurors, described the jury's role in fact finding, but it also described the jury's role in applying "the law as stated by the judge" to the facts to reach a verdict. (49 CT 10725.)

doubt. Indeed, as noted, when the trial court gave the concluding instructions, it clearly advised the jury of the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt.

B. Prosecution's Burden And Presumption Of Innocence

Appellant complains that the pretrial instructions did not include the presumption of innocence and the burden of proof beyond a reasonable doubt. (2B AOB 533-534.) He claims the instructional error was exacerbated by the pretrial instruction advising the jury to "determine the question of the guilt or innocence of the defendant" (1 TRT 13). (2B AOB 534.) He is correct that the preliminary instructions did not expressly include the presumption of innocence or the burden of proof. (1 TRT 11-16.) However, the trial court told the jury that "at the end of the case I will instruct you as to the law that is to be applied in this case." (1 TRT 11.) Those "end of the case" instructions clearly and correctly delineated the presumption of innocence and the prosecution's burden to prove guilt beyond a reasonable doubt. (65 TRT 12189.) Under California law, the correctness of jury instructions is determined from entire charge of the court. (*People v. Frye, supra,* 18 Cal.4th at p. 957.)

Moreover, appellant's suggestion that the jury "heard the evidence without any judicial instruction as to rudimentary constitutional principles which governed their consideration of such evidence" simply ignores repeated statements of law concerning the presumption of innocence and the prosecution's burden of proof, by not only the trial court, but also the prosecution and the defense, throughout the jury selection process.

In addressing the members of the venire before hardship questioning, the trial court stated, "As you know, in a criminal case, the defendant is presumed innocent until proven guilty. The People of the State of California bear the burden of proving the defendant's guilt beyond a reasonable doubt." (257 PRT

26542; 258 PRT 26688; 259 PRT 26872; 260 PRT 26987, 27085; 262 PRT 27429.) The trial court also told the hardship-qualified, prospective jurors prior to death-qualification that "[i]n the guilt phase the People are required to prove beyond a reasonable doubt that the defendant is guilty of each charge and allegation." (257 PRT 26660; 258 PRT 26807; 259 PRT 26959; 260 PRT 27063, 27160; 261 PRT 27236, 27271-27272.)

In questioning the prospective jurors during death-qualification *voir dire*, the trial court ensured that the prospective jurors understood that the jury's duty in the guilt phase was to determine whether the defendant was guilty beyond a reasonable doubt. (E.g. 262 PRT 27296, 27342, 27411; 263 PRT 27525, 27589.) Defense counsel reminded prospective jurors that appellant was presumed to be innocent and that the defendant guilt had to be found to be beyond a reasonable doubt. (E.g. 262 PRT 27308, 27365, 27381-27382; 263 PRT 27543, 27577, 27601.) The prosecutor also reminded jurors of the presumption of innocence and that they would be making a decision of whether the charges had been proven beyond a reasonable doubt. (E.g. 262 PRT 27315-27316, 27367, 27417-27418.)

Prior to beginning general *voir dire*, the trial court gave some preliminary instructions to the jury which included an instruction on the definition of reasonable doubt. (303 PRT 35271; 306 PRT 35964.) Defense counsel opened general questioning reminding the prospective jurors that the trial court "had discussed with you the presumption of innocence, and in a criminal case - - uniquely so in a criminal case there is only one party that has a burden of proof and that burden of proof is beyond a reasonable doubt." (303 PRT 35279-35280.) The defense reiterated those points at various times throughout the questioning and solicited the jurors understanding of those points. (See, e.g., 303 PRT 35281-35282, 35283, 35285, 35291, 35294, 35358, 35455-35456, 35477; 304 PRT 35554-35555, 35563, 35568; 305 PRT 35726-

35727, 35759, 35841, 35850; 306 PRT 35977, 35980, 36094, 36158-36159.) Questioning by the prosecutor also reminded the prospective jurors of the presumption of innocence and burden of proof beyond a reasonable doubt and, again, solicited the jurors' understanding of those concepts. (See, e.g., 303 PRT 35480-35481; 304 PRT 35517-35518, 35524, 35526-35527, 35674; 305 PRT 35795; 306 PRT 36171.)

Appellant's reliance on *United States v. Veltmann* (11th Cir. 1993) 6 F.3d 1483, is misplaced. Appellant quotes one sentence which suggests support for his position, but the court's concern arose from no mention whatsoever of the presumption of innocence until the concluding instructions, as the complete paragraph makes plain:

> We are troubled however, by an argument first raised in Defendants' reply brief concerning the absence of instruction on the presumption of innocence at the beginning of the trial. *Scrutiny of the record reveals that the presumption of innocence was not mentioned by the court even once before, during, or after voir dire of the jury.* Defendants question this omission. Although the court charged the jury on the presumption before they retired to deliberate, we believe it extraordinary for a trial to progress to that stage with nary a mention of this jurisprudential bedrock.

(*Id.* at p. 1493, italics added.)

Unlike the case in *Veltmann*, the jury was instructed on presumption of innocence as well as the prosecution's burden of proof beyond a reasonable doubt, throughout the *voir dire*, not only be the trial court but also by both sides. Indeed, at one point the trial court gave a formal instruction on the statutory definition of reasonable doubt. This case would not have troubled the *Veltmann* court.

Since there was no error, there was nothing to exacerbate. Moreover, there was nothing exacerbating in instructing the jury that each juror must individually "determine the question of the guilt or innocence of the defendant."

(1 TRT 13.) The trial court's preliminary instructions clearly indicated that "at the conclusion of this case I will instruct you as to the law that is to be applied in this case." (1 TRT 11.) That law clearly and unequivocally indicated that in determining appellant's guilt or innocence, appellant was "presumed to be innocent" until his guilt was proven beyond a reasonable doubt. (65 TRT 12189.) Moreover, as noted above, that connection was repeatedly stressed throughout the jury questioning. Thus, the jury's determination of appellant's guilt or innocence was never divorced from the presumption of innocence and the prosecution's burden to proved guilt beyond a reasonable doubt.[185]

L.

THERE IS NO STATE OR FEDERAL DUE PROCESS VIOLATION ARISING FROM A CRIMINAL PROSECUTION IN THE NAME OF THE PEOPLE

Appellant contends his state and federal constitutional rights to due process and a fair trial were violated by allowing the prosecution to proceed in the name of the People of the State of California. (2B AOB 538-550; 3 AOB 1028; 4 AOB 1209-1210; 5 AOB 1343-1344.) The claim lacks merit.

Appellant's claim was addressed and rejected in *People v. Black* (2003) 114 Cal.App.4th 830. As that court recognized, prosecution in the name of the People is sanctioned by statute. (*Id.* at p. 832-833, citing Pen. Code, § 684, Gov. Code, § 100.)[186] Contrary to appellant's claim, "[t]here is no state

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185. Appellant also reiterates his claim that the cross-admissibility instructions improperly highlighted that evidence. (2B AOB 534, citing 2A AOB 231-236.) The flaw in this claim has already been addressed in Argument IX, *supra*, and is not incorporated herein by reference.

186. Penal Code section 684 provides:

> A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense.

constitutional infirmity in prosecuting criminal cases in the name of 'The People of the State of California.'" (*People v. Black, supra,* 114 Cal.App.4th at p. 834.)

California's first Constitution was adopted on November 13, 1849, prior to statehood. (Deerings Ann. Cal. Const., Foreword, at p. v.) As amended in 1862, article VI, section 18 of the 1849 Constitution provided, "The style of all process shall be: 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." (*Id.*, App. I, at p. 494.) The current state constitution was adopted by constitutional convention and ratified on May 7, 1879. (Deerings, Cal. Const., Foreword, at p. v.) In 1872, prior to adoption of the 1879 constitution, Penal Code section 684 was enacted. Moreover, the state constitution was amended by initiative adopted June 5, 1990, to add, inter alia, article I, section 29, which provides, "In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial." Section 29 implicitly recognizes the People as the proper party prosecuting a criminal case. Thus, naming the prosecution as the People does not violate the state constitutional due process provision.

Appellant also contends prosecution in the name of the people violates his right to due process under the federal constitution.

> "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. [Citation omitted.] The Clause also provides heightened protection against government interference with certain fundamental rights and

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Government Code section 100 provides:

> (a) The sovereignty of the state resides in the people thereof, and all writs and processes shall issue in their name.
>
> (b) The style of all process shall be "The People of the State of California," and all prosecutions shall be conducted in their name and by their authority.

liberty interests." (*Washington v. Glucksberg* (1997) 521 U.S. 702, [719-720, 117 S.Ct. 2258, 138 L.Ed.2d 772].)

However, the fundamental rights and liberties recognized by the high court have been limited to "issues of marriage, family procreation, and certain forms of bodily integrity." (*People v. Frazer* (1999) 21 Cal.4th 737, 772, fn. 31; see *Washington v. Glucksberg*, *supra*, 521 U.S. at p. 720.) The High Court has "always been reluctant to expand the concept of substantive due process" and has exercised "the utmost care whenever we are asked to break new ground in this field" in order to avoid converting policy preferences into constitutionally protected liberty. (*Washington v. Glucksberg*, *supra*, 521 U.S. at p. 720; see also *People v. Frazer*, *supra*, 21 Cal.4th at p. 772, fn. 31.) While caution is not abrogation of the court's role in addressing constitutional challenges, in entertaining such challenges the court must presume the constitutional validity of legislative acts and resolve doubts in favor of the statute. (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 939.)

Starting with a presumption in favor of the 128 year old Legislative determination to designate the prosecution as the People of the State of California (Pen. Code, § 684), which finds its genesis 10 years earlier in a constitutional provision (Cal. Const. of 1849, as amended 1862, art. VI, § 18), the due process analysis has "two primary features." (*Washington v. Glucksberg*, *supra*, 521 U.S. at p. 720.) There must first be "'"a careful description" of the asserted fundamental liberty interest.'" (*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 940, quoting *Washington* v. *Glucksberg*, *supra,* 521 U.S. at p. 721.) The description must be "concrete and particularized, rather than abstract and general." (*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 940.) Here, appellant claims a fundamental liberty interest in precluding his criminal case from being prosecuted in the name of the People.

Second, the court must determine whether the asserted interest, as carefully described, is one of our fundamental rights and liberties;

> central to this determination is whether the asserted interest finds support in our history, our traditions, and the conscience of our people.

(*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 940.)

As noted, prosecution in the name of the People has a 138 year tradition in California. Appellant indicates that four other states join in that practice. (2B AOB 539-540.) He points to the remaining states and the federal government practice of designating the prosecution in the name of some governmental body as "the constitutionally correct way." (2B AOB 540.) Even if his assertion regarding state and federal practice is correct, his conclusion is flawed. The fact that many or even most states and the federal government engages in a different method of designating the prosecution demonstrates nothing greater than a policy choice. Appellant fails to show that the policy decision amounts to a universal condemnation of California's practice. In *Washington* v. *Glucksberg*, the Supreme Court rejected a constitutionally protected liberty interest in physician-assisted suicide, noting that historically and in current practice, both suicide and assisted suicide are, with one exception (Oregon) universally condemned. (*Washington* v. *Glucksberg*, *supra*, 521 U.S. at p. 710-719.) "[O]ur laws have consistently condemned, and continue to prohibit, assisting suicide." (*Id.*, at p. 719.) The fact, if true, that most jurisdictions denominate the prosecution as some governmental body falls far short of the necessary showing that the practice of prosecuting in the name of the People is "consistently condemned" and prohibited. (*Id.*, at p. 719.) Indeed, "even if California's practice were unique, that would not tend to prove a

constitutional violation."[187] (*People v. Black, supra,* 114 Cal.App.4th at p. 833.)

Appellant's discussion of the limitations placed on government in favor of the rights of the people does not aid his cause. While those limitations are plainly part of our constitutional heritage, nothing about those limitations describes condemnation of prosecution in the name of the People. Indeed, the pernicious aspect of appellant's argument is the implicit premise that government exists apart from the People who created it. Nothing could be further from our constitutional history. Government was created by the People and exercises only those powers granted by the People. The authority to prosecute crimes comes from the People, it did not originate in the government.

Finally, "substantive due process principles preclude arbitrary and capricious legislation even where no fundamental right or liberty interest is at

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187. The Due Process Clause of the Fourteenth Amendment protects individuals from two different types of governmental action. The "substantive" due process protection prevents the government from engaging in conduct that shocks the "conscience," (*Rochin v. California* (1952) 342 U.S. 165, 172, 96 L.Ed. 183, 72 S.Ct. 205 (1952), or interfers with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325-236, 82 L.Ed.2d 288, 58 S.Ct. 140 (1937). When government action drpriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathres. Edlridge,* 429 U.S. 319, 335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). This requirement has traditionally been referred to as "procedural" due process. *United States v. Salerno*, 481 U.S. 739, 746, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987). The High Court has applied the same test when reviewing both substantive and procedural due process challenges to criminal laws. See, e.g. *Medina v. California*, 505 U.S. 437, 445, 120 L.Ed.2d 353, 112 S.Ct. 2572 (1992) [holding that a criminal procedure does not violate due process unless "it offends some principle of justice so rooted in the traditions and consciousness of our people as to be ranked a fundamental" (internal quotation marks omitted)); *Washington v. Glucksberg,* supra, 521 U.S. at pp. 720-721 (applying same test to a substantive due process claim). Accordingly, it is axiomatic that the absence of any substantive due process denial also confirms tha absence of any procedural due process violation.

stake." (*People v. Frazer*, *supra*, 21 Cal.4th at p. 773.) Under this limitation, the legislative determination that criminal prosecutions proceed in the name of the People must be "rationally related to legitimate government interests." (*Washington v. Glucksberg*, *supra*, 521 U.S. at p. 728.) This imposes, however, a "deferential standard." (*People v. Frazer*, *supra*, 21 Cal.4th at p. 773.) Appellant makes no argument addressing this aspect of substantive due process. However, recognition of the People as the source of power to institute criminal prosecutions (indeed, as the source of all governmental power) is irrefutably a legitimate governmental interest and directing that criminal prosecutions proceed in the name of People is rationally related to that interest.

Appellant also argues that prosecution in the name of the People violates his right to a jury of his peers and his right to the presumption of innocence. Relying on statutory amendment to make laws gender-neutral, appellant claims a "subtle" message is presented which either dehumanizes him or sets him apart from the populace. His argument simply fails. Relying on decades of service as jurists on hundreds of cases, the court in *Black* noted:

> We are not aware of a single instance in which the fact that a prosecution was brought in the name of "the People" has had any influence whatsoever on the decision of a jury with respect to a defendant's guilt or innocence."

(*People v. Black, supra,* 114 Cal.App.4th at p. 833.)

Indeed, as was the case with the defendant in *Black*, appellant makes no attempt to demonstrate by record citation how his trial fell short of due process. Indeed, during *voir dire* by defense counsel, there appeared to be no bias on the part of prospective jurors simply because the prosecution was brought in the name of the People of the State of California. (304 PRT 35571-35572.) Moreover, the jury acquitted appellant of the Garcia murder and failed to reach a verdict on the Strang and Fisher murders. Appellant fails to demonstrate either error or prejudice.

LI.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO VIEW ACCOMPLICE TESTIMONY WITH DISTRUST WAS HARMLESS

Appellant contends the trial court prejudicially erred and violated his constitutional rights by failing to *sua sponte* instruct the jury to view the testimony of Massingale with distrust because he was an accomplice to the Jacobs murders. (2B AOB 551-562.) The trial court did not err and there was neither prejudice nor a violation of constitutional rights from the lack of the instruction.

As more fully described in the Statement of Facts, *supra*, the defense contended that appellant's guilt of the Jacobs murders had not been shown beyond a reasonable based on evidence that Massingale confessed to, and had been arrested for, the Jacobs murders.[188/] In an apparent effort to blunt the impact of the defense evidence, the prosecution called Massingale in its case-in-chief, where he denied committing the murders and asserted his confession was false. (5 TRT 658-692.)[189/]

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188. Consistent with this evidence and defense theory, as well as evidence and similar defense theories relating to the other charged murders, the trial court instructed the jury:

> The defense has presented evidence in this trial for the purpose of showing that a person or persons other than the defendant may have committed a crime or crimes charged.
>
> If, after a consideration of the entire case, such third party evidence alone or together with other evidence raises a reasonable doubt whether the defendant committed a crime or crimes charged, you must give the defendant the benefit of that doubt and find him not guilty. (65 TRT 12200-12201.)

189. Massingale was also subjected to more than 100 pages of cross-examination. (5 TRT 693 - 6 TRT 857.)

Penal Code section 1111 provides:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

In *People v. Ward* (2005) 36 Cal.4th 186, this Court stated that the statutory definition of an accomplice also "requires a relationship between the defendant and accomplice, either by virtue of a conspiracy or by acts aiding and abetting the crime." (*Id.* at p. 212.) In the absence of facts showing such a relationship, the standard instruction on witness credibility is sufficient to appraise the jury on its consideration of the testimony by an alleged alternate perpetrator. (*Ibid.*) Here, as in *Ward*, there is no evidence of a conspiracy between appellant and Massingale or that Massingale aided and abetted appellant. Thus, there was no instructional error.

Appellant relies on *People v. Gordon* (1973) 10 Cal.3d 460, where this Court concluded, based on the statutory definition in Penal Code section 1111, that "where the evidence indicates that the crime may have been committed by either the witness or the defendant, but not necessarily both," the witness is an accomplice. (*Id.* at p. 468.) Under such circumstances, the trial court has a *sua sponte* obligation to give accomplice instructions which, at that time, required the jury to view the witness's testimony with distrust and not base a conviction on the accomplice's testimony unless it is corroborated by other evidence connecting the defendant to commission of the crime. (*People v. Gordon, supra,* 10 Cal.3d at p. 466, fn. 3, citing CALJIC (5th ed. 1988) Nos. 3.11 and 3.18.)

However, in *Ward*, this Court distinguished *Gordon* and found it did not undermine the relationship requirement as there was evidence in *Gordon* of a preexisting involvement between the defendant and the alleged accomplice. (*People v. Ward, supra,* 36 Cal.4th at p. 212.) As noted, there was no such evidence in this case.

Moreover, any error was harmless, as a more favorable result is not reasonably probable even had the omitted instructions been given. (*People v. Gordon, supra,* 10 Cal.3d at p. 470, citing Cal. Const., art. VI, §13, and *People v. Watson, supra, 46* Cal.2d at p. 836.)

Appellant makes no mention of the lack of a corroboration instruction, and for good reason. Corroboration need only be slight. (*People v. Frye, supra,*18 Cal.4th at p. 966.) As described in the Statement of Facts, *supra*, there was ample evidence which independently connected appellant to commission of the Jacobs murders. Where, as here, there is sufficient evidence of corroboration in the record, the failure to give the corroboration instruction is harmless. (*Ibid.*) In fact, it was the independent evidence upon which the jury relied in convicting appellant, not anything Massingale said, because although Massingale denied committing the murders, he provided no evidence which incriminated appellant.

Since, by implication, appellant concedes that the absence of a corroboration instruction was rendered harmless, he is left with the absence of the cautionary instruction as a basis for claiming prejudice.[190] However, "[a] trial court's failure to instruct the jury that it should view an accomplice's testimony with distrust does not prejudice the defendant when the record

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190. While CALJIC No. 3.18 at that time, cautioned the jury to view the accomplice's testimony with distrust, this Court has concluded that an instruction to view the accomplice's testimony with care and caution "better articulates the proper approach to be taken by the jury to such evidence." (*People v. Guiuan* (1998) 18 Cal.4th 558, 569, fn. omitted.)

contains sufficient corroborating evidence." (*People v. Williams, supra*, 16 Cal.4th at p. 226, citing *People v. Arias, supra,* 13 Cal.4th at pp. 142-143.) Thus, again, appellant's implied concession that there was ample corroboration undermines his claim of prejudice.

Moreover, the reason accomplice testimony is subject to distrust is because it comes from a tainted source, often given in the hope or expectation of leniency or immunity (*People v. Tewksbury, supra,* 15 Cal.3d at p. 967) or, in the case of an alternate sole perpetrator, of complete freedom (*People v. Gordon, supra,* 10 Cal.3d at p. 468). Here, the jury was aware that Massingale had confessed to the Jacobs murders; that the officers who obtained the confession disclaimed any impropriety; that Massingale was arrested for the murders and returned to San Diego; and that there were facts which supported his guilt. Thus, the jury did not need an instruction to clue them in on the notion that Massingale had ample reason to deny his guilt and dispute his confession.

In *Tewksbury*, this Court also stated that accomplice testimony is frequently cloaked with plausibility because an accomplice is peculiarly equipped by reason of inside knowledge of the crime to convince the unwary. Thus, Penal Code section 1111:

> concerns the reliability of evidence that is used to convict an accused of a criminal offense. The rationale underlying the statutory requirement of corroboration is the danger that an accomplice will falsely implicate the defendant in order to obtain leniency or immunity for herself.

(*People v. Frye, supra,* 18 Cal.4th at p. 968; see also *People v. Guiuan, supra,*18 Cal.4th at p. 567 [accomplice testimony is subject to distrust because the witness has the motive, opportunity, and means to help himself <u>at the defendant's expense</u>].) However, Massingale's testimony was not used to convict appellant since Massingale said nothing which connected appellant to

the crime. Indeed, nothing Massingale said in his testimony implicated appellant.

In light of the evidence which surrounded Massingale and his confession, the jury was keenly aware of his motivation to deny culpability and the absence of an instruction to that effect did nothing to divert the jury's attention from what was plainly evidence in need of careful consideration. Massingale's testimony provided him with no opportunity to curry favor or escape prosecution for it provided no evidence against appellant. Considered in the light of all the evidence, the lack of an accomplice "distrust" instruction was harmless as a more favorable result is not reasonably probable even had such an instruction been given.[191]

LII.

BECAUSE THE JURY WAS ADEQUATELY INSTRUCTED ON FACTORS RELEVANT TO ASSESSING A WITNESS TESTIMONY, THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S SPECIAL INSTRUCTION TO CONSIDER A WITNESS'S IMMUNITY

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing to give a defense-requested instruction advising the jury that an immunity agreement may be considered in assessing a witness's credibility. (2B AOB 558-562.)

Prosecution witness Frank Clark testified under a grant of immunity from prosecution for the possession and use of narcotics which he

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191. Appellant also claims the instructional error violated his constitutional rights. However, "[m]ere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [112 S.Ct. 475, 481-484, 116 L.Ed.2d 385].)" (*People v. Carpenter, supra,* 15 Cal.4th at p. 393.)

acknowledged during his testimony. (21 TRT 3800, 3916-3918.)[192/] The defense requested the following jury instruction:

> Immunity from prosecution and other favors or assistance provided a witness by law enforcement agents, including the prosecutors, may be considered in assessing the witness's believability. [¶] An immunity agreement may constitute a motive for bias.

(65 CT 14504.)

The trial court declined to give the instruction. (60 TRT 11402.) However, the trial court gave CALJIC No. 2.20, which advised the jury, among other things, that "in determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including, . . . [¶] [t]he existence or nonexistence of a bias, interest, or motive." (65 TRT 12192-12193.)

Appellant cites no authority requiring a trial court, on request, to instruct a jury that immunity from prosecution may be considered in assessing a witness's credibility when it has already instructed the jury with CALJIC No. 2.20. Dictum in both *People v. Harvey* (1984) 163 Cal.App.3d 90, and *People v. Pitts* (1990) 223 Cal.App.3d 606, stated that on request a jury should be instructed to view testimony of an immunized witness with distrust (*People v. Harvey, supra,* 163 Cal.App.3d at p. 112) or with greater caution than a normal witness (*People v. Pitts, supra,* 223 Cal.App.3d at pp. 880-881). However, in *People v. Hunter* (1989) 49 Cal.3d 957, this Court rejected the contention that "a trial court must, upon request, give cautionary instructions as to the testimony of immunized witness testimony." (*Id.* at p. 977; see also *People v. Echievarria* (1992) 11 Cal.App.4th 444, 449 ["There is no requirement to view

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192. Prosecution witness Richard Adler also testified under a similar grant of immunity. (19 TRT 3457-3465.)

immunized testimony with distrust"]; *People v. Hampton* (1999) 73 Cal.App.4th 710, 721.)

Appellant takes support for his position from that fact that his instruction did not require the jury to view immunized testimony with distrust or caution, but only directed the jury that it may consider immunization in assessing a witness's credibility. He notes that several of the cases found the jury adequately instructed on the subject of immunized testimony by addition of similar language to CALJIC No. 2.20. (*People v. Hunter, supra,* 49 Cal.3d at p. 978; *People v. Hampton, supra,* 73 Cal.App.4th at p. 721; *People v. Echievarria, supra,* 11 Cal.App.4th at p. 450.) However, none of those cases concluded that a jury would not be adequately informed of the need to assess the motives of an immunized witness had the jury only been given the standard instruction on witness credibility, as was the case here.

In *People v. Harrison* (2005) 35 Cal.4th 208, this Court considered whether the trial court erred in refusing defense requested instruction directing the jury to consider a witness's felony conviction and expectation of leniency in assessing the witness's credibility. Finding no error in refusing the instruction, this Court noted that the jury had been instructed with CALJIC Nos. 2.20 and 2.23 and concluded that "[t]ogether, these instructions adequately informed the jury that the 'existence or nonexistence of a bias, interest, or other motive' and the witness's prior convictions of a felony were factors it could consider in determining the believability of a witness." (*Id.* at p. 254.) Since the instructions expressly addressed the witnesses prior felony convictions, the witnesses' expectation of leniency was adequately covered by the language of CALJIC No. 2.20 to consider bias, interest, or motive. Here too, the language of CALJIC No. 2.20 adequately informed the jury to consider the witness's immunity and the trial court did not err.

Even had it been err to refuse the instruction, it was harmless, as a more favorable result is not reasonably probable had the requested instruction been given. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) In arguing prejudice, appellant says "it was crucial for the jury to know that Clark testified pursuant to an immunity agreement." But, of course, the jury did know that. (21 TRT 3800, 3916.) As the trial court stated in denying the defense instruction, "this is a matter for counsel to argue" (60 TRT 11402), which is exactly what defense counsel did. In discussing CALJIC No. 2.20, defense counsel illustrated a witness's adverse interest or motive as including whether the witness was given immunity. (62 TRT 11853.) Defense counsel challenged Frank Clark's credibility and specifically challenged the prosecution's presenting Clark as a trustworthy witness. (63 TRT 11930, 11933.) Defense counsel told the jury that Clark was "lucky he got immunity because otherwise he would be in prison for what he admitted to doing. (63 TRT 11950.) Defense counsel told the jury:

> A grant of immunity was provided by the prosecution to Mr. Clark. With regard to the guidelines for the evaluation of witnesses testimony, immunity is one of those things that you should consider, because immunity provides a witness with the ability to admit criminal conduct without fear of consequence. So that, in theory, then, you can evaluate the witness to see whether he or she is true or false.
>
> And when we talk about Rick Adler's narcotics involvement and his grant of immunity, you should consider that. And when considering Frank Clark's immunized testimony, independent - - independent of the brain damage which must necessarily have happened to him, given the quantity of narcotics use, beyond a reasonable doubt and to a moral certainty is Frank Clark accurate?

(63 TRT 11950.)

Though the prosecution objected to the defense hyperbole that Clark would be in prison for his admitted drug usage (63 TRT 11950), it never took

issue with the proposition that the jury could consider immunity is assessing credibility.[193]

In light of the trial court's instruction and the arguments, any error in refusing the defense instruction was harmless.[194]

LIII.

THE TRIAL COURT PROPERLY REFUSED DEFENSE PROFFERED INSTRUCTIONS ON PRELIMINARY FINDINGS

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing various defense-requested preliminary finding instructions. (2B AOB 563-569; 3 AOB 1029; 4 AOB 1211; 5 AOB 1345-1346.)

Two of his instructional complaints were raised earlier in his brief and have been addressed. In Argument X, *supra*, respondent demonstrated that the trial court's instruction on consideration of cross-admissible evidence was proper (2B AOB 563 (sub. B.1.)). In Argument XV, *supra*, respondent demonstrated that the error in failing to give a preliminary fact instruction regarding the authentication of the Love Insurance note photograph was

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193. Of course, the defense undercut its own argument challenging Clark and Adler, when it later urged the jury to rely on both of them to find that appellant had a reason to get rid of his 280Z car other than having used it in his unsuccessful attempt to murder Santiago. (64 TRT 12096.)

194. Appellant also claims the instructional error violated his constitutional rights. However, "[m]ere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [112 S.Ct. 475, 481-484, 116 L.Ed.2d 385].)" (*People v. Carpenter, supra,* 15 Cal.4th at p. 393.)

harmless (2B AOB 565 (sub. B.6.)). Those arguments are incorporated herein by reference.

Appellant requested an instruction which required the jury, before considering opinion testimony based on a "comparative identification technique" to find "that the items compared are reasonably comparable." (66 CT 14632.)[195/] The trial court denied the instruction. (60 TRT 11467.) Appellant cites no authority supporting the instruction (2B AOB 563-564) and the single case he cited to the trial court, *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, does not address jury instructions or preliminary factual findings under Evidence Code section 403. (*Id.* at pp. 379-380.) Moreover, the instruction is so vague as to be meaningless and, thus, confusing and properly rejected. (*People v. Gurule* (2002) 28 Cal.4th 557, 659 [instructions which might confuse the jury are properly refused].)

As the trial court noted, to the extent the proposed instruction conveyed something meaningful to the jury, it was covered by other instructions. The trial court instructed the jury that expert opinion may be disregarded if the jury finds it to be unreasonable. (65 TRT 12196.) The trial court also instructed the jury that lay opinion must be rationally based on perception. (65 TRT 12197.) Both of these instructions fairly informed the jury that an opinion based on a comparison of uncomparably dissimilar objects should be rejected. A trial court

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195. The requested instruction provided:

> Before you may consider any opinion testimony based on a comparative identification technique, you must first find, as a preliminary fact, that the proponent of the evidence has established a foundation which proves that the items compared are reasonably comparable. [¶] Absent the proponent establishing the preliminary fact, you must disregard the opinion testimony.

(66 CT 14632.)

may properly refuse a requested instruction which duplicates other instructions. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.)

Appellant also requested an instruction which directed the jury to disregard expert opinion which is based on speculative or conjectural data. (66 CT 14631.)[196/] The trial court denied the instruction as adequately covered by other instructions. (60 TRT 11479.) Initially, it seems clear that the proposed instruction does not address any preliminary fact finding by the jury, but instead directs the jury to reject certain expert opinion which is based on speculative or conjectural data. However, the trial court instructed the jury than in considering an expert's opinion, the jury may consider *inter alia* reasons given in support of the opinion and may disregard any such opinion the jury finds it to be unreasonable. (65 TRT 12196.) Thus, the proposed instruction was properly refused. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.)

Appellant requested an instruction advising the jury that the identification of physical evidence must be proven before the jury may consider expert or lay opinion based thereon.[197/] The trial court denied the instruction. (60 TRT 11429-11431.)

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196. The requested instruction provided:

> If you find that expert opinion is based upon speculative or conjectural data, you should disregard any such opinion based on such data. You may consider the remainder of an opinion, not affected by the improper use of speculative or conjectural fata, and give it the weight to which it is entitled.

(66 CT 14631.)

197. The requested instruction provided:

> Physical evidence draws no weight merely because it was received. Where expert opinion or lay opinion evidence involving human body specimens, such as blood, hair, tissue, and fingernails, or physical evidence taken from a crime scene or other location is offered by a party, the party introducing the

Chain of custody is a necessary showing for physical evidence to be admitted. The proponent of the evidence must demonstrate to the trial court that it is "reasonably certain that there was no alteration." (*People v. Lucas, supra,* 12 Cal.4th at p. 444.) However, once admitted, the jury does not reassess the trial court's determination. Instead, challenges to the chain go to weight. (*Ibid.*) Thus, there was no error in refusing the instruction.

Finally, based on the trial court's ruling that electrophoretic results would not be admissible in the absence of an adequate photograph of the gel plate, demonstrating the band development (62 CT 13841), appellant requested an instruction advising the jury not consider any expert opinion based on an

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> opinion evidence has a burden of proving identity of the items analyzed or viewed by the expert or lay witness. Identification of the specimen or item is a preliminary fact which must be proven before there may be consideration of any opinion testimony regarding the items.
>
> A method of establishing identity of an item is chain or custody, which is a type of circumstantial evidence. Chain of custody requires the party to show that the physical evidence evaluated was in fact the evidence found at the scene of the crime taken from a person or place, and that between receipt and analysis there has been no substitution, tampering, or break in the chain of custody.
>
> The burden on the party offering the evidence is to show to your satisfaction that, taking all the circumstances into account, it is reasonably certain that there was no break in the chain of custody, alteration or tampering.
>
> The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, or where there has been actual tampering, because then it is as likely as not that the evidence analyzed or viewed was not the evidence originally received.

(65 CT 14531-14532.)

electrophoretic test which did not have a photograph which adequately depicted the diagnostic bands.[198] The trial court denied the instruction. (60 TRT 11477-11478.)

As pointed on in Argument XLIV, sub. B, *supra*, the trial court's ruling was premised on an erroneous interpretation of the *Kelly* prong three requirement the erroneous, did not prejudice appellant. Thus, declining an instruction on the erroneous ruling was not error. Moreover, the *Kelly* prong three requirement is a matter of evidence admissibility decided by the trial court. Once admitted, the jury does not reassess the admissibility issue, but considers questions concerning proper test procedures as affecting weight. (*People v. Venegas, supra,* 18 Cal.4th at p. 81.)

Because the requested instructions were properly rejected, there was neither error nor constitutional violation.

LIV.

APPELLANT FORFEITED HIS CHALLENGE TO USE OF THE TERM "EXPERT WITNESS" AND USE OF THE TERM WAS NOT ONE-SIDED AND DID NOT IMPROPERLY GIVE UNDUE STATURE TO THOSE WITNESSES

Appellant contends the trial court prejudicially erred and violated his constitutional right by using the term "expert witness" during trial and in the

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198. The requested instruction provided:

> If, after any review and analysis of photographs depicting the results of electrophoretic testing, you are not able to observe banding patterns, or if the patterns are so diffuse and vague as to prevent a determination that separate and distinct banding patterns [sic], than you may not consider any opinion testimony based on the electrophoretic runs. As a matter of law, results of electrophoretic runs that are not depicted and confirmed by photographs is speculative and conjectural, and may not be considered by you.

(66 CT 14630.)

instructions. (2B AOB 570-573; 3 AOB 1030; 4 AOB 1212; 5 AOB 1347-1348.) Appellant forfeited his challenge by failing to object to use of the term during trial and failing to seek modification of the instructions. Moreover, the contention that use of "expert witness" gave undue stature to those witnesses and was one-sided is simply incorrect, as the term was applied equally to experts who testified on behalf of both sides and the instructions did not give expert witnesses any undue statute.

Appellant challenges use of the trial court's use of the term "expert witness" during the trial and in jury instructions. However, he points to no objection he voiced to the trial court's use of the term. Respondent has examined the examples appellant cited and found no object to the trial court's use of that terminology. Indeed, the example he cites during voir dire was defense counsel referring to "expert" witnesses (303 PRT 35312-35313, 35315-35316), an example he cites during opening statements was by defense counsel (1 TRT 56),[199] and an example he cites during witness examination was by defense counsel (4 TRT 548). Thus, his claim is forfeited. (*People v. Snow, supra,* 30 Cal.4th at pp. 77-78.)

He also complains about use of the term in the instructions, but points to no request for modification. Moreover, appellant submitted several proposed jury instructions which referred to witnesses as experts. (65 CT 14523-14529.) Thus, the claim is forfeited. (*People v. Farnam, supra,* 28 Cal.4th at p. 165; *People v. Arias, supra,* 13 Cal.4th at p. 171; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) In any case, the claims are without merit.

Appellant claims that by "designating certain witnesses as 'experts'," the trial court gave undue stature and emphasis to those witnesses in the eyes of the jury. However, the trial court did not designate any witnesses as experts and its instructions, both prior to the presentation of evidence and at the conclusion of the

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199. Appellant also cites an instance in which the trial court used the term outside the jury's presence during a break in the opening statements. (1 TRT 91.) It is difficult to see how the trial court's terminology outside the jury's presence could impact the jury in any way.

evidence, clearly advised the jury that a witness "is qualified to testify as an expert," not because of any behind-the-scene assessment of the witness by the trial court, but because "he or she has sufficient knowledge, skill, experience, training, or education." (1 TRT 12; 65 TRT 12196.) The trial court's instructions also made it clear that even if a witness qualified as an expert, that did not mean the testimony must be accepted. (1 TRT 12; 65 TRT 12196.) Moreover, in its pre-evidence instructions, the trial court advised the jury of its duty to determine the credibility "of the witnesses who testify in this case" and "[y]ou are required to apply the same standards to each witness no matter who the witness may be." (1 TRT 11.) In its closing instructions, the trial court instructed the jury that "[e]very person who testified under oath or affirmation is a witness" and that the jurors "are the sole judges of the believability of a witness and the weight to be given the testimony of each witness." (65 TRT 12192.) The trial court also cautioned the jury that:

> I have not intended by anything I have said or done or by any questions that I may have asked or by any ruling I may have made to intimate or suggest that you should - - what you should find to be the facts or that I believe or disbelieve any witness [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(65 TRT 12217.)

Appellant's suggestion that the trial court's instructions were one-sided or slanted in favor of the prosecution is without any support in the record. The defense called numerous expert witnesses. (41 TRT 7744 [toxicologist with the San Diego County Coroner's Lab]; 44 TRT 8290 [criminalist]; 45 TRT 8417 [forensic dentist]; 46 TRT 8667 [hair comparison expert]; 47 TRT 8765 [criminalist]; 48 TRT 8957 [criminalist]; 48 TRT 8963 [psychiatrist]; 48 TRT 8974 [forensic documents examiner]; 48 TRT 9027 [psychiatrist]; 50 TRT 9369 [forensic pathologist]; 51 TRT 9630 [serologist].) The trial court's instructions regarding expert witnesses applied equally to prosecution and defense expert witness, and neither favored the prosecution witnesses nor denigrated the defense witnesses.

Even had appellant not forfeited his claim, the use of the term "expert witness" did not violate any of appellant's rights or make his trial fundamentally unfair.

LV.

THE TRIAL COURT DID NOT ERR IN REJECTING A DEFENSE INSTRUCTION DEFINING THE TERM "INFERENCE" WHICH DUPLICATED THE TRIAL COURT'S OWN INSTRUCTION

Appellant claims the trial court prejudicially erred in denying a defense requested instruction defining the term "inference." (2B AOB 574-578; 3 AOB 1031; 4 AOB 1213; 5 AOB 1349-1350.) There was no error as the term was adequately defined in another instruction given by the trial court.

In its instructions to the jury, the trial court advised the jury, pursuant to CALJIC No. 2.00:

> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.
>
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact of group of facts established by the evidence.

(65 TRT 12187.)

Appellant requested the trial court additionally give the following instruction:

> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
>
> An inference must be based on a rational connection between the fact proved and the fact to be inferred. Before a rational connection can be found, there must be a finding with substantial assurance that the fact proved gives rise to the fact to be inferred.
>
> An inference cannot be based on suspicion, imagination, speculation, conjecture or guess work.

Evidence which produces suspicion, imagination, speculation, conjecture or guess work must be disregarded.

(65 CT 14493.)

The trial court denied the instruction, finding it adequately covered. (61 TRT 11620-11622.) As the defense conceded, the first paragraph is simply a restatement of the trial court's instructional definition of an inference from CALJIC No. 2.00. (59 TRT 11307.) Moreover, the remaining paragraphs added nothing to that definition. A jury assessing a possible inference for logic and reasonableness would necessarily reject an inference not rationally connected to the underlying facts or based solely on suspicion, imagination, speculation, conjecture or guess work. As the trial court noted, whether a proposed inference is logical and reasonable or simply speculative and conjectural was a matter for argument. (61 TRT 11621.)

A trial court may properly refuse a requested instruction which duplicates other instructions. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.) There was no error.

LVI.

THERE IS NO REASONABLE LIKELIHOOD THAT THE JURY VIEWED THE INSTRUCTIONS AS PERMITTING IT TO ARBITRARILY DISREGARD EVIDENCE

Appellant contends the trial court prejudicially erred and committed structural constitutional error in using the terms "should" or "may," rather than "must," in various jury instructions dealing with the jury's consideration of evidence He asserts the permissive language unconstitutionally allowed the jury to simply disregard his evidence. (2B AOB 579-584; 3 AOB 1032-1033; 4 AOB 1214; 5 AOB 1351.) The words "may" and "should" are used consistently throughout the CALJIC instructions and properly instruct the jury as to its duty. There is no reasonable likelihood that the jury viewed the instructions as permitting it to arbitrarily disregard some evidence in reaching its verdicts.

As appellant points out, the trial court used a variety of standard CALJIC instructions which used "should" or "may" in directing the jury's consideration of evidence, rather than "must." (2B AOB 582; see, e.g., 65 TRT 12191 ["In determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony . . ."], 12193 ["In evaluating the testimony of witnesses or a witness' previous statements, you should consider all of the factors surrounding their testimony or statements . . ."], *id.* [Evidence that on some former occasion a witness made a statement or statements that were inconsistent or consistent with his or her testimony in this trial may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts stated . . .]; see also 65 TRT 12194, 12196-12197, 12199-12200.)

Appellant complains that the language permitted the jury to simply disregard evidence. However, none of the instructions told the jury it was free to arbitrarily disregard any evidence presented at trial. At most, the terminology might be subject to erroneous interpretation, in which case, the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 381, [110 S.Ct. 1190, 108 L.Ed.2d 316]; see also *Victor v. Nebraska* (1994) 511 U.S. 1, 6, [114 S.Ct. 1239, 127 L.Ed.2d 583]; *People v. Clair* (1992) 2 Cal.4th 629, 663.) Moreover, instructions are not viewed in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was so instructed. (65 TRT 12185.)

To begin, this Court has concluded in the context of permissive inference instructions, use of "should" "could easily be interpreted by a reasonable juror to transform the instruction from a permissive guideline into a mandatory directive. . . ." (*People v. Roder* (1983) 33 Cal.3d 491, 506.) Thus, standing alone, use of

"should" in several of the instructions does not raise a reasonable likelihood that the jury would interpret the instruction as permitting arbitrary disregard of evidence.

Although "may" might be taken as permitting the jury to disregard evidence, the instructions as a whole and the trial record do not support a reasonable likelihood that the jury would interpret the term in this fashion. At the outset, the jury was instructed that one of its duties was to "determine the facts from the evidence received in the trial." (65 TRT 12184.) The jury was later instructed that it was to "decide all questions of fact in this case from the evidence received in this trial." (65 TRT 12214.) It was also instructed that "[e]ach of you must consider the evidence for the purpose of reaching a verdict, if you can do so" and each jury must decide the case individually, but "only after discussing the evidence and instructions with the other jurors." (65 TRT 12215.) These instructions plainly directed the jury to consider all of the evidence and there is no reasonable likelihood the jury would have interpreted use of "may" and "should" to permit the jury to arbitrarily disregard any evidence.

By consistently instructing on various types of evidence that may be considered, the trial court informed the jury it must use its discretion in deciding which evidence to rely on to determine the facts. The jury was instructed that the jurors were "the sole judges of the believability of a witness and the weight to be given the testimony of each witness." (65 TRT 12192.) The jury was also instructed that the final test in determining an issue of fact is "in the convincing force of the evidence." (65 TRT 12195.) If certain witnesses are found not credible or certain evidence is not convincing, the jury "may" disregard it in making its factual findings. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 ["Evidence of intoxication, while legally *relevant*, may be factually unconvincing" (italics in orig.) and jury may disregard that evidence in determining aider-and-abettor intent; an instruction on intoxication "might simply instruct that the jury may consider intoxication"].) Accordingly, the trial court cannot, in advance, instruct the jury on what evidence it

must consider, but can properly inform jurors of what is available for their discretionary consideration.

Of the various cases cited by appellant, only one appears to deal with use of "may." However, his reliance on *State v. Foster* (Wis. App. 1995) 528 N.W.2d 22, is misplaced. The Court stated that the trial court's instruction that the jury may consider evidence of intoxication could be interpreted to mean the jury need not consider that evidence at all. (*Id.* at p. 27-28.) However, the Court concluded there was no reasonable possibility the jury applied the instruction in that manner in light of the instructions as a whole, which, as here, included several instructions requiring the jury to consider all the evidence. (*Id.* at p. 28.) Here, as in *State v. Foster*,

> the word "may" emerged in the instructions not as a term giving permission to the jury to consider evidence, but rather, as a term explaining the jury's authority to reach certain determinations based on its evaluation of the evidence.

(*Ibid.*)

Properly considered in light of the instructions as a whole and the trial record, there is no reasonable likelihood the jury would have misunderstood the trial court's instruction in the manner suggested by appellant. Thus, there was no error.

Moreover, any error was harmless since a result more favorable to appellant is not reasonably likely even had the instructional terminology been changed. (*People v. Watson, supra,* 56 Cal.2d at p. 836; see *People v. Mendoza, supra,* 18 Cal.4th at pp. 1134-1135; see also *People v. Carter* (2003) 30 Cal.4th 1166, 1220-1222 [lack of evidentiary instructions at penalty phase was not structural error or federal constitutional error and was harmless under state law].) Appellant points to nothing aside from speculation that the jury arbitrarily disregarded any defense evidence. Indeed, the jury did not arbitrarily ignore defense evidence since it found appellant not guilty of the Garcia murder and was unable to reach a unanimous verdict as to the Strang and Fisher murders. Thus, even had there been error, it was harmless.

LVII.

THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S INSTRUCTION DESIGNATING OPINION TESTIMONY AS CIRCUMSTANTIAL EVIDENCE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing an instruction advising the jury that all opinion testimony is circumstantial, not direct evidence, and delineating various expert opinion witness testimony and all lay opinion testimony which the jury was required to consider as circumstantial evidence. (2B AOB 585-589; 4 AOB 1215.) The trial court properly rejected the defense-requested instruction as duplicating instructions which would be given, and appellant was not prejudiced. by its absence.

With regard to direct and circumstantial evidence, pursuant to CALJIC No. 2.00, the trial court instructed the jury, *inter alia*:

> Evidence is either direct or circumstantial. [¶] Direct evidence is evidence that directly proves a fact without the necessity of an inference. It is evidence which, by itself, if found to be true, establishes that fact. [¶] Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. [¶] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

(65 TRT 12187.)

Appellant requested an instruction advising the jury that expert and lay opinion testimony is circumstantial. (65 CT 14523;[200/] 59 TRT 11321-11322.) The

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200. The requested instruction provided:

> Expert opinion testimony and lay opinion testimony are a type of circumstantial evidence and not direct evidence.
>
> Therefore, the circumstantial evidence instructions shall be applied to opinion testimony considered by you to any evidence offered by a criminalist, serologist, handwriting analyst,

trial court denied the defense-requested instruction on the basis that it was duplicative and argumentative. (60 TRT 11421-11422.)

A trial court may properly deny an instruction which as duplicative or argumentative. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.) By defining circumstantial evidence as evidence from which an inference of another fact may be drawn, the trial court adequately instructed the jury as to the circumstantial character of opinion testimony, as well as other forms of circumstantial evidence.

Appellant relies on *People v. Gentry* (1968) 257 Cal.App.2d 607, and *People v. Goldstein* (1956) 139 Cal.App.2d 146. However, while both cases hold that expert opinion is a form of circumstantial evidence, neither case requires a trial court, even upon request, to highlight such evidence as circumstantial in jury instructions. (*People v. Gentry, supra,*257 Cal.App.2d at p. 610-612; *People v. Goldstein, supra,*139 Cal.App.2d at p. 151-155.)

Appellant claims it is reasonably likely that the jury concluded expert testimony in the areas of handwriting analysis and serology was direct evidence. However, jurors are presumed to be intelligent, and capable of understanding and applying instructions to the facts of a case. (*People v. Lewis, supra,* 26 Cal.4th at p. 390.) In each example cited by appellant, the testimony plainly indicated the expert was giving an opinion from which an inference might arise and not testifying to the inferred fact.

John Harris opined that based on his comparison, the person who wrote the due course handwriting also wrote the Love insurance note. (13 TRT 2309.) While the jury could reasonably infer from Harris' opinion that appellant wrote the Love

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fingerprint analyst, shoe comparison analyst, tracking analyst, hair comparison analyst, or any other analyst.

The circumstantial evidence instructions shall also be applied to all lay opinion testimony.

insurance note, the reasoning process is plainly one of inference-drawing, not direct evidence.

Similarly, Brian Wraxall testified that the blood stain on the sheepskin seat cover could have come from Swanke (31 TRT 5728) and the blood under Swanke's nails could have come from appellant (31 TRT 5742). In each instance, Wraxall indicated the population frequency attributable to the blood characteristics. (31 TRT 5735-5736, 5743.) Once again, the jury's reasoning process was plainly one of inference-drawing, not direct proof.

Moreover, by highlighting specific evidence in the form of a special instruction, the defense-requested instruction was argumentative. (*People v. Hughes, supra*, 27 Cal.4th at p. 361.) As the trial court pointed out, the defense was free to argue the circumstantial character of the opinion evidence, as well as other prosecution evidence. (60 TRT 11422.)

For both reasons, there was neither error nor prejudice in declining to give the defense-requested instruction.

LVIII.

THE TRIAL COURT DID NOT ERR IN DECLINING TO DELETE THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing to delete the jury instruction titles from the written instructions which were provided to the jury during the guilt and penalty phase deliberations. (2B AOB 590-599; 3 AOB 1034-1035; 4 AOB 1216-1217; 5 AOB 1352-1353.)[201/] There was no error and his claim of prejudice is speculative.

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201. Although presented in the AOB as part of the guilt phase issues, appellant specifically mentions the penalty phase instructions as well as the guilt phase instructions. Respondent's argument applies to both.

The record indicates that after its verbal instructions, the trial court provided the jury with the instructions in written form, in both the guilt phase (64 TRT 12177; 65 TRT 12215) and penalty phase (70 TRT 13333). As to the guilt phase instructions, appellant requested that the instruction headings be deleted and the trial court denied the request. (61 TRT 11550.)[202/]

As appellant acknowledges, this Court has previously considered a challenge to the trial court's failure to delete the titles from written jury instructions and found "no error." (*People v. Bloyd* (1987) 43 Cal.3d 333, 355-356.) This Court approved the Attorney General's offer that the descriptive titles "undoubtedly aided the jurors to find the particular subjects they wished to consult." (*Id.* at p. 356.) The trial court in this case noted the same consideration in denying the request to delete the titles. (61 TRT 11550.)

More recently, this Court rejected a claim of error based on the trial court's failure to delete a reference to co-conspirator in the title of a jury instruction addressing a claim of alibi by an aider and abettor or co-conspirator, when there was no evidence or issue of a conspiracy. (*People v. Staten* (2000) 24 Cal.4th 434, 459, fn. 7.) This Court found the defendant's claim of error "unpersuasive" and noted the lack of any prejudice. (*Ibid.*)

Appellant argues the instruction titles overemphasized legal concepts mentioned, under-emphasized concepts not mentioned, and were confusing. Appellant's argument ignores both the ability of the jurors and the context of the trial. As noted previously, jurors are presumed to be intelligent, and capable of understanding and applying instructions to the facts of a case. (*People v. Lewis, supra,* 26 Cal.4th at p. 390.) Moreover, instructions are not viewed in artificial isolation, but must be considered in the context of the instructions as a whole and the

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202. Appellant has not cited, and respondent has not found any similar objection to the penalty phase instruction headings. However, the trial court's reason for denying the request as to the guilt instructions would apply equally to the penalty phase instructions.

trial record. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was so instructed. (65 TRT 12185.)

Even looking at the instructions individually, it would be readily apparent to presumptively intelligent jurors that the titles are just what this Court has called them, "descriptive titles." (*People v. Bloyd, supra,* 43 Cal.3d at p. 356.) However, the jury did not receive the written instructions until after receiving the instructions verbally from the trial court. (See 65 TRT 12215[guilt phase]; 70 TRT 13333[penalty phase].) In each instance, the jury was instructed that every part of the text of an instruction was of equal importance. (65 TRT 12216; 70 TRT 13333.) Appellant's arguments amount to lawyerly parsing and technical hairsplitting which is not the way a jury would approach the instructions. (*Boyde v. California, supra,* 494 U.S. at pp. 380-381.)

Finally, as in *Staten*, appellant fails to demonstrate any prejudice other than speculation. Thus, any error was harmless. (*People v. Staten, supra,* 24 Cal.4th at p. 459, fn. 7.)

LIX.

THE TRIAL COURT'S INSTRUCTIONS WERE NOT IMRPOPERLY COERCIVE

Appellant contends the trial court's instructions improperly coerced the jurors to reach a unanimous verdict rather than determine guilt or innocence individually. (2B AOB 600-604; 3 AOB 1036-1037; 4 AOB 1218; 5 AOB 1354.) Appellant's claim of coercion is premised on an unreasonable reading of particular portions of the instructions, culled out of the whole. When considered as a whole, no reasonable jury would understand the instructions as directing that the jurors subvert their individual opinions in favor of unanimity.

Appellant complains that while the jury was instructed to reach a "'just verdict,'" it was never instructed on the "propriety and/or desirability of not reaching

a verdict." He claims the alleged instructional deficiency created "a danger of improper juror coercion" where jurors might believe they should reach a verdict regardless of their individual disagreement. He also suggests that the instructions were conflicting, at best, and were one-sided. (2B AOB 600.)

As noted previously, jurors are presumed to be intelligent, and capable of understanding and applying instructions to the facts of a case. (*People v. Lewis, supra,* 26 Cal.4th at p. 390.) Moreover, instructions are not viewed in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was so instructed. (65 TRT 12185.) The jury was not instructed that a verdict was required, and there was no conflict or one-sidedness in the instructions.

The trial court instructed the jurors that they had two duties: to determine the facts from the evidence and to apply the law to the facts in reaching a verdict. (65 TRT 12184.) The trial court specifically instructed the jury that it must "accept and follow the law as I state it to you." The trial court's instructions admonished the jury that:

> The People and the defendant are entitled to the *individual opinion* of each juror. [¶] *Each of you* must consider the evidence for the purpose of reaching a verdict, *if you can do so. Each of you* must decide the case *for yourself*, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do no hesitate to change an opinion if you are convinced it is wrong. However, *do not decide any question any particular way because a majority of the jurors or any of them favor such a decision.*

(65 TRT 12214-12215, italics added.)

The trial court's instruction regarding a "just verdict" stated:

> You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weight the evidence, apply the law, and reach a *just verdict* regardless of the consequences.

(65 TRT 12185, italics added.)

The instruction itself plainly advised the jury that any verdict which the jury reached must be a just verdict; i.e., one reached after considering and weighing the evidence, applying the law and without regard to the consequences. In light of the other instructions, the jury would have understood that applying the law to reach a just verdict required each juror to come to his or her own conclusion. Moreover, contrary to appellant's claim, there was specific instruction to the jury which advised what to do in the case of an inability to reach a verdict on the murder counts. (See 65 TRT 12210.)[203/]

There is no reasonable likelihood that the jury applied the challenged instruction in a way that undermined the obligation of each juror to come to his or her own conclusion. (*Boyde v. California, supra,* 494 U.S. at p. 381.)

Moreover, any error was plainly harmless. The jury was unable to reach a verdict on the Strang and Fisher murder counts. Appellant references the penalty phase where the jury initially reported deadlock. However, as noted, by that time the jury had already failed to reach verdicts on two of the charged murders in the guilt phase, which the trial court accepted. Moreover, like the guilt phase instructions, the penalty phase instructions admonished the jury that unanimity was required for a verdict, the jury was to reach a penalty verdict "if you can do so," and each of the jurors was to reach a penalty decision individually and not because "a majority of the jurors of any of them favor such a decision." (70 TRT 13331-13332.) There was neither error nor prejudice.

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203. The jury was instructed:

> If you are unable to agree on the allegations of first degree murder, your foreperson shall report such fact to the Court. If you are unable to unanimously agree on the allegation of second degree murder, your foreperson shall report such fact to the Court.

LX.

THERE WERE NO DEFICIENCIES IN THE TRIAL COURT'S INSTRUCTIONS

Appellant contends that several "instructional deficiencies" were individually and cumulatively prejudicial. (2B AOB 605-621; 3 AOB 1038-1039; 4 AOB 1219-1220; 5 AOB 1355-1356.) None of the alleged deficiencies demonstrates error or prejudice. Respondent will address each claim in the order presented.

A. Use Of "Guilt Or Innocence"

Appellant claims that instructional references to "guilt or innocence" conflicted with and undermined the prosecution's burden of proving guilt beyond a reasonable doubt. (2B AOB 605-606.) They did not.

The trial court instructed the jury that: (1) appellant's arrest, charges and trial may not be used to infer "he is more likely to be guilty that innocent" (65 TRT 12185); (2) the jury must adopt a reasonable inference raised by circumstantial evidence which points to innocence (65 TRT 12188); (3) the absence of motive may tend to establish innocence (65 TRT 12200); and numerical votes on guilt or innocence were not to be disclosed unless directed by the trial court (65 TRT 12216).

However, the trial court also instructed the jury that: (1) circumstantial evidence necessary to establish appellant's guilt "must be proved beyond a reasonable doubt" (65 TRT 12187); (2) appellant is presumed innocent and his guilt must be proven beyond a reasonable doubt (65 TRT 12189); (3) appellant is entitled to the benefit of a reasonable doubt as to his guilt and must be found not guilty if there is reasonable doubt about guilt (65 TRT 12190); (4) appellant may rely on the failure of the People to prove beyond a reasonable doubt every essential element of the charges (65 TRT 12191-12192); (5) a reasonable doubt that appellant was present at the time any crime was committed requires a finding of not guilty (65 TRT 12200); (6) appellant is entitled to the benefit of any reasonable doubt raised by

evidence of third party guilt and must be found not guilty (65 TRT 12200-12201); (7) appellant may not be found guilty of kidnaping in counts 4 and 8 (Robertson and Swanke) unless the jury finds beyond a reasonable doubt he committed those offenses within the time they were shown to have been committed (65 TRT 12201-12202); (8) the jury must determine whether appellant is guilty or not guilty of murder and give appellant the benefit of any reasonable doubt as to the degree of the murder (65 TRT 12207, 12209-12210); and (9) appellant may be found guilty or not guilty of any or all the charged crimes (65 TRT 12214).

Under virtually identical instructions, this Court held:

> Taking all the instructions together, as required, the jurors would instead have understood that while the issue before them is defendant's guilt or innocence, a conviction may be returned only if the prosecution has proved defendant's guilt beyond a reasonable doubt. Because there was no reasonable likelihood of misunderstanding, the challenged instructions did not deprive defendant of a fair trial or a reliable penalty determination.

(*People v. Snow, supra,* 30 Cal.4th at p. 97; see also *People v. Frye, supra,* 18 Cal.4th at p. 958 ["Viewing the instructions as a whole, and in light of the record at trial, we conclude it is not reasonably likely the jury understood the challenged instructions to mean defendant had the burden of establishing his innocence"].)

For the same reason, there was no error here.

B. Failure To *Sua Sponte* Define "Material"

The trial court instructed the jury with CALJIC No. 2.21.2:

> A witness who is willfully false in one material part of his of her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars.

(65 TRT 12194.)

Appellant claims the trial court erred in failing to *sua sponte* define "material" in the context of the instruction, which he claims has a technical legal meaning derived from the materiality element of perjury. (2B AOB 607-608.) He is mistaken. To be sure, materiality has a technical legal meaning within the crime of perjury. (*People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1575.) However, in the context of CALJIC No. 2.21.2, "material" is not used in the sense in which it is used in perjury.

While appellant contends "material" has the same meaning in both contexts, he cites no supportive authority and gives no rational. As the court explained in *People v. Wade* (1995) 39 Cal.App.4th 1487:

> It would make no sense to tell the jury that it could distrust a false witness *only* if the falsity influenced the outcome of the case. Rather, as used in the instruction, "material" carries its ordinary meaning of "substantial, essential, relevant, or pertinent." The instruction thus tells the jury it can distrust a witness who is willfully false in giving relevant or pertinent testimony."

(*Id.* at p. 1496, italics added.)

As appellant acknowledges, there is no *sua sponte* duty to define the meaning of words of common usage. (*Id.* at p. 1495.) Thus, there was no error.

C. "Probability Of Truth" And "Convincing Force":

Appellant contends that the trial court's use of CALJIC No. 2.21.2, *supra*, was improper for the additional reason that its reference to the "probability of truth" when applied to prosecution witnesses is "suspect" and exacerbated by instructional language in CALJIC No. 2.22, which directs the jury to decide disputed factual issues, not on the basis of the number of witnesses on each side, but on the convincing force of the evidence. The gist of his contention appears to be that the challenged language undermines the prosecution's burden to prove guilt beyond a reasonable doubt. (2B AOB 608-610.)

However, this Court has already considered and rejected these same arguments. (*People v. Nakahara* (2003) 30 Cal.4th 705, 714; *People v. Maury, supra,* 30 Cal.4th at pp. 428-429.) There was no error.

D. CALJIC No. 2.20 (Witness Credibility)

Appellant contends the trial court erred in giving CALJIC no. 2.20 because the instruction was limited to the testimony of witnesses, thereby leaving the jury without any direction to determine the credibility of out-of-court statements, specifically by Shannon Lucas, Jodie Santiago, Johnny Massingale, and Jimmie Joe Nelson. (2B AOB 610-615.) To the contrary, the trial court's instructions plainly applied to both in-court testimony and out-of-court statements made by witnesses. Moreover, CALJIC No. 2.20 was inapplicable to the single out-of-court statement made by a non-witness, Shannon Lucas, and the jury was adequately instructed of its role in assessing that evidence.

As to witness credibility, the trial court instructed the jury:

> Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.
>
> In determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including, but not limited to, any of the following:
>
> The ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;
>
> The ability of the witness to remember or to communicate any matter about which the witness has testified;
>
> The character and quality of that testimony;
>
> The demeanor and manner of the witness while testifying;
>
> The existence or nonexistence of a bias, interest, or other motive;

Evidence of the existence of nonexistence of any fact testified to by the witness;

The attitude of the witness toward this action or toward the giving of testimony;

A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness;

The character of the witness for honesty or truthfulness or their opposites;

An admission by the witness of untruthfulness;

The witness' prior conviction of a felony.

In evaluating the testimony of witnesses or a witness' previous statements, you should consider all of the factors surrounding their testimony or statements, including any evidence of cognitive impairment.

"Cognitive" means the ability to perceive, to understand, to remember, and to communicate any matter about which the witness has knowledge.

Evidence that on some former occasion a witness made a statement or statements that were inconsistent or consistent with his or her testimony in this trial may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion. (65 TRT 12192-12193.)

Contrary to appellant's argument, the above-quoted instruction plainly directs the jury to assess the credibility of a witness' out-of-court statements, as part of its assessment of the witness' credibility. The instruction directs the jury to consider prior consistent or inconsistent statements by a witness as one factor in assessing the credibility of the witness' testimony. It also advises the jury to evaluate a witness' testimony and prior statements and in doing so, directs the jury to "consider all of the factors surrounding their testimony or statements." Thus, as to Jodie Santiago, Johnny Massingale, and Jimmie Joe Nelson, each of whom testified (5 TRT 658 [Massingale]; 38 TRT 7314 [Santiago]; 41 TRT 7850 [Nelson]), the jury was adequately instructed to assess the out-of-court statements of witnesses.

Shannon Lucas did not testify as a witness (26 TRT 4833), but her out-of-court statement, in which she identified the dog choke-chain recovered from around Anne Swanke's neck as belonging to the dog she and appellant owned, was admitted. (25 TRT 4737.) The circumstances surrounding Shannon Lucas' statement were also admitted. (25 TRT 4733-4739.) Additionally, evidence was presented that the choke-chain was different from the Lucas's dog's chain (37 TRT 6955-6963 [Patricia Rutan]), that the Lucas's dog was put to sleep half a year before the Swanke crimes (55 TRT 10401-10402 [Peggy Fisher]), and that the choke-chain from Swanke's neck was a type commonly manufactured and distributed in the United States (56 TRT 10570-10594 [James Boyd]; 57 TRT 10795-10799 [Kevin Chess]).

Thus, the jury was given testimonial and nontestimonial evidence concerning whether the chain recovered from around Swanke's neck had belonged to appellant's dog. That evidence was conflicting and the conflict required the jury to determine the credibility of Shannon Lucas' identification. Moreover, the jury was instructed that one of its duties was to "determine the facts from the evidence received at trial" (65 TRT 12184) and that "[e]vidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact" (65 TRT 12186-12187).

Considering the instructions as a whole and in light of the trial record, it is not reasonably likely that the jury would have understood that it was free to uncritically accept Shannon Lucas's statement at face value. (*People v. Frye, supra,* 18 Cal.4th at p. 958.)

E. Witness Testimony Instructions

Expanding upon his previous argument, appellant contends that various instructions which guided the jury's assessment of witness credibility were improperly limited to witness testimony to the exclusion of out-of-court statements, specifically instructions addressing discrepancies in testimony (CALJIC No.

2.21.1[204]), willful falsehoods by witnesses (CALJIC No. 2.21.2[205]), a witness' prior felony conviction (CALJIC No. 2.23[206]), weighing conflicting testimony (CALJIC No. 2.22[207]), and sufficiency of testimony by one witness (CALJIC No. 2.27[208]). (2B

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204. The trial court instructed the jury:

> Discrepancies in a witness' testimony or between his or her testimony and that of others - - that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocence misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. [¶] Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. (65 TRT 12194.)

205. The trial court instructed the jury:

> A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars. (65 TRT 12194.)

206. The trial court instructed the jury:

> The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair a witness' believability. It is one of the circumstances that you may take into account in weighing the testimony of such a witness. (65 TRT 12194-12195.)

207. The trial court instructed the jury:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing

AOB 615-618.) However, as previously demonstrated, the trial court's instruction, pursuant to CALJIC No. 2.20, directed the jury to assess the credibility of a witness' out-of-court statements, as part of its assessment of the witness' credibility, and also advised the jury to evaluate a witness' testimony and prior statements and in doing so, directs the jury to "consider all of the factors surrounding their testimony or statements." There was simply no different treatment given to out-of-court statements.

F. Instruction On Prior Testimony

Appellant contends the trial court erred in refusing a defense-requested instruction patterned after CALJIC No. 2.12[209], regarding prior testimony read from

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> force. [¶] You may not disregard the testimony of the greater number of witnesses merely from caprice, whom or prejudice, of from a desire to favor one side as against the other. [¶] You must not decide an issue by the simple process of counting the numbers of - - number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence. (65 TRT 12195.)

208. The trial court instructed the jury:

> Testimony concerning any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends. (65 TRT 12195.)

209. CALJIC NO. 2.12 provides:

> In this case testimony given by a witness at a prior proceeding who was unavailable at this trial has been read to you from the reporter's transcript of that proceeding. You are to consider such testimony in the same light and in accordance with the same rules which you have been given as to testimony of

a transcript, leaving the jury was no instruction on how to consider such prior testimony. (2B AOB 618-619.) The requested instruction stated:

> Testimony given by a witness at a prior proceeding has been read to you from the reporter's transcript of that proceeding. You must consider such testimony as if it had been given before you in this trial.

(65 CT 14499.) The trial court denied the instruction. (61 TRT 11555.)

While witnesses were questioned about statements made in prior testimony (see, e.g., 1 TRT 131-132) and a witness' prior testimony was read during the witness' examination (27 TRT 5042-5044), appellant points to no prior testimony by a person who did not testify at his trial. (See *People v. Wharton* (1991) 53 Cal.3d 522, 599.) The trial court correctly ruled that the proposed instruction did not accurately state the law as to consideration of prior testimony given as prior consistent or inconsistent statements and, in any case, as pointed out in subheading D, *supra*, the trial court accurately instructed the jury on consideration of prior consistent and inconsistent statements. There was no error.

G. Cumulative Prejudice

Appellant claims the cumulative effect of the various instructional errors asserted in this argument requires reversal. (2B AOB 619-621.) As demonstrated herein, there were no error. Thus, there was no prejudice, individually or cumulatively.

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witnesses who have testified here in court.

LXI.

THE PRESUMPTION THAT JURORS UNDERSTOOD THE TRIAL COURT'S GUILT AND PENALTY PHASE INSTRUCTIONS IS NOT REBUTTED BY EMPIRICAL STUDIES WHICH WERE NOT SUBJECTED TO CROSS-EXAMINATION, THE DECISION TO IMPROVE THE REASONABLE DOUBT INSTRUCTION, OR THE EFFORTS TO IMPROVE THE JURY INSTRUCTIONS IN GENERAL

Appellant contends the guilt and penalty phase instructions were not sufficiently understandable to meet the heightened reliability for a constitutionally imposed capital penalty. (2B AOB 622-632; 3 AOB 1040-1041; 4 AOB 1221-1222; 5 AOB 1357-1358.) This Court has already rejected this claim and appellant's reliance on additional authority does not make his claim any better.

In *People v. Welch* (1999) 20 Cal.4th 701, this Court rejected a claim that the standard jury instruction regarding mitigating factors was inadequate in defining mitigation. (*Id.* at pp. 772-773.) In making the claim, the defendant did not focus on any particular instructional language, but relied on two articles describing the results of studies of persons' understanding of CALJIC No. 8.88. (*Ibid.*) This Court held that the presumption that jurors comprehend and accept the court's instructions "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." (*Id.* at p. 773.)

Appellant does not limit his claim to the instructional language concerning mitigation, but claims none of the instructions were understandable. Like the defendant in *Welch*, appellant does not point to any particular deficiency in any of the instructions, but relies on articles describing empirical studies (one of which is one of the articles relied upon by the defendant in *Welch*), a statement by a commission tasked to review and suggest improvements to the jury system, and the opinions and legislative actions resulting in a revision of the reasonable doubt instruction.

As in *Welch*, appellant's reliance on empirical assertions based on research which was not presented in the trial court and was not subjected to cross examination, does not overcome the presumption that jurors understand and follow the trial court's instructions.[210/]

Appellant's reliance on the comment by the committee of the California Judicial Council fares no better. To the extent the commission concluded that some jury instructions are impenetrable, that opinion is not supported by any evidence, does not point to which of the instructions raised this concern, and was neither presented in the trial court nor subjected to cross examination. The laudable goal of improving instructional language says nothing about the jury's understanding of the instructions in appellant's case or undermine the presumption of understanding.

Finally, appellant points to criticism of the reasonable doubt instruction in *Victor v. Nebraska, supra*, 511 U.S. 1, which lead to this Court opinion in *People v. Freeman* (1994) 8 Cal.4th 450, and the subsequent changes in the instruction and

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210. Appellant's description of the studies raises more questions than support for his claim. For example, the fact that many of the subjects of the Haney, et. al., study dismissed mitigating evidence which did not lessen the defendant's responsibility for the crime, may indicate misunderstanding, but may also indicate an assessment of weight, which jurors are permitted, and the fact that many of the subjects disbelieved the literal language of life without possibility of parole, says more about the subjects' distrust of the legal system than misunderstanding of the term. Additionally, the jury in appellant's case was not a mock jury. Appellant's jury was subjected to extensive discussion of legal concepts in *voir dire* as well as during the attorney arguments, and received the jury instructions, amplified by various defense-proposed instructions, in written form.

Penal Code section 1096, upon which the instruction is based.[211] However, neither the cases nor the changes support his claim.

In *Victor*, the Court considered a challenge to the constitutionality of the reasonable doubt instruction based on two phrases: "moral evidence" and "moral certainty." (*Victor v. Nebraska, supra,* 511 U.S. at p. 10.) The Court found the phrase "moral evidence," though not a mainstay of modern lexicon, had no different meaning than its proper meaning and found its presence in the instruction "unproblematic." (*Id.* at pp. 12-13.) Though the Court found the phrase "moral certainty" when standing alone raised more concern (*id.* at p. 13), it concluded that the remaining instructional language, which was also given in this case, did not convey an erroneous, unconstitutional meaning. (*Id.* at pp. 14-17.) Thus, *Victor* does not support appellant's unspecified blanket challenge to the guilt and penalty instructions, much less a challenge to the reasonable doubt instruction given in this case.[212]

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211. The trial court instructed the jury on the prosecution's burden of proof beyond a reasonable doubt and defined reasonable doubt as follows:

> It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(65 TRT 12189.)

212. The Court in *Victor* suggested that the changing meaning of language might ultimately change the meaning of "moral certainty" to a degree that it would conflict with the standard of proof beyond a reasonable doubt. (*Victor v. Nebraska, supra,* 511 U.S. at p. 16.) However, appellant's case was tried in 1988-1989, several years before the decision in *Victor*. Any potential change in meaning after the decision in *Victor* could not have affected appellant's case.

In *People v. Freeman, supra,* 8 Cal.4th 450, this Court also recognized that the decision in *Victor* upheld the California reasonable doubt instruction. While the Court also endorsed a modification of the instruction to delete the two phrases at issue in *Victor*, it did so with an eye to the high court's prognostication of a possible future change in the meaning of the phrases. (*Id.* at p. 504.) Thus, *Freeman* also does not support appellant's unspecified blanket challenge to the guilt and penalty instructions, much less a challenge to the reasonable doubt instruction given in this case. And, while it may follow without saying, adoption of the change suggested in *Freeman* may be an endorsement of the need to anticipate and correct a possible future problem, it does not support appellant's unspecified blanket challenge to the guilt and penalty instructions.

Nothing which appellant points to supports his unspecific challenge to the presumptive ability of the jury to understand and follow the instructional language in his case. Thus, his claim must be rejected.[213/]

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213. Appellant also briefly references jury questions during the penalty deliberations as support for his blanket challenge to the guilt and penalty instructions. (2B AOB 628.) Since the reference is unaccompanied by any argument, it is difficult to decipher appellant's reference. However, the jury did not ask any questions during the guilt phase, so presumably appellant acknowledges that lack of questions as undermining his challenge to the guilt phase instructions. The jury's penalty phase deliberative questions asked about the result of a deadlock, whether evidence from the entire trial should be considered in determining the penalty, and whether the jury was limited to the factors listed in the instructions. (108 CT 24251-24252.) It is difficult to see how the jury's question about a deadlock supports appellant's claim, since the subject of jury deadlock is not addressed in the instructions. Moreover, the other questions were addressed in the trial court's answers. (108 CT 24253.) Thus, any arguable lack of understanding was cured by the subsequent instruction.

LXII.

THE TRIAL COURT'S INSTRUCTIONS CLEARLY AND UNAMBIGUOUSLY PLACED THE ONLY BURDEN OF PROOF ON THE PROSECUTION

Appellant contends the trial court prejudicially erred by failing to instruct the jury that the defense had no obligation to present evidence or refute evidence presented by the prosecution. (2B AOB 643-653; 3 AOB 1044; 4 AOB 1228; 5 AOB 1361.)[214] Appellant's argument, while paying lip-service to the standard for analyzing claims of instructional error, is built upon the type of technical hairsplitting which jurors do not undertake. A reasonable reading of the instructions refutes appellant's claim.

Appellant claims the trial court's instruction on the presumption of innocence and the prosecution's burden of proof (CALJIC No. 2.90) failed to "expressly explain" the presumption of innocence. The trial court instructed the jury:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

(65 TRT 12189.)

By referring to the presumption of innocence as a "technical" term (2B AOB 645), appellant appears to be invoking the rule that requires a trial court to *sua sponte* define words with a technical legal meaning. (*People v. Bland* (2002) 28 Cal.4th 313, 334.) The reasonable doubt instruction is taken from Penal Code section 1096.

> If a statutory word or phrase is commonly understood and is not used in a technical sense, the court need not give any sua sponte instruction as to its meaning. If, however, a word or phrase is used in a technical sense differing

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214. Although attempting generally to follow the presentation of issues in the AOB, we address issue 2.10.2 here and 2.10.1 in the following argument, since the argument in 2.10.2 is incorporated as the first subheading in 2.10.1.

from its commonly understood meaning, clarifying instructions are appropriate and should be given on the court's own motion.

(*People v. Rodriguez* (2002) 28 Cal.4th 543, 546-547.)

Appellant' cites no authority finding "presumed," "innocent," or "presumed to be innocent" to have a technical meaning differing from their commonly understood meaning. To presume is commonly understood to mean to accept as true or credible without proof or before inquiry and innocent is commonly understood to mean free from legal guilt. (Webster's Third New International Dictionary (2002) pp. 1166, 1796.) That is how they are used in the statute and the instruction. There was no technical meaning and no obligation to instruct further.

Appellant also argues that the phrase would be understood to imply some obligation of proof on the defendant. Appellant says the jury would be naturally inclined to view their duty as deciding whether the defendant has proven or disproven facts in issue. He cites no authority for such a natural inclination nor any reason why the jury would be so inclined. To the contrary, society as become so imbued with legal news and dramas that, like the *Miranda* warnings, it would be remarkable to find any juror unfamiliar with the presumption of innocence and the burden of proof beyond a reasonable doubt.[215/216] Further, the trial court in

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215. His reliance on *People v. Hill* (1998) 17 Cal.4th 800, is misplaced. As this Court found, the prosecutor's argument in *Hill* was "somewhat ambiguous" and would have been erroneous if understood by the jury to mean that the prosecutor did not have the burden of proof as to every element of the charged crime or that there must be affirmative evidence demonstrating reasonable doubt. However, the prosecutor's argument would have been correct if understood by the jury as directing the jury to determine whether the charges had been proven beyond a reasonable doubt based on the evidence. (*Id.* at pp. 831-832.) Notably, this Court pointed to language in CALJIC No. 2.61 as correctly stating the defendant's lack of any burden of proof. (*Ibid.*)

216. Further, the trial court in appellant's case also instructed the jury that "the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential

appellant's case also instructed the the jury that "the defendant may chgoose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him." (65 TRT 12191-12192.)

Such an implication clearly does not arise from the plain meaning of the instruction. The proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California, supra,* 494 U.S. at p. 381; see also *Victor v. Nebraska, supra,* 511 U.S. at p. 6; *People v. Clair, supra,* 2 Cal.4th at p. 663.) Moreover, instructions are not viewed in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was so instructed. (65 TRT 12185.) There is simply nothing in the reasonable doubt instruction which suggests, much less, directs the jury to place any burden of proof on the defendant.

Appellant claims to give consideration of the instructions as a whole, but, in fact, treats the instructions individually with the technical scalpel of a lawyer parsing for hidden meaning. As he notes, the jury was instructed on its two duties, but unlike his partial quote, the instruction told the jury their duties were to "determine the facts from the evidence received in the trial and not from any other source" and "apply the law that I state to you to the facts . . . and in this way arrive at your verdict." (65 TRT 12184.) Nothing in the actual language of the instruction could be reasonably construed as implying any burden of proof on appellant and the instruction clearly and unambiguously directed to jury to apply the law, which included the reasonable doubt instruction giving only the prosecution the burden of proof. Similarly, appellant cites a number of instructions, none of which state any burden of proof requirement on the defense, and complains that the phrasing of each raises an

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element of the charge against him." (65 TRT 12191-12192.)

negative implication, which the jury would rely on in following their natural inclination. However, as we have noted, there is no support for appellant's assertion of a natural inclination and a plain reading of the instructions imposes no burden on appellant whatsoever.

The instructions clearly and unambiguously placed the only burden of proof on the prosecution. Appellant's claim of instructional error must be denied.

LXIII.

THE TRIAL COURT'S INSTRUCTIONS FULLY AND ADEQUATELY EXPLAINED THE PROSECUTION'S BURDEN OF PROOF

Appellant contends the trial court prejudicially erred by failing to define and explain the terms "burden" and "burden of proof." (2B AOB 633-642; 3 AOB 1044; 4 AOB 1228; 5 AOB 1360-1361.) Appellant's assertion relies on a legalistic parsing of instructional language for hidden implications which a jury is not reasonably likely to find.

Appellant begins by reasserting the claim which we have demonstrated in Argument LXII, *supra*, to be without merit. (2B AOB 633.)

He next relies on his meritless claim to assert the instructions failed to explain that his presentation of evidence did not alter the burden of proof. (2B AOB 634-635.) However, as explained in Argument LXII, *supra*, the instructions expressly impose only one burden – proof beyond a reasonable doubt – place it squarely on the prosecution, and nothing in the language of the instructions makes it reasonably likely the jury would find appellant had any burden whatsoever.

Moreover, there was nothing in the instructions which would suggest the jury could find facts in the prosecution's favor from the rejection of defense evidence. To the contrary, the jury was instructed it must find the facts from the evidence received in the trial. (65 TRT 12184.) In delineating the various forms which evidence might take (65 TRT 12186-12187) the jury was instructed that evidence

was either direct, when it directly proved a fact, or circumstantial, when it proved a fact from which an inference arose. (65 TRT 12187.) Those instructions made it unambiguously clear that evidence did not prove facts by being disbelieved. Additionally, the jury was instructed that deciding an issue is not a matter of counting witnesses, but of assessing the "convincing force of the evidence." (65 TRT 12195.) The jury was also instructed that a fact required to be proved by the prosecution may be satisfied by the testimony of a single, carefully considered witness, which the jury believes. (65 TRT 12195.) These instructions reinforced the idea that facts are proved from evidence which is believed, not from disbelief of evidence.

Appellant next contends the instructions failed to inform the jury that reasonable doubt may arise from equally probable conflicting inferences or from a lack of evidence. (2B AOB 636.) As to the latter point, the instructions plainly, unambiguously and repeatedly informed the jury of the prosecution's burden to prove appellant's identity as the perpetrator and every element of the charged crimes, as well as the special circumstance and other allegations. (65 TRT 12189-12190, 12201-12002, 12207, 12211-12213.) As to the former, the instructions expressly and unambiguously told the jury that equally probable inferences arising from the evidence require the jury to adopt the inferences which point to innocence. (65 TRT 12188.)[217/]

Appellant contends the instructions failed to advise the jury that the presumption of innocence remained in effect throughout the trial. (2B AOB 636-638.) He claims CALJIC No. 2.90 "did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations." (2B AOB 637.) The obvious problem with appellant's argument is that neither CALJIC No. 2.90 nor any other instruction provided for any shifting of the burden of proof; the

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217. Appellant incorporates his later challenge to the CALJIC circumstantial evidence instruction. We will address that challenge in Argument No. LXIX, infra.

one and only burden of proof which the instructions imposed was the prosecution's burden to proof beyond a reasonable doubt.

Moreover, appellant attempts to support his argument by improperly divorcing the presumption of innocence from the prosecution's burden of proof. Rather than being separate concepts, they are simply two sides of the same coin. As the jury was instructed, it was the presumption of innocence which "places upon the People the burden of proving [appellant] guilty beyond a reasonable doubt." (65 TRT 12189.) The jury was further instructed that each juror must consider the evidence for the purpose of reaching a verdict, but "only after discussing the evidence and instructions [during deliberations] with the other jurors." (65 TRT 12215.) These instructions unambiguously told the jury that the determination of whether the prosecution had met its burden of proof and thereby overcame the presumption of innocence had to be made by each juror and only after considering the evidence and the law during deliberations. Moreover, from the outset of the trial through its conclusion, the jury was admonished not to form or express any opinion on the case "until the cause is finally submitted to you." (114 CT 25554.)

Appellant criticizes use of the word "until," rather than "unless,"in the reasonable doubt instruction, claiming it undermined the prosecution's burden of proof by implying that the burden of proof would be met. (2B AOB 638-640.) The argument suffers from the same faulty perspective which ails his other complaints. Even in isolation, the word "until" does not suggest that the triggering event will occur. While the word indicates the continuation of an event or condition to a particular time or event, nothing in its ordinary meaning denotes that the ending time or event will occur. (Webster's Third New International Dictionary (2002) p. 2513.)

Moreover, "until" is not used in isolation. The instruction advised the jury that:

> A defendant in a criminal trial is presumed to be innocent *until* the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty.

(65 TRT 12189, italics added.)

The instruction does not lend itself to an interpretation that implies adequate proof of the defendant's guilt would be forthcoming since it unambiguously advises the jury of the consequences of a failure to meet the burden of proof. (*People v. Lewis* (2001) 25 Cal.4th 610, 651-652.)

Appellant argues the trial court failed to provide a definition for the term "burden" which he claims is a technical legal term. As he impliedly agrees, where a statutory word "is commonly understood and is not used in a technical sense, the court need not give any sua sponte instruction as to its meaning." (*People v. Rodriguez, supra,* 28 Cal.4th at pp. 546-547.) Appellant cites no authority holding that "burden" has a technical, legal meaning. *People v. McElheny* (1982) 137 Cal.App.3d 396, holds that "assault" has a technical legal meaning, but does not address "burden." (*Id.* at pp. 403-404.) *People v. Mixon* (1990) 225 Cal.App.3d 1471, describes the effect of a burden of proof, but offers no legal technical meaning for "burden." (*Id.* at p. 1484.)

The word "burden" is commonly understood to mean something that is borne as a duty, obligation, or responsibility (Webster's Third New International Dictionary (2002) p. 298), which is the same meaning it has in the reasonable doubt instruction. No additional instructional definition was required.

Finally, appellant contends the instructions did not advise the jury exactly what must be proved before finding appellant guilty. (2B AOB 640-641.) Not so. The reasonable doubt instruction told the jury that the defendant's guilt must be proven beyond a reasonable doubt. (65 TRT 12189.) The jury was instructed that "[t]he burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crimes with which he is charged." (65 TRT 12189; see also 65 TRT 12200-12201.) The jury was instructed that the defendant may rely

on "the state of the evidence and upon the failure, if any of the People to prove beyond a reasonable doubt every essential element of the charge against him." (65 TRT 12191-12192.) The jury was instructed with respect to particular counts that it must find beyond a reasonable doubt that appellant committed those counts within a given time parameter. (65 TRT 12201-12202.) The jury was instructed on the required joint operation of act and intent or mental state. (65 TRT 12202-12203.) The jury was instructed on each of the elements of the charged and lesser crimes which "must be proved." (65 TRT 12204, 12206-12208, 12211-12212.) The jury was instructed on the elements of the special circumstance and other allegations. (65 TRT 12211-12213.) There simply was no instructional error.

The instructions, reasonably understood and considered as a whole, demonstrate no error in explaining the prosecution's burden of proof.

LXIV.

THE TRIAL COURT'S INSTRUCTION WITH CALJIC NO. 2.90 FULLY AND ADEQUATELY DEFINED THE PROSECUTION'S BURDEN OF PROOF

Appellant contends the trial court's instructions were unconstitutional and prejudicial in that they did not adequately define the standard of proof applicable to his case. He claims specifically that the language in the standard reasonable doubt instruction does not make it clear that proof beyond a reasonable doubt is a higher standard than clear and convincing evidence. (2B AOB 654-658; 3 AOB 1044-1045; 4 AOB 1228-1229; 5 AOB 1361.) What appellant does not explain is why the jury needs an instruction on clear and convincing evidence (which was not relevant to any issue) in order to understand the plain and unambiguous language of the reasonable doubt instruction or why the jury should be burdened with instructions on an inapplicable standard. If such an instruction had been given, appellant would no doubt be complaining the superfulous instruction confused and diluted the burden of proof beyond a reasonable doubt.

Pursuant to CALJIC No. 2.90, the trial court instructed the jury:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows:
>
> It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(65 TRT 12189.)

The instructional language plainly and unambiguously describes the People's burden of proving guilt beyond a reasonable doubt and further defines reasonable doubt in the then-applicable statutory formulation. There is simply nothing inadequate about the standard instruction. Moreover, appellant's proposed instructions were irrelevant and erroneous.

Appellant requested an instruction defining clear and convincing evidence and an instruction describing proof beyond a reasonable doubt as being a higher standard

than clear and convincing evidence. (65 CT 14568-14569.)[218] The trial court rejected the proposed instructions. (60 TRT 11447.)

The only way the jury might have been confused about the difference between beyond a reasonable doubt and clear and convincing is if appellant's erroneous instructions had been given. The trial court has the duty "'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.'" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.)

No burden of proof, besides proof beyond a reasonable doubt, was applicable in appellant's case. (*Cf. People v. Mabibi* (2001) 92 Cal.App.4th 654, 656 [special statute of limitations required victim's testimony be clearly and convincingly

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218. The first instruction provided:

> "Clear and convincing" evidence requires a higher standard of proof than proof by a preponderance of the evidence. [¶] "Clear and convincing" evidence means clear, explicit, and unequivocal evidence, so clear as to be unmistakable, which creates a high probability of the truth of the facts for which it is offered as proof, so as to leave no serious or substantial doubt as to its truth, and is sufficiently strong to command the unhesitating assent of every reasonable and impartial mind. (65 CT 14568.)

The second instruction provided:

> "Proof beyond a reasonable doubt" requires a higher standard of proof than proof by clear and convincing evidence, and is the heaviest burden imposed in law. [¶] Proof beyond a reasonable doubt requires evidence that is clear, explicit, and unequivocal, so clear as to be unmistakable, which persuades to a near certainty of the truth of the facts for which it is offered as proof, so as to leave no reasonable doubt as to its truth, and is sufficiently strong to command the assent of every reasonable and impartial mind to a moral certainty and an abiding conviction.

corroborated].) Additionally, appellant's instruction on clear and convincing evidence was not only inapplicable, it was also incorrect.

> The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence.

(*Id.* at p. 662.)[219] Appellant's proposed instruction on clear and convincing evidence imported language from dicta in cases which did not address how the standard should be defined. (*People v. Mabibi, supra,* 92 Cal.App.4th at pp. 660-661.) Moreover, some of imported language in appellant's proposed instruction effectively equated clear and convincing evidence with proof beyond a reasonable doubt. (*Id.* at p. 662.) Additionally, use of "unequivocal" in both of appellant's proposed instructions had the potential of confusing the jury with a higher standard than proof beyond a reasonable doubt. (*Ibid.*) Finally, apart from the potentially confusing and misleading language, appellant's second proposed instruction on reasonable doubt adds nothing of substance to CALJIC No. 2.90.[220] A trial court may properly deny an instruction which as duplicative. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.)

Since the trial court's instructions adequately described the People's burden and appellant's proposed instructions were irrelevant and erroneous, the trial court did not err in rejecting them.

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219. BAJI No. 2.62 (January 2005 ed.) provides, in pertinent part:

> "Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

220. Contrary to appellant's claim, *People v. Bassett* (1968) 69 Cal.2d 122, does not support his proposed instructions. In *Bassett*, the Court addressed the standard for reviewing the sufficiency of the evidence supporting a criminal conviction, and made no ruling on reasonable doubt instructions. (*Id.* at p. 139.)

LXV.

THE TRIAL COURT DID NOT ERR IN REFUSING THE DEFENSE-REQUESTED INSTRUCTIONS ON CLEAR AND CONVINCING EVIDENCE AND REASONABLE DOUBT AS THEY WERE IRRELEVANT AND ERRONEOUS

Relying on the two defense-requested instructions set forth in Argument LXIV, *supra*, appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing to give those instructions as a necessary comparison between proof beyond a reasonable doubt and proof by clear and convincing evidence. (2B AOB 659-664; 3 AOB 1045; 4 AOB 1229; 5 AOB 1362.) Respondent will not repeat the argument presented in Argument LXIV, *supra*, however, for the reasons stated therein, the trial court did not err in refusing the defense-requested instructions as they were both irrelevant and erroneous.[221]

LXVI.

THE TRIAL COURT'S REASONABLE DOUBT INSTRUCTION DID NOT REQUIRE THE JURORS TO ARTICULATE THE REASON FOR ANY DOUBT

Appellant contends the trial court's instruction on reasonable doubt was prejudicially erroneous and unconstitutional by requiring the jury to articulate a

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221. Appellant apparently seeks to support his requested clear and convincing instruction by arguing the BAJI "high probability" instructional language (see fn. 214, *supra*) does not go far enough. (2B AOB 662, fn. 473.) However, the authority he cites does not assist him. This Court ordered the opinion in *Stone v. New England Ins. Co.*, (1995) formerly at 33 Cal.App.4th 1175, unpublished. (See 33 Cal.App.4th 1223.) The dicta in *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, and *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, by the Second District Court of Appeal, Division Three, was later rejected by that court in *Mattco Forge, Inc. v. Arthur Anderson & Co.* (1997) 52 Cal.App.4th 820, 847-850. (See *People v. Mabibi, supra,* 92 Cal.App.4th at p. 660.)

reason for any doubt upon which an acquittal might be based. (2B AOB 665-670; 3 AOB 1045; 4 AOB 1229; 5 AOB 1362.) The instruction has no such requirement.

Pursuant to CALJIC No. 2.90, the trial court instructed the jury:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows:
>
> It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(65 TRT 12189.)

As appellant concedes (2B AOB 667), nothing in the instructional language stated that the jurors were required to articulate the basis for any doubt upon which they might find the prosecution failed to satisfactorily prove appellant's guilt. He asserts such a requirement if implicit. However, by contrasting reasonable doubt with "possible or imaginary doubt," the instruction implied no duty to articulate anything; rather, it merely provided an understandable basis for assessing any doubt against the evidence. A duty to "articulate" was not implied, either clearly or ambiguously.

Appellant's authority does not support his claim. In *People v. Antommarchi* (N.Y. 1992) 604 N.E.2d 95, the court found it entirely appropriate to instruct a jury that reasonable doubt "is a doubt for which a juror can give a reason if he or she is called upon to do so in the jury room." (*Id.* at pp. 97-98.) The error was in an *Allen-*

type instruction[222] given during deliberations which placed on each juror "the express duty of giving a 'fair, claim [sic] explanation for your position,'" thereby improperly imposing a duty on the defense to present evidence. (*Id.* at p. 98.)[223]

Nothing in the trial court's instruction imposed upon the jurors an obligation to give a reason for doubt. While the trial court's instruction was not even ambiguous, the prosecutor's argument also did not suggest the jury were required to state the reason for doubt.

Appellant points to the prosecutor's argument wherein he stated:

> But in analyzing the evidence and whether or not reasonable doubt exists, do this:
>
> First of all, **ask yourself**, "based upon my full examination and assessment of this case, do I have any doubt?" That's the first question. Then **ask yourself**, "If the answer - -" excuse me. If the answer is "Yes, I have some doubt," if you come to that conclusion, then you must take step number two and analyze that doubt and **say to yourself**, "Well, okay. Here is the doubt.
>
> Do I have any reason and logic that I can attach to that doubt?"
>
> If you can attach reason and logic to that doubt, then the doubt is a reasonable one and you should acquit [appellant] of these charges.

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222. *Allen v. United States* (1896) 164 U.S. 492 [17 S.Ct. 154, 41 L.Ed.2d 528].

223. While the *Antommarchi* opinion does not support appellant's claim and, in fact, undermines it, the finding of instructional error in that case is not persuasive. The court premised its finding of error on the conclusion that "[a]n instruction that requires jurors to supply concrete reasons 'based upon the evidence'" imposes on defendants an obligation to present evidence to support the jurors' position. (*Id.* at p. 98.) However, the *Allen* instruction indicated the jurors should give their explanation for finding reasonable doubt "'based upon the evidence or the lack of evidence'" in the case. (*Id.* at p. 97.) Such language imposed no burden on the defense.

If that doubt is only a possible doubt or an imaginary doubt, then you should not acquit [appellant]. You should convict him of the crimes he's charged with."

(64 TRT 12169, emphasis added.)

As the emphasized language makes clear, the prosecutor urged the jurors to individually examine any doubt against the evidence and determine whether the doubt was reasonable or only possible or imaginary. Nothing in the prosecutor's argument suggested the jurors were required to articulate the basis for their decision after making it.

Since appellant's claim of error is not supported by the language of the instruction or the prosecutor's argument, it must be rejected.

LXVII.

"POSSIBLE DOUBT" UNTETHERED TO A REASONABLE CONSIDERATION OF THE EVIDENCE IS PROPERLY EXCLUDED AS A BASIS FOR FINDING REASONABLE DOUBT

Appellant contends the trial court's reasonable doubt instruction (CALJIC No. 2.90) was prejudicially erroneous and unconstitutional because removing "possible doubt" as a basis for finding reasonable doubt undermined the prosecution's burden of proof. (2B AOB 671-677; 3 AOB 1045-1046; 4 AOB 1229-1230; 5 AOB 1362-1363.) However, as the United States Supreme Court has already concluded, in the context of the instruction, "possible doubt" is doubt untethered to a reasoned assessment of the evidence and, thus, properly excluded as a basis for finding reasonable doubt.

As noted previously, pursuant to CALJIC No. 2.90, the trial court instructed the jury:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption

places upon the People the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows:

It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(65 TRT 12189.)

In *Victor v. Nebraska, supra,* 511 U.S. 1, the United States Supreme Court considered Sandoval's objection to the reference in the reasonable doubt instruction to "not a mere possible doubt." (*Id.* at p. 17.) The Court rejected his challenge because reasonable doubt is based on reason and "fanciful doubt is not reasonable doubt." (*Ibid.*) Appellant claims the high court did not examine the instructional language, but relied on a limiting construction provided in defense counsel's argument. (2B AOB 674-675, fn. 475.) Appellant is incorrect. After noting that reasonable doubt must be reasonable and not fanciful, the Court stated:

As Sandoval's defense attorney told the jury: "Anything can be possible . . . . [A] planet could be made out of blue cheese. But that's really not in the realm of what we're talking about." . . . That this is the sense in which the instruction uses "possible" is made clear from the final phrase of the sentence, which notes that everything "is open to some possible or imaginary doubt." We therefore reject Sandoval's challenge to this portion of the instruction as well.

(*Victor v. Nebraska, supra,* 511 U.S. at p. 17, underlining added.) The underlined language plainly indicates the Court found the instructional language correctly limited "possible doubt" to unreasonable, fanciful doubt. Thus, there was no error.

LXVIII.

THE REFERENCES TO "MORAL EVIDENCE" AND "MORAL CERTAINTY" IN THE REASONABLE DOUBT INSTRUCTION DID NOT UNDERMINE THE PROSECUTION'S BURDEN OF PROOF

Appellant contends the trial court prejudicially erred and violated his constitutional rights by giving the reasonable doubt instruction (CALJIC No. 2.90) which included the phrases "moral evidence" and "moral certainty." (2B AOB 678-682; 3 AOB 1046; 4 AOB 1230; 5 AOB 1363.) Both this Court and the United States Supreme Court have rejected this claim.

In *Victor v. Nebraska, supra,* 511 U.S. 1, the United States Supreme Court held the phrase "moral evidence," though not a mainstay of modern lexicon, had no different meaning than its proper meaning and found its presence in the instruction "unproblematic." (*Id.* at pp. 12-13.) Though the Court found the phrase "moral certainty," when standing alone, raised more concern (*id.* at p. 13), it concluded that the remaining instructional language, which was also given in this case, did not convey an erroneous, unconstitutional meaning. (*Id.* at pp. 14-17.) In *People v. Freeman, supra,* 8 Cal.4th 450, this Court also recognized that the decision in *Victor* upheld the California reasonable doubt instruction. While the Court also endorsed a modification of the instruction to delete the two phrases at issue in *Victor*, it did so with an eye to the high court's prognostication of a possible future change in the meaning of the phrases. (*Id.* at p. 504.)

Appellant points to the high court's suggestion in *Victor* that the changing meaning of language might ultimately change the meaning of "moral certainty" to a degree that it would conflict with the standard of proof beyond a reasonable doubt. (*Victor v. Nebraska, supra,* 511 U.S. at p. 16.) However, appellant's case was tried in 1988-1989, several years before the decision in *Victor*. Any potential change in meaning after the decision in *Victor* could not have affected appellant's case. Thus, appellant's claim must be rejected.

LXIX.

CALJIC NOS. 2.01 AND 2.02 DO NOT LIGHTEN THE PROSECUTION'S BURDEN OF PROOF OR CREATE A MANDATORY PRESUMPTION

Appellant contends the trial court's circumstantial evidence instructions (CALJIC Nos. 2.01 and 2.02)[224] unconstitutionally lightened the prosecution's

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224. Pursuant to CALJIC Nos. 2.01 and 2.02, the trial court instructed the jury:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but, two, cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proven beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt.
>
> If, on the other hand, one interpretations of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.
>
> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. But you may not find the defendant guilty

burden of proof and created an unconstitutional mandatory presumption. (2B AOB 683-690; 3 AOB 1046; 4 AOB 1230; 5 AOB 1363.) This Court has previously and repeatedly rejected this claim and appellant provides no basis for this Court revisiting its prior holdings.

> [T]hese instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other 'reasonable' interpretation can be drawn. Particularly when viewed in conjunction with the other instructions correctly stating the prosecution's burden to prove defendant's guilt beyond a reasonable doubt, these circumstantial evidence instructions do not reduce or weaken the prosecution's constitutionally mandated burden of proof or amount to an improper mandatory presumption of guilt. [Citations.] (*People v. Kipp* (1998) 18 Cal.4th 349, 375 [75 Cal.Rptr.2d 716, 956 P.2d 1169].)

(*People v. Koontz, supra,* 27 Cal.4th at pp. 1084-1085.)

> of the offenses of murder or attempted murder, nor may you find the existence of infliction of great bodily injury unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent or mental state, but, two, cannot be reconciled with any other rational conclusion.
>
> And this also applies to the personal use of a dangerous or deadly weapon.
>
> Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.
>
> If, on the other hand, one interpretations of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretations to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(65 TRT 12187-12189.)

For the same reasons reiterated in *Koontz*, appellant's claim must be rejected.

LXX.

THE TRIAL COURT DID NOT ERR IN REJECTING A DEFENSE-REQUESTED INSTRUCTION WHICH ERRONEOUSLY IMPORTED CIRCUMSTANTIAL EVIDENCE PRINCIPLES INTO THE JURY'S CONSIDERATION OF DIRECT EVIDENCE

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing a defense-requested instruction purportedly applying circumstantial evidence principles (requiring adoption of interpretation pointing to innocence) to direct evidence. (2B AOB 691-697; 3 AOB 1047; 4 AOB 1230-1231.) The trial court did not err in refusing the defense-requested instruction because the conflicting-inference rule governing circumstantial evidence does not apply to direct evidence, which simply requires the jury to determine credibility and weight.

The defense requested an instruction which stated:

> If direct evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretations which points to his guilt.

(65 CT 14496; 59 TRT 11308-11309.) The trial court denied the proposed instruction. (60 TRT 11399-11400.)

The defense-requested instruction takes the rule in CALJIC No. 2.01, controlling the jury's resolution of conflicting inferences arising from circumstantial evidence, and applies it to direct evidence. The application is erroneous because, as the trial court instructed the jury, "[d]irect evidence is evidence that directly proves a fact without the necessity of an inference. It is evidence which, by itself, if found to be true, establishes that fact." (65 TRT 12187.) As the instruction advised the jury, the rule governing the jury's assessment of direct evidence is not based on inferences or interpretations, but on weight and credibility.

This Court has "'consistently held that CALJIC No. 2.01 is not necessary unless the prosecution substantially relies on circumstantial evidence to prove its case.'" (*People v. Brown, supra,* 31 Cal.4th at p. 562.) That is because "where circumstantial evidence is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction may confuse and mislead, and thus should not be given." (*People v. Anderson, supra,* 25 Cal.4th at p. 582.) The potential confusion arises because direct evidence does not involve proof of facts by inference, but requires the jury to assess its credibility and weight. (*People v. Malbrough* (1961) 55 Cal.2d 249, 251 [direct evidence proves a fact immediately and directly, without any intervening fact or process]; see *People v. Gould* (1960) 54 Cal.2d 621, 629 ["Such instruction should not be given when the problem of inferring guilt from a pattern of incriminating evidence is not present."]; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1271 [no inferences arose from direct evidence; jury either believed defendant or victim on issue of consent].)

None of the cases upon which appellant relies, imposes the instructional obligation he seeks. In fact, *People v. Bender* (1945) 27 Cal.2d 164, upon which appellant places primary reliance, was a case in which the "proof of guilt was entirely circumstantial." (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.) As this Court stated in *Yrigoyen*:

> we declared in *People v. Bender*, 27 Cal.2d 164, 174 et seq. [163 P.2d 8], that the court on its own motion should have given an instruction embodying the principle that to justify a conviction *on circumstantial evidence* the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

(*Ibid.*, emphasis added; see also *People v. Carroll* (1947) 79 Cal.App.2d 146, 150 [trial court's instructions forcefully advised the jury of the principles governing circumstantial evidence].)

Since the defense-requested instruction erroneously applied circumstantial evidence principles to direct evidence, the trial court did not err in refusing the instruction.

LXXI.

THE TRIAL COURT DID NOT VIOLATE STATE OR CONSTITUTIONAL LAW BY PROVIDING THE JURY WITH TRANSCRIPTS OF A WITNESS'S TESTIMONY RATHER THAN HAVING THAT TESTIMONY READ

Appellant contends the trial court violated Penal Code section 1138 and his rights to due process, personal presence, presence of the trial judge and assistance of counsel by submitting transcripts of witness testimony to the jury when it requested such transcripts during deliberations. (2B AOB 698-724; 3 AOB 1048-1049; 4 AOB 1232-1233; 5 AOB 1365-1366.) In a separate argument, which he incorporates into this argument, appellant also claims the transcript procedure violated his constitutional right to a public trial. (2B AOB 725-730; 3 AOB 1050-1051; 4 AOB 1234-1235; 5 AOB 1367-1368.) We respond to appellant's claims in this single argument. Appellant waived his public trial right claim by impliedly agreeing that any presentation of testimony to the jury during deliberations would not be public and there was neither error nor constitutional violation in providing transcripts of witness testimony requested by the jury during its deliberations.

At the conclusion of the closing argument, prior to instructing the jury, the trial court proposed that any requests from the jury during deliberations for testimony be handled by having the reporter prepare a redacted transcript (i.e., removing objections and conferences between the trial court and counsel) of the testimony, which would be given to the jury. The trial court would advise counsel by telephone of the request and the transcript pages before providing them to the jury. Additionally, in the event the jury requested something less than a witness's testimony on direct or cross, the trial court proposed to have counsel appear and

discuss the request. The prosecution expressly agreed with the proposal. While the defense never expressly agreed, it raised several questions about how the proposal would work. After the trial court addressed the defense concerns, which included a modification to the original proposal to meet one defense concern, the defense made no objection. (64 TRT 12177-12182.)

The trial court reiterated its plan on handling jury requests for testimony after the instructions, adding that such testimony may be read, rather than supplied in a transcript, if that proved to be faster. (65 TRT 12226.) When the defense stated its preference to have the reporter read all requested testimony to ensure that the jurors heard all the supplied testimony, the trial court declined, noting that it did not think the jury should be forced to listen to testimony it did not need. (65 TRT 12226-12227.) The trial court indicated that one transcript copy would be provided to the jury. (65 TRT 12227.) Again, the prosecution expressly agreed and the defense did not object. (65 TRT 12227.)

The trial court followed that procedure of providing transcripts for the first two witness testimony requests. (65 TRT 12232-12233; 26 CT 5555; 108 CT 24241.) The jury also made several other requests for testimony and transcripts were prepared. (26 CT 5559-5562; 108 CT 24242-24243, 24245-24248.) A request for testimony was also made during the penalty phase deliberations. (108 CT 24263.)[225]

A. Right To Personal Presence And Counsel

Appellant claims the transcript procedure violated his right to be present and his right to counsel. However, contrary to appellant's assertion, the rereading of testimony is not a critical stage of the proceedings. (*People v. Cox, supra,* 30 Cal.4th

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225. The alleged errors are also alleged as to the penalty phase. (See 7 AOB 1723-1750.) In response to that assertion, Respondent references and incorporates this responsive argument, rather than repeating it. (See Argument CX, *infra*.

at p. 963; *People v. Box* (2000) 23 Cal.4th 1153, 1213; *People v. Ayala* (2000) 23 Cal.4th 225, 288.) Thus, the trial court's procedure did not violate appellant's constitutional right to be present or to counsel at a critical stage of the trial. (*People v. Box, supra,* 23 Cal.4th at pp. 1213-1214.) While Penal Code section 1138[226] requires that testimony requested by a deliberating jury be furnished, the form in which it is furnished, written or oral, is a matter of trial court discretion. (*People v. Box, supra,* 23 Cal.4th at p. 1214.) Appellant does not show an abuse of discretion.

B. Right To Presence Of Trial Judge

Appellant also claims the transcript procedure violated his constitutional and statutory right to the presence of the trial judge. Again, he is wrong. As to his claim of statutory error, Penal Code section 1138.5, specifically permits the trial court to be absent when testimony is provided to the jury.[227] Appellant's constitutional claim is also without merit.

> When a trial judge exercises control over whether and what testimony previously introduced in evidence should be read to the jurors at their request after deliberation has begun, and the judge remains available to address any questions from the jurors to the court that might arise during the readback of

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226. Penal Code section 1138 provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

227. Penal Code section 1138.5 provides:

> Except for good cause shown, the judge in his of her discretion need not be present in the court while testimony previously received in evidence is read to the jury.

> the testimony, nothing in logic, reason, due process of law, or the right to a trial before an impartial jury compels the judge to be present while the testimony is read to the jurors.

(*People v. Rhoades* (2001) 93 Cal.App.4th 1122, 1127.)

As the appellate court in *Rhoades* explained, appellant's reliance on *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, is misplaced. In *Riley*, "[t]he critical factor was whether the judge abdicated judicial control over the process." In this case there was no judicial abdication. The trial court, with the input of counsel, fashioned and carried out a plan for handling jury requests for testimony. "[N]othing in logic, reason, due process of law, or the right to a trial before an impartial jury compels the judge to be present while the testimony is" presented to the jury. (*People v. Rhoades, supra,* 93 Cal.App.4th at p. 1127.)

C. Public Trial

Finally, appellant claims the transcript procedure violated his right to a public trial. However, there was no objection based on appellant's asserted right to a public trial. While defense counsel raised concerns over how much of a witness's testimony would be given and, at one point, wanted the testimony read rather than provided in a transcript, the trial court's proposal and the defense concerns both assumed that the additional testimony would be presented in the jury deliberation room, not in open court. (64 TRT 12177-12182; 65 TRT 12226-12228.) Thus, appellant waived any right he might have had to a public trial by failing to object and inviting the alleged error. (*People v. Catlin* (2001) 26 Cal.4th 81, 161; *People v. Box, supra,* 23 Cal.4th at p. 1213; *People v. Ayala, supra,* 23 Cal.4th at p. 288; *People v. Bradford* (1997) 14 Cal.4th 1005, 1046.) Moreover, his public trial claim lacks merit.

"Every person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times." (*People*

v. Woodward (1992) 4 Cal.4th 376, 382.) However, not every proceeding in a criminal trial is open to the public.

> It has long been recognized that "'[t]he trial of the action, so far as the term "public trial" is concerned, consists in the proceedings for the impanelment of the jury, the opening statements of counsel, the presentation of evidence, the arguments, the instructions to the jury and the return of the verdict,' but does not include conferences between court and counsel where 'the subject matter of the conferences between court and counsel was a question or questions of law, and not matters advanced for consideration of the triers of fact.'" (*People v. Harris* (1992) 10 Cal.App.4th 672, 685 [12 Cal.Rptr.2d 758], citing *People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 206-207 [329 P.2d 157]; see also *People v. Murphy* (1973) 35 Cal.App.3d 905, 925-926 [111 Cal.Rptr. 295].)

(*People v. Feagin* (1995) 34 Cal.App.4th 1427, 1438-1439; see also *People v. Woodward, supra,* 4 Cal.4th at pp. 383-386 [partial exclusion of public from closing argument too *de minimis* to constitute a public trial violation]; *People v. Engleman* (2002) 28 Cal.4th 436, 442-443 [secrecy of jury deliberations].)

In this case, the public was not excluded from any phase of the trial. During deliberations, the jury requested and the trial court provided transcripts of testimony given by witnesses in open court. The form in which testimony is provided to a deliberating jury is a matter of trial court discretion. (*People v. Box, supra,*23 Cal.4th at p. 1214.) However, regardless of the form, providing the deliberating jury with access to previously admitted evidence, whether testimony or exhibits, does not implicate appellant's right to a public trial. Thus, although appellant forfeited his public trial claim, it is also without merit.

LXXII.

THE TRIAL COURT'S INSTRUCTIONS CORRECTLY ADVISED THE JURY ON THE PROPER USE OF TRANSCRIBED TESTIMONY

Appellant contends the trial court prejudicially erred and violated his constitutional rights by failing to instruct the jury on the proper use of transcripts

provided at the jury's request during deliberations. (2B AOB 731-735; 3 AOB 1052-1053; 4 AOB 1236-1237; 5 AOB 1369-1370.) To the contrary, the trial court instructed the jury on the proper use of the transcripts.[228]

Appellant argues that a jury must be instructed to weigh all of the evidence and not give undue focus to one portion of the trial because when a deliberating jury requests to review some testimonial evidence there exists a danger the jury will emphasize this evidence over other evidence. However, appellant ignores that fact that in both its preliminary instructions and its final instructions, the trial court addressed the proper use of requested testimony.

As part of its preliminary and final instructions, the trial court advised the jury that the notebooks which had been provided were for note-taking. (1 TRT 14; 65 TRT 12216.) The trial court cautioned the jury that such notes are only an aid to memory and should not take precedence over independent recollection and that note-taking should not distract the jurors from the ongoing proceedings. (1 TRT 14; 65 TRT 12216.) Finally, the trial court instructed the jury that should there be any discrepancy between a juror's recollection of evidence and his or her notes, the reporter's transcript may be read back and the trial transcript must prevail over the juror's notes. (1 TRT 15; 65 TRT 12216.)[229]

The trial court's instructions make it plain that the transcripts were available to resolve discrepancies in the jurors' recollection of evidence. In a trial of this length with the large number of witnesses, it is not difficult to understand why the jury might want the witness testimony to resolve differences and ensure an accurate recollection of the testimony.

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228. In a later argument, appellant repeats this claim as to transcripts provided to the jury during the penalty phase deliberations. (7 AOB 1757-1760.) Rather than repeat this argument, respondent refers this Court back to this responsive argument. (See Argument CXI, *infra*.)

229. These same instructions were given in the penalty phase. (70 TRT 13333-13334.)

The trial court also instructed the jury that witness testimony was only one form of evidence (65 TRT 12186); that both direct and circumstantial evidence are acceptable means of proof and neither is entitled to any greater weight than the other (65 TRT 12187); that the jurors were the sole judges of the believability of a witness and the weight to be given to the testimony of each witness (65 TRT 12192); that the jury must resolve issues based on the convincing force of the evidence (65 TRT 12195); and that the jurors must consider the evidence presented in the case for the purpose of reaching a verdict (65 TRT 12215).[230] These additional instructions plainly admonished the jury not to emphasize particular evidence. In fact, the trial court's reasonable doubt instruction advised the jury that its determination of guilt or innocence was to be made "after the entire comparison and consideration of all the evidence." (65 TRT 12189.) Jurors are presumed to be intelligent, and capable of understanding and applying instructions. (*People v. Lewis, supra,* 26 Cal.4th at p. 390.)

Considered as a whole the trial court's instructions more than adequately advised the jurors not to overemphasize testimony or take it out of context merely because it has been provided, at their request, in the form of a transcript.

Appellant's authorities do not support his claim of error. In *State v. Norris* (Kan. 1985) 10 Kan.App.2d 397, 699 P.2d 585, the appellate court found prejudicial error when the trial court provided the jury with a written copy of the jury instructions without reading the instructions to the jury or instructing the jury to read them before deliberating. (*Id.*, 699 P.2d at pp. 586-588.) The case has nothing to do with appellant's claim of error. In *United States v. Schilleci* (5th Cir. 1977) 545 F.2d 519, the appellate court found that providing the written instructions to the jury was conducive to dissection of the charge and overemphasis on parts thereof particularly in light of the failure to instruct the jury that the instructions were to be considered

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230. Those same instructions were given to the jury in the penalty phase. (70 TRT 13321-13324, 13332.)

as a whole. (*Id.* at p. 526.) Once again, appellant's complaint addresses the jury's request for transcripts of testimony, not the trial court's providing the written instructions to the jury. Moreover, as noted, the trial court specifically instructed the jury to consider all of the evidence in reaching a verdict.

Appellant appears to place his main reliance on *United States v. Rodgers* (6th Cir. 1997) 109 F.3d 1138, which imposed an obligation on district courts to instruct juries on the proper use of transcribed testimony. (*Id.* at p. 1145.) The court said that transcribed testimony raised two inherent dangers. The jury may place undue emphasis on the transcribed testimony and it may be taken out of context. However, the second danger (out of context) was eliminated by ensuring the transcript included the witness's direct and cross examination (*id.* at p. 1143), which was exactly what the trial court did in this case. The danger of undue emphasis arose when the transcript is supplied after a jury reports an inability to reach a verdict (*id.* at pp. 1143-1144), which was not the case here. Moreover, here, as in *Rodgers*, there were no other special factors suggesting the jury placed undue emphasis on the transcribed testimony. (*Id.* at p. 1144.) Indeed, the jury's requests for transcripts strongly suggests it was methodically working through the counts, carefully considering the evidence, and giving especially careful consideration to testimony from both prosecution and defense witnesses which dealt with key issues.

While the Sixth Circuit directed that district court's admonish juries on the proper use of transcribed testimony, it never suggested that those admonitions may not come as part of the trial court's instructions, which occurred here.

Having instructed the jury to consider the evidence as a whole, the trial court did not err in failing to repeat those instructions when providing the jury with transcripts of the testimony it requested. Moreover, given the methodical, careful and evenhanded consideration of testimony on both sides of the issues by the jury, any error in failing to repeat its instructions when providing the transcripts was harmless.

LXXIII.

THE TRIAL COURT'S INSTRUCTIONS PROPERLY DESCRIBED THE ROLE OF THE JURY FOREPERSON

Appellant contends the trial court prejudicially erred and violated his constitutional rights by failing to instruct the jury on the duties of its foreperson. (2B AOB 736-740; 3 AOB 1054-1055; 4 AOB 1238-1239; 5 AOB 1371-1372.)[231] To the contrary, the trial court's instructions properly described the role of the jury foreperson.

The trial court instructed the jury that the foreperson was to be elected by the members of the jury, preside over the deliberations, and fill in, date and sign the verdict forms. (65 TRT 12209-12210, 12217-12218.)[232] Moreover, the trial court's instructions delineated the duties which all the jurors shared: the duty to determine the facts and apply the law in reaching a just and lawful verdict (65 TRT 12184, 12213); the duty to discuss the case only with fellow jurors after the case is submitted for decision and only when all jurors are present (65 TRT 12214) the duty not to discuss or consider penalty or punishment (65 TRT 12214); the duty of each juror to consider the evidence for the purpose of reaching a verdict, to discuss the evidence and instructions with the other jurors, and to reach his or her individual opinion (65 TRT 12214-12215); and the duty to be impartial judges, not partisans or advocates (65 TRT 12215).[233]

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231. Appellant later raises the same claim of error with respect to the trial court's penalty phase instructions. Rather than repeat this argument later, respondent will refer this Court back to this argument, since, for the sane reasons, the claims are without merit.

232. The same instructions were given in the penalty phase. (70 TRT 13335.)

233. The jury was given the same instructional duties at the penalty phase, except that the jury was instructed to determine the appropriate punishment rather than not to consider penalty or punishment. (70 TRT 13319-13321, 13332-13333.)

Appellant points to no authority that the duties of the jury foreperson in this state are other than described in the trial court's instructions. Instead, he points to instructions from other states and quotes from a Washington state opinion which described the foreperson's duties as including seeing that the deliberations are sensible and orderly, that the issues are fully and fairly discussed, and that every juror has an opportunity to participate. (2B AOB 736-737, fn 499, quoting *State v. Mak* (Wash. 1986) 718 P.2d 407, 443, 105 Wash.2d 692.) However, by imposing on the foreperson the duty to preside at the jury's deliberations and imposing on all jurors the duties to fully and fairly consider and discuss the evidence and law with their fellow jurors for the purpose of reaching a fair and just verdict, the trial court's instructions fairly called upon the foreperson to preside over the deliberations in a fashion conducive to fulfilling those juror duties.

Appellant claims the foreperson was permitted to exercise undue influence over other jurors. However, appellant simply ignores the other instructions described above, which unambiguously imposed on each juror the duty to individually reach his or her own opinion. Moreover, the trial court's instructions told the jurors:

> Do not hesitate to change an opinion if you are convinced its it wrong. However, do not decide any question any particular way because a majority of the jurors or any of them favor such a decision.

(65 TRT 12215, emphasis added.)[234/]

Considered as a whole by intelligent jurors, the trial court's instructions fairly and unambiguously assured the deliberations would be full and fair, and no juror would be improperly influence by any other. There was no error. Moreover, given the import of the trial court's instructions which directed each juror to reach an individual opinion after fully and fairly considering and discussing the evidence and

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234. This same instruction was given in the penalty phase. (70 TRT 13332.)

the law with the other jurors in order to reach a fair and just verdict, any error was harmless.

LXXIV.

APPELLANT'S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT

Appellant claims that the cumulative effect of the errors he asserts, if not individually prejudicial, cumulatively undermined the fairness of his trial and require reversal of the convictions. (2B AOB 741-744; 3 AOB 1056-1061; 4 AOB 1240-1244.) However, as delineated hereinabove, the trial court only erred in its failure to apply the *Kelly* prong three test to DNA testing (Arg. XLIV, sub. A, *supra*) and in failing to give an accomplice testimony instruction as to Massingale (Arg. LI, *supra*). In both instances, as described in those arguments, the errors were harmless. Indeed, as described in various arguments herein, even possible errors were harmless. Thus, there was no prejudice to accumulate and appellant's claim must be denied. (*People v. Bolden, supra,* 29 Cal.43th at pp. 567-568.)

LXXV.

THE TRIAL COURT DID NOT FORECLOSE PROPER HOVEY VOIR DIRE OR GENERAL VOIR DIRE ON APPELLANT'S PRIOR RAPE CONVICTION

Appellant contends the trial court erred in preventing the defense from asking, during *Hovey* voir dire,[235] the prospective jurors about the effect of appellant's prior rape conviction on their ability to fairly judge the penalty decision. He contends the error requires reversal of the death judgment. (6 AOB 1432-1439.) To the contrary, the trial court properly prevented the attorneys from asking the prospective jurors to

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235. *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

prejudge the penalty decision based on any one particular factor, including appellant's prior rape conviction.

A. Factual Background

As part of its notice of evidence in aggravation, the prosecution noticed appellant's 1973 rape conviction. (See 54 CT 11344-11345.) Early in the *Hovey* voir dire, in response to a question by the prosecutor, the trial court indicated it was appropriate to ask the prospective jurors about their reaction to factual aspects involved in the case which might impact their ability to fairly consider penalty. Those factual aspects were multiple murders, throat slashing, and women and children as victims. (262 PRT 27336.)

During questioning of the second prospective juror, the trial court sustained a prosecution objection when the defense posed the following hypothetical:

> Now, let me throw something else at you. I want you to make all the assumptions you have just made. Okay. We have got the guilt, you have listened to the evidence, you have heard it all.
>
> Now we're in a penalty phase and you hear evidence from a woman who you believe; you're certain this woman is telling you the truth who says, "That man, Mr. Lucas, raped me." And you further learn that that man, Mr. Lucas, who this woman says raped her, went to prison as a result of it.

(262 PRT 27388-27389.)

When the defense next asked the prospective juror whether there was "line" beyond which "this kind of conduct over such a long period of time really puts me in a position where I really believe death is the only appropriate verdict," the trial court sustained the prosecutor's objection that "[c]ounsel is asking for a commitment from the juror, and it is prejudging the case." (262 PRT 27389.) The defense next asked the prospective juror whether there was "any situation" where the prospective juror could not be impartial, where "the crime was so terrible, the facts were so awful" that no matter what mitigating evidence was presented "none of that would

make any difference to you and you would automatically return a verdict of death?" (262 PRT 27390.)

The trial court overruled the prosecution's objection, but stated "we don't want a specific. I think if it's done without specifics in a general question, then I think it's permissible." The trial court then reworded the question "to make sure we have it proper."

> We don't want you to give us back a specific case. I think the question is whether or not right now you believe that you might be of the frame of mind that something would be - - that you might hear facts of, for instance, multiple murders and throat slashings and have children as victims that would be so awful, you would, in fact, close your mind at the end of the guilt phase and you would say, "That's it. I am going to vote death and I don't case about the mitigating factors. Nothing in mitigation that I could possibly hear, nothing would change my mind. I wouldn't listen."

(262 PRT 27391.)

At the next break in voir dire, the defense advised the trial court that its "question with regard to the prior is a cause question . . ." which "directly addresses the issue of cause or bias." The trial court responded by explaining that "whenever you start putting to a juror any particular fact and detail of the case and say 'If you heard that Mr. Lucas had committed' and you're telling exactly the whole details of it, of the prior, you know, whatever, and spent time in prison and so on, 'would you automatically vote death.' How could they possibly answer that question?" (262 PRT 27394.) The trial court agreed that its view was that the defense needed to be "more general about a prior felony with a prison term." (262 PRT 27395.) The trial court stated that "the proper way" to ask would be

> in a more general term - - otherwise you are getting pre-commitments from these jurors. You are asking them to prejudge the evidence. And really, the totality of the circumstances begins to fade away and they are asking to zero in, "would you," and you're positing the worst thing in the world and they haven't heard any of the mitigating evidence and you are saying, "would you this . . ." and people are liable to say, "well, yes." But they haven't heard anything yet. (262 PRT 27395.)

The trial court indicated that the defense could direct the prospective jurors to the pages of the informational sheet they had been given, which contained the aggravating and mitigation factors in the penalty phase, and ask whether there was any aggravating evidence when"added to these crimes that would tell you, 'I don't care about the law that tells me I have to consider mitigating factors. If I found this or that, then that would be the end of it; I would vote death.'" (262 PRT 27395-27396.) In responding to the prosecutor's objection to allowing any mention of potential aggravating factors as calling for a prejudgment on penalty (262 PRT 27396), the trial court stated that "these distinctions are hard to draw" and "[w]e could obviously limit this down to where we wouldn't get anything meaningful out of these people." (262 PRT 27397.) However, the trial court did not think it could go as far as "shut[ting] off all discussion of any types of facts or discussion of any types of mitigation and aggravating factors because we wouldn't get into the ability to determine really whether these people could follow the law under certain circumstances that may apply to these certain classes." (262 PRT 27397.)

However, the trial court stated that "you have to go through certain hoops first." Any questioning would have to "go through the generalities and then get to the specifics." (262 PRT 27397.) The trial court noted that some prospective jurors will never get to the specifics, while others would get into the specifics, but not to the extent presented in the original defense hypothetical posed to the prospective juror because "[t]hat's asking them to prejudge and they are doing it in a vacuum." (262 PRT 27397-27398.) Indeed, the trial court noted that the prospective juror "looked legitimately confused by" the defense questions. (262 PRT 27398.) The trial court directed counsel to "be more inventive" and be "more general" in presenting aggravating evidence "more general" and tie the questions about aggravating evidence to whether the prospective jurors "can follow the law under certain circumstances or not." (262 PRT 27398.) The trial court agreed with defense counsel that counsel could direct the prospective jurors to the aggravating and

mitigating factors and ask whether there was anything which would tell the juror "'automatically, "I now can't think any further."'" (262 PRT 27399-27400.)

The trial court concluded "it has to be a generalized thing. We can't get into those specifics that are actually going to be applied in the mitigating and aggravating factors in the case . . . [i]t has to be kept in a hypothetical way." (262 PRT 27401.)

The following week, the trial court reiterated that general questions of prospective jurors, directing them to aggravating and mitigating factors to see whether they would be able to consider all of the factors in determining penalty, were permissible, but questions which direct the prospective jurors to specific facts in any effort to have the prospective jurors prejudge penalty were impermissible. (264 PRT 27642-27645.) In response to the defense asking about questioning prospective jurors about appellant's prior rape conviction, the trial court indicated it was permissible "to find out how strongly their feelings would be for the death penalty once they heard some of those factors." (264 PRT 27646-27647.) While the trial court concluded that asking the prospective jurors what their vote would be in light of specific facts was impermissible, the trial court found it permissible to determine how strongly a prospective juror's feelings in support of the death penalty would be in light of facts which would be presented in aggravation at the penalty phase. (264 PRT 27648-27649.) As long as prospective jurors were not asked how they would vote, questions about factors involved in the case, including appellant's prior rape, were permissible. (264 PRT 27648-27651.) As the trial court put it:

> Well, see, the real rub here is what are they being asked to tell. If they are being asked to tell "I would vote death penalty." "What is your vote." Okay. I think that's inappropriate. But to say "Would it close your mind so you couldn't listen to anything else, couldn't - - you couldn't literally give any consideration to anything else," . . .

(264 PRT 27657.)

The trial court took under submission "how far you can go into the facts on aggravation and mitigation." (264 PRT 27662.)

The following day, the trial court revised the scope of its ruling, concluding that it was improper to present prospective jurors with specific factors in aggravation or mitigation and asking how they would vote, whether automatically or otherwise. (265 PRT 27672.) The trial court explained that such questioning amounted to prejudgment because it placed the jury in the context of the penalty phase, where they would be free to assign whatever weight they accorded individual pieces of evidence, even to the degree that any individual piece of evidence would foreclose a particular verdict, and would also give rise to back-and-forth questioning about competing pieces of evidence. (265 PRT 27671-27672, 27674-27676, 27679-27681.) However, questions which placed the prospective jurors at the end of the guilt phase and asked their willingness to consider both penalties in light of factors arising in the guilt phase and the aggravating and mitigating factors were appropriate. (265 PRT 27682-27683.) "You can't hypothesize them into the penalty phase and give them specifics of aggravating and mitigating factors and ask how they feel." (265 PRT 27684.) The trial court also ruled that peremptory challenge-type questions also could not properly ask specifics, but could "certainly explore their feelings on things that you think may come up in those aggravating and mitigating circumstances," including rape. (265 PRT 27684.)

Following voir dire questioning of the next prospective juror, which included questions about her attitude toward drug usage, the trial court admonished the prosecutor for his question whether the prospective juror would vote one way automatically based on drug evidence (see PRT 27722), but approved the defense questioning which directed the prospective juror's attention to the issue of drug usage and asked whether her attitude would prevent her from considering such usage as mitigating rather than aggravating, thereby preventing her from following the law (see 265 PRT 27711-27714). (265 PRT 27730.) The trial court indicated it would put the jury informational pamphlet on the podium to assist counsel in directing the prospective jurors to specific factors and inquiring whether the prospective jurors

could follow that law, but reminding counsel not to ask how the prospective jurors would vote based on and particular factor or combination of factors. (265 PRT 27731.)

Later, during a discussion on the nature of proper *Hovey* voir dire question about consideration of background evidence as mitigation, the defense again raised the issue of proper questioning during *Hovey* voir dire concerning appellant's prior rape conviction. (288 PRT 32855.) The trial court reiterated its conclusion that asking prospective jurors if they would vote for death if they heard about a prior rape without giving weight to the other evidence called for prejudgment, but it was proper as part of the *Hovey* voir dire or the general voir dire to ask the prospective jurors about rape. (288 PRT 32855, 32857.)

The following day, the defense returned to the issue, citing a voir dire question in this Court's decision in *People v. Rich* (1988) 45 Cal.3d 1036,[236] and the trial court explained that the propriety of specific questions depended on the context.

Well, it depends on context.

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236. In *Rich*,

> The prosecutor and defense . . . agreed on a question that read, "If the facts in this case disclose that [defendant] is guilty of four separate murders and multiple rapes, including the murder of an eleven-year-old girl who was sexually abused and was killed by being thrown off a high bridge, would those facts trigger emotional responses in you that would make it hard to consider life imprisonment without possibility of parole, or would you under those circumstances vote for the death penalty?"

(*People v. Rich, supra,* 45 Cal.3d at pp. 1104-1105.)

This Court stated that the proposed question "fully comports with the law existing at the time the voir dire examination was held." (*Id.* at p. 1105.)

Again, as I have said every time, it's context. I have to look at how the questions have led up to that to see how the prospective juror is going to take that.

I would have no problem with a question like that, as long as the context indicates that we are talking about guilt phase and the end of guilt phase and what the question is calling for is an indication of whether the juror is closed to the mitigating factors. And if, in the context, it's clear to the juror that that's what's being asked, then I would have no problem with that question.

If it somehow is - - through the context would appear that they are being asked to place themselves into a penalty phase and give a judgment based on apparent factors that may or may not be in the penalty phase for mitigation, then I don't think it's proper question.

That's all I can say. I just think that the question of whether something calls for a prejudgment or not is a very fine line, and it really depends on the context and how the questions and answers have been going to see whether that juror feels that they are being asked for a prejudgment in the case or would legitimately feel that way in the context of the questioning.

Along this line, the concerns that we have discussed about drugs and people's feelings about rape are very important issues, and I think both sides have the right to inquire into people's feelings about drugs and rape.

Keeping it away from prejudgment is the important thing, and drawing that line is what I am trying to do.

So you can't ask for a prejudgment on those areas, but what you can do is certainly ask them about their feelings in those areas. Open-ended questions may be the best way to approach that. I don't know. I can't - - you know, I don't want to get involved in the lawyer process; that's your job. All I can do is tell you that some of the questions that have come out so far, I think, are impermissible. I don't want to hamper you by anything I have said from inquiring into those areas, however.

(289 PRT 32915-32917.)

B. Law And Analysis

"Under both the federal and state Constitutions, a sentencing jury in a capital case must be impartial." (*People v. Bolden* (2002) 29 Cal.4th 515, 536.)

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.

(*Id.* at p. 538, quoting *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188, [101 S.Ct. 1629, 1634, 68 L.Ed.2d 22].)

Prospective jurors on a capital case may be excused for cause when their views on capital punishment would prevent or substantially impair the performance on their duties as jurors. (*People v. Cash* (2002) 28 Cal.4th 703, 719.) "[E]ither party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." (*People v. Cash, supra,* 28 Cal.4th at pp. 720-720.)

However, "death-qualification voir dire must avoid two extremes." (*Id.* at p. 721.) "[I]t must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried." (*Ibid.*) "On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of mitigating and aggravating evidence likely to be presented." (*Id.* at pp. 721-722.) It is not improper for a trial court to refuse to permit counsel to ask a juror to consider particular facts that would cause him or her to impose the death penalty. (*People v. Jenkins, supra,* 22 Cal.4th at p. 991.)

In deciding where to strike the balance between voir dire questioning which is too abstract and voir dire questioning which is too specific, the trial court has considerable discretion. (*People v. Cash, supra,* 28 Cal.4th at p. 722.) Thus, a trial court's limitations on death-qualification voir dire is reviewed for an abuse of

discretion. (*People v. Burgener, supra,* 29 Cal.4th at p. 865; *People v. Jenkins, supra,* 22 Cal.4th at p. 990.)

On the other hand, a trial court errs when it prevents all questioning about facts or circumstances not expressly pleaded in the information. (*People v. Cash, supra,* 28 Cal.4th at pp. 719-722.) A challenge for cause may be based on a prospective juror's response when informed of facts or circumstances likely to be present in the case being tried (*id.* at p. 720) and the defense should be permitted to probe the prospective juror's attitudes as to that fact or circumstance. (*Id.* at p. 721.)

Appellant claims the trial court foreclosed the defense "from specifically questioning the prospective jurors about a prior conviction which was to be presented in aggravation it the penalty trial." (6 AOB 1437.) However, contrary to appellant's one page summary of the trial court's purported erroneous ruling (6 AOB 1433), the trial court and counsel engaged in a lengthy and detailed discussion of the bounds of permissible questioning, and the trial court did not foreclose all questioning regarding appellant's prior rape.

The trial court correctly recognized at the outset that questioning which placed the prospective juror in the penalty phase, delineated a particular aggravating fact (in this case, the prior rape), and would reasonably be understood by the juror as calling for a prejudgment on that evidence and the penalty determination was improper. (*People v. Jenkins, supra,* 22 Cal.4th at p. 991 [not error to refuse questions asking a juror to consider a particular fact that would cause him or her to impose death].) The trial court did not preclude questioning about appellant's prior rape conviction, but ruled that any such questioning had to be more general so that the prospective jurors were not placed in a situation where they might believe they were being asked to make a prejudgment on the facts or penalty. Twice the trial court pointed the defense to the jury informational sheet which listed the aggravating and mitigating circumstances, including prior felony convictions and acts of violence, and indicted introducing that to the prospective jurors as a general way of getting their attitude on

those topics without calling for any prejudgment. (262 PRT 27395-27396; 265 PRT 27731.) The trial court also indicated that more specific questioning might be appropriate, but any questioning would have to "go through the generalities and then get to the specifics." (262 PRT 27397.) However, the trial court made it clear that it did not think it could go as far as "shut[ting] off all discussion of any types of facts or discussion of any types of mitigation and aggravating factors because we wouldn't get into the ability to determine really whether these people could follow the law under certain circumstances that may apply to these certain classes." (262 PRT 27397.) The trial court also ruled that peremptory challenge-type could "certainly explore their feelings on things that you think may come up in those aggravating and mitigating circumstances" even though, there to, specific questions asking for prejudgment were improper. (265 PRT 27684.)

Throughout the remaining discussions, the trial court repeatedly indicated it was attempting to draw a fine line between precluding questioning which put the prospective jurors in the position of prejudging evidence and the penalty decision, and permitting the defense and prosecution to inquire into the jurors' feelings and attitudes toward facts and circumstances which would arise in the case. As the trial court stated, "the real rub here is what are they being asked to tell. If they are being asked to tell 'I would vote death penalty.' 'What is your vote.' Okay. I think that's inappropriate. But to say 'Would it close your mind so you couldn't listen to anything else, couldn't - - you couldn't literally give any consideration to anything else,' . . . ." (264 PRT 27657.)

Appellant seems to suggest that the trial court's repeated willingness to permit counsel to question the prospective jurors about rape did not adequately permit proper questioning concerning appellant's rape conviction. However, it is plain throughout the discussions that the trial court's reference to rape encompassed appellant's rape conviction and, in fact, the defense never claimed that they understood the trial court's terminology to impose the limitation appellant now sees.

Additionally, the trial court's repeated references to having counsel direct the prospective jurors' attention to the listing of aggravating and mitigating circumstances also undermines any suggestion that the defense was not permitted questions concerning the prospective jurors' attitudes toward a rape conviction, as opposed to rape. Indeed, the trial court specifically indicated that more specific questions may be required after the topics were explored generally.

Considered in its entirety, the trial court repeatedly made it clear that its concern was to preclude questions which placed the prospective jurors in the position of prejudging penalty phase evidence and the penalty decision, while permitting both sides to properly explore the prospective jurors' attitudes toward facts and circumstances likely to be present in the case. The trial court did not impose any improper across-the-board restriction on voir dire and did not abuse its discretion in striking the balance between questioning too general to identify removable jurors and so specific as to call for prejudgment.

Finally, because any error in its restriction of voir dire did not absolutely bar questions concerning appellant's prior rape conviction, in order to obtain reversal, appellant must establish that one or more jurors who eventually served were biased against him. (*People v. Cunningham, supra,* 25 Cal.4th at pp. 974-975.) Appellant has not done so. Thus, any error was harmless.

LXXVI.

APPELLANT'S CLAIM THAT DENIAL OF HIS STATUTORY JUDICIAL DISQUALIFICATION MOTION WAS ERRONEOUS IS NOT COGNIZABLE ON APPEAL; APPELLANT'S DUE PROCESS CLAIM THAT THE TRIAL COURT WAS NOT IMPARTIAL IN HEARING HIS MOTION CHALLENGING THE CONSTITUTIONALITY OF HIS PRIOR RAPE CONVICTION IS BARRED AND WITHOUT MERIT

Appellant contends the trial court prejudicially erred and violated his constitutional due process right to an impartial judge by denying his motion to

disqualify the trial court from hearing his motion challenging his prior rape conviction. (6 AOB 1483-1488.) His claim of statutory error is not cognizable on appeal and his claim of constitutional error is forfeited and without merit.

A. Procedural Background

As part of a trial brief filed November 19, 1986, appellant argued his prior rape conviction was constitutionally deficient because his trial and appellate counsel had rendered ineffective assistance of counsel. (36 CT 7745-7781.) Appellant argued his trial attorney was deficient because he (1) failed to make a motion for a psychiatric examination of the victim, pursuant to *Ballard v. Superior Court* (1966) 64 Cal.2d 159, following her trial testimony; (2) introduced evidence of other sexual crimes attributable to appellant during cross-examination of the investigating detective; (3) requested the jury be instructed with CALJIC No. 2.62; and (4) failed to investigate and present the testimony of Alejandrina Casas Valenzuela. (36 CT 7756-7765.) Appellant argued his appellate attorney was deficient because he (1) failed to argue ineffective assistance of trial counsel based on the alleged deficiencies trial counsel committed; (2) made an inadequate argument in support of augmentation of the appellate record to include opening statements and closing arguments; (3) failed to challenge admission of the statement the rape victim made to her friend shortly after the rape, in which she told her friend about the rape; and (4) failed to advise appellant of the opportunity to seek rehearing or hearing after the court of appeal affirmed the conviction. (36 CT 7770-7781.) The prosecution opposed appellant's assertions of ineffective assistance of counsel with points and authorities filed April 23, 1987. (48 CT 10328.) The prosecutor argued, inter alia, that relief should be denied "without presentation of evidence, inasmuch as even assuming the existence of facts which support defendant's claims, defendant would nonetheless be entitled to no relief." (48 CT 10337.)

On January 4, 1988, when the matter came before the trial court for hearing, the court questioned whether a motion challenging a prior conviction based on presentation of evidence of ineffective assistance of counsel was a proper procedure, as opposed to bring the issue in habeas corpus. (196 PRT 18857-18858, 18860-18862, 18864-18865.) The trial court put the matter over to allow the parties an opportunity to brief the issue. (196 PRT 18867-18868.) On January 26, 1988, the defense filed its brief in support of its position that it could challenge the constitutionality of appellant's prior rape conviction by presenting evidence to support his motion alleging ineffective assistance of counsel. (53 CT 11589-11595; see 194 PRT 19554 [trial court received and read the brief].)[237/] After further argument, including discussions of the trial court's original habeas jurisdiction and issues of due diligence in habeas, the trial court deferred ruling until counsel had additional opportunity for further research. (203 PRT 19624-19625.)

On February 11, 1988, following further argument (209 PRT 20249-20279), the trial court ruled appellant could not challenge his prior conviction on the grounds of ineffective assistance of counsel by way of a motion, but had to proceed by way of habeas corpus. (209 PRT 20280-20292.)

The next court day, February 16, 1988, the trial court, after considering other issues, returned to the prior conviction motion:

> There was another issue. On the habeas on the 1973 case, I am - - I hope it's clear that I am very much desirous of having that taken up to the 4th District or wherever, and I don't want to entrap you into thinking that if you file it back here, that I haven't made up my mind on those issues. I read all the points and authorities that you submitted and I spent considerable time going over the transcript, and it was my opinion that none of the issues raised

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237. The prosecution did not file a brief, but orally represented its concern that case law did not clearly preclude the requested hearing. (203 PRT 19595.) Nonetheless, the prosecution maintained its view that the factual assertions made in the trial brief in support of the ineffective assistance of counsel claims were insufficient to merit relief. (*Ibid.* and *id.* at p. 19625-19626.)

showed incompetency either of Mr. Gilham [trial counsel] or of Mr. Arm [appellate counsel], so I will say that right out.

(210 PRT 20361.)

Responding to the defense concern that the trial court had not heard expert testimony on the ineffective assistance of counsel issues, the trial court stated:

> Well, off of the transcripts that was my judgment.[238/] And the bottom line of all of this, if I haven't made it clear . . . is that the significant difference in the way a habeas is treated makes the difference in the way these ought to be handled. That if this is brought to the trial court, it seems to me any suggestion of an issue must be treated with the full evidentiary hearing on all issues raised on any constitutional ground. And the differences with the habeas is that it's raised to the - - usually to an appellate court, and if there is not a significant issue raised on the papers themselves, then the habeas will be denied. And timeliness comes into question there, of course, but timeliness also - - the ruling on any timeliness will be somewhat a product of the court's judgment as to the seriousness of the constitutional issue raised.
>
> . . .
>
> I see it in a very different kind of thing happening in a habeas than coming through here, but I also didn't want to invite you to bring it back to this court under a habeas proceeding when I already know that - - you know, I don't want to entrap you into thinking you come back here and I may find for you. I have already reviewed it and I don't find it, at least on the paper work.

(210 PRT 20363-20364.)[239/]

On April 29, 1988, the California Court of Appeal, Fourth Appellate District, Division One, filed its opinion on appellant's petition, issuing a peremptory writ of mandate "directing the superior court to entertain the motion to strike." (*Lucas v.*

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238. The defense filed copies of the Clerk's Transcript and Reporter's Transcript, as well as appellate briefing, in appellant's prior rape conviction. (33 CT 7088 - 35 CT 7664.)

239. In response to a question from the prosecution, the trial court indicated it had read all the pleadings and all the transcripts from the prior rape conviction. (210 PRT 20364.)

Superior Court (1988) 201 Cal.App.3d 149, 151, disapproved in *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 966, fn. 6.) On May 31, 1988, the prosecution filed a petition for review in this Court, which was denied on August 11, 1988. (*Lucas v. Superior Court*, S005863.)

On June 14, 1988, in discussions of how the defense motion would be handled in the event this Court did not grant a requested stay of the trial proceedings pending a decision on the petition (250 PRT 25800-25801), the trial court indicated that if the stay was refused, "we go ahead right away with the hearing" and defense counsel estimated one to two days to hear the motion. (250 PRT 25802.) The trial court also assented to the prosecution request for "the opportunity" to argue that the prima facie case had not been shown. (*Ibid.*)

On July 19, 1988, during a scheduling discussion, the prosecution indicated it anticipated a ruling on its petition for review by July 27. (252 PRT 26023.) When the trial court indicated that the hearing would then be scheduled "immediately the following week," defense counsel indicated he just needed to check witness schedules to insure the defense would be ready to proceed on the motion at that time. (*Ibid.*)

On July 25, 1988, still anticipating a decision by July 27, the trial court scheduled a hearing for July 28 (253 PRT 26086-26087), and "[i]f it comes back . . . then we will set the date for the hearing." (253 PRT 26087.) When defense counsel advised the trial court that his calender showed "between August 1 and August 5" for "a hearing on that issue" and "I don't have a problem" with those dates, the trial court agreed, saying, "Let's schedule it for that day and then we're all ready for it." (253 PRT 26088.)

On July 28, after discussion this Court's extension of time to decide the petition for review (to August 29), the trial court indicated the hearing on the defense motion would proceed on a Friday convenient to all counsel. Defense counsel responded, "There is no problem, your Honor." (254 PRT 26100.)

On August 1, 1988, the trial court heard arguments on "whether the penalty phase evidence in aggravation should be limited simply to the facts of conviction of the 1973 crimes, if they pass constitutional muster, or whether the People would be entitled to put in not only the facts of the conviction, but also additional facts related to the circumstances of the crime itself." (254 PRT 26209.) Following the arguments, the trial court made a tentative ruling that the conviction, including the armed finding, would be admissible, as well as the underlying facts of the rape and kidnapping. (255 PRT 26296-26300.)

On August 23, 1988, the prosecution advised the trial court that this Court had denied the petition for review. (258 PRT 26709.) The prosecutor also asked for "the opportunity to argue it based on the pleadings" before proceeding with the hearing on the motion. (*Ibid.*) The trial court responded that "we have to schedule a hearing to do all this." (*Ibid.*)

On September 7, 1988, is discussing questioning of prospective jurors during *Hovey* voir dire about appellant's prior rape conviction, the prosecution noted the need to litigate the validity of the prior, advised that the remittitur had issued, and reminded the trial court of its desire to argue the validity based on the pleadings. (264 PRT 27665.) The trial court scheduled the matter for hearing on Friday, September 30. (265 PRT 27666.) When the defense indicated that it would take more than an afternoon "[i]f we litigate," the trial court indicated "we will have at least the initial argument on it that day." (*Ibid.*)

The defense filed a motion pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6), and the state and federal constitutional rights to due process, to disqualify the trial court from hearing the prior conviction motion on September 15. (61 CT 13443.) The prosecution filed an opposition on September 22. (61 PRT 13453.) On September 23, the trial court filed its order striking the defense disqualification statement on the bases that it was untimely and disclosed no legal ground for disqualification. (61 PRT 13477.)

In addressing the prosecution's contention that the defense was precluded from presenting evidence in support of the challenge to the rape prior conviction without an offer of proof, the trial court agreed with the defense characterization of its prior statements regarding the sufficiency of the defense pleading that distinguished between the adequacy of the pleading in the context of habeas corpus and its adequacy in the context of a motion. (273 PRT 29600-29602; see also 265 PRT 29624-29625.) In the motion context, the trial court stated that "[t]he real issue that's here, however, is the calling of the additional witnesses, and it seems to me this is just a simply matter of asking for an offer of proof before you call the witnesses and going forward from that point." (273 PRT 29601.) The trial court later restated its position:

> That based on the paper work, without further argument, the Court would say that the paper work is insufficient to establish ineffective assistance of trial counsel or appellate counsel. And that if you wish to augment your paper work with testimony from trial and appellate counsel, then you would first have to make an offer of proof as to what you would expect they would say after - - during testimony.

(281 PRT 31325.)

Once defense counsel made his offer of proof, the trial court found it sufficient to go forward with a hearing in order to hear the witness testimony. (281 PRT 31328-31333.)

B. Appellant's Statutory Claim Is Not Cognizable

To the extent appellant claims the trial court erred in striking his disqualification motion, "his claim is not cognizable on appeal." (*People v. Panah* (2005) 35 Cal.4th 395, 444.) A judge is disqualified if, for any reason, "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code of Civ. Proc., § 170.1, subd. (a)(6)(C).) When a judge does not disqualify herself, "any party may file with the clerk a written verified statement

objecting to the hearing or trial before the judge and setting forth facts constituting the grounds for disqualification of the judge." (Code of Civ. Proc., § 170.3, subd. (c)(1).) Code of Civil Procedure section 170.3, subdivision (d) provides:

> The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding.

Code of Civil Procedure section 170.3, subdivision (d) "applies to all *statutory* judicial disqualification claims" (*People v. Brown* (1993) 6 Cal.4th 322, 335, italics in orig.) and "forecloses appeal of a claim that a *statutory* motion for disqualification authorized by section 170.1 was erroneously denied." (*Id.* at p. 334, italics in orig.) "Even in a capital case, . . . all litigants who seek to challenge denial of a statutory judicial disqualification motion are relegated to writ review as described in section 170.3(d)." (*Id.* at p. 335.)

The trial court struck appellant's motion as untimely and failing to disclose any legal ground for disqualification. (61 PRT 13477.) The sole remedy was to seek a writ of mandate, which appellant did not do. His statutory claim is not cognizable on appeal.

C. Appellant's Due Process Claim Is Barred And Without Merit

While the statutory prohibition on appellate review of a disqualification motion does not bar appellate review of a due process claim of judicial bias (*People v. Brown, supra,* 6 Cal.4th at p. 335), in order to preserve the due process claim for appellate review, a litigant must use the statutory procedure to present the claim in the trial court and seek writ relief in the appellate court. (*Id.* at p. 336; see also *People v. Hernandez, supra,* 30 Cal.4th at p. 855 [failure to challenge trial judge and seek review by timely writ bars due process claim on appeal].) While appellant raised his due process claim in his disqualification motion (61 CT 13443), appellant

did not timely seek writ review of the denial of his claim. Thus, he did not preserve his due process claim and may not obtain relief on appeal.

Moreover, the claim is without merit. Appellant's judicial bias claim is based on the trial court's statement about his constitutional challenge to his prior rape conviction. Appellant claims the trial judge made a prejudgment on the merits of the challenge without hearing the evidence or argument. However, the trial court's explanations of its statement, both at the time of the allegedly biased statement and later, unambiguously demonstrate that the trial court's statement merely reflected its view on the existence of a prima facie case should the motion be presented as a habeas corpus petition.

As noted earlier, on January 4, 1988, when the matter came before the trial court for hearing, the trial court questioned whether a motion challenging a prior conviction based on presentation of evidence of ineffective assistance of counsel was a proper procedure, as opposed to bring the issue in habeas corpus. (196 PRT 18857-18858, 18860-18862, 18864-18865.) The trial court's focus at the time was the proper procedural vehicle to present appellant's claim that his rape conviction was infected with ineffective assistance of counsel, a point the trial court later specifically explained. (273 PRT 29624.) The trial court ultimately ruled appellant could not challenge his prior conviction on the grounds of ineffective assistance of counsel by way of a motion, but had to proceed by way of habeas corpus. (209 PRT 20280-20292.) It was in that habeas context that the trial court stated its view on the claim. The trial court stated that its view on the insufficiency of the pleadings was premised on the possibility the defense might repackage its motion as a habeas petition. (210 PRT 20361, 20363-20364.) The trial court stated its view that a prima facie case had not been made based on the pleading and supporting documents, because the trial court did not want to mislead defense counsel into believing that obtaining a favorable ruling was merely a matter of changing the procedural vehicle to a habeas petition.

Of course, one of the initial questions facing any court considering a habeas petition is whether a prima facie showing has been made in the pleadings and supporting documents; if not, an order to show cause will not issue and there will be no evidentiary hearing. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)[240/]

In the context in which the trial court's statement was made, it is clear the trial court was attempting to encourage the defense to either fortify its allegations and documentary support should the challenge be brought back to the trial court by way of a habeas petition or to seek habeas relief initially in the court of appeal. There was simply no prejudgment of the matter as a motion, which was the procedural vehicle the trial court was required to accept once the matter was returned from the court of appeal and the basis for the defense disqualification motion. While the trial court required an offer of proof in order to proceed with an evidentiary presentation in support of the motion, it did not - as would have been the case with a habeas petition - deny any evidentiary presentation based solely on the pleadings. Indeed, after hearing the offer of proof, the trial court proceeded with the evidentiary presentation and ruled on the motion in light of that additional evidence. (Cf. *People v. Farnam* (2002) 28 Cal.4th 107, 193-195 [while trial judge's remarks after death verdict appeared to reflect prejudgment of modification motion, the judge's handling of the modification motion demonstrated impartiality and compliance with statutory duties].)

The trial court's preliminary habeas assessment did not constitute a prejudgment on the merits of the prior conviction issue as a motion, and although the defense mistakenly believed otherwise in presenting the disqualification motion,[241/]

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240. The other initial inquiry made by a court is whether the claims are procedurally barred. (*People v. Romero* (1994) 8 Cal.4th 728, 737.)

241. The defense ultimately recognized that the trial court's allegedly biased statements were not a prejudgment of the prior conviction issue as a motion, but simply a habeas corpus prima facie determination. (273 PRT 29600-29602.)

it obtained a full hearing and a decision based on that hearing, which explains why it did not seek writ review of the denial of its disqualification motion. Thus, appellant's due process claim is without merit even had it not been forfeited.

LXXVII.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE HIS PRIOR RAPE CONVICTION AS EVIDENCE IN AGGRAVATION BECAUSE APPELLANT FAILED TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF HIS TRIAL ATTORNEY

Appellant contends his death sentence must be reversed because the trial court allegedly erred in denying his motion to strike his prior rape conviction as evidence in aggravation, based on appellant's claim that the prior rape conviction was the result of constitutionally ineffective assistance of trial counsel. (6 AOB 1489-1497.) The trial court did not err in declining to strike the prior rape conviction as appellant failed to prove either of the two prongs of his ineffective assistance claim.

A. Procedural And Factual Background

As delineated in the previous argument (Argument LXXVI, *supra*), appellant moved to strike his prior rape conviction from the information and notice of aggravation on the grounds of ineffective assistance of trial and appellate counsel. In hearing the motion, the trial court considered the pleadings, the record of the rape conviction, and testimony.

1. Rape Conviction Procedural History

Appellant was charged by information filed June 15, 1973, with rape (Pen. Code, § 261), assault with a deadly weapon (Pen. Code, § 245, subd. (a)) and kidnapping (Pen. Code, § 207). It was further alleged that appellant inflicted great bodily injury in the commission of the rape (Pen. Code, § 264), and used a knife in

the commission of the rape and kidnapping (Pen. Code, §12022). (34 CT 7297-7298.)

Following a jury trial, on August 16, 1973, appellant was convicted of rape and assault with a deadly weapon. As to the rape conviction, the great bodily injury allegation was found not true and the knife use allegation was found true. (34 CT 7299-7302, 7320.)[242/] Appellant was subsequently referred for an evaluation as a mentally disordered sexual offender and, after a court trial, was found not to be an MDSO. (34 CT 7323, 7325-7326.)

On August 26, 1973, the trial court held a hearing on appellant's coram nobis petition. (34 CT 7327.) The petition was denied November 5, 1973, and appellant was committed to the California Youth Authority. (34 CT 7328.) Appellant filed a notice of appeal on November 6, 1973. (34 CT 7310.)

2. Rape Conviction Trial

The victim, 20 year old Teresa Briseño, lived in the Cook residence in San Diego, where she worked as a maid for the Cook family and other families in the area. (34 CT 7447-7448.) She had come from Mexico approximately two years earlier and worked for the Cook family for approximately one year.

On Memorial Day weekend (May 26-28, 1973), Mr. and Mrs. Cook and their daughter, Candy, left for Palm Springs. (34 CT 7448; 35 CT 7618.) The Cook's son, Jeff, stayed in San Diego, as did Briseño, although Jeff was not around the family home very much that weekend. (34 CT 7448.)

When she left with her parents, Candy Cook left the house key with her friend and neighbor, 16-year-old Linda Kilbourn. (35 CT 7542-7543.) Kilbourn let three

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242. During deliberations, the trial court withdrew the kidnapping charge. (34 CT 7320.)

teenage boys use the house to party: 15-year-old David Carroll, 16-year-old David Cline, and 18-year-old appellant. (35 CT 7543, 7551, 7641, 7648.)

Briseño was away from the house on Saturday, May 26, with her boyfriend who was visiting from San Jose. She spent the night with him. (34 CT 7449.) The three teenagers were in and out of the house on Saturday, drinking beer and listening to music, finally leaving around midnight. (35 CT 7629-7633, 7649-7652.) Jeff Cook arrived prior to the three leaving. (35 CT 7605.) Linda Kilbourn was at the house at that time also, and all four were drunk and under the influence of marijuana. (35 CT 7609.)

Jeff's friend, Steve Hopkins, called the house around 11:45 p.m. (35 CT 7590.) Linda Kilbourn answered the call and gave the phone to Jeff Cook. (35 CT 7590, 7602, 7609.) While Jeff and Steve were talking, one of the males said Steve should bring his girlfriend to the house and they would rape her. (35 CT 7590-7591, 7606.) One of the males also said they wanted to "strap" (meaning to rape) the maid. (35 CT 7610, 7612.)

After the call, Jeff told the others to leave and left to pick up Steve. They had pizza and returned to the Cook home where they spent the night. (35 CT 7602.)[243] Sunday morning, Jeff and Steve left the house. (35 CT 7602.)

Briseño returned to the home Sunday morning. (34 CT 7449.) She was visited that afternoon by a girlfriend. (34 CT 7450.) Cline, Carroll, and appellant also returned to the house, with more beer, and two girls joined them. (34 CT 7450-7451.) During the day, Carroll obtained the keys to the Cook vehicle and drove to the store. (35 CT 7635.) Carroll later told San Diego Police Detective Gary Murphy that Cline and appellant were standing in the doorway, watching as he took the car keys from the master bedroom dresser. (33 CT 7145-7146.) Because he was unable

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243. Steve Hopkins slept in Candy Cook's bedroom, where the group had been partying. (34 CT 7589.) There were empty beer cans, records and other items all over the floor, and the whole house smelled of marijuana. (35 CT 7589.)

to purchase cigarettes, Carroll drove back and got appellant to return to the store to make the purchase. (35 CT 7636.) When Carroll had difficulty with the car, appellant drove it back to the house. (35 CT 7636.) Carroll put the keys back on the dresser where he had obtained them. (33 CT 7147; 35 CT 7637.)

Briseño and her girlfriend left that evening to get something to eat. They returned to the house around 7:00 to 7:30 p.m. (34 CT 7453.) Cline, Carroll and appellant were still at the house. (34 CT 7453.) Around 9:00 p.m., Briesño asked her girlfriend to tell the teenagers to leave, which they did. Briesño's girlfriend also left, before the teenagers did. (34 CT 7453-7454; 35 CT 7639, 7656.)

Sometime later, while she was watching television, Briseño heard a knock at the door; it was appellant, who said he had left his jacket.[244] Briseño let him in and sat outside because appellant was "rather drunk" and she "did not know him very well." (34 CT 7457.) Within a few minutes appellant came out, grabbed Briseño from behind and put a small kitchen knife to her throat. (34 CT 7457.) Appellant took Briseño inside to her room, where he told her not to yell and pressed her breast very hard. (34 CT 7458-7460.) He then took her back outside and put her in the Cook car. (34 CT 7460-7461.)[245] After some difficulty starting the car, appellant drove to Cowles mountain, approximately 1.7 miles away. (34 CT 7418, 7462-7463, 7465.) Appellant drove approximately 0.6 miles up a dirt road where he stopped, got Briseño out of the car, and raped her. (34 CT 7418-7419, 7466-7469.)[246] After the rape, Briesño struggled with appellant over the knife which he held against her

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244. She testified it was "[a]bout 9:30, more or less. I'm not sure." (34 CT 7456.) She also testified "[p]erhaps it was 10:30 or 10:00. I don't know." (34 CT 7527.)

245. While she did not see how he obtained it, appellant had a larger kitchen knife when they were in the car. (34 CT 7461, 7463-7464.)

246. Appellant tore Briseño's bra off her. (34 CT 7468.)

throat. She was able to get it away from him and threw it into the bushes.[247] (34 CT 7470-7471.)[248]

After dressing, appellant drove Briesño back to the house, arriving shortly before 11:00. (34 CT 7472, 7527; 35 CT 7530.) Because the door was locked and Briesño had no key, appellant went across the street to the Kilbourn residence and returned with a key, letting Briesño in the house. (34 CT 7472.) After appellant left, Briesño locked the house and waited, because appellant had told Briseño not to tell anyone and he would be outside. (34 CT 7437, 7480.)

As Briseño was waiting in the house, Linda Kilbourn, her 14-year-old sister Laurie, and her 16-year-old friend, Deborah Modica, arrived at the house and Briesño let them in to get records from Candy Cook's bedroom. (34 CT 7473.) Right after the girls left, Briesño called Julie Marino. (35 CT 7534.) Steven Hopkins arrived at the house after Briseño's call to the Marino. (35 CT 7534.)

Marino, who lived in Alpine, was home in bed when she received Briseño's call at around 11:15 p.m. (34 CT 7386-7387, 7396, 7410.)[249] Briseño asked to be picked up and she sounded like something was wrong. (34 CT 7389.) When Marino arrived at the Cook residence, Briseño hurried her back into her car. (34 CT 7390.) Briseño had cuts on her hands and neck, and was upset and very frightened. (34 CT 7391-7392.) Briseño continued to say "O, Dios, mio" while she described to Marino how "a hippie" put a knife to her throat, took her in a car to the mountain, had her undress, ripped off her bra, raped her, brought her back to the house, and threatened to kill her if she told anyone. (34 CT 7396, 7400.) Marino took Briseño to her home

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247. Briseño's fingers and neck were cut during the struggle. (34 CT 7470.)

248. On May 29, Briseño returned to the scene with Detective Murphy, who recovered her bra and the knife. (34 CT 7418,7423-7424, 7536.)

249. Marino testified the call was within 10 or 15 minutes of 11:15. (34 CT 7397.)

where she awaited the return of the Cooks so she could talk to Mrs. Cook. (34 CT 7401-7402.)

Officer Murphy met Briseño at the Cook residence on May 29 and saw the cuts. (34 CT 7418, 7439.) In addition to recovering Briseño's bra and the kitchen knife from Cowles Mountain that day, he later prepared a photographic lineup containing appellant's photograph which he presented to Briseño. (34 CT 7433.) Briseño identified appellant. (34 CT 7434.)

The defense contended Steve Hopkins, not appellant was the rapist. (33 CT 7148.) Appellant testified to his presence at the house on Saturday and Sunday, and Briseño's presence at the house on Sunday. (33 CT 7118-7122.) Appellant agreed that Briseño's friend told them to leave and she (the friend) left, then appellant, Cline and Carroll left to Cline's house.[250] (33 CT 7122-7123.)[251] Appellant said after arriving at Cline's home, he later left and walked to Fletcher Parkway where he was unsuccessful at hitching a ride. (33 CT 7123.) Appellant said he gave up around 9:45, and began walking back to Cline's house, up a steep him where he fell and scraped his arm and backside. (33 CT 7124.) Appellant said the lights were out at the Cline residence, so he walked to the Kilbourn residence, and saw Briseño sitting outside the Cook residence. (34 CT 7124.) Appellant said Briseño indicated she was locked out, so he got the key from Linda Kilbourn, let Briseño in, and returned the key to Kilbourn, then walked back to the Cline house, where he called Kirt Andrewson around 10:30 for a ride and to stay at Andrewson's house. (33 CT 7124-7126.) Appellant said he and Cline walked back to the Cook house to retrieve his jacket which he left there when letting Briseño in. (33 CT 7126.) He and Cline then

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250. Carroll testified that Briseño's friend asked them to leave which they did shortly after being asked. (35 CT 7639.)

251. Cline testified his house, although on a different street, was only 15 houses away from the Cook residence. (35 CT 7648.)

walked to the local shopping center where they met Andrewson around 10:45. (33 CT 7126-7127.)

Linda Kilbourn testified appellant got the house key at "exactly 10:30" and she knew that was the time because Debbie Modica looked at the clock in the kitchen and told her the time. (35 CT 7546, 7547.) Deborah Modica also testified it was 10:30. Kilbourn and Modica also both testified appellant returned the key "about three minutes" after receiving it. (35 CT 7545, 7556.) However, when Linda Kilbourn spoke with Officer Murphy on Tuesday, May 29, she said appellant got the key between 10:30 and 11:00. (33 CT 7143.)

Kilbourn, Modica, and Laurie Kilbourn also testified to going to the Cook residence shortly after appellant returned the key (Modica said it was about 10 minutes later to get phonographs, contacting Briseño, and not seeing any cuts on her neck. (35 CT 7547-7549, 7557-7558,7569-7571.) However, Modica said she was not paying attention to Briseño when they entered and Laurie Kilbourn said it was "real dim" when Briseño answered the door. (35 CT 7564, 7571.)

Steven Hopkins testified he arrived at the Cook residence around 10:25 and 10:30, and Briseño let him in. He said he looked at the clock at his girlfriend's house when he left at 10:00, and it takes 12 to 15 minutes to drive from there to the Cook house, but this time he got a ride from his girlfriend's sister. (35 CT 7584.) Hopkins said he went to sleep in Candy's Cook's room, after hearing Briseño let the dog out and said good night. (35 CT 7579-7582.) He was later awakened by Jeff Cook. (35 CT 7583.) Jeff Cook said he left his girlfriend's house at 10:30 and saw Hopkins sleeping in his sister's room when he got home between 10:50 and 11:00. (35 CT7603-7604.)

Cline and Carroll testified that appellant left the Cline residence at around 9:10 or 9:15 to hitchhike home. (35 CT 7640, 7657.) Cline said appellant returned at about 10:25 or 10:30 with a scrape on his elbow and dirt on his pants, called Andrewson for a ride, then two of them went to the Cook residence where appellant

picked up his jacket, then on to the shopping center where they met Andrewson. (35 CT 7657-7659; 33 CT 7106.) Andrewson testified he received a call from appellant around 10:15 and 10:30 to meet at the shopping center. (33 CT 7111.) Andrewson met appellant at about 10:40, and they arrived at Andrewson's home at 11:00. (33 CT 7110-7111.) Appellant had a scrape on his elbow and a scrape over his tailbone. (33 CT 7111-7112.)

3. Coram Nobis Hearing

At the hearing on appellant's coram nobis petition, Alejandrina Casas Valenzuelas testified that she met Briseño at the Cook residence on Sunday May 27, at around 4:30 p.m. (33 CT 7254-7255.) The swam, showered, went to eat and go to the market, the returned to the house. (33 CT 7255.) That evening she asked appellant for a ride, but appellant had no car. (33 CT 7256.) At Briseño's request, she also asked appellant that he and his friends leave. (33 CT 7256.) Casas testified she left around 9:20 to 9:25, when she got a ride, and appellant and his friends were still at the house at that time. (33 CT 7257.)

When Casas got home, which took about 10 minutes, she met her boyfriend, talked to him for about 15 to 20 minutes, then went inside to change. (33 CT 7256-7258.) She also called Briseño to see how she was. (33 CT 7258.) Casas testified she called at 10:00 and spoke to Briseño for five minutes or less. Briseño was not distressed and said the teenagers had left. (33 CT 7259-7260.) Briseño called the next day from Alpine. (33 CT 7260.) She was crying and hysterical, and said the man to whom Casas had spoken, returned to the house, said he forgot his jacket, took her at knifepoint and raped her. (33 CT 7261-7262.)

B. Ineffective Assistance Of Counsel

Appellant contends his trial counsel's failure to interview Casas until after the verdict and the new trial motion constituted ineffective assistance under *Strickland*

v. Washington (1984) 466 U.S. 668, [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674]. However, in order to prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must prove counsel's performance was objectively unreasonable when assessed in light of prevailing professional norms and he was prejudiced by showing a reasonable probability of a more favorable outcome in the absence of the deficient performance. (*People v. Maury, supra,* 30 Cal.4th at p. 389; *Massaro v. United States* (2003) 538 U.S. 500, 505, 123 S.Ct. 1690, 155 L.Ed.2d 714 ["a defendant claiming ineffective assistance of counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial].)

1. Appellant Failed To Prove Deficient Performance

In asserting deficient performance, appellant claims "[t]here was no conceivable justification for failing to interview Casas prior to trial and to present her testimony to the jury." (6 AOB 1492, fn. omitted.) However, despite the hearing on his motion to strike, he points to no testimony by trial counsel Gilham as to why Casas was not interviewed prior to trial. Thus, his claim of deficient performance appears to be premised on the assertion that because Casas was identifiable and at the Cook house on the day of the rape, it was deficient performance not to interview her. He cites no authority holding that trial counsel must interview every person listed in a police report regardless of how disconnected that person is to the crime. To the contrary, "counsel need not interview every possible witness to have performed proficiently." (*Riley v. Payne* (9th Cir. 2003) 352 F.3d 1313, 1318.) Counsel has a duty "to make a reasonable decision that makes particular investigations unnecessary." (*Strickland v. Washington, supra,* 466 U.S. at p. 691.)

In *Riley v. Payne, supra,* 352 F.3d 1313, defense counsel was found to have performed deficiently because he failed to interview a key witness, identified by the defendant as being present at the time of the alleged crime. (*Id.* at pp. 1315-1319.)

As appellant concedes, every witness who appeared to have information on appellant's and the victim's whereabouts around the time of the rape was interviewed. (6 AOB 1492-1493, fn. 1280.)

Appellant contends Casas was a "potentially material witness" (6 AOB 1492-1493, fn 1280), but fails to explain why. There was no contested issue as to Casas' presence at the house that afternoon and evening or the fact that she requested the teenagers leave and left before they did. Briseño testified to those facts and Carroll, Cline, and appellant confirmed those facts in their testimony. (33 CT 7120-7122; 34 CT 7474507454; 35 CT 7634-7639, 7654-7656.) Defense counsel had obviously interviewed them prior to trial. (*Strickland v. Washington, supra,* 466 U.S. at p. 691 [the reasonableness of counsel's actions may be determined or substantially influence by defendant's own statements].) Casas' presence at the house and what occurred at that time was so uncontroversial the prosecution did not even present her as a witness.

Although defense counsel learned after trial of the telephone call by Casas to Briseño, hindsight is not a proper basis for evaluating counsel's actions. (*In re Scott* (2003) 29 Cal.4th 783, 811-812, citing *Bell v. Cone* (2002) 535 U.S. 685, 702, [122 S.Ct. 1843, 1854, 152 L.Ed.2d 914] ["'a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.'"]; *People v. Maury, supra,* 30 Cal.4th at p. 389 ["counsel's decisionmaking must be evaluated in the context of the available facts"].)

The facts presented in support of the motion to strike show defendant counsel had no reason to have Casas interviewed as there was no basis to believe she had any information to the charged offenses of the defense.

2. Appellant Failed To Prove Prejudice

Appellant's claim to prejudice is based on two faulty premises: (1) that the kidnapping and rape took 45 minutes and (2) that appellant and the victim's whereabouts were established between 10:30 to 10:45. (6 AOB 1494.)

Appellant's claim that the rape took at least 45 minutes is both ironic and an overstatement. It is ironic in that appellant relies on the accuracy and credibility of the victim in making that assertion. However, after learning of the Casas telephone call, defense counsel indicated his defense would have been that there was no rape (299 PRT 34883); i.e., he would have asserted the victim was inaccurate and untruthful. Appellant also fails to explain how the jury would have been more favorably disposed to the defense by asserting the victim was truthful and accurate in her estimates of the time for the rape, but untruthful in claiming that the rape occurred.

Additionally, her time estimates for the kidnapping and rape were extremely uncertain and speculative. She made few time estimates of the kidnapping and rape during the trial. She said appellant arrived back at the house at about 9:30, but she was not sure of that time. (34 CT 7456, 7499.) She acknowledged her preliminary hearing estimate of appellant's arrival time as 10:00 or 10:30, but again said she wasn't sure. (34 CT 7500.) She said she sat outside about three to four minutes before appellant came out and grabbed her. (34 CT 7457.) She also said she got back to the house about 11:00 or maybe 10:30, and she was not sure. (34 CT 7499-7500.)

Appellant points to the victim's preliminary hearing testimony, but there again, she offered little more than uncertainty and speculation. When asked during direct examination how long the car drove before coming to a stop, she said, "I am not very sure, because I'm not very sure, because he would stop, because he couldn't get the lights of the car on." (36 CT 7825.) When the prosecutor pressed the victim by asking whether the car was "moving down the street, fifteen minutes more or

less," the victim responded "[m]ore or less some ten or fifteen minutes." (36 CT 7825.) From this leading, vague, and uncertain exchange, appellant says the victim estimated driving in the car "for 10 or 15 minutes." (6 AOB 1494.)

The victim's vague estimates continued: "[a]bout some, well, about some five minutes" for the time appellant had her in the house (36 CT 7837); "[w]ell, about ten minutes" was spent with appellant trying to get the car started and the lights on (36 CT 7838);[252] "[w]ell, it would be about fifteen or twenty minutes" that they spent on the mountain. (36 CT 7838.)[253]

In sum, trial counsel simply had no credible basis for asserting the crime sequence took a minimum of 45 minutes.[254]

Appellant's assertion that witnesses placed appellant and the victim at the Cook's residence between 10:30 and 10:45, suggests there was reason to believe the jury credited that evidence. However, as the prosecution noted in its opposition to the motion to strike (48 CT 10352-10353), those times were contested and the jury had to have discounted the credibility and weight of that evidence in convicting appellant. Moreover, that time evidence was rife with incredulity and inconsistency.

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252. In trial, the victim testified that appellant got the lights on when they reached their stopping point on Cowles Mountain (34 CT 7465-7466), which would suggest her estimate included drive time to and up the mountain.

253. The victim gave no estimate of the drive time back to the house, but appellant allows 10 minutes. (6 AOB 1494.) Driving 30 mph for 1.7 miles (34 CT 7418) would take less than four minutes. Officer Murphy described the dirt road and 0.6 mile distance, but was never asked for a time estimate. Appellant's allowance is simply unadorned speculation, which appears to be pretty close to the victim's time estimates.

254. While it may go without saying, the jury was certainly well aware of the common, if not universal, recognition that time seems to slow considerably during unpleasant experiences. Thus, even apart from the victim's own uncertainty, any reasonable jury would have recognized the strong likelihood that the victim's estimates were longer than the actual time.

Linda Kilbourn asserted appellant arrived at her house to ask for the Cook house key at "exactly 10:30" (it could not have been earlier and it could not have been later) and she knew it was "exactly 10:30" because Deborah Modica looked at the clock and told her the time. (35 CT 7546.) However, as soon as she was reminded of having spoken to Officer Murphy, appellant's arrival time was "not exactly" 10:30. (35 CT 7546.) In fact, when speaking with Officer Murphy on May 29, two days after the crimes, Linda Kilbourn said appellant appeared at her house between 10:30 to 11:00, though she thought it was closer to 10:30. (33 CT 7143.)

Plainly, Linda Kilbourn's credibility suffered mightily, as did the credibility of Deborah Modica, on whom she allegedly relied for the patently false "exactly 10:30" time. Moreover, when asked how long until appellant returned the house key, both Kilbourn and Modica parroted "about three minutes." (35 CT 7545, 7556.) No reasonable jury would have relegated that identical time reference to coincidence.[255]

Additionally, appellant never challenged the testimony that the victim's telephone call to Marino's occurred around 11:15 p.m. (34 CT 7386-7387, 7500.) The victim testified she call Marino right after the Kilbourns and Modica left, after getting the records. (35 CT 7534.) That unchallenged testimony together with Laurie Kilbourn's[256] testimony that they went to get the records shortly after

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255. Kilbourn's and Modica's credibility also faltered on their attempt to distance themselves from the illegal activities occurring at the Cook residence in their absence. Both claimed only being at the residence a short time. (35 CT 7544, 7560.) However, other witnesses placed Kilbourn at the house with her boyfriend at one time and intoxicated and under the influence of marijuana. Modica was also part of the group. (34 CT 7450, 7473; 35 CT 7609, 7611.)

256. Contrary to appellant's assertion (6 AOB 1494), Laurie Kilbourn was a defense witness, not a prosecution witness and she gave no time estimate for appellant's arrival at the Kilbourn house to get the key. (35 CT 7567-7576.) Presumably, appellant meant to refer to Linda Kilbourn, who was called as a prosecution witness. However, the significance of who called Linda Kilbourn is unclear. (See Evidence Code section 785, and the Law Revision

appellant returned the house key (35 CT 7569), puts appellant's return of the house key at around 11:00, which is entirely consistent with the victim's estimate. Moreover, even with Casas' 10:00 telephone call, there was ample time for the 45-minute kidnapping and rape, even if the jury chose to credit that vague and speculative time estimate.

Steven Hopkins claimed he arrived at the Cook residence at 10:25 to 10:30 and the victim let him in. (35 CT 7578.) He testified he went to sleep shortly after arriving and later was awakened by Jeff Cook, who testified he arrived home at 10:50 to 11:00 and woke Hopkins. (35 CT 7582-7583, 7602-7603.) But it was the defense position that Hopkins was the person who raped the victim (33 CT 7148) and both Hopkins and Jeff Cook lied about the time they arrived at the house. (35 CT 7620.) The defense challenged both about whether they had lied about their arrival times. (35 CT 7594, 7619, 7621.)

Moreover, the victim could not have let Hopkins in the house at 10:25, if appellant did not show up at the Kilbourn residence to get the key until 10:30, and as explained above, appellant arrived at the Kilbourn house even later than 10:30. Likewise, Hopkins and Cook did not arrive at the Cook residence until after the Kilbourn girls and Modica got the records, and after the 11:15 call from the victim to Marino.

Finally, David Cline testified appellant arrived at his house at 10:25 to 10:30 and called Kurt Andrewson. (35 CT 7657, 7659.) Andrewson said he received a call from appellant between 10:15 and 10:30. (33 CT 7111.) But, according to appellant, all of that occurred after he let the victim in the house with the key. (33 CT 7124-7126.) However, appellant could not have arrived that early if he was getting the key from Linda Kilbourn at "exactly 10:30" or between 10:30 and 11:00. Andrewson said he had picked up appellant at the shopping center and arrived back home by

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Commission Comment thereto.) Additionally, as already described, the prosecutor thoroughly discredited Linda Kilbourn's "exactly 10:30" testimony.

11:00. (33 CT 7111.) But the Cook residence was only a couple minutes walk from the Cline residence and it was only a 10 minute normal-pace walk to the shopping center and they were walking fast to get to the shopping center. (35 CT 7648, 7659.)

Of course, the jury had already confronted these less-than-credible time estimates and did not find a reasonable doubt of appellant's guilt. Adding Casas' 10:00 telephone call does not create a reasonable probability of a different result.[257]

C. Harmless

Even if the trial court erred in failing to strike the prior conviction as evidence in aggravation, the error was harmless, as there is no reasonable possibility of a different result. (*People v. Alvarez, supra,* 14 Cal.4th at p. 234, citing *People v. Brown* (1988) 46 Cal.3d 432, 448.)

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257. Two additional points merit brief mention.

First, appellant spends considerable time erecting and knocking down a straw man, which he describes as the prosecution theory of when the rape occurred. Based on little more than bits and pieces of the record and considerable supposition, he claims the prosecution theorized in closing argument that the rape began at 9:30 in order to end by 10:30. However, there is no transcript of the closing argument, so appellant's straw man is nothing more than speculation. In any case, the jury's duty was to determine whether appellant's guilt had been proven beyond a reasonable doubt, not whether the prosecution's factual theory was correct. The prosecution demonstrated that the witness testimony accounting for appellant's presence at 10:30 was not credible; it had no need to theorize a rape time to accommodate incredible testimony.

Second, appellant claims the victim's credibility would have been undermined by her request that Casas not mention the 10:00 call to the police. But the only evidence on that point was Casas' testimony at the coram nobis hearing where she testified she never had a conversation with the victim about the 10:00 phone call. (33 CT 7261.) Appellant references a statement made by defense counsel in which he contended Casas did attribute such a request to the victim, but no evidence of those statements was presented. (6 AOB 1495, fn. 1284.)

The only evidence of appellant's prior conviction was by way of court documents from the court file on appellant's August 16, 1973, conviction of rape while armed with a knife. (67 TRT 12579.) While the prosecution properly argued the prior conviction should be considered under factors (b) and (c) (70 TRT 13268-1370, 13273), when the prosecutor asked the jury to consider "[w]hat is the just punishment," he noted the prior rape conviction, but told the jury that the circumstances of the crimes (factor (a)) were "most importantly, most importantly, the heaviest most significant factor of all." (70 TRT 13274.)

After reminding the jury of the horror of the murders, the prosecutor asked the jury to consider the benefits of a sentence of life (70 TRT 13274-13276) and asked, "[d]oes this man deserve a future . . . for the brutal slayings of Suzanne and Colin Jacobs, the attempted murder of Jodie Robertson, and the murder of Anne Catherine Swanke?" (70 TRT 13276.) Answering his question, the prosecutor said, "I think not. Life is too good for Mr. Lucas for what he did." (70 TRT 13276.) The prosecutor told the jury appellant had committed "the ultimate acts of evil in murders" (70 TRT 13277) and that "this lust for death sits within Mr. Lucas and will continue to sit with him for the rest of his life." (70 TRT 13278.) Again the prosecutor reminded the jury that appellant "is a person with a depraved sense of pleasure; his meanness, his cold, deliberate murders of two women, and innocent child, and the attempt[ed] murder of Jodie Robertson," "cries for the penalty of death." (70 TRT 13278.)

Appellant points to the trial court's consideration of the prior conviction as a factor in aggravation which "weighted heavily with the court" (73 TRT 13661), claims the prior undermined lingering doubt, and points to the prosecution's use of the prior to cross-examine defense witnesses. (6 AOB 1440-1441.) However, appellant had his rape defense attorney testify to his belief in appellant's innocence. (67 TRT 12605.) And, as the trial court pointed out in its review of the guilt-phase evidence, "[n]o lingering doubts remain in this Court's mind as to Mr. Lucas' guilt

of these crimes." (73 TRT 13659.) Finally, as the trial court aptly noted, "as a factor in aggravation, the scenes of the crime and the wounds suffered by the victims paint as severe a picture of aggravation as this Court can contemplate." (73 TRT 13659.)

> The extremely distinctive throat wounds in these cases, added to the lack of any evidence of the normal criminal motive - normal motive being rape, robbery, or revenge - showed that [appellant] had a singular and highly unusual and evil design: he wanted to cut young women's throats in a certain way. A way that would require stealth, close bodily contact to gain control of his victim, and a lack of squeamishness, even a desire, to be covered in his victim's blood.
>
> If his motive had been simple killing, he could have show his victims quickly and from a distance, or he could have simply bludgeoned them from behind, creating no suffering. But that kind of killing would not allowed [appellant] the feeling of power he undoubtedly obtained from the close contact and physical control required in these cases.
>
> [Appellant] had to carefully premeditate these killings to create the specialized wound he did. He had to want to cause in his victims a feeling of helplessness and a consciousness of their own deaths. Whether to cause his victims and their families to suffer the more, or simply in a vicious and self-centered satiation of his own twisted desires, he deliberately unclothed his victims, and in Anne Swanke's case, choked her with a dog chain. He wanted to degrade his victims; to make a statement, as argued by the prosecution.
>
> As for the atrocious murder of three-year-old Colin Jacobs, the image of the killing of that defenseless little boy defies words. [Appellant] knew he was terrifying and torturing that child and his mother, and he just as surely knew that the greater and unending torture would be to the father who came home to the slaughter of his family.
>
> The circumstances of these crimes are a testament to intentional, deliberate, and premeditated evil.

(73 TRT 13660-13661, emphasis added.)

In light appellant's horrific crimes, there is no reasonable possibility of a more favorable result even had the prior rape conviction been excluded.

LXXVIII.

THE TRIAL COURT DID NOT ERR IN FAILING TO STRIKE APPELLANT'S PRIOR RAPE CONVICTION AS AGGRAVATING EVIDENCE BASED ON AN ALLEGED CONFLICT OF INTEREST BY APPELLANT'S ATTORNEY ON APPEAL BECAUSE THERE WAS NO CONFLICT OF INTEREST OR ADVERSE EFFECT ARISING OUT OF HIS MOTHER'S PAYMENT OF APPELLATE COUNSEL'S FEE

Appellant contends the trial court prejudicially erred in failing to strike his prior rape conviction from the aggravating evidence in the penalty phase because the rape conviction was constitutionally invalid due to a conflict of interest which adversely affected his appellate counsel's representation. He claims two conflicts arising from the payment of the retainer by appellant's mother. First, appellant claims his mother was given discretion to make important decisions about the appeal. Second, appellant claims that because the fixed fee retainer covered only preparation of the appeal, he was deprived of additional necessary services for which his mother would not pay. (6 AOB 1498-1530.) Neither of appellant's asserted conflicts constitute an actual conflict of interest. Moreover, neither of the asserted conflicts resulted in an adverse effect of appellant's appeal.

A. Factual Background

After his rape conviction, attorney Fred Arm was retained by appellant's mother to handle the appeal. (299 PRT 34773.) The retainer was a flat fee of $1500 for the appeal. (301 PRT 35030.) Arm began reviewing the trial record with trial defense counsel Gilham and they met several times before the record was certified. (301 PRT 35033-35035.) Arm also talked with Gilham about the case on several occasions when the two were in court. (301 PRT 35035.) Arm's billing records reflected two meetings with appellant in November 1973, court appearances, and telephone conferences with appellant's mother. (301 PRT 35014.) However, Arm met with appellant more than two times and those meetings would not have been

reflected in his billing records because the case was not billed on an hourly basis. (301 PRT 35006-35007.)

In his discussions about the appeal with appellant's mother, Arm raised a possible claim of ineffective assistance of counsel by Gilham. Appellant's mother did not want to raise a claim which might hurt Gilham. (301 PRT 35005.) Although the details of the claim were not discussed with appellant, appellant "ratified" his mother's desire. (301 PRT 35005.) Despite their expressed desires, a decision was not made and Arm continued to explore the ineffective assistance of counsel claim and prepared a draft opening brief which included the ineffective assistance claim. (299 PRT 34786.) Ultimately, based on continuing discussions with appellant's mother to which appellant agreed, Arm removed the ineffective assistance claim. (301 PRT 35051.) When Arm advised appellant, "[h]e said, 'sure, that's fine.'" (301 PRT 35051.)

After appellant's convictions were affirmed on appeal, Arm did not seek a hearing in this Court. Appellant's mother declined to pay for any further efforts beyond the appeal. (299 PRT 34802.)

B. Analysis

The state and federal constitutional right to effective assistance of counsel, includes the right to representation that is free from conflicts of interest. (*People v. Cox, supra,* 30 Cal.4th at p. 948; *People v. Sanchez* (1995) 12 Cal.4th 1, 45.)

> To establish a federal constitutional violation, a defendant who fails to object at trial "must establish that an actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 350 [100 S.Ct. 1708, 1719, 64 L.Ed.2d 333].) The *Sullivan* court made clear "that the possibility of conflict is insufficient to impugn a criminal conviction."
>
> (*Ibid.*)

> To show a violation of the corresponding right under our state Constitution, a defendant need only demonstrate a *potential* conflict, so long

> as the record supports an 'informed speculation' that the asserted conflict adversely affected counsel's performance. [Citations]." (*People v. Frye* (1998) 18 Cal.4th 894, 998 [77 Cal.Rptr.2d 25, 959 P.2d 183].) "But '[p]ermissible speculation giving rise to a conflict of interest may be deemed an informed speculation . . . only when such is grounded on a factual basis that can be found in the record.'"

(*People v. Belmontes* (1988) 45 Cal.3d 744, 776 [248 Cal.Rptr. 126, 755 P.2d 310] (*Belmontes*), quoting *People v. Cook* (1975) 13 Cal.3d 663, 670-671 [119 Cal.Rptr. 500, 532 P.2d 148].)

> To determine whether counsel's performance was "adversely affected," we have suggested that *Sullivan* requires an inquiry into whether counsel "pulled his punches," i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict. (*People v. Easley* (1988) 46 Cal.3d 712, 725 [250 Cal.Rptr. 855, 759 P.2d 490].) In undertaking such an inquiry, we are, as stated, bound by the record. But where a conflict of interest causes an attorney *not* to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. (*Id.* at p. 727.)

(*People v. Cox, supra,* 30 Cal.4th at p. 948-949, emphasis in orig.)

This Court has recognized that conflicts of interest arise in situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to a third person. (*People v. Horton* (1995) 11 Cal.4th 1068, 1106.) For example, the United States Supreme Court has noted the inherent dangers which arise when a criminal defendant is represented by a lawyer hired and paid by a third party. (*Wood v. Georgia* (1981) 450 U.S. 261, 268, 101 S.Ct. 1097, 67 L.Ed.2d 220.) Nonetheless, in *Wood v. Georgia*, where the defendants' attorney was retained and paid for by their employer, an operator of an allegedly criminal enterprise, it was "difficult for this Court to determine whether an actual conflict of interest was present." (*Wood v. Georgia, supra,* 450 U.S. at p. 272.)

While it is correct that appellant's mother hired and paid attorney Arm, appellant points to no conflict arising from that transaction; i.e., no interest his mother had which was adverse to appellant. Both apparently sought reversal of appellant's conviction, but both also did not want any challenges to Gilham's representation. Appellant points out Arm's characterization of appellant's mother as "orchestrating" the appeal. (6 AOB 1504; citing 301 PRT 35051.) What he does not point out is Arm's explanation for why appellant's mother had such an active role. Arm said appellant was "only 19 and very unsophisticated, and he more or less would go along with whatever his mother said." (301 PRT 35051.) Indeed, Arm later testified that in his opinion appellant did not have a mind of his own. (301 PRT 35055.)

Essentially, as described by Arm, appellant accepted and adopted his mother's decisions, specifically, the decision to delete the ineffective assistance claim. Arm's loyalty and efforts on behalf of appellant were never threatened because in carrying out appellant's mother's decisions, Arm was carrying out appellant's decisions. While Arm may have felt the decision to withdraw the ineffective claim was unwise, it was his duty to respect and defer to that decision, since it was the decision of his client. (*People v. Massie* (1998) 19 Cal.4th 550, 572.)

The same result obtains with appellant's alleged conflict arising from his mother's decision to not fund additional matters beyond preparation of the appeal. Appellant agreed to his mother making the decisions on the appeal. Thus, his interests were expressed in her decisions. There was no actual conflict. For the same reasons, there was no potential conflict.

While "inherent dangers" exist when a criminal defendant's attorney is hired and paid by another person (*Wood v. Georgia, supra,* 450 U.S. at p. 268), a potential conflict only exists if a factual basis in the record demonstrates that the asserted conflict adversely affected counsel's performance. (*People v. Cox, supra,* 30 Cal.4th at p. 948.) An attorney's representation is adversely affected where counsel failed

to represent the defendant as vigorously as he might have had there been no conflict. (*Ibid.*) As described by Arm, appellant was relatively young, unsophisticated, did not have a mind of his own, and would go along with whatever his mother said. These characteristics of appellant demonstrate that his mother would have had the same decision-making role in his appeal, whether she paid the retainer or not. The fact appellant permitted her to exercise control over the important decisions in his case fails to demonstrate a conflict, actual or potential, and shows that Arm would be left with the same client-decisions which he followed when he withdrew the ineffective assistance claim from the opening brief. (*People v. Cox, supra,* 30 Cal.4th at p. 949.)

Attorney Arm was in the position of having a client who delegated the decisions in the appeal to his mother. By all indications, that circumstance existed without regard to the payment of the fee by appellant's mother. Appellant was entitled to make decisions about his appeal, delegate the decision-making authority, and have Arm respect and defer to those decisions. There was neither a conflict of interest, actual or potential, nor any adverse affect.[258/]

Finally, for the reasons stated in Argument LXXVII, subd. C, *supra*, any error in failing to strike the prior rape conviction as evidence in aggravation was harmless.

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258. Appellant delineates a number of alleged deficiencies of attorney Gilham which could have been included in a claim of ineffective assistance of counsel. (6 AOB 1510-1522.) It remains, however, as a matter of record that the only ineffective assistance claim which Arm failed to present due to the direction of appellant's mother was the one he prepared as part of his draft opening brief: the failure to seek a psychiatric examination of the victim under *Ballard*. (299 PRT 34796, 347800; 301 PRT 35045; Defense In Limine Exhibit 758.)

LXXIX.

THE TRIAL COURT DID NOT ERR IN FAILING TO STRIKE APPELLANT'S PRIOR RAPE CONVICTION AS AGGRAVATING EVIDENCE BASED ON APPELLATE COUNSEL'S FAILURE TO SEEK REHEARING

Appellant contends the trial court prejudicially erred in refusing to strike his prior rape conviction from the evidence in aggravation in the penalty phase based on appellate counsel's failure to file a petition for rehearing after the rape conviction was affirmed on appeal. Appellant contends the failure to file a rehearing petition constituted a denial of counsel at a critical stage of the appellate process. (6 AOB 1531-1541.) However, the decision not to seek rehearing was made by appellant's mother with appellant's assent and appellant was not prejudiced by the failure to seek rehearing.

As described more fully in Argument LXXVII, *supra*, appellant's mother paid for attorney Arm to handle the appeal of appellant's rape conviction. However, although she made decisions about the handling of the appeal, her authority to make those decisions did not arise from her payment of the retainer, but from appellant's assent. Thus, her decision not to seek further review was, in fact, appellant's decision because appellant agreed with his mother making the decisions. In following that decision, Arm did not abandon appellant, he merely followed appellant's decision as he was required to do. (*People v. Massie, supra,* 19 Cal.4th at p. 572.)

Moreover, appellant was not prejudiced by the lack of a rehearing petition. In the first place, the decision to grant a rehearing is discretionary. (Cal. Rules of Court, rule 25.) Thus, appellant had no constitutional right to counsel for purposes of seeking rehearing. (*Ross v. Moffitt* (1974) 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 [constitutional right to counsel on first appeal as of right does not extend to post-appeal discretionary review].)

Second, there was no basis for seeking rehearing. Rehearing may be sought based on a "strong showing of a substantial error of law or fact." (9 Witkin, Cal. Proc. (4th ed. 1997) § 850, p. 886.) Appellant claims the appellate court misconstrued his evidentiary argument as one of insufficiency when it was actually one of trial court error in denying a new trial.[259] To the contrary, any fair reading of the evidentiary argument demonstrates it challenged the sufficiency of the evidence. The argument heading was :

> THE EVIDENCE PRESENTED IN THE LOWER COURT WAS INHERENTLY IMPROBABLE AND THEREBY WAS INSUFFICIENT TO SUPPORT THE GUILTY VERDICT

(34 CT 7352, 7362.)

In the first paragraph of the argument, it is stated that "the evidence presented at the time of trial clearly exculpates the defendant-appellant herein by making it an inherently impossibility to have committed the crime of rape at the time prescribed." (34 CT 7362.) As appellant concedes, the argument cites only "sufficiency of the evidence authority." (6 AOB 1539.) The argument heading for the responsive argument in the respondent's brief stated:

> THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT OF THE JURY

(34 CT 7333, 7341.) Additionally, the respondent's argument began, "Appellant contends that the evidence was improbable and insufficient to support the verdict." (34 CT 7341.) No reply brief was filed.

Given the tenor of the arguments, the court of appeal did not err in addressing the argument as one of evidentiary insufficiency. In asserting otherwise appellant relies on three sentences in the argument. In the first, it is stated that "the trial court

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259. The opening brief raised two issues. The first challenged the evidentiary sufficiency and the second challenged the trial court's refusal to require the victim to submit to a polygraph examination. (34 CT 7352.)

below abused its discretion in not granting the defendant a new trial" (34 CT 7364); the second asserts the trial court's denial of the new trial motion must be reversed (34 CT 7365); and the third asks that the judgment be reversed and remanded for retrial (34 CT 7365). While appellant is correct that a new trial is not the remedy for insufficient evidence, it is clear that the issue was the inherent improbability of the evidence underlying the judgment and thus a challenge to the sufficiency of the evidence. At most the new trial references reflect an error in the appropriate remedy, not an issue other that evidentiary insufficiency. Indeed, had evidentiary insufficiency not been the issue, there was ample opportunity to make that clear in a reply brief responding to the characterization of the issue by respondent, yet no reply brief was filed.

Moreover, even were the brief references intended to raise an issue other than evidentiary sufficiency, there was no error on the part of the court of appeal in failing to address it. As noted, the argument and supporting authorities addressed evidentiary sufficiency. The three brief references constitute, at most, a general assertion without legal argument or authorities. As such, the issue is waived and the court of appeal did not err in giving it no consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)[260]

Finally, for the reasons stated in Argument LXXVII, subd. C, *supra*, any error in failing to strike the prior rape conviction as evidence in aggravation was harmless.

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260. Moreover, for the reasons stated in Argument LXXVII, *supra*, the trial court did not abuse its discretion in denying the new trial motion.

LXXX.

THE TRIAL COURT DID NOT ERR IN FAILING TO STRIKE APPELLANT'S PRIOR RAPE CONVICTION AS AGGRAVATING EVIDENCE BASED ON INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL IN FAILING TO ASSERT ON APPEAL TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT CASAS AS A DEFENSE WITNESS

Appellant contends the trial court prejudicially erred in refusing to strike his prior rape conviction from the evidence in aggravation in the penalty phase based on appellate counsel's failure to assert on appeal ineffective assistance of trial counsel for failing to present Casas as a defense witness. (6 AOB 1542.) However, as described in Argument LXXVIII, *supra*, if appellate counsel failed to present the ineffective assistance claim at the behest of appellant's mother, who made those discretionary decisions with appellant's approval and consent, he was simply following appellant's decisions and there was no deficient performance. Moreover, the appellate record of the rape conviction did not support a finding of either deficient performance by trial counsel or prejudice. Thus, the failure to assert ineffective assistance of trial counsel on appeal was not ineffective assistance of appellate counsel.

The proper standards governing a claim of ineffective assistance of counsel on appeal are those delineated in *Strickland v. Washington, supra,* 466 U.S. 668. (*Smith v. Robbins* (2002) 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756.) First, it must be shown that appellate counsel was objectively unreasonable in failing to discover and raise nonfrivilous issues. Second, it must be shown that had appellate counsel raised the issues he would have prevailed on appeal. (*Ibid.*) This Court has "repeatedly stressed 'that "[i]f the record on appeal sheds no light on why counsel acted of failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory

explanation," the claim on appeal must be rejected.'" (*People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 266.)

Appellant claims there could be no satisfactory reason for failing to call Casas to testify on behalf of the defense. However, as described in Argument LXXVII, subd. C 1, *supra,* the victim's statements in the police report and appellant's rendition of the events both showed Casas was present at the house during the afternoon and evening, but gone prior to any of the events which made up the crimes. It is entirely reasonable and appropriate not to call a witness who appears to have no relevant information.

Moreover, appellate counsel was aware of the post-trial *coram nobis* pleadings and hearings. In the *coram nobis* petition, defense counsel Gilham indicated information about Casas' telephone call had "just come to light." (*In limine* Exh. 761, at p. 2.) Even post-trial, Casas had refused to talk to Gilham, so he subpoenaed her to the new trial motion, where she continued to refuse to talk to him, which is why Gilham did not call her to testify at the new trial motion. (*Id.* at p. 3; see also 33 CT 7218 [Gilham telling trial court at new trial motion that "new evidence" witness in hallway "can add nothing to the case"].) It was not until after Gilham's investigator spoke to Casas in the court hallway, that the information became known. Thus, the facts of record in the appeal demonstrate trial counsel had no basis for calling Casas as a defense witness until after the hearing on the *coram nobis* petition. It cannot be seriously contended that defense counsel acts objectively unreasonable in failing to call a witness when defense counsel has no reason to believe that a whether the witness has any relevant information and also appears hostile to the defense.

Additionally, as more fully described in Argument LXXVII, subd. C 2, *supra,* the failure to call Casas as a witness was not prejudicial because there is no reasonable probability of a more favorable result even had her testimony of the 10:00 telephone call been presented.

For both reasons, appellate counsel did not perform deficiently and there was no prejudice in his failure to assert ineffective assistance of trial counsel as an issue on appeal.

Finally, for the reasons stated in Argument LXXVII, subd. C, *supra*, any error in failing to strike the prior rape conviction as evidence in aggravation was harmless.

LXXXI.

APPELLANT DID NOT PROPERLY PRESERVE HIS CONSTITUTIONAL CLAIM THAT THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE IN THE PENALTY PHASE THAT HE PASSED A POLYGRAPH EXAMINATION CONCERNING HIS PRIOR RAPE CONVICTION AND, IN ANY CASE, THE POLYGRAPH EVIDENCE WAS PROPERLY EXCLUDED

Appellant contends the trial court prejudicially erred in excluding from the penalty phase, evidence that he had taken and passed a polygraph in connection with his prior rape conviction. (6 AOB 1543-1550.) Appellant did not preserve his claim by offering to make a showing under *Kelly/Frye*. In any case, the polygraph was properly excluded.

During the trial on appellant's prior rape, defense counsel indicated appellant had taken and passed a polygraph examination. (33 CT 7095, 7191-7192.) As part of a multifaceted attack on the constitutionality of the statutory death penalty scheme, the defense argued the prosecution's ability to control admission of favorable polygraph evidence in Evidence Code section 351.1,[261] violated the defendant's right

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261. Evidence Code section 351.1 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post

to present mitigating evidence. (197 PRT 18913-18916.) Noting that "[t]he problem with polygraph evidence and evidence of offers to take polygraph exams, however, is that after lengthy statewide courtroom hearings on the subject, polygraph evidence has failed to pass the Kelly-Frye test," the trial court found no constitutional violation. (199 PRT 19215-19216.)

In order to preserve a claim challenging the evidentiary exclusion of polygraph evidence in Evidence Code section 351.1, a defendant must make an offer of proof that polygraph evidence is generally accepted in the scientific community and the particular results being offered were reliable. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 847; *People v. Maury, supra,* 30 Cal.4th 342, 433.) Appellant made no such offer of proof. Thus, his claim is not preserved for appellate review.

The claim is also without merit. In *People v. Wilkinson, supra,* Court discussed the United States Supreme Court decision in *United States v. Scheffer* (1998) 523 U.S. 303, [118 S.Ct. 1261, 1266, 140 L.Ed.2d 413], in which the high court found no consensus on the admissibility and reliability of polygraph evidence and concluded that a per se exclusion of such evidence is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. (*People v. Wilkinson, supra,* 33 Cal.4th at p. 849.) This Court reached the same conclusion as the United States Supreme Court. (*Id.* at p. 850.)

Seeking to avoid those conclusions, appellant relies on the fact he sought admission of the polygraph in the penalty phase in order to counter the prosecution's use of his prior rape conviction. He asserts he was deprived of his rights to present mitigating evidence and to an opportunity to explain or deny evidence against him.

> conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

However, the United States Supreme Court has made it clear that the right to present mitigating evidence is not unbounded. In *Buchanan v. Angelone* (1998) 522 U.S. 269, [118 S.Ct. 757, 139 L.Ed.2d 702], the Court stated:

> In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 317-318 (1989); *Eddings v. Oklahoma* 455 U.S. 104, 113-114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 362 (1993); *Penry, supra,* at 326; *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in *Boyde v. California*, 494 U.S. 370 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*, at 380; see also *Johnson, supra,* at 367-368.

(*Buchanan v. Angelone, supra,* 522 U.S. at p. 276, underlining added.)

Plainly, whatever relaxed standards exist to permit introduction of mitigating evidence, minimally, such evidence must meet the standard of constitutional relevance and the states are not in violation of federal constitutional law in imposing restrictions to ensure the proffered evidence meets that standard.

In *People v. Burgener, supra,* 29 Cal.4th 833, this Court stated:

> Before a criminal defendant can establish a federal due process right to use the results of a polygraph examination, it is necessary (although perhaps not sufficient) to offer proof that the technique has become generally accepted in the scientific community.

(*Id.* at p. 871.)

There is nothing inconsistent with federal constitutional law in imposing general acceptance as a minimum standard for permitting evidence to be admitted as constitutionally relevant. Appellant's reliance on *Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434, is misplaced. In *Rupe*, the Washington state trial court excluded a

polygraph result on its primary prosecution witness although state law permitted such evidence, subject to cross-examination by the prosecution, upon a showing that the examiner was qualified and the test was conducted under proper conditions. (*Rupe v. Wood, supra,* 93 F.3d at p. 1439.) The polygraph result was excluded despite the fact the state trial court held a hearing into its reliability and did not find it unreliable. (*Ibid.*) *Rupe* does stand for the proposition that all mitigation evidence must be admitted no matter how unreliable.

Here, in contrast, the trial court specifically noted that the polygraph had been the subject of lengthy hearings in other courts and failed to pass the test of *Kelly-Frye* basic reliability. Additionally, the defense did not even offer to meet the reliability standard. As noted above, this Court has recently reiterated the lack of reliability of the polygraph and also noted the same conclusion by the United States Supreme Court. (*People v. Wilkinson, supra,* 33 Cal.4th at p. 849.) The federal constitution simply does not mandate admission of polygraph results in capital sentencing proceedings. (*Goins v. Angelone* (4th Cir. 2000) 226 F.3d 312, 326.) ([Since polygraph results inadmissible under the state law cannot be considered material to either guilt or punishment in a capital case].)

Appellant's reliance on *Gardner v. Florida* (1977) 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 to claim that he had no opportunity to explain or deny the aggravating evidence of the rape conviction is simply incorrect. In *Gardner v. Florida*, the death sentence was imposed by a trial judge who relied, at least in part, on a probation report, parts of which were kept from the defense. (*Id.* at p. 353.) Here, there was no confidential information given to the jury and kept from the defense. While appellant was not allowed to offer an unreliable polygraph test result to counter his rape prior, he was fully aware of the prior conviction and, in fact, offered his rape attorney's belief in his innocence as mitigation and Kurt Andrewson's testimony that he was with appellant at the time and appellant did not commit the rape. (67 TRT 12604-12605, 12704-12705.)

Appellant's reliance on *Skipper v. South Carolina* (1986) 476 U.S. 1, [106 S.Ct. 1669, 90 L.Ed.2d 1], is similarly flawed. Though reiterating the right to an opportunity to explain or deny evidence offered in support of a death sentence (*id.* at p. 5. fn. 1), the Court stated that the question before it was whether exclusion of evidence of good behavior while incarcerated during trial "deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." (*Id.* at p. 4, underlining added.) As noted above, by failing the basic test of reliability, appellant's polygraph evidence failed constitutional relevance.

Finally, appellant asserts that traditional rules of evidence cannot be used to exclude relevant evidence in mitigation. (6 AOB 1546, citing *Green v. Georgia* (1979) 442 U.S. 95, [99 S.Ct. 2150, 60 L.Ed.2d 738].) Again, however, his reliance is misplaced. In *Green*, the trial court excluded, pursuant to state evidence law, an out of court statement by a co-perpetrator in which the co-perpetrator, Moore, indicated he killed the robbery victim when the defendant was not present. (*Id.* at p. 96.) The excluded evidence was "highly relevant to a critical issue in the punishment phase . . . and substantial reasons existed to assume its reliability." (*Id.* at p. 97.) Those reasons included the spontaneous nature of Moore's statement and the fact it was made to a friend, the existence of ample corroborating evidence, the fact the statement was against Moore's interest and the lack of ulterior motive, and the fact the State used the same statement as evidence against Moore in his separate trial and obtained Moore's conviction and death sentence. (*Ibid.*) Here, in contrast, the polygraph evidence was not shown to even meet basic reliability. Additionally, there were no reasons to assume its reliability. Appellant's denial was self-serving and the polygraph was administered by a person selected by the defense. (33 CT 7233.) There was certainly no spontaneity or no corroborating evidence; it was in appellant's interest and he had an ulterior motive; and the State never relied on the polygraph in another criminal proceeding.

There was no error in the trial court's conclusion that the polygraph evidence was properly excluded under state law based it being unreliable. Moreover, as described in Argument LXXVII, subd. C, *supra*, since any error in failing to strike the prior rape conviction as evidence in aggravation was harmless, any error in failing to admit the polygraph was also harmless.

LXXXII.

THE TRIAL COURT DID NOT EXCLUDE THE TESTIMONY OF CASAS CONCERNING APPELLANT'S PRIOR RAPE CONVICTION AS MITIGATING EVIDENCE BECAUSE APPELLANT NEVER OFFERED IT AND, IN ANY CASE, THE TRIAL COURT DID NOT ERR IN PRECLUDING THE DEFENSE FROM RETRYING THE RAPE WHEN ONLY THE FACT OF THE CONVICTION WAS OFFERED IN AGGRAVATION

Appellant contends the trial court prejudicially erred and violated his constitutional right to present mitigating evidence by precluding the defense from presenting the testimony of Alejandrina Casas as evidence mitigating his prior rape conviction. (6 AOB 1551-1558.) To the contrary, the defense never offered to present the testimony of Casas and while the trial court precluded the defense from relitigating appellant's prior rape conviction, it did not precluded the admission of relevant mitigating evidence. Moreover, the defense was allowed to present evidence allegedly mitigating his prior rape conviction.

A. Trial Court Proceedings And Ruling

As its sole evidence in aggravation at the penalty phase, the prosecution introduced, by stipulation, documentary evidence of appellant's prior conviction of rape while armed with a knife. (67 TRT 12597; Exh. 271.)

Prior to the penalty phase, the defense indicated it wanted to introduce "two things" relative to appellant's prior rape conviction: appellant's polygraph and "a

witness who can testify that he was with [appellant] at the time of the rape." (66 TRT 12483-12484.) The trial court reiterated its ruling excluding the polygraph. (66 TRT 12483.) As to the one alibi witness, the defense asserted it was not seeking to relitigate appellant's rape conviction, but was offering the witness as mitigation. (66 TRT 12484-12485.) In response to the defense assertion, under Evidence Code section 352, that the witness would be brief, the trial court noted that asserting an alibi might prompt an entire relitigation of the rape trial. (66 TRT 12485.)

The trial court expressed its concerns about the propriety of relitigating a prior conviction even when offered under factor (b) as well as factor (c) and concluded "that cannot be permitted." (66 TRT 12488-12489.) Nonetheless, the court noted that its relitigation ruling did not preclude presentation of mitigating evidence concerning the rape, such as evidence that appellant was under the influence at the time of the rape or mitigating aspects of how the rape was committed. (66 TRT 12489-12490.)

In rejecting the defense assertion that the single witness claiming to have been with appellant at the time of the rape was not relitigation of the prior conviction, the trial court queried whether appellant's rape trial attorney, Gilham, could testify. (66 TRT 12495.) The trial court initially concluded, "No, along the same reasoning that I have already proffered." (66 TRT 12495.) The trial court also rejected the defense request to have Gilham testify that he provided ineffective assistance in his representation. (66 TRT 12496.)

However, the trial court concluded that Gilham "can certainly testify to his knowledge of [appellant] and that he think's he's a person of good character and that he wouldn't believe [appellant] would ever do anything wrong. . . ." (66 TRT 12499.) At that point the defense raised the possibility of also having Gilham testify that after the rape trial "the boyfriend of Theresa [sic] BRISEÑO" was located who had "newly discovered evidence" which Gilham felt should have been presented to

the rape jury. (66 TRT 12449.)[262] After the defense returned to the issue of Gilham's testimony regarding his incompetent handling of the rape, the trial court concluded that all such evidence sought to relitigate the prior conviction and was improper for that reason. (66 TRT 12500.)

The trial court restated that it would permit presentation of evidence of mitigation about the rape, such as appellant's age at the time, whether he was under the influence, the lack of serious injury, and any remorse. (66 TRT 12501-12502.) The trial court, consistent with its conclusion permitting Gilham to testify to his opinion of appellant, also approved other defense witnesses to testify to their opinions that the rape was out of character. (66 TRT 12502.)

The following day, the prosecution returned to the issue of the defense rape-alibi witness and indicated its non-opposition to such witness, assuming there was an adequate foundation for the alleged alibi testimony as to the time of the rape. (67 TRT 12585-12586.) Ultimately, as appellant notes (6 AOB 1553, fn. 1327), Curt Andrewson testified he was aware of appellant's rape conviction and testified as a witness in the rape case. (67 TRT 12603-12604.) Andrewson testified that he was with appellant "during the relevant time period" on the day of the rape, he so testified in the rape trial, and appellant did not rape anyone that day. (67 TRT 12604-12605.) Additionally, appellant's rape attorney, Gilham, also testified to his opinion that appellant was not guilty of the rape. (67 TRT 12704-12705.)

B. Analysis

At the outset, it should be noted that appellant's claim of improperly excluded mitigation evidence relies on Casas' testimony regarding her 10:00 telephone call with the rape victim. (See 6 AOB 1551 [argument heading], 1558 [reference to 6

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262. As appellant notes (6 AOB 1552, fn. 1326), defense counsel's reference to "boyfriend" appears to be a misstated reference to Briseno's girlfriend, Casas.

AOB 1494-1496 where Casas' coram nobis testimony is discussed].) However, appellant never offered to present Casas as a witness. The defense proposed only "two things" as evidence responsive to the rape conviction: the polygraph and one alibi witness (who turned out to be Andrewson). (66 TRT 12483-12484.) In response to the trial court raising the possibility of attorney Gilham testifying, the defense proposed to have attorney Gilham describe his obtaining Casas after the rape trial as new evidence which was not presented to the rape jury. (66 TRT 12449.) Gilham could not have described Casas' coram nobis testimony, as that would have been hearsay and, as pointed out, the defense never proposed to actually call Casas. As the defense did not offer Casas' testimony, the trial court cannot be faulted for excluding it. (Evid. Code, § 354.)[263/]

Apart from his waiver, appellant's claim that he was entitled to submit evidence on the prior rape in order to undermine the prior conviction is both contrary to his position at trial and incorrect. During the discussion of the issue in the trial court, the defense, at several points, expressly disavowed any intent to relitigate the

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263. Evidence Code section 354 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
>
> (b) The rulings of the court made compliance with subdivision (a) futile; or
>
> (c) The evidence was sought by questions asked during cross-examination or recross-examination.

prior rape. (See, e.g., 66 TRT 12489.) Now, on appeal, appellant challenges the trial court's exclusion on the basis of an alleged right to relitigate the prior rape. (6 AOB 1553-1555.) However, the trial court was correct in concluding that although there were a variety of ways a defendant might seek to mitigate a prior conviction, relitigation of the conviction was not one of them.

In asserting a right to relitigate the prior rape conviction, appellant points to the requirement that evidence of other violent crimes must be proven beyond a reasonable doubt in order to be considered as aggravation under factor (b). (See *People v. Ashmus* (1991) 54 Cal.3d 932, 1000.) However, that requirement applies to unadjudicated violent criminal activity. (*Ibid.*) "[A] reasonable doubt instruction is not required when, as here, the defendant has already been convicted of the crime in question." (*Ibid.*, citing *People v. Morales, supra,* 48 Cal.3d at p. 566 ["the *Robertson* instruction need not be given where defendant already has been convicted of the prior offense"].) When the penalty phase evidence discloses a crime in addition to the one of which the defendant was convicted, a beyond-a reasonable-doubt instruction is required. (*Ibid.*) These cases clearly support the trial court's conclusion that relitigation of a prior conviction is not appropriate.

Appellant argues that because the prior conviction was admitted under factor (b) as well as factor (c), it is the underlying conduct which is at issue. While correct, it does not follow that appellant was entitled to relitigate that conduct. The prior conviction evidenced appellant's prior violent rape with a knife and nothing more. While the prosecutor would have been put to the test of proving any unadjudicated crime beyond a reasonable doubt, thereby opening the door to evidence disputing its proof, the conduct evidenced by appellant's prior conviction was fully litigated to a conviction and judgment, which was upheld on appeal.

Appellant claims the rape jury did not have the benefit of Casas' testimony and demonstrating his wrongful conviction would have not only provided mitigation under factor (b), but also factor (c). However, the rape conviction withstood Casas'

testimony on coram nobis, and appellant specifically declined to seek habeas corpus when the trial court ruled that was the appropriate remedy. Had appellant been able to set aside his prior conviction on habeas, and obtain an acquittal on retrial, his claim of mitigation in a wrongful conviction would have had more substance, but in that case, the prior conviction would not have been admitted.

As the trial court properly ruled, proper respect for finality precluded relitigation of appellant's prior rape conviction.

Finally any error was harmless. As noted, appellant did not propose to call Casas to testify and, even if he had called her, her testimony about her 10:00 telephone call to Briseño would have not undermined the conviction because it provided the jury with no information about when the rape occurred. Without fully presenting the entire prior trial, which the defense never proposed to do, Casas' testimony had no foundation from which the jury could reach any conclusions. Moreover, for the reasons set forth in Argument LXXVII, subd. C, even had the jury divined some basis for disputing the prior rape conviction, the conviction paled in comparison to the brutality of the special circumstances crimes of which appellant stood convicted.

LXXXIII.

THE TRIAL COURT DID NOT ERR IN FAILING TO *SUA SPONTE* INSTRUCT THE PENALTY PHASE JURY NOT TO CONSIDER THE GUILT-PHASE CONVICTIONS IN DETERMINING WHETHER APPELLANT'S PRIOR RAPE HAD BEEN PROVEN

Appellant contends the trial court prejudicially erred by failing to *sua sponte* instruct the jury it could not consider the guilt-phase convictions in determining whether the prior rape had been proven beyond a reasonable doubt. (6 AOB 1559-1564.) There is no requirement for giving such an instruction *sua sponte* and, as appellant impliedly concedes, he made no such request. Moreover, the penalty phase

instructions did not permit use of the guilt phase convictions or evidence in the manner suggested by appellant and the cross-admissibility instructions from the guilt phase would not have reasonably been understood by the jury as permitting consideration of the guilt-phase convictions or evidence in determining whether the prior rape had been proven beyond a reasonable doubt.

Appellant claims that it can be credibly argued that consideration of other crimes evidence cannot fairly be accomplished by a jury which convicted the defendant. However, appellant correctly acknowledges that this Court has rejected that claim. (*People v. Bolin, supra,* 18 Cal.4th at p. 335; *People v. Balderas, supra,* 41 Cal.3d at pp. 204-205.) Nonetheless, appellant asserts that his jury might have used the cross-admissibility instructions from the guilt phase to draw support for considering the guilt-phase convictions as proof of the prior rape. He asserts that since there was no basis for cross-admissibility between the guilt phase convictions and his prior rape, such use would have been improper and a *sua sponte* instruction was required to prevent it. However, an instruction limiting the use of guilt phase evidence in the penalty phase must be requested. (*People v. Coddington, supra,* 23 cal.4th at p. 637; *People v. Champion* (1995) 9 Cal.4th 879, 947.) Moreover, appellant's claim of improper jury use is without merit.

Although not required since appellant's prior rape was not unadjudicated (*People v. Ashmus, supra,* 54 Cal.3d at p. 1000; *People v. Morales, supra,* 48 Cal.3d at p. 566), the trial court instructed the jury it was not to consider the prior rape as an act of violence under factor (b) unless appellant's commission of the act was proven beyond a reasonable doubt. (70 TRT 13329-13330.)[264/] While the trial court's penalty phase instructions precluded use of only conflicting guilt phase instructions (70 TRT 13319), the trial court also instructed the jury that questions of fact in the

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264. The jury was also instructed that it may not consider appellant's prior rape conviction unless satisfied beyond a reasonable doubt that appellant was in fact convicted. (70 TRT 13329.)

penalty phase are to be decided by use of "the evidence received here or from the guilt phase, as permitted, and not from any other source." (70 TRT 13320, emphasis added.) Appellant's guilt phase convictions were not offered in evidence in the penalty phase of the trial. Instead, they were the result of the jury's consideration of guilt-phase evidence and the jury was instructed that the guilt-phase convictions and special circumstance finding were the reason for the penalty phase. (70 TRT 13319.) The jury was also instructed it should consider guilt-phase evidence in considering the circumstances of the crimes and special circumstance. (70 TRT 13326.) However, no instruction indicated the fact of the convictions was evidence. Thus, there is no instructional basis for appellant's claim that the jury might have considered the guilt-phase convictions in determining his prior rape.

To the extent appellant means to suggest the jury might have considered evidence underlying the convictions in determining the prior rape, the instructions permitted consideration of guilt phase evidence in considering aggravating factor (a) and mitigating factors (d), (e), (f), (g), (h), (i), and potentially (j), but not factor (b). (70 TRT 13326-13327.) Since the jury was instructed it could consider guilt-phase evidence in deciding penalty phase questions of fact "as permitted," The lack of permission precluded the improper use appellant suggests.

Finally, it is both illogical and unreasonable to believe the jury would rely on the guilt-phase cross-admissibility instructions to infer permission to use the guilt phase convictions or evidence in deciding appellant's prior rape. The guilt-phase instructions directed the jury to consider each count separately. (65 TRT 12197.) Cross-consideration of evidence on the various counts was permitted only for "certain limited purposes," including identity, characteristic method, plan or scheme, intent, and motive. (65 TRT 12197-12199.) The guilt-phase instructions specifically cautioned the jury that such evidence may not be used to prove character of disposition. (65 TRT 12199.) The jury was instructed on the need for factors of similarity in order to find a characteristic method, plan or scheme and advised that

no inference could arise if there are no shared unique or highly distinctive marks of similarity. (65 TRT 12199-12200.) Thus, if the jury remembered anything about the guilt phase instructions it would have been the extremely limited and restricted circumstances in which cross-admissibility was allowed. Those limited and restricted circumstances would not have been understood by the jury to afford blanket permission to judge appellant's prior rape by evidence of his guilt phase convictions. Indeed, the jury's ability to understand and follow those limited and restricted cross-admissibility instructions is amply demonstrated in the inability to reach a verdict on the Strang and Fisher counts, and the acquittal on the Garcia count. Appellant's claim to the contrary is simply without merit.

Finally, for the reasons set forth in Argument LXXVII, subd. C, any error in failing to expressly caution the jury against considering the guilt phase convictions and evidence in deciding the prior rape was harmless.

LXXXIV.

THE TRIAL COURT INSTRUCTED THE JURY THAT IT MUST FIND APPELLANT COMMITTED THE PRIOR RAPE BEYOND A REASONABLE DOUBT BEFORE CONSIDERING THE PRIOR RAPE AS A FACTOR IN AGGRAVATION

Appellant contends the trial court failed to instruct the jury that it must find appellant committed the prior rape beyond a reasonable doubt before considering the prior rape as a factor in aggravation. (6 AOB 1565-1566.) To the contrary, the trial court gave such an instruction.

In instructing the jury on finding other crimes of violence under factor (b), the trial court instructed:

> Evidence has been introduced showing that the defendant has committed a criminal act which involved the express or implied use of force or violence or the threat of force or violence. The act is as follows:
>
> Forcible rape while armed with a deadly weapon; to wit, a knife.

> Before you may consider such criminal act as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal act.

(70 TRT 13330.)

As noted previously, since proof of appellant's prior rape under factor (b) was limited to the record of conviction, a beyond-a-reasonable-doubt instruction was unnecessary. (*People v. Ashmus, supra,* 54 Cal.3d at p. 1000; *People v. Morales, supra,* 48 Cal.3d at p. 566.) Nonetheless, contrary to appellant's claim, the above instruction plainly directed the jury to find the prior rape beyond a reasonable doubt before considering it under factor (b).

Appellant's claim of error is hinged on another instruction in which the trial court told the jury it must find beyond a reasonable doubt that appellant was convicted of the prior rape before considering the prior rape conviction as a factor in aggravation:

> Evidence has been introduced for the purpose of showing that the defendant has been convicted of the crime of forcible rape while armed with a deadly weapon prior to the offenses of murder in the first degree of which he has been found guilty in this case.
>
> Before you may consider such alleged crime as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of such prior crime.

(70 TRT 13329, underlining added; cf. *People v. Ashmus, supra,* 54 Cal.3d at p. 1000.)

The second instruction, which imposed another beyond-a-reasonable-doubt requirement to consideration of appellant's prior conviction, created neither error nor an inconsistency in the instructions. Together the two instructions required the jury to find both the conduct and the conviction proven beyond a reasonable doubt. Both instructions benefitted appellant beyond any entitlement; since the prior conviction was entered by stipulation there was no issue as to the conviction and since the

conviction established the essential elements of the prior rape and nothing more, there was no need for a reasonable doubt instruction. There was no error.

LXXXV.

APPELLANT WAIVED HIS PRESENCE WHEN THE TRIAL COURT DISCUSSED WITH COUNSEL THE DEFENSE EXPERT'S INADVERTENT POSSESSION OF A DEFENSE ATTORNEY-PREPARED DOCUMENT; THERE WAS NEITHER AN ACTUAL CONFLICT OF INTEREST NOR AN ADVERSE EFFECT IN DEFENSE COUNSELS' REPRESENTATION OF APPELLANT AT THE HEARING; AND THE TRIAL COURT ACTED TO ENSURE APPELLANT'S RIGHT TO A FAIR TRIAL

Appellant contends the trial court prejudicially erred and violated his constitutional rights by excluding him from an *in camera* discussion concerning a defense expert's inadvertent possession of "social history" on appellant which had been prepared by defense counsel appellant characterizes his absence as allowing appellant to be represented at the *in camera* hearing by trial counsel who labored under a conflict of interest, and placing judicial efficiency above protection of appellant's rights during that hearing. (7 AOB 1567-1577.) Appellant was not excluded from the hearing, he waived his presence. Appellant's counsel had no actual conflict of interest in representing him during the hearing and there was no adverse effect on their representation. Finally, the trial court conducted the hearing in order to protect appellant's right to a fair trial.

A. Trial Proceedings

The defense called Dr. Alvin Marks, a clinical and forensic psychologist, as a witness in the penalty phase. (67 TRT 12775.) Dr. Marks testified to his diagnosis of appellant under the DSM II (inadequate personality), the DSM III (mixed personality disorder), and the DSM III-R (personality disorder, not otherwise

specified) and described the diagnostic characteristics of a personality disorder. (67 TRT 12780-12781.)[265] Dr. Marks testified that he had met with appellant and conducted psychological interviews and tests, had contact with appellant's family, and considered other historical data on appellant from his birth until 1985. (67 TRT 12778, 12782, 12785.) Dr. Marks also described the effects of the personality disorder on appellant, including his rage against women, its derivation, and appellant's ability to comply with authority despite the personality disorder. (67 TRT 12782-12789.) Dr. Marks described his familiarity with appellant's incarceration and behavior at Atascadero, and opined it was consistent with his own clinical analysis of appellant. (67 TRT 12790.)

Dr. Marks also testified to his opinion that as a result of traumatic injuries suffered by appellant, he had minimal brain damage, which was corroborated by the report of a neuropsychologist, Dr. Bach. (67 TRT 12791-12793.)

Prior to beginning cross-examination, the prosecution made a request for all of the material Dr. Marks reviewed in forming his opinion as well as time to review that material before beginning cross-examination. (67 TRT 12794-12795.) Other than raising concerns about logistics and witness scheduling, the defense did not object. (67 TRT 12797-12800.)

The prosecution also asked for access to materials which had been delivered from Atascadero pursuant to a subpoena, which the defense apparently contested. (67 TRT 12797, 12800.)[266] After providing the prosecution with a portion of the Atascadero records relied on by a prior witness, as well as Dr. Marks' notes and data,

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265. The DSM III-R was the then-current version of the Diagnostic and Statistic Manual. (67 TRT 12779-12780.) The DSM III was in effect at the time of the murder of Anne Swanke and the attempted murder of Jodie Santiago. (67 TRT 12780.) The DSM II was in effect at the time of the murder of Suzanne and Colin Jacobs. (67 TRT 12779.)

266. Appellant had been sent to Atascadero from his commitment to CYA following his rape conviction. (67 TRT 12754, 12759.)

and Dr. Bach's report, the defense objected to the prosecution's access to the Atascadero records, claiming that Dr. Marks had not relied on those records in forming his opinion. (67 TRT 12803-12804.) Finding appellant's mental state had been placed in issue as well as his behavior at Atascadero (which the defense conceded), the trial court ordered the Atascadero records made available to both sides. (67 TRT 12804.)

The following day, during cross-examination, Dr. Marks testified he learned about appellant's life from a combination of sources including "a chronological report by an investigator" (68 TRT 12831) which was provided to him by the defense through the investigator. (68 TRT 12832.) Although Dr. Marks read and relied on that report in forming his opinion, that chronological report was not included in the materials made available to the prosecution. (68 TRT 12831-12832.)

During a subsequent break, the prosecution asked for a copy of the chronological report. (68 TRT 12842.) Defense counsel claimed the report had actually been prepared by him and claimed attorney work product and attorney client privileges. (68 TRT 12843.) Because it appeared defense counsel had not reviewed the report in some time, the trial court directed defense counsel to obtain the report and make specific objections. (68 TRT 12843-12844.)

The following day, defense counsel indicated a copy of the report had been obtained and reviewed, and the defense asserted work product privilege. (69 TRT 12992.) The defense contended in an offer of proof that the report was prepared for the defense attorneys' use in the case preparation and included "editorial comments"; Dr. Marks had reached his diagnosis prior to receiving the report and he did not rely on the report in reaching his diagnosis; and the report was not given to Dr. Marks by the attorneys, but may have been delivered by a defense investigator without authorization to do so. (69 TRT 12992-12995.) The trial court concluded that matters of family history in the report were properly the subject of cross-examination

of Dr. Marks, but that comments would not be turned over unless Dr. Marks took them into consideration. (69 TRT 12998.)

Finally, when defense counsel claimed they did not make a knowing judgment in calling Dr. Marks because they were unaware he had the report, the trial court opined there was a "large problem" and asked if the prosecution really wanted it. (69 TRT 13002.) When the prosecution questioned the nature of the problem, the trial court indicated it would like to speak with counsel in chambers without appellant and asked whether appellant would waive his presence. (69 TRT 13002-13003.) After a discussion between appellant and his attorneys, appellant waived his right to be present. (69 TRT 13003.)

During the *in camera* hearing with defense counsel and the prosecutors, the trial court expressed the view that Dr. Marks had been given the so-called social history by mistake and suggested the mistake could be later raised as a claim of ineffective assistance of counsel. (69-1 TRT 13006-13007.) While recognizing the relevance of the social history to cross-examination, the trial court ruled it could not be used. (69-1 TRT 13012.) At that point the trial court addressed the prosecution's earlier complaint that having received the Atascadero records, it was unable to produce appropriate expert witnesses in time to follow the available prosecution witnesses. (See 69-1 TRT 13009.) The trial court indicated it would grant a necessary continuance to allow time for the prosecution to produce the necessary expert witnesses from the Atascadero records. (69-1 TRT 13013.)

However, in discussing the amount of time needed for a continuance, the prosecution indicated one witness, Dr. Shumann, would not be available until late the following week. (69-1 TRT 13013.) When the trial court asked whether the substance of Dr. Schumann's testimony could be provided by stipulation, the defense indicated it depended on what the prosecution wanted. (69-1 TRT 13014.) The prosecution indicated it desired the diagnosis of appellant which Dr. Schumann made when appellant left Atascadero and wanted to cross-examine Dr. marks on that

diagnosis, if a stipulation was agreed. (69-1 TRT 13014.) The trial court questioned whether the proposed stipulation was necessary for cross-examination, but ultimately left the matter of the stipulation to counsel. (69-1 TRT 13015-13016.)

When the proceedings resumed, the defense indicated a stipulation had been reached. (69 TRT 13017.)

B. Appellant Waived His Right To Be Present At The *In Camera* Hearing

"[A]s a matter of both federal and state constitutional law, a capital defendant may validly waive his presence at critical stages of the trial." (*People v. Dickey* (2005) 35 Cal.4th 884, 923.) There is no heightened standard for such a waiver nor any *sua sponte* duty on the part of the trial court for particular admonitions. (*People v. Weaver, supra,* 26 Cal.4th at p. 967.) The validity of the waiver is judged by whether it was voluntary, knowing and intelligent. (*Ibid.*)

In this instance, like he had done in many, many instances throughout the pretrial and trial proceedings (see, e.g., 67 TRT 12806-12807), appellant waived his presence at the *in camera* hearing. The trial court's inquiry as to whether appellant would waive his presence during the hearing, particularly in light of the many times previously in which appellant waived his presence, plainly and unambiguously indicated appellant had a right to not waive his presence. Moreover, as was typical, appellant consulted with his counsel before waiving his presence. (69 TRT 13003.) Appellant was neither coerced nor promised anything in exchange for his waiver. Under the circumstances, particularly appellant's many prior instances of waiving his presence, his waiver in this instance was voluntary, knowing and intelligent.

Appellant claims the waiver should be disregarded for several reasons. (7 AOB 1575.) First, because it was not in writing. To the contrary, appellant had executed a written waiver of personal presence pursuant to Penal Code section 977, subdivision (b). (27 CT 5724.) Moreover, the lack of a written wavier is "merely statutory" and subject to harmless error analysis. (*People v. Dickey, supra,* 35

Cal.4th at p. 923.) The end result of the *in camera* hearing was to benefit appellant by precluding the prosecution from cross-examining Dr. Marks on the social history. (See 69 TRT 13029-13030.)[267] Appellant seems to suggest that a *quid pro quo* for that benefit was the defense stipulation to the contrary diagnosis from the Atascadero records. (7 AOB 1570.) However, the record clearly demonstrates that the trial court precluded use of the social history without regard to the later-entered stipulation. (69-1 TRT 13012.) The trial court's suggestion of a stipulation came only in response to the prosecution's need for time to produce witnesses from Atascadero. (69-1 TRT 13013-13014.) There was no *quid pro quo*. By the defense placing appellant's mental status in issue as a factor in mitigation, the prosecution was entitled to rebut that evidence with the contrary diagnosis. (See *People v. Carpenter, supra,* 15 Cal.4th at pp. 412-413.) In any case, the stipulation amounted to an effective means of minimizing the impact of that rebuttal evidence.

Appellant claims a waiver of personal presence should not be permitted in a capital case. However, this Court has concluded otherwise (*People v. Dickey* (2005) 26 Cal.4th at p. 967) and appellant fails to offers any reason in support of his assertion.

In a somewhat circular argument, appellant argues that waiver should not be permitted when the topic of discussion is ineffective assistance of counsel since that is substantially related to the opportunity to defense. In effect, appellant simply reasserts his claim that waiver should not be allowed, which as noted, this Court has already rejected. Moreover, there was no basis for finding ineffective assistance of counsel.

Appellant claims the trial court never told appellant what he was waiving. The clear and unambiguous import of the trial court's query was whether appellant would waive his right to be present at the proposed *in camera* hearing with the

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267. The trial court also barred use of material in Dr. Bach's report beyond the test result relied on by Dr. Marks. (69 TRT 13032.)

attorneys, as he had done many times before. (69 TRT 13003.) Before deciding not to be present, appellant knew his attorney stated he had not made a knowing judgment in calling Dr. Marks, and the prosecution was seeking materials given by the defense to Dr. Marks, and the court had indicated the prosecution request was a "large problem." (69 TRT 13002.) Thus, the record amply demonstrates appellant knew of his right to be present and the consequences of his waiver.

Since appellant waived his right to be present, there was no error in holding the hearing in his absence.

C. There Was Neither Conflict Of Interest Nor Adverse Effect

Conflicts of interest may arise in a situation in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his own interests. (*People v. Horton, supra,* 11 Cal.4th at p. 1106.) Under the federal constitution, a defendant who fails to object at trial must establish that an actual conflict of interest adversely affected his lawyer's performance, while under the state constitution, a defendant need only show a potential conflict so long as the record supports informed speculation that the asserted conflict adversely affected counsel's performance. (*People v. Cox, supra,* 30 Cal.4th at p. 948.)

The trial court's concern in holding the hearing was its conclusion that there were mistakes by which Dr. Marks obtained Dr. Bach's report and the defense attorney-prepared chronological history on appellant which might later be considered ineffective assistance of counsel if the prosecution were to obtain and be permitted to use material from those documents in cross-examining Dr. Marks. (69-1 TRT 13006-13007.) Similarly, and completely consistent with appellant's interest, both before the hearing and during the hearing, the defense made a record that Dr. Mark's possession of attorney-client work product was unintended and also sought to prevent the prosecution from obtaining and using those documents to cross-examine Dr. Marks. (69 TRT 12992-12995; 69-1 TRT 13009-13011.) At the point of the

hearing, whether or not the "mistakes" were deficient performance, both the trial court and defense counsel were concerned with preventing appellant from being harmed by the prosecution's potential cross-examination with these documents. Ultimately, of course, the trial court precluded the prosecution from obtaining the social history. (69-1 TRT 13012.)

There was no conflict of interest, actual or otherwise, nor an adverse effect on counsel's performance is demonstrated in the record.

D. Trial Court Impartiality

Citing *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795, appellant contends the trial court's actions violated his right to a fair and impartial judge by subordinating appellant's rights to the interests of judicial efficiency. (7 AOB 1574.) However, as pointed out above, it was appellant's right to a fair penalty phase which motivated the trial court's actions. The trial court believed it was a mistake which delivered the defense attorney prepared chronology to the defense expert and saw that same mistake requiring the delivery of the document to the prosecutor. The trial court's efforts sought to avoid any prejudice to appellant's penalty phase defense which might have arisen from delivery of the document to the prosecutor. Ultimately, the trial court precluded the prosecution from obtaining and using the social history. Thus, the trial court did not place judicial efficiency above appellant's right to a fair trial; in fact, the trial court's actions were in the interest of the fairness of the appellant's trial.

In *Cuccia*, the trial court forced appellant to testify rather than permit a short continuance to await the arrival of the next defense witness and refused to allow the defense a short continuance after the prosecutor was allowed to introduce new evidence on rebuttal. (*Id.* at pp. 790-795.) The appellate court found the combined effect of the two instances where the trial court chose efficiency over short continuances violated the defendant's right to a fair trial. (*Id.* at p. 795.)

Here, in contrast, the trial court sought to prevent prejudice to appellant from the defense mistake and acted to assure appellant's right to a fair trial. Appellalnt's non-presence at the hearing is unrelated to any suggestion of judicial impartiality or efficiency. The trial court's actions did not undermine appellant's right to a fair and impartial judge.

LXXXVI.

BY FAILING TO REQUEST AMPLIFICATION OR MODIFICATION, APPELLANT WAIVED HIS CLAIM OF ERROR REGARDING THE TRIAL COURT INSTRUCTION ON A STIPULATION; IN ANY CASE, THERE IS NO REASONABLE LIKELIHOOD THE JURY UNDERSTOOD THE STIPULATION AND INSTRUCTION IN THE MANNER APPELLANT SUGGESTS

Appellant contends the trial court prejudicially erred and violated his constitutional rights by instructing the jury that a stipulation was a matter of fact rather than a matter of evidence. (7 AOB 1578-1583.) Appellant forfeited his claim by failing to seek amplification or clarification. In any case, there is no reasonable likelihood trial court's instruction was understood by the jury as directing the jury to find appellant's mental condition consistent with the stipulation.

After the hearing in which the trial court and counsel resolved the issue of prosecution discovery and use of a defense attorney-prepared chronology, counsel and the trial court discussed a proposed stipulation presenting appellant's diagnosis by an Atascadero physician. (69 TRT 13017-13020.) When the trial continued before the jury, the prosecutor presented the stipulation:

> [Prosecutor] Mr. Williams: The stipulation being that on February 7th, 1974, a licenced physician with the State of California, a doctor - - medical doctor, psychiatrist, but the name of R. M. Schumann, S-c-h-u-m-a-n-n, examined in the month of February or diagnosed in the month of February 1974 Mr. David Allen Lucas, the defendant in this action, while at the Atascadero State Hospital that has heretofore been referred to in these proceedings, and diagnosed him as in the DSM III or in the DSM manual as

an antisocial personality, severe; alcoholism, habitual excessive drinking, and a sexual deviation, aggressive sexuality, and the prognosis was very guarded.

[Defense Counsel] Mr. Landon: So stipulated.

The Court: Fine.

Again, Ladies and gentlemen, that's a stipulated matter, now. It's not a matter that you have to decide. It's given to you as a fact.

(69 TRT 13026.)

In the guilt phase instructions, the trial court had instructed the jury that a fact was something proved by evidence or a stipulation, a stipulation was "an agreement between the attorneys regarding facts," and that "if the attorneys have stipulated or agreed to a fact, you must regard that fact as conclusively proved." (65 TRT 12184-12185.) The trial court gave the same instructions regarding stipulations in its penalty phase instructions. In its penalty phase instructions, the trial court repeated that "if the attorneys have stipulated of agreed to a fact, you must regard that fact as conclusively proved." (70 TRT 13320.)

In effect, appellant argues the trial court should have amplified or clarified its instructions. "The instruction correctly states the law, and defendant did not request clarification or amplification. He has therefore waived the issue on appeal." (*People v. Bolin, supra,* 18 Cal.4th at pp. 328.) In any case, the claim lacks merit.

Appellant argues that the effect of the trial court's instruction was to direct the jury to find that the Atascadero diagnosis was proven. However, no reasonable jury would have understood either the stipulation or the trial court's instruction in that manner. The parties did not stipulate to appellant's mental condition; they stipulated to Dr. Schumann's diagnosis. Thus, the "fact" which the trial court instructed the jury to accept was that Dr. Schumann had made a diagnosis. Moreover, before and after the stipulation, the jury heard the testimony of Dr. Marks, which disputed, both implicitly and explicitly, Dr. Schumann's diagnosis. There is simply no reasonable likelihood the jury would have understood the trial court's instruction as directing the

acceptance of Dr. Schumann's diagnosis as proven when evidence was subsequently admitted disputing the diagnosis. (*People v. Snow, supra,* 30 Cal.4th at p. 97; see also *People v. Frye, supra,* 18 Cal.4th at p. 958.)

Finally, any error was harmless. The importance of Dr. Marks' testimony was not the label he applied to appellant, but his testimony about the cause of his rage, as stemming from his father, and his testimony about appellant's other qualities, including his ability to conform to authority. The prosecution argued that was not a basis for the lesser punishment (70 TRT 13271-13272) and the defense argued that it was (70 TRT 13298). It was simply not incumbent upon the defense, or the prosecution for that matter, or necessary to show which of the two diagnoses were correct.

LXXXVII.

APPELLANT WAIVED HIS CLAIM OF PROSECUTORIAL MISCONDUCT AND THE PROSECUTOR'S PENALTY PHASE ARGUMENT DID NOT UNDERMINE THE JURY'S SENSE OF RESPONSIBILITY OR MISGUIDE THE JURY IN SENTENCING CONSIDERATIONS

Appellant contends the prosecutor committed misconduct by referring, in his closing argument, to a biblical verse and a battle between good and evil. He asserts the references were improperly used to invoke religious authority in support of a death judgment and provided an improper basis for making the decision between the two available sentences. (7 AOB 1584-1593.) To the contrary, the prosecutor's allusions were merely a means of arguing his position that when the legal requirements were properly followed, appellant deserved the death penalty.

A. The Prosecutor's Argument

The prosecutor began his argument by telling the jury that "[t]he candle of the wicked shall be put out." He described the crimes on which the jury returned guilty

verdicts as "vile, cold-blooded, savage, and brutal" and stated that appellant's commission of the crimes made him a wicked person. He then told the jury that the "evidence in aggravation is astonishing" and overwhelmingly supported a finding of death. (70 TRT 13266.)

In that opening paragraph the prosecutor summarized the point of his entire argument: that the moral depravity evidenced in the circumstances surrounding commission of the crimes overwhelmed all else and demanded a death verdict as the only just punishment under the law. For the remainder of that page and the seven pages that follow, the prosecutor detailed the legal requirements the jury was to follow in reaching a penalty verdict. (70 TRT 13266-13273.) He told the jury that its "duty" was to impose a penalty mandated by the law and "that is just." (70 TRT 13266.) He told the jury he would be discussing why the prosecution believed the "evidence supports a finding of death," and that the law properly restricted the scope of the prosecution argument and properly placed little restriction on the defense. (70 TRT 13266.) The prosecutor reiterated that the jury should not interpret the brevity of his argument to mean the prosecution believes the "evidence is lacking in support of a verdict of death." (70 TRT 13267.)

The prosecution directed the jury to a chart setting forth "the legal factors" which the jury considers "in weighing and evaluating the appropriate penalty." (70 TRT 13267.) He told the jury of its "first obligation" to determine whether the various factors existed under the evidence and the next "obligation" was to "attach any weight to that factor that you find it is entitled." (70 TRT 13267.) He stressed the two aggravating factors which must be found beyond a reasonable doubt. (70 TRT 13267-13269.) He told the jury:

> The ultimate test - - the ultimate test for you to concern yourself with is this; in the event, after full and complete consideration of the penalty evidence and the guilt evidence, you feel that the circumstances in aggravation are so substantial in comparison to the mitigating circumstances, only in that event are you capable of rendering a verdict of death. [¶] And I submit to you, again, indeed this evidence is overwhelming in support of a verdict of death.

(70 TRT 13269.)

The prosecutor then discussed his view on the factors. (70 TRT 13269-13275.) In doing so, he told the jury that its duty was to "dispense justice" (70 TRT 13273) and "you are here because you seek justice." (70 TRT 13275.) After discussing aspects of a life sentence, the prosecutor told the jury that "[l]ife is too good for [appellant] for what he did." (70 TRT 13276.)

He then told the jury that "[w]ithin the story of life . . . is the battle between good and evil" and "[t]here are times when we have to enter into the battle of good and evil" even when unpleasant "we have to do it" and "as sworn jurors, you have to do that." (70 TRT 13277.) He told the jury that capital punishment "has been with us for thousands of years, as Moses laid it down, as the punishment for premeditated murder, and we have had it ever since because it is a just penalty when someone commits the ultimate act of evil." (70 TRT 13277.) He also told the jury that appellant "has indeed committed the ultimate acts of evil in murder." (70 TRT 13277.) The prosecutor told the jury:

> For in that battle between good and evil there are times when we must, when we must get into that battle and do what is right and what is just and sometimes that requires that we impose the death penalty, and it is proper and just in this case.

(70 TRT 13277.)

He told that jurors "if you fail to get into that battle and deal with it and do what is just, if you fail, then justice is not done." (70 TRT 13277.) He reiterated that "the appropriate penalty is death." (70 TRT 13278.) He asked the jury, "Are you going to give him what he wants or what he deserves for what he did?" (70 TRT 13278.) In concluding, the prosecutor told the jury:

> Ladies and gentlemen, justice cries for the ultimate penalty; the ultimate penalty of death for [appellant]. He is a person with a depraved sense of pleasure; his meanness, his cold, deliberate murders of two women, an innocent child, and the attempted murder of Jodie Robertson. [¶] No one is going to try to tell you that your task is a pleasant one; no one. But you must get into the battle between good and evil and take care of that problem. [¶]

> This case cries for the penalty of death, and the candle of the wicked shall be put out.

(70 TRT 13278.)

B. Waiver And Admonition

Appellant did not object to the prosecutor's allegedly improper references during the argument, but waited until after the argument and even then made no objection to the candle metaphor. (70 TRT 13279.) Having failed to make a timely objection and request for admonition, the claim of misconduct is waived. (*People v. Noguera* (1992) 4 Cal.4th 599, 638.)

Appellant appears to suggest the untimeliness of his objection to the good-versus-evil reference should be excused because the trial judge's stated preference was for objections after the conclusion of argument. (7 AOB 1586, fn. 1346, citing 61 TRT 11701-11702, 11729 and 58 TRT 10996.) However, in each instance, the trial court stated a preference that closing argument not be interrupted for minor points and made it clear that substantial errors in argument should bring an immediate objection.

In its comments concerning the closing arguments following the guilt phase, the trial court stated it would not interrupt counsel "even if their particular rendition of the law is not exactly correct," but "[i]f there is something so drastically wrong with the description of the law to the jury as it's being said that something has to be done about it, I may chose to interrupt at that point." (58 TRT 10996.) As to objections by counsel, while the trial court discouraged such action, it indicated interrupting argument was acceptable if "it is felt by counsel that no amount of retort argument can possibly cure what has just happened and the judge's final instructions can't cure this egregious terrible thing that's happened." (58 TRT 10997.)

Similarly, in its comments about closing argument in the penalty phase, while the trial court restated its preference for not interrupting argument (70 TRT 11701-

11702, 11729) because "most things can be cured after the fact," the trial court also stated that "[t]he only thing that would lead, I think, to interrupting an argument would be generally a misstatement of the law that's beyond insubstantial." (70 TRT 11701.)

Moreover, the defense interrupted the prosecutor's guilt phase arguments several times with objections, even repeating objections the trial court had already overruled. (62 TRT 11752, 11761, 11762, 11765, 11769, 11830, 11831[three objections]; 64 TRT 12134, 12142, 12145, 12153, 12155, 12156, 12169.) Additionally, when the trial court discussed several of the defense guilt-phase objections during a break in the argument, it did not discourage timely objections. (62 TRT 11774-11779.) In fact, it sustained objections made during argument, struck offending comments, and gave admonitions. (62 TRT 11831; 64 TRT 12142, 12145, 12155-12156, 12170.) Thus, appellant's excuse for the absence of a timely objection does not withstand scrutiny.

During the post-argument discussion regarding appellant's complaints, the trial court found one part of the prosecution's argument - - that mercy "is not an earthly gift" and "is a divine gift, and only God can grant mercy" (70 TRT 13273) - - to be contrary to law. (70 TRT 13281.) When the jury trial reconvened, the trial court instructed the jury that "the law does specifically provide that the jury may consider mercy for the defendant in considering his sentence." (70 TRT 13283.) Additionally, consistent with that admonition, the jury was instructed that it "may properly consider sympathy, pity, and mercy for the defendant in determining his sentence." Any potential harm to appellant from the prosecutor's error was cured because the jury is presumed to have followed the admonition. (*People v. Jones* (1997) 15 Cal.4th 119, 168, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Davis* (1995) 10 Cal.4th 463, 506.)

C. No Improper Argument

Appellant contends the prosecutor improperly invoked religious law as support for the death penalty and misstated the jury's sentencing function as one of choosing between good and evil. Neither assertion has merit.

This Court has stressed that "biblical law has no proper role in the sentencing process." (*People v. Roybal, supra*, 19 Cal.4th at p. 520.) However, it is not the mere mention of the Bible or references to it which constitute misconduct.

> As we have explained, "[t]he primary vice in referring to the Bible and other religious authority is that such argument may 'diminish the jury's sense of responsibility for its verdict and . . . imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions.'"

(*People v. Hughes, supra,* 27 Cal.4th at p. 389, quoting *People v. Wash, supra,* 6 Cal.4th 215, 261, in turn quoting *People v. Wrest* (1992) 3 Cal.4th 1088, 1107; see also *People v. Lenart* (2004) 32 Cal.4th 1107, 1129.) Thus, in *Hughes*, there was no misconduct despite the fact the prosecutor spoke about the Bible and quoted several passages. (*People v. Hughes, supra,* 27 Cal.4th at p. 392.)

Appellant builds his religious misconduct claim on the prosecutor's opening and closing statement, "The candle of the wicked shall be put out" (70 TRT 13266, 13278) and the prosecutor's reference to a battle between good and evil. However, in neither case did the prosecutor expressly reference the Bible as a source for either points.[268/] While the candle statement is apparently derived from the Bible, it is certainly not one of the well-known and easily-recognized biblical verses. In fact, metaphorical references to life as a burning candle are extant in both secular works

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268. The prosecutor made two more direct biblical law references of which appellant does not complain: he told the jury that mercy came only from God and the death penalty had been in existence since Moses. The latter was not an exhortation to follow a higher law or to seek support for death from religion, but was merely an assertion that capital punishment had long been viewed as an appropriate response to murder. The former, though erroneous, was cured by the trial court's admonition.

and popular culture. (See e,g., "Candle in the Wind" by Bernie Taupin and Elton John; Shakespeare, MacBeth, Act V. Stene 5.) As a metaphorical statement, the prosecutor merely asserted that death was appropriate for those whose acts extended beyond bad to evil; i.e., wicked. That was, after all, the thrust of the prosecutor's death sentence argument; that the aggravating weight inherent in the circumstances of the crimes overwhelmed all else and demanded death as the just punishment. (70 TRT 13274, 13278.)

Similarly, the prosecutor did not reference the Bible in making his good-versus-evil argument. While it comes as no surprise that appellant can find several references to good and evil in the Bible, again, it is also a matter of secular and popular currency. Indeed, the prosecutor told the jury that the battle between good and evil was "[w]ithin the story of life," thereby undermining any inference he was suggesting biblical law as a basis for decision. (70 TRT 13277.) In neither case, would a jury be reasonably likely to construe the prosecutor's references to an invocation of biblical authority in support of the death penalty or as implying that a higher law applies to the jury's penalty decision. (*People v. Ayala, supra,*24 Cal.4th at p. 288 [claims of prosecutorial misconduct in argument are evaluated to determine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief alleged].)

The prosecutor spent the better part of his argument talking to the jurors about how they were to approach the task of determining sentence and the legal requirements for returning a proper and just sentence. The prosecutor's metaphorical references would have been reasonably understood by the jury as encouragement to impose the just penalty reached after following the law, rather than shy away from that penalty due to the enormity of the consequences in imposing death. He told the jury that no one would tell them their task was pleasant. (70 TRT 13278; cf. *People v. Jones, supra,* 15 Cal.4th at p. 185 [proper for prosecutor to argue that determining the appropriate punishment is a difficult decision requiring courage].)

Appellant also argues the good-versus-evil metaphor misstated the nature of the jury's sentencing determination. But, again, the prosecutor neither expressly nor impliedly told the jury they were to chose the punishment based on their assessment of good and bad about the crimes or appellant. In fact, he told the jurors that they were obligated to determine the applicability of the various legal factors applicable to the sentencing decision and then obligated to weigh those factors. (70 TRT 13267.) He also told the jury that the ultimate test, after a full and complete consideration of the evidence, was whether the aggravation was so substantial in comparison to the mitigation and only then could a death sentence be returned. (70 TRT 13269.)

The prosecutor's metaphors were his effort to convince the jury that aggravation so substantially outweighed mitigation that death was just and appropriate under the law. He asserted no higher or different law, or different standard in seeking a death verdict and the jury would not have understood his argument to make any such assertions. There was no misconduct.

D. Harmless

Even if the prosecutor's candle and good-versus-evil references were held improper, reversal is not required as there is no reasonable possibility of an effect on the outcome and any impropriety was harmless beyond a reasonable doubt. (*People v. Roybal, supra,* 19 Cal.4th at p. 520.)

As noted above, the prosecutor's two points made no clear and direct reference to biblical authority as support for a death verdict. His allusions were "little more than commonplaces" (*People v. Roybal, supra,* 19 Cal.4th at p. 521) which, if recognized as having a connection to the Bible would also have been recognized as having secular and popular connections as well.

The prosecutor's argument focused primarily on the legal requirements for imposing the death penalty, pointed out obligations of the jury under the law in

reaching a death verdict, stressed the overwhelming weight of the aggravating evidence, particularly the brutality of the crimes, and repeatedly asked for a death verdict as a just, proper and appropriate punishment. (*People v. Slaughter, supra,* 27 Cal.4th at p. 1210; *People v. Welch, supra,* 20 Cal.4th at p. 762; *People v. Roybal, supra,* 19 Cal.4th at p. 521.) The defense also "apprised the jury of its responsibility under California law." (*People v. Welch, supra,* 20 Cal.4th at p. 762.) The trial court admonished the jury, contrary to the prosecutor's argument, that mercy was a proper consideration.

Given the magnitude of the penalty phase evidence, particularly the heinous and brutal nature of the murders, the relatively minor place and ambiguous nature of the references in the context of the argument as a whole, the balancing effect of the defense argument, and the trial court's admonition, the remarks could not have diminished a reasonable jurors sense of responsibility or displaced the trial court's instructions.

LXXXVIII.

APPELLANT WAIVED HIS CLAIM OF PROSECUTORIAL MISCONDUCT AND, IN ANY CASE, THE PROSECUTOR'S PENALTY PHASE ARGUMENT DID NOT MINIMIZE THE JURY'S ROLE, SUGGEST A DEATH SENTENCE WAS PREORDAINED, OR IMPROPERLY DISCOUNT THE EVIDENCE OFFERED IN MITIGATION

Appellant claims the prosecutor, in one sentence of his argument, undermined the jury's sense of responsibility for a death sentence, implied a duty to return a death sentence, and urged the jurors to disregard the mitigating evidence. (7 AOB 1594-1596.) Other than *Caldwell* error,[269] the claim is waived. The claim is also without merit.

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269. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [105 S.Ct. 2633, 86 L.Ed.2d 231].

At one point in the prosecutor's argument, after going through all the factors, discussing their applicability and weight, and urging the death, not life without parole, was the appropriate punishment, the prosecutor stated, "If [appellant] does not deserve the death penalty in this case, we should abolish it as a measure of punishment in the State of California." (70 TRT 13275.)

A. Waiver

Appellant did not object to that point at the time, but waited until the recess to claim the statement was improper. (70 TRT 13279-13280.) The Court has recently imposed an objection-and-admonition requirement to preserve *Caldwell* error for appellate review. (*People v. Cleveland* (2004) 32 Cal.4th 704, 762.) However, such was not the case at the time of appellant's trial. (*Ibid.*) As to the other bases for claiming the argument was improper, for the reasons set forth in Argument LXXXVII, subdivision B., *supra*, they are forfeited. (*People v. Noguera, supra,* 4 Cal.4th at p. 638.)

B. *Caldwell* Error

"'[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'" (*People v. Cleveland, supra,* 32 Cal.4th at p. 762, quoting *Caldwell v. Mississippi,* supra, 472 U.S. at 328-329. As noted in the previous argument, in review claims of misconduct in prosecutorial argument, the argument is examined to determine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief alleged. (*People v. Ayala, supra,*24 Cal.4th at p. 288.) Statements in an argument must be taken in context. (*People v. Hughes, supra,* 27 Cal.4th at p. 390.) There is no reasonable likelihood the jury would have understood

the prosecutor's point to be that death was preordained in appellant's case by the authors of the death penalty statute, thereby relieving the jury of responsibility.

In the very opening paragraph of his argument, the prosecutor told the jury that the aggravating evidence was "astonishing" and "overwhelming[ly]" supported a "a finding of death in your verdict." (70 TRT 13266, underlining added.) He told the jury it was "[y]our duty" to follow the law and impose a just penalty. (70 TRT 13266, underlining added.) He told the jury that the approach "you will take" would not be to simply to added up the aggravating and mitigating factors to see which is greater. (70 TRT 13267, underlining added.) He told the jury that "your first obligation" was to determine whether there was any evidence of the various factor and it would the be "your obligation or your responsibility" to assign weight to applicable factors. (70 TRT 13267, underlining added.) He told the jury:

> Some of these factors may weigh heavily. Some of these factors may be relatively insignificant in your consideration of the appropriate penalty, but what you will do is determine which of those factors are present, which are absent. Those that are present you will attach that weight to it that you find it entitled.

(70 TRT 13267, underlining added.)

The prosecutor told the jury that the "ultimate test," after a full and complete consideration of the evidence, was whether "you feel that the circumstances in aggravation are so substantial in comparison to the mitigating circumstances, only in that event are you capable of rendering a verdict of death." (70 TRT 13269, underlining added.)

In discussing the factors and evidence, the prosecutor told the jury that appellant wanted "your sympathy" (70 TRT 13272, underlining added) and "mercy from you" (70 TRT 13273, underlining added, but that "[y]our duty is to dispense justice." (70 TRT 13273, underlining added.) He asked, "What is a just punishment?" He told the jury that was "your decision." (70 TRT 13273, underlining added.) He reminded the jurors that each of them had indicated "you

indeed would impose the penalty of death if you felt it was indeed appropriate." (70 TRT 13275.) It was at that point that the allegedly unconstitutional statement was made. (70 TRT 13275.)

Taken in context, however, there is no reasonable likelihood the jurors, after hearing the prosecutor repeatedly exhort them about their duties and obligations, and stress that the decision would be made based on their assessment of the evidence, would take the prosecutor's comment as anything other that a dramatic effort to convince them that death was the just punishment. (Cf. *People v. Jones, supra,* 15 Cal.4th at p. 185 [prosecutor's argument that not imposing death would make death penalty meaningless, though overstated, was within the bounds of proper argument].)

In *Caldwell v. Mississippi, supra,* the prosecutor told the jury that the decision to impose death is not the final decision and would be automatically reviewed on appeal. (*Caldwell v. Mississippi, supra,* 472 U.S. at pp. 325-326.) The trial court also stated that a death verdict would be automatically reviewed. (*Id.* at p. 325.) Here, in contrast, the prosecutor never stated or suggested responsibility for a death verdict rested anywhere other than with the jury; indeed, throughout his argument he referred the jury to "your duty," "your obligation," "your responsibility," "your verdict," "your decision." The claim of *Caldwell* error is simply without merit.

C. Duty To Reach A Patricular Result

Appellant contends the prosecutor's statement was improper because it suggested the jury had a duty to return a death verdict. The argument fails because the prosecutor said no such thing and there is no reasonable likelihood the jury would have understood his argument in that fashion.

In *U.S. v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, the court found the prosecutor crossed "a fine line between a proper and improper 'do your duty' argument" (*id.* at p. 1225) when he told the jury "that you as jurors do your duty and

well consider this matter and find these defendant guilty." (*Id.* at p. 1224.) The court stated it was improper to state "that the duty of the jury is to find the defendant guilt" (*ibid.*), while it is proper to tell the jury it is obligated to convict if every element of the charged crimes are proven beyond a reasonable doubt. (*Id.* at p. 1225.) Similarly, in *State v. Stewart* (1978) 162 N.J. Super. 96, 392 A.2d 234, the court held it improper for the prosecutor to argue that "'a fair trial did not mean a not guilt verdict'" because it is improper to tell a jury that its sworn obligation is to convict. (*Id.* at p. 238.)

In this case appellant points to no reference, much less an improper reference, by the prosecutor to a duty to convict. He claims that the sentence he has picked out would have been so understood, however, he ignores the plain language of the sentence and the context within the argument as a whole. As noted in subdivision B., above, the prosecutor's statement came after a lengthy analysis of the jurors' duties under the law, the legal limitations on imposing a death sentence, and the prosecutor's analysis of the applicability and weight of the various factors which guide the jury's decision. Placed in context, there is no reasonable likelihood the jury would have misinterpreted the prosecutor's statement as invoking a duty to return a death verdict, when in fact he was clearly arguing the appropriateness of a death sentence in light of the overwhelming weigh of the aggravating evidence.[270]

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270. Appellant also cites *Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527. In *Lesko*, the court found the prosecutor's argument suggested the jury had a duty to even the score and invited the jury to impose a death verdict based on the charged murder and a separate murder which was before the jury as an aggravating factor, not for sentencing. (*Id.* at p. 1545.) The court found it improper for the prosecutor to suggest the jury had authority to impose a death verdict for a murder which was not before the jury for sentencing. (*Ibid.*) In this case, appellant does not claim the prosecutor's statement made any such improper suggestion.

D. Disregard Or Discount Mitigating Evidence

Appellant also complains that the prosecutor's statement implied the mitigating evidence should be disregarded or discounted. Again, however, the prosecutor's statement asserted no such thing and the context of his argument as a whole plainly indicated his statement was a comment on the relative weight of the aggravating and mitigating evidence.

Although it is improper to argue that mitigating evidence should not be considered, "'[a] prosecutor does not mischaracterize such evidence [offered in mitigation] by arguing it should not carry extenuating weight when evaluated in a broader factual context.'" (*People v. Sims* (1993) 5 Cal.4th 405, 464; see also *People v. Crew* (2003) 31 Cal.4th 822, 857-858; *People v. Jones, supra,* 15 Cal.4th at p. 185; *People v. Scott* (1997) 15 Cal.4th 1188, 1220.)

In this case, the prosecutor never argued or suggested the jury should disregard the evidence offered in mitigation. Indeed, he spent considerable time discussing the defense evidence as appropriately considered under the "catchall" factor. (70 TRT 13271-13273.) He never told the jury to disregard the defense evidence and while he discounted the mitigating value of the defense evidence when evaluated in a broader factual context, that was entirely appropriate. (*People v. Sims, supra,* 5 Cal.4th at p. 464.)

Finally, for the reasons set forth in Argument LXXXVII, subdivision D., *supra*, any error was harmless.

LXXXIX.

BY FAILING TO TIMELY OBJECT, APPELLANT FORFEITED HIS PROSECUTORIAL CLAIM AND, IN ANY CASE, THE PROSECUTOR DID NOT ERR IN ARGUING THE RELATIVE WEIGHT OF APPELLANT'S MITIGATING EVIDENCE

Appellant contends the prosecutor committed prejudicial misconduct and violated his constitutional due process right to a fair trial by referring to the infamous serial murderer Ted Bundy when discussing mitigating evidence presented by appellant's friends. Appellant claims the references improperly encouraged the jury to disregard and discount his mitigating evidence and was based on facts outside the trial record. (7 AOB 1597-1600.) The claim is waived and without merit.

In discussing the defense evidence offered in mitigation, the prosecution reminded the jury that appellant's "friends came in and said he was a good guy." (70 TRT 13271.) After noting that one of appellant's friends had not seen him in 14 years, the prosecutor said, "Ted Bundy was a good guy when he wasn't murdering people." (70 TRT 13272.) The defense did not object to the argument until the recess and sought a mistrial, not an admonition. For the reasons stated in Argument LXXXVII, subdivision B., *supra*, the claim is forfeited.

Appellant claims the remark was improper because it was premised on facts not in evidence; i.e., "that even the most notorious murders [sic] would be able to present evidence akin to that produced by [appellant]." (7 AOB 1598.) However, while it is generally improper to state facts not in evidence, that general proscription does not apply to matters of common knowledge or illustrations drawn from experience, history, or literature. (*People v. Boyette, supra,* 29 Cal.4th 381, 463.) At that time, Ted Bundy, like other infamous multi-murderers such as Charles Manson and Adolf Hitler, existed in infamy in the public consciousness. Moreover, it was not simply because he was a notorious murderer that he had notoriety, but

because of his boy-next-door looks and personality. It was not improper for the prosecutor to reference Ted Bundy in his argument.[271]

Appellant also argues the reference unfairly prejudiced the jury's consideration of his mitigating evidence. It did not. In *People v. Jones, supra,* 15 Cal.4th 119, the prosecutor argued that "every murderer on death row 'really probably grew up as a kid, nice kid.'" (*Id.* at p. 185.) This Court found the argument "was proper because the prosecutor 'did not imply that the jury should disregard the evidence of defendant's background, but rather that, in relation to the nature of the crimes committed, it had no mitigating effect.'" (*Ibid.*, quoting *People v. Sims, supra,* 5 Cal.4th at p. 464; see also *People v. Millwee, supra,* 18 Cal.4th at p. 153 [prosecutor's reference to Hitler and Manson was a permissible basis for assisting the jurors in exercising their sentencing discretion]; *People v. Pinholster* (1992) 1 Cal.4th 865, 964 [prosecutor's reference to Hitler having a mother who loved him was proper attempt to diminish the weight of defendant's evidence in mitigation].)

In this case, the prosecutor said nothing to suggest the jury was to disregard the evidence from appellant's friends. Indeed, the prosecutor acknowledged this evidence was properly before the jury and should be considered by the jury under the "catchall" factor. (70 TRT 13271-13272.) However, as was the case in *Jones, Millwee, Sims,* and *Pinholster,* it was proper for the prosecutor to argue to the jury that appellant's evidence, in relation to the nature of the crimes had little or no mitigating weight. There was no prosecutorial error.

Finally, for the reasons set forth in Argument LXXXVII, subdivision D., *supra*, any error was harmless.

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271. Indeed, the defense also referenced several publicized murder cases in which the defendants did not receive the death penalty. (70 TRT 13295.)

XC.

THE ALLEGED INSTANCES OF PROSECUTORIAL MISCONDUCT IN PENALTY PHASE ARGUMENT DID NOT CUMULATIVELY PREJUDICE APPELLANT

Citing his previous arguments concerning claims of prosecutorial misconduct in the penalty phase argument, appellant claims that if not individually prejudicial, cumulatively they require reversal. (7 AOB 1601.) However, as described in the responsive argument, there was only one error in the prosecutor's argument, which the trial court corrected with an admonition, and that correction was duplicated in an instruction. Moreover, for the reasons stated in Argument LXXXVII, subdivision D., *supra*, any cumulative error was harmless.

XCI.

APPELLANT FORFEITED HIS APPELLATE CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS CHALLENGE FOR CAUSE BY FAILURE TO USE AN AVAILABLE PEREMPTORY CHALLENGE TO REMOVE THE JUROR AND THE T RIAL COURT DID NOT ERR IN ITS RULING

Appellant contends the trial court prejudicially erred and violated his constitutional right to an impartial jury by denying a defense challenge for cause to juror S.B. (7 AOB 1602-1621.) The claim is forfeited by appellant's failure to use available peremptory challenges to remove the juror. The claim is also without merit.

A. Juror S.B.

In her questionnaire, Juror S.B. indicated she supported the death penalty somewhat strongly (104 CT 23455); she did not respond to the question about the purpose served by the death penalty (104 CT 23456); and in response to the question about whether there were any crimes for which the death penalty should always be

imposed, she wrote, "I think the death penalty should be available for any heinous crime." (104 CT 23457.)

In response to questioning by the trial court, Juror S.B. said she would not close her mind to mitigating evidence and an L.W.O.P. sentence simply because appellant was proven guilty of the charged murders, nor would she close her mind to a death sentence. (293 PRT 33719-33720.) She stated that she could reserve judgment on the appropriate sentence following conviction of the crimes in this case until she heard additional background evidence and discussed the evidence and legal factors with her fellow jurors. (293 PRT 33720.) She would have no hesitancy returning either sentence which she felt was appropriate. (293 PRT 33271.)

When asked by defense counsel to rate the responsibility of having to decide "this type of case with these type of allegations," she said, "Well, I think I have a rather open mind, and I will listen before I make a decision." (293 PRT 33734.) When asked about the purpose for having a death penalty, she said, "it's the ultimate penance for someone committing a heinous crime." (293 PRT 33734-33735.) When asked for her definition of a heinous crime, she said, "Well, I would have to say bodily harm to a small child would be the worst" and she acknowledged that the two charged murders of three-year-old children were heinous in her view. (293 PRT 33725.)

When asked whether she would be leaning toward a death penalty when entering the penalty phase after having convicted appellant of the premeditated murder of four women and two three-year-old children, she said, "I would have to listen to the mitigating circumstances and things of that nature before I could make a definite judgment." (293 PRT 33736.) When asked if she would enter the penalty phase with an open mind as to the two penalties, she said, "I would probably have to be - - it would have to be proven to me then, I am afraid. . . . That a life sentence was - - should be voted." (293 PRT 33736.) She agreed she would be "substantially leaning" in favor of a death penalty "at that point," but "I would listen, I really

would. That's all I can say. It's truthful." (293 PRT 33736-33737.) When asked if she could deliberate the penalty decision with an open mind when no factors in mitigation were presented in the penalty phase, she said, "I probably would find it hard to go in open-mindedly, if the defendant had been found guilty. I would more or less need to be convinced in some way that he deserved a life sentence rather than a death." (293 PRT 33748-33749.)

In questioning by the prosecutor, Juror S.B. agreed that she considered these crimes to be of an aggravated nature which weighed in favor of a death sentence. (293 PRT 33749.) She said that "in the penalty trial . . . where background and other items are brought up," she could discuss such matters openly and even if she had heard no evidence she found mitigating in the penalty phase, she would still be able to discuss the two penalties "because possibly one of [her fellow jurors] had interpreted something as mitigating." (293 PRT 33750-33751.) When asked if she heard evidence in the penalty phase which came under the mitigating factors, whether that might affect her sense of compassion and her consideration of a life sentence, she said, "I really don't know . . . I would have to her the actual evidence before I could say something. . . ." (293 PRT 33752.) However, she agreed it was possible for her to consider a life sentence if mitigating evidence was presented during the penalty phase. (293 PRT 33753.)

The trial court then heard and denied a defense challenge for cause. (293 PRT 33754-33761.) However, the trial court also permitted additional questioning. (293 PRT 33761-33764.) When the defense then asked Juror S.B. what might prompt her to consider a sentence other than death in a case of the murder of four women and two three-year-old children, she said, "I can't think of the proper words, but compassion. I think I have compassion." (293 PRT 33765.)

B. Forfeiture

> To preserve a claim of error in the denial of a challenge for cause, the defense must either exhaust its peremptory challenges and object to the jury as finally constituted or justify the failure to do so.

(*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [30 Cal.Rptr.2d 818, 874 P.2d 248]; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088 [259 Cal.Rptr. 630, 774 P.2d 659].) (*People v. Lucas, supra,* 12 Cal.4th 415, 480.)

As appellant concedes (7 AOB 1606), when the jury, including Juror S.B., was sworn, he had exercised only 15 of his 26 peremptory challenges. (306 PRT 36181-36184.) He also did not object to the jury as finally constituted nor has he justified his failure to remove the juror with a peremptory. "Accordingly, the point is waived and will not be considered on the merits." (*Ibid.*)

Appellant argues against the waiver rule, contending that leaving a biased juror on the jury undermines the reliability requirement of the Eighth Amendment and if waiver of the right to an impartial jury is permissible it cannot be accomplished by the actions of counsel. However, appellant has not waived his right to an impartial jury; he has simply failed to properly preserve for appellate review his claim of trial court error in denial of the challenge for cause. It is more properly characterized as a forfeiture. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590, and fn. 6.) Consequently, there was no requirement that appellant make a personal, intelligent and knowing waiver.

Moreover, this Court has said that a "[d]efendant's right to a fair and impartial jury is not compromised as long []as he could have secured the juror's removal through the exercise of a peremptory challenge." (*Ibid.*) It follows that Eighth Amendment reliability is also not compromised when the defendant has a peremptory challenge available to remove the allegedly biased juror.

Appellant also claims that requiring him to use an available peremptory challenge improperly requires he make a choice between his right to appeal the trial court's ruling and his right to determine whether to exercise a peremptory challenge.

Of course, "peremptory challenges are not of constitutional dimension." (*Ross v. Oklahoma,* (1988) 487 U.S. 81, 108 S.Ct. 2273-2278, 101 L.Ed.2d 80.) This Court has recognized that, even as to constitutional rights, not all tradeoffs are forbidden; some hard choices are not unconstitutional. (*People v. Frye, supra,* 18 Cal.4th at p. 940 [right to speedy trial and right to effective assistance of counsel].) In this case, appellant does not even pose a hard choice. Unlike most trial court rulings, where the defense must accept the adverse ruling and seek appellate relief, the availability of a peremptory challenge provides an "instant" remedy for an allegedly incorrect ruling on a challenge for cause, thereby ensuring a fair trial by an impartial jury. All appellant had to give up was the opportunity to have 11 peremptory challenges go unused rather than 10. The claim of error is forfeited.

C. The Trial Court Did Not Err In Failing To Grant The Challenge

> [A] challenge for cause should be sustained as to any prospective juror whose views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the court's instructions and the juror's oath (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 851-852, 105 S.Ct. 844]). A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause. . . .

(*People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1005.)

The trial court found Juror S.B. was not substantially impaired. (293 PRT 33761.) Substantial evidence is the standard of review applicable to a finding on the potential effect of a prospective juror's views related to capital punishment. The same standard applies for determining the nature of such views. (*People v. Wilson* (2005) 36 Cal.4th 309, 324.) As delineated in section A, the trial court's finding is supported by substantial evidence.

Appellant ignores the numerous statements Juror S.B. made indicating her willingness to follow the oath and the trial court's instructions. Instead, he faults the trial court's finding based on Juror S.B.'s statements that had she only the murder convictions of four women and two three-year-old children to consider, she would lean toward death and would need mitigating evidence before returning a life sentence. However, neither the defense questions, nor Juror S.B.'s answers ever suggested any basis for finding her views would prevent or substantially impair her performance as a juror in accordance with the trial court's instructions or her oath. The statements which appellant relies on to support his claim show only that Juror S.B. would find the murders of four women and two children to be aggravating evidence which weighed in favor of death - hardly a surprising position. She never indicated an inability to follow the law or to weigh and consider the sentence in light of all of the evidence presented, including mitigating evidence.

Citing *People v. Boyette, supra,* 29 Cal.4th at pages 417-418, appellant asserts that a juror substantially leaning in favor of one side is not impartial and unbiased, and should be excused. (7 AOB 1609.) However, the juror in *Boyette*, was strongly biased in favor of imposing the death penalty without consideration of any facts involved in the case, was not open to imposing a life sentence, and would not follow the trial court's instruction to assume a life sentence would not result in the defendant's release. (*People v. Boyette, supra,* 29 Cal.4th at pp. 417-418.) Juror S.B. shared none of the attitudes which this Court found should have resulted in the removal of the juror in *Boyette.*

Appellant also cites *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, for the proposition that "the quality of indifference . . . is the hallmark of an unbiased juror." (*Id.* at p. 982.) However, Juror S.B.'s answers to the trial judge's questions demonstrated she was indifferent to the two available punishments. It was only when she was placed in the position of judging the weight of exceedingly strong aggravating factors - the actual murders of four woman and two children - that she

leaned toward the death penalty. As the trial court aptly noted, the defense questioning which placed Juror S.B. in the position of prejudging the penalty decision based only on unmitigated aggravating convictions was unfair to the juror and her leaning under the circumstances did not reflect lack of impartiality. (293 PRT 33755-33757, 33759, 33761.)[272] Juror S.B. never indicated she would automatically vote for death and repeatedly indicated she was open to either penalty and to mitigating evidence.

Appellant asserts Juror S.B.'s leaning violated California law applying no burden of proof to either side. However, Juror S.B. never imposed any burden of proof; instead, she indicated she would lean toward death based on severely aggravating convictions (four women and two young children) and would look to any mitigating evidence to change her leaning toward a life sentence. As noted earlier, her statements reflected her assessment and weighing of limited aggravating factors without being given all of the penalty phase evidence and any of the mitigating evidence. Moreover, in *People v. Stewart* (2004) 33 Cal.4th 425, this Court stated:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra*, 469 U.S. 412, 105 S.Ct. 844. . . . A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

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272. In a footnote, appellant asserts the trial court had a *sua sponte* duty to remove the juror. (7 AOB 1609, fn. 1370.) However, in *People v. Bolin* (1998) 18 Cal.4th 297, this Court rejected any such duty and stated that the cases on which appellant relies created a "misperception." (*Id.* at p. 315, fn. 2.)

(*Id.* at p. 447.)

In *Stewart*, this Court addressed the removal of a juror who was personally opposed to the death penalty and indicated that his opposition would either prevent or make it difficult to vote for a death sentence. (*Id.* at p. 446.) However, this Court stated:

> "The real question is whether the jurors attitude will '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' (*Wainwright v. Witt, supra*, 469 U.S. at p. 424, 105 S.Ct. 844, fn. omitted.) A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. *A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict.*' (Italics added.)"

(*Ibid.*, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

Like the juror personally opposed to the death penalty, Juror S.B.'s leaning toward the death penalty based solely on the number and character of the murders, did not disqualify her from service under *Witt*. The fact she viewed the murders as aggravating and weighing in favor of a death verdict may not be a basis for exclusion "'*unless that predilection would actually preclude [her] from engaging in the weighing process and returning a capital verdict.*' (Italics added.)" (*Ibid.*)

> *Kaurish, supra,* 52 Cal.3d 648, recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty.

(*People v. Stewart, supra,* 33 Cal.4th at p. 477.)

Of course, Juror S.B. never expressed any view that would lead her to impose a higher threshold before imposing a life sentence or that would make it very difficult to impose a life sentence. All she indicated was the very understandable view that she would weigh conviction of the six charged murders as sufficiently aggravating

to impose a death sentence absent counterbalancing mitigating evidence. While the defense was able to have Juror S.B. preview her assessment of the most severe aggravating evidence, she never indicated any unwillingness or impaired ability to follow the trial court instructions and the oath.

XCII.

THE TRIAL COURT'S PRE-PENALTY PHASE CAUTIONARY ADMONITION DID NOT PERMIT THE JURY TO PREJUDGE THE PENALTY DECISION

Appellant contends the trial court prejudicially erred and violated his constitutional rights by implying that the jury was free to form an opinion on punishment before the start of the penalty phase, when it failed to admonish the jury against such action in its post-guilt verdict admonition. (7 AOB 1622-1625.) Appellant waived his claim of error by failing to request the trial court amplify or modify its instruction. Additionally, it is not reasonably likely the jury would have engaged in the mental gymnastics necessary to reach that conclusion.

After accepting the jury's guilt phase verdicts and declaring a mistrial as to counts the jury was unable to decide, the trial court reminded the jury that "this does not end your service. . . . You are not done as to your service, as you know. We have a second phase of trial. . . ." (65 TRT 12320.) After discussing the date for commencement of the penalty phase, the trial court told the jury, "I want to admonish you strongly" that "[a]ll of you are still full participants in this trial, and you must remember the admonition that you are not to discuss anything concerning the case whatsoever with anybody, not even the persons with whom you live at home. You are not to conduct any investigations of any kind concerning the case. You are not to subject yourselves to any news reports of any kind on the radio, television, or in the newspapers. . . ." (65 TRT 12321.)

Noting that the jury was admonished during the guilt phase not to form or express any opinion until the matter is submitted for decision (7 AOB 1622),

appellant argues that the jurors would have noted the absence of that particular admonition in the trial court's post-verdict instruction, and surmised from its absence that they were free to form an opinion as to penalty prior to the penalty phase.

Appellant points to nothing erroneous in the trial court post-verdict instructs to the jury and, in particular, does not contend the trial court actually instructed the jury it may form an opinion as to penalty. Instead, he contends that the absence of a particular admonition not to form an opinion, combined with the trial court's guilt-phase admonitions not to form any opinion until the case was submitted for decision, might have been taken by the jury to permit, by implication, the forming of opinions regarding penalty before the case was submitted for penalty deliberations. However, appellant made no request that the trial court amplify or clarify its admonition. Thus, the claim of error is waived. (*People v. Alvarez, supra,* 14 Cal.4th at p. 223; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1142; *People v. Johnson, supra,* 3 Cal.4th at p. 1236.)

The claim is also without merit. When a trial court's instruction is challenged, the reviewing court must view the challenged instruction in the context of the instructions as a whole to determine whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. (*People v. Reliford, supra,* 29 Cal.4th at p. 1013.) In this context it appears appropriate to consider the challenged admonition (which is simply an instruction) in light of the admonishments provided to the jury to that point. Appellant impliedly agrees, in that the basis for his claim is an alleged interpretation of the admonition in light of prior admonitions.

After swearing the jury and the alternates, the trial court provided the jurors with "a handout of the admonishment so that [the jury would] remember that and [the trial court would not] have to keep rereading it all the time." (308 PRT 36639.) While stressing the press interest and the hazards of discussing the case, the trial

court emphasized that the admonishment "is the most important thing you can keep in your mind." (308 PRT 36640.) In that admonition, the jury was told:

> Ladies and Gentlemen, you are ordered NOT TO:
>
> 1. Communicate among yourselves or with anyone else on any subject connected with this trial.
>
> 2. Form any opinion or express any opinion on the case until the cause is finally submitted to you.
>
> 3. Permit yourself to see or hear any news report or broadcast of any kind about this case.
>
> 4. Conduct any kind of personal investigation whatsoever concerning the case.

(114 CT 25551 [Court's Trial Ex. 10]; see 71 CT 15833 [admonition and trial holiday schedule marked as Court's Trial Ex. 10]; 114 CT 25554 [Court's Trial Exh. 11]; 1 TRT 1 [Court's Exh. 11 includes admonition and other items provided in the jury's notebooks].)

It is highly unlikely, not reasonably likely, that the jury would have concluded it was relieved on the obligation not to form any opinion on the case simply because the trial court stressed the press interest and the need not to talk about the case following the verdicts, a time when press and public interest would naturally arise. Indeed, after providing the written admonition to the newly sworn jury, the trial court stressed the press interest and not speaking to others about the case. (308 PRT 36640.) Appellant points to one instance in which the trial court expressly admonished the jury not to form or express any opinion until the case was submitted, which occurred after both sides rested. (7 AOB 1622, citing 59 TRT 11290.) At that time the trial court restated the entire written admonition. (59 TRT 11291.)

However, the trial court did not restate the entire admonition at every adjournment and often simply reminded the jury of the admonition. (See, e.g., 1 TRT 87 [first trial break, trial court reminds jury not to discuss the case or form

opinions, does not mention news reports or personal investigation], 178 [end of first day, trial court reminds jury of admonition not to "see, hear, or speak anything about the case," not mentioning forming opinions, news reports or personal investigation].)

When considered in light of the admonitions provided throughout the trial, there is no reasonable likelihood the jury understood the trial court's post-verdict admonition as removing the obligation not to form any opinion on penalty.[273]

Moreover, any error was harmless. Even if any juror were to have concluded he or she was permitted to form, but not express an opinion on penalty, there is no evidence any juror did so. Additionally, in the trial court's penalty phase introductory instructions, it reminded the jurors of the admonition including "not to form or express any opinion about the penalty phase determination you are being asked to decide in this case" (67 TRT 12593), thereby effective instructing the jurors to discard any previously formed opinion. Thus, not only is there no evidence that any juror formed an opinion on penalty, the trial court's introductory instructions negated the prejudicial effect of any previously-formed penalty opinion. Under even the more strict standard for constitutional error, the alleged instructional error by omission was harmless beyond a reasonable doubt.

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273. The claim is even more unlikely in light of the express admonition not to "discuss anything concerning the case whatsoever with anybody." (65 TRT 12321.) The jurors would have had to conclude that they were permitted to form opinions without discussing them with other jurors which is contrary to admonition on how to conduct deliberations. (65 TRT 12215.)

XCIII.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO RE-VOIR DIRE THE JURY BEFORE THE PENALTY PHASE AS IT WAS BASED SOLELY ON SPECULATION WHICH IS ALSO THE ONLY BASIS OF HIS ASSERTION OF PREJUDICE

Appellant contends the trial court prejudicially erred and violated his constitutional rights when it denied his motion to re-voir dire the jury prior to the penalty phase. (7 AOB 1626-1635.) Inasmuch as his claim of error and assertions of prejudice are based entirely on speculation, the claim must be denied.

In its pre-penalty phase hearings, the trial court ruled that the jury would be precluded from considering the Strang and Fisher murders in the penalty phase. (66 TRT 12343.) Based on the jury's eleven-to-one vote to convict on the Strang and Fisher counts, appellant moved, in the alternative, for a judgment of acquittal on the Strang and Fisher counts, that a new jury be impaneled to try the penalty phase, or that the jury be subjected to voir dire questioning. (66 TRT 12381.) The trial court denied all three motions. (66 TRT 12381.) Ultimately, the trial court instructed the jury to disregard the guilt phase evidence as it related to the Strang, Fisher and Garcia murders. (70 TRT 13326.)[274/] It also restated that limitation in answer to a jury

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274. The pertinent portion of the penalty phase jury instructions stated:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during the guilt phase of this trial insofar as such evidence is relevant to factors in aggravation or mitigation, except you may not consider any evidence produced at the guilt phase with respect to the victims Gayle Garcia, Rhonda Strang, and Amber Fisher.

(70 TRT 13326.)

question regarding the proper scope of the jury's consideration of guilt phase evidence. (65 CT 14401, 14403.)[275/]

Appellant does not challenge the trial court's denial of his motion for acquittal or his motion for a new jury. Instead, he contends the trial court erred in denying his request to voir dire the jury. He argues that the eleven jurors who voted to convict on the Strang and Fisher murders would be unlikely to be able to disregard those murders in assessing the penalty decision, despite the trial court's instruction. To the

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275. In answer to the jury's question, the trial court indicated, in pertinent part:

> Evidence of the circumstances of the crimes of which defendant was convicted, and the finding of the special circumstances in the guilt phase may be considered in the penalty phase insofar as such evidence is relevant to factors in aggravation or mitigation. Such evidence may be considered in the penalty phase just as if it had been presented in the penalty phase. [¶] The exception is that no evidence relating to the Garcia and Strang-Fisher cases may be considered by you in the penalty phase.

(65 CT 14401.)

> Ladies and Gentlemen:
>
> A matter of clarification. In case there is any question, the jury should understand that it has access to the following during deliberations as the Penalty Phase:
>
> Jury Instructions, Jurors' Notes, Exhibits, and Verdict Forms from the Penalty Phase.
>
> Jury Instructions, Jurors' Notes, and Exhibits from the Guilt Phase. (Except: The Jury must exclude from consideration those Guilt Phase Instructions, Notes and Exhibits relating to the Garcia and Strang-Fisher cases.)

contrary, the only error the trial court made was in precluding the jurors from considering the Strang and Fisher murders under factor (b).

Under Penal Code section 190.3, subdivision (b), the penalty phase jury "shall take into account" "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Appellant neither justifies the trial court's limitation, nor argues that the Strang and Fisher murders did not constitute criminal activity involving the use of force or violence.[276]

Despite the fact that Penal Code section 190.3 prohibits the presentation of evidence of prior criminal activity of which the defendant was tried and acquitted, that section "obviously was intended to preclude presentation at the penalty phase of criminal charges of which the defendant was acquitted in a *different* proceeding, not charges disposed of in the present prosecution." (*People v. Bonillas* (1989) 48 Cal.3d 757, 786, italics in orig.) As this Court stated in *Bonillas*, the statutory preference for a single jury to hear the guilt and penalty phases of the trial "contemplates that the jury may have considered charges at the guilt phase of which the defendant was acquitted." (*Ibid.*) The same may be said of charges on which the jury was unable to reach a verdict. In either case, the jury's consideration of the evidence underlying charges that did not result in a guilty verdict is limited by whether those charges involved force or violence (factor (b)) and whether they were proven beyond a reasonable doubt (*People v. Robertson* (1982) 33 Cal.3d 21, 53-57). In this case, the trial court erred in its limitation. If, as appellant speculates, the jury did consider the Strang and Fisher murders as aggravating evidence, he has not established that such consideration was erroneous under state or federal law.

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276. Indeed, the trial court offered no legal reason for its ruling, only citing the practical difficulty created if a retrial of the Strang and Fisher cases resulted in an acquittal. However, that would be for the DA, not the trial court to decide, and, in any event, would justify exclusion of all factor (b) crimes on which the statute of limitation had not run.

In essence, appellant's argument boils down to a claim that he was not likely to get the benefit of the trial court's erroneous ruling, but that claim also fails. The trial court's decision not to impanel a new jury for the penalty phase or to re-voir dire the jury is reviewed for an abuse of discretion. (*People v. Bradford, supra,* 15 Cal. 4th at p. 1353.) "[A] showing of good cause is a prerequisite to granting the motion to discharge the jury *or* to reopen voir dire." (*Id.* at p. 1354.) Mere speculation that good cause to discharge the jury might be discovered by questioning the juror does not require such questioning. (*Ibid.*) In *Bradford*, this Court detailed numerous cases in which the trial court properly denied impanelment of a new jury or reopening voir dire based on nothing more than speculation on the effect of various aspects of the guilt and penalty phases on the jury. (*Id.* at pp. 1354-1355.) In addition, in *Bradford*, this Court found that specific conduct of jurors at the outset of deliberations which did not amount to misconduct did not amount to good cause. (*Id.* at p. 1355.)[277] Here, appellant points to no facts demonstrating an inability of the part of the jurors to follow the trial court's erroneous instruction. He simply speculates that those jurors who voted to convict on Strang and Fisher would be unlikely to follow the instruction.

Appellant also faults the trial court's instruction. He claims it conflicted with the factor (b) instruction which permitted consideration of the Strang and Fisher murders. There was no conflict, only the statement of the general rule and an exception. He claims the instruction only excluded consideration of evidence, instructions and exhibits, without telling the jurors to disregard their impressions of appellant's moral culpability. However, impressions of moral culpability cannot be

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277. Appellant's suggestion of a duty to inquire lacks merit. (7 AOB 1628.) In both cases he cites, this Court discussed the trial court's duty to inquire to determine facts alleged as juror misconduct whenever the court is put on notice that good cause to discharge a juror may exist. (*People v. Jenkins, supra,* 22 Cal.4th at p. 985, and *People v. Davis, supra,* 10 Cal.4th at p. 547.) There was no such good cause here, only speculation.

so easily divorced from the evidence from which they arose. In telling the jury not to consider the evidence exhibits and instructions relating to Garcia, Strang, and Fisher, the trial court essentially removed those crimes from the penalty consideration. He also claims the instruction was ineffective because the Strang and Fisher murders just could not be ignored by jurors who found him guilty. However, as we have already noted, that did not create any error because that evidence was properly considered. Moreover, as already discussed his claim of bias arising in the jurors who found him guilty is nothing more than speculation.

Finally, because the only error which occurred harmed the prosecution and benefitted the defense, appellant has not been prejudiced.

XCIV.

THE LINGERING DOUBT INSTRUCTION WAS NOT CONSTITUTIONALLY DEFICIENT

Appellant claims the trial court prejudicially erred and violated his constitutional rights by providing a lingering doubt instruction which allowed, but did not require the jury to consider lingering doubt; did not require the jury to apply lingering doubt to individual convictions; failed to identify lingering doubt as a mitigating factor; and did not define lingering doubt. (7 AOB 1636-1642.) None of the asserted deficiencies withstands scrutiny.

The trial court penalty phase instructions included the following instruction on lingering doubt:

> Despite your determination in the first phase of this trial that the evidence proved [appellant's] guilt of multiple counts beyond a reasonable doubt, you may consider any lingering doubts you may have about [appellant's] guilt in your determination of the appropriate penalty.

(70 TRT 13328-13329.)

As discussed in Argument LVI., *supra,* there is no reasonable likelihood that the jury viewed the instruction as permitting it to arbitrarily disregard lingering doubt

in reaching its verdict. (*Boyde v. California, supra,* 494 U.S. at p. 381.) In the first place, the instruction simply did not state the jury was free to arbitrarily disregard lingering doubt; instead, it addressed a subject area not covered in the factors the jury was to consider in determining punishment (see 70 TRT 13326-13327) and expressly permitted consideration of lingering doubt as part of the penalty determination.

Moreover, instructions are not viewed in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was so instructed. (70 TRT 13320.) The jury was instructed that despite the guilt phase instruction to the contrary, it "may properly consider sympathy, pity, and mercy" in determining penalty. (70 TRT 13330.) Like the lingering doubt instruction, the sympathy instruction ensured the jury would understand it was permitted to consider matters not expressly included in the statutory factors in determining penalty, not that it was permitted to arbitrarily disregard such matters. Moreover, each instruction pointed the jury to permissible considerations in reaching the penalty determination. An instructional requirement for consideration in reaching the penalty would have mandated the jury's inclusion of such matters in its determination of penalty even if it found those matters of no significance or weight, a point appellant concedes would have been incorrect. (7 AOB 1638.)

As there is no reasonable probability the jury would have understood the lingering doubt instruction as permitting arbitrary rejection of lingering doubt, there was no error.

In arguing that the instruction was "misleading" by implication (7 AOB 1638), appellant apparently concedes that, at worst, the instruction was ambiguous. Yet, there is no reasonable likelihood the jury would have understood the instruction as precluding consideration of lingering doubt relating to only one conviction. While the instruction began by referencing appellant conviction of multiple counts, the jury

was instructed it may consider "any lingering doubts you may have about [appellant's] guilt." (70 TRT 13328, underlining added.) Even if ambiguous, the language is broadly worded so as to reasonably include a lingering doubt as to appellant's guilt of only one conviction. Indeed, appellant does not explain how a jury might come to the conclusion that the instruction precluded consideration of lingering doubt unless such doubt applied to all convictions. Certainly, the instruction permits consideration of lingering doubt as to all convictions, but as explained it also includes lingering doubt as to only one conviction.

As there is no reasonable probability the jury would have understood the lingering doubt instruction as allowing consideration of lingering doubt only if it reach all convictions, there was no error.

Appellant cites no authority supporting his claim that lingering doubt must be identified as mitigating. This Court has held that the statutory factors need not be identified as aggravating or mitigating because the aggravating or mitigating nature of those factors is self-evident. (*People v. Frye, supra,* 18 Cal.4th at p. 1026.) It is difficult to even imagine how any juror, much less a reasonable jury, would come to any other conclusion concerning lingering doubt.

Once again, appellant fails to cite any authoritative support for his claim. Appellant concedes he asked for no instructional definition of the term (see 7 AOB 1640, fn. 1390) and "[a] court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language, but it does have a duty to define terms that have a technical meaning peculiar to the law." (*People v. Bland, supra,*28 Cal.4th at p. 334.) The term lingering doubt has no technical legal meaning and simply refers to its commonly understood meaning of any remaining uncertainty. That commonly understood meaning is also reinforced by the reasonable doubt instruction, which the jury received in both the guilt and penalty phases and which described reasonable doubt as not including mere possible doubt. (See 70 TRT 13329.) In the context of the lingering doubt and reasonable doubt

instructions, it was uncertainty that remained in the minds of any juror, despite an abiding conviction to a moral certainty in the truth of the charge.

Appellant points to cases in which this Court has approved instructions which have given a definition of lingering doubt. (7 AOB 1640.) However, neither of those cases held that lingering doubt has a technical meaning peculiar to the law. (*People v. Snow, supra,* 30 Cal.4th at p. 125; *People v. Arias, supra,* 13 Cal.4th at pp. 182-183.)

Appellant claims the jurors might conclude that lingering doubt was simply a double-check on the guilty verdicts in that it "relate[d] to" whether they were still convinced of appellant's guilt beyond a reasonable doubt. (7 AOB 1640.) That is not a construction which reasonable jurors would likely reach. The lingering doubt instruction presented lingering doubt as a possible consideration "[d]espite" the jury's finding of guilt beyond a reasonable doubt and it allowed consideration of "any lingering doubt" unconnected to the previous guilt determination. Moreover, even the double-check option would not limit the jurors' consideration of any other lingering doubt, which existed despite a continuing belief that appellant's guilt had been proven beyond a reasonable doubt. Thus, even if the jurors reexamined their guilt determination and adhered to their determination that guilt had been proven beyond a reasonable doubt, they were still left with "any lingering doubt" as a consideration.

XCV.

THE TRIAL COURT'S INSTRUCTIONS DID NOT LIMIT THE JURY'S CONSIDERATION OF MITIGATION TO EVIDENCE OFFERED BY THE DEFENSE

Appellant contends the trial court prejudicially erred and violated his constitutional rights in its instructions to the jury, four words of which he contends restricted the jury's consideration of potentially mitigating evidence. (7 AOB 1643-

1646.) No reasonable jury would have understood the trial court's instructions in the manner appellant claims.

As noted previously, jurors are presumed to be intelligent, and capable of understanding and applying instructions to the facts of a case. (*People v. Lewis, supra,* 26 Cal.4th at p. 390.) Moreover, instructions are not viewed in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was so instructed. (65 TRT 12185.)

In its penalty phase instructions, the trial court gave the following instruction regarding evidence and factors the jury was to consider in reaching a penalty:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during the guilt phase of this trial insofar as such evidence is relevant to factors in aggravation or mitigation . . . [¶] You shall consider, take into account, and be guided by the following factors, if applicable: . . . [¶] 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, background or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
>
> (64 CT 14266-14267; 67 TRT 12590-12591 [pre-penalty phase instructions]; 65 CT 14373-14374; 70 TRT 13326-13327 [penalty phase closing instructions].)

Appellant argues use of the phrase "that the defendant offers" prevented the jury from considering guilt phase evidence presented by the prosecution which the jury might have considered mitigating; specifically, evidence of appellant's kindness to others, evidence of appellant's business initiative, acumen and responsibility, and evidence of appellant's drug and alcohol use. However, the instruction says nothing about limiting consideration of evidence. To the contrary, it specifically instructs the jury to consider "all of the evidence which has been received during the guilt phase of this trial" in examining the aggravating and mitigating factors. Moreover, the mitigating factor described in the instruction does not end with "that the defendant

offers," but describes "any sympathetic or other aspect of the defendant's character, background or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (Emphasis added.)

In argument to the jury, defense counsel stressed the language of the instruction which focused on mitigation arising "any sympathetic or other aspect of the defendant's character, sympathetic, whether or not related to the offense. His background." (70 TRT 13290.) In addressing sympathy, defense counsel told the jury to consider "[w]hat [appellant] has done in the past." (70 TRT 13291.) In discussing appellant's likely behavior in prison, defense counsel pointed to "[h]is work record. Those with good work records on the outside do well inside. Generally a good sign for adjustment purposes." (70 TRT 13296.) Defense counsel argued appellant "has positive lifelong character traits of being a good worker." (70 TRT 13298.) Defense counsel argued that appellant "has the ability to help other people" and pointed specifically to the occasion appellant gave Vicky Johnson money to get medical care for her son. (70 TRT 13300; see 67 TRT 12624.) Appellant was described as a "loving and considerate son, brother, uncle, and friend" and "a person who helped people," who "gave people employment and training," and who "helped people whether they were family or not." (70 TRT 13309.) Thus, the defense offered, as a basis for a sentence of less than death, appellant's kindness to others and his work ability and accomplishments, regardless of the source of the evidence.

As to appellant's drug and alcohol use, all of that evidence was part of the circumstances of the crimes, a factor which the jury was specifically instructed to consider. (64 CT 14266; 67 TRT 12590; 65 CT 14373; 70 TRT 13326.) In addition, the jury was instructed to consider as a factor, whether intoxication, without regard to its cause, impaired appellant's ability to appreciate the criminality of his conduct or conform his conduct to the requirement of the law. (64 CT 14267; 67 TRT 12591; 65 CT 14374; 70 TRT 13327.) And, like the other matters, defense

counsel argued appellant's use of intoxicants as a matter of mitigation. (70 TRT 13309.)

Finally, in response to a jury question about its consideration of guilt phase evidence, the trial court's response stated, in pertinent part:

> Evidence of the circumstances of the crimes of which defendant was convicted, and the finding of the special circumstances in the guilt phase may be considered in the penalty phase insofar as such evidence is relevant to factors in aggravation or mitigation. Such evidence may be considered in the penalty phase just as if it had been presented in the penalty phase. . . . [¶] You may view factors (a), (b) and (c) as aggravating or mitigation.

(108 CT 24253, underlining added.)

Considering the instructions as a whole, particularly in light of the arguments of defense counsel there is no reasonable likelihood the jury would have understood the phrase "that the defendant offers" to preclude consideration of mitigating evidence presented by the prosecution during the guilt phase. Moreover, because all of these matters were brought to the jury's attention as mitigation during the defense argument, any error in the instruction was harmless.

XCVI.

THERE IS NO REASONABLE LIKELIHOOD THAT THE JURY APPLIED A GUILT PHASE INSTRUCTION DESIGNED TO PREVENT THE JURY'S CONSIDERATION OF REACTIONS TO EVIDENCE AS PRECLUDING GIVING MITIGATING EFFECT TO APPELLANT'S GOOD BEHAVIOR DURING TRIAL

Appellant claims the trial court erred and his constitutional rights were violated by a guilt phase instruction which directed the jury to disregard any reaction to evidence presented during the trial. He claims the instruction unconstitutionally prevented the jury, during the penalty phase, from giving mitigating effect to his good behavior during the trial. (7 AOB 1647-1649.) There is no reasonable likelihood the jury understood the instructions in that way.

As appellant points out (albeit in a footnote – see 7 AOB 1647, fn.1397), the allegedly offensive instruction came in the guilt phase, not in the penalty phase. The instruction stated:

> The reactions to evidence introduced during the trial, if any, by the judge, court personnel, attorneys, defendant, or any spectator do not constitute evidence and cannot be considered. If you have observed any such courtroom reactions, it is your duty to disregard the observations.

(65 TRT 12186.)

In an effort to tie the instruction to the penalty phase, appellant says the jury was advised that the instruction applied to the penalty phase because it did not conflict with the penalty phase instructions. The penalty phase instruction to which appellant refers stated:

> In deciding the question of penalty you must follow the instructions which I am now reading. Any prior instructions you have been given which are in conflict with the instructions I am about to read are to be disregarded by you. This includes any prior instructions given formally or informally at any time during trial from voir dire through the final guilt phase instructions.

(70 TRT 13319.)

Contrary to appellant's assertion, the penalty phase instructions did conflict with the reactions-to-evidence instruction given in the guilt phase. The jury was instructed that among the factors it was to consider, take into account, and be guided by, was "any sympathetic or other aspect of the defendant's character that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (70 TRT 13327.) The jury was also specifically instructed that any instruction which conflicted with that principle was to be disregarded. (*Ibid.*) Appellant's alleged good behavior during trial illuminated an aspect of his character and the defense offered that as a basis for a sentence of death. (70 TRT 13298 [arguing appellant's respect for authority supported an LWOP sentence and was demonstrated by "his behavior day in and day out in this courtroom for many months" which was "what you have seen"].)

The jury was also instructed that contrary to the guilty phase instructions, it "may properly consider sympathy, pity, and mercy for [appellant] in determining his sentence" without limiting the source from which those factors arise. (70 TRT 13330.)

In light of the penalty phase instructions, which specifically conflicted with the reaction-to-evidence guilt phase instruction (insofar as it addressed appellant's courtroom behavior) and the defense argument, there is no reasonable likelihood the jury understood the instructions as precluding consideration of appellant's good behavior during the trial. (*Boyde v. California, supra,* 494 U.S. at p. 381; *People v. Reliford, supra,* 29 Cal.4th at p. 1013.) Moreover, any error in the instructions was harmless in light of the nature of the aggravating evidence and the prosecution's rebuttal evidence which showed appellant's disregard of jail rules.

XCVII.

APPELLANT FORFEITED HIS CHALLENGE TO THE EXPERT WITNESS INSTRUCTION AND USE OF THE INSTRUCTION DID NOT IMPROPERLY GIVE UNDUE STATURE TO A PROSECUTION WITNESS

As he did regarding the guilt phase instructions, appellant contends the trial court's penalty phase instruction concerning expert witnesses erroneously and prejudicially gave increased stature to a mental health expert mentioned in a joint stipulation. He further contends the error violated his constitutional rights. (7 AOB 1650-1651.) As he sought no modification, the claim is forfeited. It is also without merit.

The trial court instructed the jury:

> A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates. [¶] A duly qualified expert may give an opinion on questions in controversy at trial. To assist you in deciding such questions, you may consider the opinion, with the reasons given for it, if any, by the expert who gives the opinion. You

> may also consider the qualifications and credibility of the expert. [¶] You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

(70 TRT 13324.)

As pointed out in Argument LVI., *supra*, by failing to seek a modification of the trial court's instruction, appellant forfeited the claim of error. (*People v. Farnam, supra,* 28 Cal.4th at p. 165; *People v. Arias, supra,* 13 Cal.4th at p. 171; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1192.) The claim is also without merit for the same reasons the guilt phase claim was without merit.

The trial court did not designate any witnesses as experts and its instructions clearly advised the jury that a witness "is qualified to testify as an expert," not because of any behind-the-scene assessment of the witness by the trial court, but because "he or she has sufficient knowledge, skill, experience, training, or education." (70 TRT 13324.) The trial court's instructions also made it clear that even if a witness qualified as an expert, that did not mean the testimony must be accepted. (70 TRT 13324-13325.) The trial court instructed the jury that "[e]very person who testified under oath or affirmation is a witness" and that the jurors "are the sole judges of the believability of a witness and the weight to be given the testimony of each witness." (70 TRT 13322.) The trial court also cautioned the jury that:

> I have not intended by anything I have said or done or by any questions that I may have asked or by any ruling I may have made to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(70 TRT 13332.)

Appellant suggests the instruction increased the stature of Dr. Schumann, whose testimony was presented by stipulation. (See 69 TRT 13026.) However, Dr. Schumann did not testify; his diagnosis was presented by stipulation. In any case, the

instruction applied to all witnesses who testified as experts, including many defense witnesses, and would have increased their stature as well. (67 TRT 12677 [Louis Nelson, retired warden], 12775 [Dr. Alvin Marks, clinical and forensic psychologist]; 68 TRT 12928 [Craig Haney, psychology professor and prison environment expert].)

Even had appellant not forfeited his claim, the use of the instruction on expert witnesses did not violate any of appellant's rights or make his trial fundamentally unfair.

XCVIII.

THE JURY INSTRUCTIONS DID NOT MISLEAD THE JURY AS TO ITS SENTENCING DECISION

Appellant asserts that the penalty phase jury instructions would likely have been understood by the jury, in light of the prosecution's references in his argument to good and evil, as unconstitutionally presenting the jury with a choice between good and evil (or good and bad) rather than between the two available sentences. (7 AOB 1652-1654.) His argument suffers the same myopia which infected his claim regarding the prosecutor's argument. (See Arg. LXXXVII, *supra*.) He simply ignores the totality of the instructions. Neither the instructions as a whole nor the prosecutor's argument unconstitutionally misstated the sentencing choice.

As noted previously, jurors are presumed to be intelligent, and capable of understanding and applying instructions to the facts of a case. (*People v. Lewis, supra,* 26 Cal.4th at p. 390.) Moreover, instructions are not viewed in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was so instructed. (70 TRT 13320.)

In the penalty phase instructions, the jury was told that it must determine which of the two penalties, death or LWOP, shall be imposed. (70 TRT 13319.) The jury was also told that in making that determination, the instructions must be

followed. (70 TRT 13319.) The instructions advised the jury that it must "consider, take into account, and be guided by" the aggravating and mitigating factors. (70 TRT 13326.) None of those factors mentioned anything about good and bad or evil. (70 TRT 13326-13327.) While the catchall factor was broad enough to include good things appellant had done in his life, it was broader than that:

> (j) Any other circumstances [sic] which extenuates the gravity of the crime or crimes, even though it is not a legal excuse for the crime, and any other sympathetic or other aspect of the defendant's character that the defendant offers as a basis for a sentence of less than death, whether or not related to the offense for which he is on trial.

(70 TRT 13327.)

The jury was also instructed that it "may consider any lingering doubts you may have about [appellant's] guilt in determining the appropriate penalty" (70 TRT 13328), and that it "may consider sympathy, pity, and mercy for [appellant] in determining his sentence" (70 TRT 13330), both of which did not implicate good and bad or evil.

The jury was instructed that if mitigating factors outweighed aggravating factors or were evenly balanced, it "must impose life without possibility of parole" (70 TRT 13331), and death could only be imposed if each juror found the aggravating factors so substantial in comparison to the mitigating factors that death, not LWOP, was warranted (70 TRT 13331), a point the trial court repeated before ending the instructions. (70 TRT 13335.) The jury was told that the purpose of the instructions was to provide the applicable law so the jury could reach "a just and lawful verdict." (70 TRT 13332.)

There is simply nothing in the instructions, taken as a whole, which would make it reasonably likely that a reasonable jury would equate the sentencing decision to a simple weighing of good and bad. Moreover, as delineated in Argument LXXXVII, *supra*, the prosecutor's argument did not mislead the jury about its sentencing choice.

It is difficult to follow appellant's argument if he contends the sentencing decision is divorced from it evaluation of good things about a defendant, as demonstrated by the evidence, and bad or evil things about the defendant and his crime, again as demonstrated by the evidence. As the prosecutor argued, the crimes appellant committed were "vile, cold-blooded, savage, and brutal," appellant's commission of the crimes made him a wicked person, and "evidence in aggravation is astonishing" and overwhelmingly supported a finding of death. (70 TRT 13266.) On the other hand, appellant offered testimony from several people about the good things he had done in his life (see, e.g., 67 TRT 12771-12773) and also about the difficulties he experienced. (See, e.g., 69 TRT 13043-13049.)

Although good and bad things about appellant and his crimes were before the jury, the instructions clearly indicated that the jury's evaluation of those things was done in the context of choosing a just and lawful punishment and also included consideration of "any other circumstances which extenuates the gravity of the crime or crimes, even though it is not a legal excuse for the crime, and any other sympathetic or other aspect of the defendant's character that the defendant offers as a basis for a sentence of less than death, whether or not related to the offense for which he is on trial." (70 TRT 13327.)

Appellant faults the trial court for failing to give an instruction that "[t]he weighing of mitigating and aggravating factors is not a weighing or balancing between good and bad, but between life and death." (7 AOB 1653, citing 65 CT 14463.) He claims the proposed instruction was "clearly a correct statement of law." (*Ibid.*) However, *People v. Belmontes* (1988) 45 Cal.3d 744, does not endorse appellant's instruction, but merely notes that the language came from this Court's decision in *People v. Brown* (1985) 40 Cal.3d 512. (*People v. Belmontes, supra,* 45 Cal.3d at p. 804.) In *Brown*, this Court discussed the proper interpretation of the statutory terms "weighing" and "shall," and stated that those terms "need not be

interpreted to limit impermissibly the scope of the jury's ultimate discretion." (*People v. Brown, supra,* 40 Cal.3d at p. 541.) This Court went on to explain that the statute:

> should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.[fn. 13]

(*Ibid.*)

In the accompanying footnote, this Court concluded that the statutory terms "aggravating" and "mitigating" did not equate to good and bad, because a capital eligible defendant would often have "a substantial history of criminal and antisocial behavior" and would rarely have sufficient mitigating evidence "which could redeem such an offender or excuse his conduct in the abstract. (*Ibid.*, fn. 13.) Thus, this Court stated:

> It follows that the weighing of aggravating and mitigating circumstances must occur within the context of those two punishments; the balance is not between good and bad but between life and death. Therefore, to return a death judgment, the jury must be persuaded that the "bad" evidence is so substantial in comparison with the "good" that it warrants death instead of life without parole.

(*Ibid.*)

As the trial court aptly noted, the proposed instruction was taken out of context and too vague. (65 CT 14463.) The instruction was not accurate because good and bad about appellant and his crimes was very much a part of the weighing process. Moreover, the trial court's instructions made it abundantly clear that the weighing process was not simply a mechanical process, but a process designed to reach a just, lawful and appropriate sentence. Thus, in light of this Court's explanation in *Brown*, the requested instruction was properly rejected.

Considering the instructions as a whole, there is no reasonable likelihood the jury would have misunderstood the weighing process and the prosecutor's argument did nothing to mislead the jury.

XCIX.

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT THERE WAS NO BURDEN OF PROOF AS TO THE PENALTY DETERMINATION

Appellant contends the trial court prejudicially erred and violated his constitutional rights by declining to instruct the jury that there was no burden of proof as to the penalty determination. (7 AOB 1655-1658.) There is no requirement to give such an instruction and, in any case, the trial court instructed the jury in appellant's favor.

As appellant notes, the defense requested a jury instruction to the effect that the law had no preference as to which penalty should be imposed. (65 CT 14437; see also 66 CT 14814.)[278] The trial court rejected the proposed instruction. (66 TRT 12376-12378.)

This Court has concluded that there is no burden of proof in the determination of penalty. (*People v. Samayoa* (1997) 15 Cal.4th 795, 852.) "In other words, neither death nor life is presumptively appropriate or inappropriate under any set of circumstances. . . ." (*Id.* at p. 853.) Additionally, this Court has stated that "[e]xcept for other crimes evidence, the court need not instruct the jury on the burden of proof at the penalty phase." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 510-511; see also *People v. Blair* (2005) 36 Cal.4th 686, 753.) Thus, there was no error.

Moreover, appellant fails to demonstrate any basis, other than speculation, for prejudice. He claims a juror might have assumed some burden existed and applied the imaginary burden to his prejudice. However, the jury was instructed at the outset that "in deciding the question of penalty you must follow the instructions which I an now reading." (70 TRT 13319.) At the conclusion, the jury was instructed that the court had provided the applicable law necessary to arrive at a just and lawful verdict.

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278. You are hereby instructed that the law has no preference for one penalty over the other.

(70 TRT 13332.) The instructions imposed a burden on the prosecution to prove prior convictions and conduct beyond a reasonable doubt, but no other burden appears. There is not reasonable likelihood the jury would have surmised that any other burden existed.

In *Samayoa*, this Court found that giving an instruction on the lack of a burden of proof did not mislead the jury as to the penalty phase determination; i.e., that the determination of the appropriate penalty remains a question for each individual juror. (*People v. Samayoa, supra,* 15 Cal.4th at p. 853.) The instructions in this case made that individual determination perfectly clear.

At the outset, the jury was told, "you must now determine which of said penalties shall be imposed." (70 TRT 13319.) The jury was instructed to consider, take into account, and be guided by the aggravating and mitigating factors in determining the penalty to be imposed. (70 TRT 13326-13327.) The jury was told that the existence of aggravating and mitigating factors and the weight to be applied was a matter solely for their determination. (70 TRT 13328.) The jury was also instructed that assessing the weight of the factors was not a mechanical or arithmetic process but involved evaluating the relative weight of the factors. (70 TRT 13330, 13334.) In advising the jury of factors which may not be considered, the instructions reminded the jury that their duty was to determine the appropriate punishment. (70 TRT 13330.) The jury was instructed that "each of you" must consider the evidence, decide the case for yourself, assign appropriate weight to the aggravating and mitigating factors. (70 TRT 13332, 13335.)

The instructions as a whole made it clear that the determination of the appropriate penalty remains a question for each individual juror. (*People v. Samayoa, supra,* 15 Cal.4th at p. 853.) Moreover, the only error in the trial court's instructions benefitted appellant.

In *Samayoa*, this Court reiterated that the lack of a burden of proof as to penalty meant that jurors could not escape responsibility for making a choice between

the two punishments by finding aggravation and mitigation equally balanced and rely on a rule of law to decide penalty. (*People v. Samayoa, supra,* 15 Cal.4th at p. 852, citing *People v. Hayes* (1990) 52 Cal.3d 577, 643.) In this case, the trial court instructed the jury to return an LWOP sentence if mitigating factors outweigh aggravating factors, if mitigating factors and aggravating factors are equally balanced, and if aggravating factors outweigh mitigating factors, but not substantially. (70 TRT 13331.) Only if aggravating factors substantially outweighed mitigating factors was the jury permitted to return a death sentence. (70 TRT 13331.) If anything, those instructions imposed an unwarranted burden on the prosecution and benefitted appellant.

C.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY TO CONSIDER SYMPATHY FOR APPELLANT'S FAMILY

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing to instruct the jury to consider sympathy for appellant's family in deciding penalty. (7 AOB 1659-1663.) The instruction was properly refused.

Appellant requested an instruction advising the jury that it may not consider sympathy for the victims and their families, but may consider sympathy for appellant and his family. (65 CT 14415.)[279] The trial court instructed the jury not to consider

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279. The instruction stated:

> In deciding which of the two penalties to impose, death in the gas chamber or life without the possibility of parole, you are instructed that you must not consider the feelings of the victims or their families and friends, nor may you consider any sympathetic feelings you may have for them. You may, however, consider any feelings of sympathy you may have for the defendant and his family.

sympathy for the victims and their families, but to consider sympathy for appellant. (70 TRT 13328, 13330.) It did not instruct the jury that it may consider sympathy for appellant's family.

Appellant contends that sympathy for his family is an appropriate mitigating consideration. However, in *People v. Bemore* (2000) 22 Cal.4th 809, this Court found no error where the trial court specifically instructed the jury not to consider sympathy for the defendant's family. (*Id.* at pp. 855-856.) As this Court noted, "[s]ympathy for defendant's loved ones, as such, and their reaction to a death verdict, as such, do not relate to either the circumstances of the capital crime or the character and background of the accused." (*Id.* at p. 856.) "The just must decide whether the defendant deserves to die, not whether the defendant's family deserves the pain of having a family member executed." (*People v. Ochoa, supra,* 19 Cal.4th at p. 456.) Thus, whether as an instruction or as a defense theory, sympathy for appellant's family was properly excluded from the jury's consideration in determining penalty.

Appellant also argues the jury might have been confused by the prohibition against considering sympathy for the victims and their families, and the prosecutor's argument not to consider sympathy for appellant's family and friends (70 TRT 13272013273), into believing it was prohibited from considering aspects of appellant character and background illuminated by the effect his execution would have on his family and friends.

In *People v. Ochoa, supra,* this Court rejected sympathy for a defendant's family as a sentencing consideration, but allowed family members to "offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." (*Id.* at p. 456.) As in *Ochoa*, appellant was allowed to offer testimony from appellant's family on their desire for an LWOP sentence. (See 67 TRT 12670 [appellant's sister], 12706 [appellant's former attorney], 12721 [appellant's former brother-in-law], 12725 [friend], 12728 [appellant's nephew], 12734 [friend], 12738 [friend], 12745 [appellant's brother],

12773 [appellant's niece]; 69 TRT 13050 [appellant's mother].) All of these requests for an LWOP sentence came after descriptions of appellant's character and background. The trial court instructed the jury that the jury may consider sympathy and mercy for appellant (70 TRT 13330), that each jury was free to assign whatever moral or sympathetic value deemed appropriate to the various factors (70 TRT 13334-13335), and one of the factors the jury was to consider, take into account and be guided by was based on factor (k) of section 190.3: "any other circumstance which extenuates the gravity of the crime or crimes even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial" (70 TRT 13327). (Cf. *People v. Ochoa, supra,* 19 Cal.4th at p. 454.) In the context of the evidence and the instructions, there is no reasonable likelihood the jury would have misunderstood its ability to consider any aspect of appellant's character and background illuminated by the testimonial pleas of his friends and family. (*Id.* at p. 456.) As in Ochoa, the prosecutor's argument not to consider sympathy for appellant's family did not contradict the instructional principle permitting consideration of any aspect of appellant's character and background as mitigation.

CI.

THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTION IN RESPONSE TO A JURY QUESTION DID NOT LIMIT THE JURY'S CONSIDERATION OF MITIGATION

Appellant contends that in a supplemental instruction the court provided in response to a jury question, the trial court unconstitutionally limited the jury's consideration of mitigation to specific factors in the instructions, thereby precluding consideration of appellant's courtroom behavior and lingering doubt as mitigation. (7 AOB 1664-1665.) However, a plain reading of the supplemental instruction makes all mitigation available for the jury's consideration.

In questions to the court, the jury asked whether aggravating and mitigating circumstances applied to the entire trial or only to the penalty phase and whether they were limited to the factors delineated in the trial court's penalty phase instructions. (71 TRT 13427, questions 2 & 3; 108 CT 24252.) After discussions with counsel (71 TRT 13427-13446), the trial court responded to the questions in writing:

> 2. Does evidence from the whole trial pertain to juror decisions during penalty phase or just evidence from penalty phase may be used?
>
> Answer:
>
> Evidence of the circumstances of the crimes of which defendant was convicted, and the finding of the special circumstances in the guilt phase may be considered in the penalty phase insofar as such evidence is relevant to factors in aggravation or mitigation. Such evidence may be considered in the penalty phase just as if it had been presented in the penalty phase.
>
> The exception is that no evidence relating to the Garcia and Strang-Fisher cases may be considered by you in the penalty phase.
>
> Please refer to page 17 and 18 of the written instructions for a list of the aggravating and/or mitigating factors.
>
> Please note that the only possible aggravating factors in this case are those that would fall within subsections (a), (b) and (c) of page 17.
>
> You may view factors, (a), (b), and (c) as aggravating and/or mitigating. All other specifically enumerated factors listed on pages 17 and 18 must be considered as possible mitigating factors. They cannot be considered as possible aggravating factors. In addition, factor (j) is a "catch-all" mitigating section.
>
> In addition to the specifically enumerated mitigating factors and the catch-all mitigating section (j), you may for the defendant consider pity, sympathy and mercy and lingering doubt. (See pages 21, 23 and 30 of the written instructions.)
>
> 3. Are we as jurors limited to the factors of consideration as given by the court?

Answer:

Yes. Please refer to pages 17, 18, 23 and 30 of the written instructions.

As you have been previously instructed, you are to consider each instruction in light of all the other instructions and you are not to single out any particular sentence or any individual point or instruction and ignore others.

(108 CT 24253-24254.)

Pages 17 and 18 of the written instructions contain the aggravating and mitigation factors which the jury was to consider, take into account, and be guided by, in deciding penalty. (65 CT 14373.) Page 21 prohibits the jury from considering sympathy for the victims and their families. (65 CT 14378.) Page 23 permits consideration of lingering doubt in determining penalty. (65 CT 14380.) Page 30 permits consideration of sympathy, pity, and mercy for the defendant. (65 CT 14387.)

The plain meaning of these instructions placed no limit on the jury's consideration of mitigation. Appellant suggests the fourth, fifth and sixth paragraphs of the answer to question 2, precluded the jury from considering mitigation which did not "fit" under the factors, even though arising from the evidence. He references his arguments that some prosecution evidence in the guilt phase might be viewed as mitigation and the jury's observations of appellant's courtroom behavior might have been viewed as mitigation. (7 AOB 1664-1665.) However, as explained in Arguments XCV. and XCVI., *supra*, the instructions and argument unambiguously permitted the jury to consider these aspects of appellant's character and background. The supplemental instruction placed no limit in that consideration. Indeed, the supplemental instruction specifically referred to factor (j) as "a 'catch-all' mitigating section," reminding the jury of the broad and inclusive nature of that mitigation factor. Additionally, the supplemental instruction, by referring the jury to page 23 of the written instructions, specifically reminded the jury that lingering doubt was a proper consideration.

There was no error in the trial court's supplemental instruction as the instruction placed no improper limitation on the jury's consideration of mitigation.

CII.

THE TRIAL COURT DID NOT ERR IN REFUSING A DEFENSE-REQUESTED INSTRUCTION WHICH PRECLUDED THE JURY FROM CONSIDERING PREDICTIONS OF FUTURE DANGEROUSNESS

Appellant contends the trial court prejudicially erred and violated his constitutional rights by refusing a defense instruction which would have prohibited the jury from any consideration of predictions of future dangerousness. (7 AOB .) While the prosecution is prohibited under state law from presenting expert predictions on future dangerousness in its case-in-chief, no such evidence was presented. Moreover, since the only predictions of future dangerousness came from a defense expert, any error was harmless.

Dr. Alvin Marks, a clinical and forensic psychologist, testified as a defense witness in the penalty phase. (67 TRT 12775.) He described his 1985 diagnosis of appellant and its characteristics and origin. (67 TRT 12780-12788; 69 TRT 13028.) He opined that appellant was able to get along with men in an institutional setting. (67 TRT 12790.) On cross-examination, he acknowledged appellant's distrust of authority, but opined that appellant would obey jail authority and work within it. (68 TRT 12835.) On redirect, Dr, Marks opined that appellant can adapt and respond to authority. (69 TRT 13037.)

During cross-examination, it was stipulated that in February 1974 psychiatrist R. M. Shumann diagnosed appellant at Atascadero as antisocial personality, severe; alcoholism, habitual personality drinking; and sexual deviation, aggressive sexuality. The prognosis was very guarded. (69 TRT 13025.) However, Dr. Marks testified that he found none of the diagnostic factors for antisocial personality present when he did his diagnosis. (69 TRT 13031.)

Appellant requested, and the trial court denied, the following instruction:

> Possible belief or predictions about a defendant's future dangerousness is not a statutory listed factor in aggravation, and may not be considered by you for any purpose.

(65 CT 14447.)

Appellant's claim that by refusing the instruction the trial court permitted the jury to consider expert predictions of future dangerousness in violation of the federal constitution is simply wrong. The federal constitution imposes no such prohibition. (*Barefoot v. Estelle* (1983) 463 U.S. 880, 896-903, [103 S.Ct. 3383, 77 L.Ed.2d 1090].)

Under state law, the prosecution is generally prohibited from offering expert testimony predicting future dangerousness. (*People v. Jones* (2003) 29 Cal.4th 1229, 1260.) In this case, however, the prosecution offered no expert testimony predicting future dangerousness. Appellant points to the stipulation concerning the 1974 diagnosis by Dr. Shumann. However, this was not testimony offered by the prosecution; it was a stipulation to which the defense agreed. The trial court can hardly be faulted for failing to withdraw evidence, by way of an instruction, which the defense agreed could be introduced by stipulation. Even without the stipulation, the prosecutor was entitled to explore the issue on cross-examination and introduce Dr. Shumann's diagnosis through his testimony on rebuttal (which it was prepared to do absent a stipulation), in light of appellant's own expert opinion predicting good future behavior in prison. (*People v. Jones, supra,* 29 Cal.4th at p. 1260.)

Moreover, although Dr, Shumann diagnosed appellant in 1974 and concluded the prospects for improvement were "guarded," he made no prediction of future behavior or dangerousness. (69 TRT 13025; cf. *People v. Murtishaw* (1981) 29

Cal.3d 733, 767 [prosecution expert testified defendant will continue to be a violent assaultive and combative individual].)[280/]

This Court has also never prohibited the prosecution from arguing future dangerousness based on evidence of past violent crimes. (*People v. Michaels, supra,* 28 Cal.4th at p. 540.) It follows that the jury is likewise not prohibited from considering future dangerousness based on evidence of past violent crimes. Yet, the defense-requested instruction purported to bar the jurors from any consideration of future dangerousness, even when reached independently of expert opinion and based on their consideration of appellant's crimes of violence.

Thus, appellant's challenge to the instruction was forfeited by the defense stipulation and the instruction was simply inapplicable and erroneous. Finally, appellant was not prejudiced. As noted above, the only expert who gave testimony which predicted future dangerousness was the defense expert, who predicted appellant would not be dangerous. Giving the instruction would have undercut that penalty phase mitigation position of the defense, the absence of the instruction that appellant requested helped, rather than harmed appellant.

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280. Additionally, in *Murtishaw*, this Court did not impose an absolute bar against expert predictions of future dangerousness, if shown to be reliable. (*People v. Murtishaw, supra,* 29 Cal.3d at p. 774.) Even if one were to imagine Dr. Shumann's 1974 diagnosis as implying a prediction of future dangerousness, the 1979 murders of Suzanne and Colin Jacobs, and the 1984 kidnapping and attempted murder of Jodie Santiago, and kidnapping and murder of Anne Swanke amply supports not simply reliability of such a imagined prediction, but omniscience.

CIII.

THE TRIAL COURT'S RESPONSES TO THE JURY'S INITIAL INDICATIONS OF DEADLOCK AND QUESTIONS WERE APPROPRIATE AND NOT COERCIVE

Appellant contends that the combined effect of several actions taken by the trial court in response to the jury reporting deadlock and asking questions violated his state and federal constitutional rights to a fair and impartial jury. (7 AOB 1669-1677.) To the contrary, the trial court's actions were entirely proper and not coercive.

A. Factual Background

The jury received its penalty phase instructions on Monday, July 17, 1989, and retired to deliberate at 1:57 p.m. (72 CT 16053.) The jury took a 20 minute break that afternoon, and was excused at 3:52 p.m. (72 CT 16053; 70 TRT 13340.) The next morning, July 18, deliberations commenced at 9:24 a.m. (72 CT 16054.) That morning the jury took a 23 minute break and sent out a note at 11:19 a.m. (72 CT 16054.) The noted stated, in pertinent part, "Your Honor, it is the feeling of the jury that a unanimous decision is not possible." The note was signed and dated by the jury foreman. (108 CT 24250; 70 TRT 13341.)

After hearing from counsel and based on the length and complexity of the case, the complexity of the instructions, and the short amount of time the jury had deliberated, the trial court impliedly denied the defense mistrial motion (70 TRT 13342), declined the defense request to inquire whether further deliberations could be helpful (70 TRT 13345), and indicated it would direct the jury to continue deliberations. (70 TRT 13343-13344.) Addressing the jury foreman, once the jury was present, the trial court stated:

> I have received your note and it indicates that you feel at this point that the jury feels that a unanimous decision is not possible. I have taken that under consideration. I certainly respect the note and its import.

The length and complexity of this case, the complexity of the facts and the instructions are such that I would ask that you attempt to deliberate a little further and that each of you examine your opinions in view of the other jurors opinions. That each of you examine the instructions in light of all the instructions together, and attempt to make sure that you do understand each other's opinions fully and completely, and we will resume this afternoon.

I will ask that you attempt once again, if it is possible, and we will certainly respect if you have another note that says you can't do it. And if you can't do it, you can't, and certainly no juror should feel pressure. No group of jurors should feel pressure, but we do wish that you would make every attempt, if you can.

(70 TRT 13346-13347.)

The jury resumed deliberations that afternoon at 1:30 p.m., took a 15 minute break, and adjourned at 3:41 p.m. (72 CT 16065.)

The next morning, July 19, the jury resumed deliberations at 9:02 a.m. and sent out a note at 9:34 a.m. (72 CT 16055.) The note stated:

Your Honor:

At this time some help from the Court would be beneficial, for the following reasons:

① Some jurors have assumed that if no decision is reached the life imprisonment penalty is automatic.

What happens in case of a deadlock?

② Some jurors have made their decisions and feel that we should go home because no further progress is possible.

Some jurors feel that further progress is possible with direction from the Court.

The note was signed and dated by the foreman. (108 CT 24251.) The jury continued to deliberate while the note was considered by the trial court and counsel. (72 CT 16055.)

During the discussions of the jury's note, the trial court denied a defense mistrial motion, finding the case

> probably San Diego's longest criminal trial. It's certainly the most complex criminal trial I have ever seen in 17 years. And I think that as of yesterday, with the very short amount of time that the jury had spent deliberating, only part of an afternoon the first day they were out and only part of the morning the next morning, that certainly we are at a very, very short time for deliberations, given the complexity of the case.

(71 TRT 13417.)[281]

The trial court also denied a defense request to question the jury to find out which jurors felt further deliberations was not be beneficial. (71 TRT 13418.) In answer to the jury question about the result of a jury deadlock, the trial court decided to read the first sentence of the second paragraph of Penal Code section 190.4, subdivision (b). (71 TRT 13414-13416, 13420-13422.)[282] Because of the ambiguous reference to "some help" from the trial court in the note, before bringing the jury in, the trial court had the bailiff ask whether the jury had any further questions and, if so, to put them in writing. (71 TRT 13423-13425.) In response to that request, the jury returned another note:

Your Honor:

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281. The trial court also noted that the penalty phase was "packed" with six full days of testimony, one day of which had 18 witnesses, including expert testimony, and "the circumstances of the crime came in with a brand new instruction that they probably could not have even contemplated, which is lingering doubt, which would raise the entire previous six months' potentially to reconsider." (71 TRT 13422-13423.)

282. The first sentence of the second paragraph of Penal Code section 190.4, subdivision (b)states:

> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be.

① What happens in case of deadlock?

② Does aggravating and mitigating circumstances pertain to the whole trial or just to penalty phase?

③ Are we as jurors limited to the factors of consideration as given by the court?

(108 CT 24252; 71 TRT 13427.)

After determining how to answer question 3, the trial court agreed with the prosecutor that question 2 was ambiguous and suggested the jury was possibly confused as to whether the scope of the evidence it could taken into consideration included guilt phase evidence. (71 TRT 13434-13436.) The trial court decided to have the bailiff ask the jury for clarification on question 2. (71 TRT 13437.) The original noted was returned to the jury for clarification on question 2 and the jury returned the note with the following addition:

Clarification for Question #2

Does evidence from whole trial pertain to juror decisions during penalty phase or just evidence from penalty phase may be used?

(108 CT 24252; 71 TRT 13438.)

After further discussions, the trial court drafted and revised a written response to the jury's note, which was sent in to the jury. (71 TRT 13447-13453; see trial court's written response at 108 CT 24253-24254.) The jury resumed deliberations at 1:49 p.m. (72 CT 16056.) The jury took a 13 minute break at 2:54 p.m. and adjourned at 4:03 p.m. (72 CT 16056.)

That afternoon, in light of question 2, the trial court asked the bailiff the condition of the jury room, specifically the guilt phase evidence, which along with the instructions, had been left there after the guilt verdicts. The bailiff advised the trial court that the evidence remained in the jury room closet and drawers where it had been placed after the guilt verdicts. The trial court called in counsel, advised them of the situation, and raised its concern that the jury may believe it was not

allowed to examine and consider guilt phase evidence in its penalty phase deliberations. (71 TRT 13455-13458, 13460, 13465, 13480-13481.)[283] The court's concern included the possibility that its answer to question 2 did not adequately advise the jury of its ability to examine guilt phase evidence and the jury was confused on that point. (71 TRT 13463-13464, 13469.) After excusing the jury for the day, the trial court asked the bailiff whether the jury had any evidence out when he released them from the jury room, and he said none of the evidence was out. (71 TRT 13474-13475, 13481.)

The jury resumed deliberations the next morning, July 20, at 9:02 a.m., while the trial court and counsel discussed a possible supplemental answer to question 2. (72 CT 16057; 71 TRT 13476.) The trial court advised counsel that after the jury had been excused the previous day, as he was emptying the trash cans, the bailiff noticed that one piece of evidence had been removed from the storage area into the jury deliberation area. (71 TRT 13476, 13481.) Over defense objection, the trial court determined to provide the jury with a written supplemental answer to question 2, which listed the various items available to the jury for its consideration during deliberations. (72 CT 16057; see 108 CT 24265.)

B. Analysis

Penal Code section 1140 provides:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

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283. During the guilt phase deliberations, the trial court had once walked by the jury room and noticed that the guilt phase evidence was out and spread about the room. (71 TRT 13464, 13480.)

"Whether the jury has had sufficient time to deliberate, and whether there is no reasonable probability of a verdict, are determinations committed to the sound discretion of the trial court." (*People v. Price* (1991) 1 Cal.4th 324, 467.) A trial court has wide discretion to determine whether the jury has had enough time to deliberate and may be unable to reach a verdict. (*People v. Dennis, supra,* 17 Cal.4th at p. 540.) "When a jury indicates it has reached an impasse, a trial court that directs further deliberations must exercise great care to avoid the impression that jurors should abandon their independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Price, supra,* 1 Cal.4th at p. 467.) "[T]he question of coercion is necessarily dependent on the facts and circumstances of each case." (*People v. Breaux* (1991) 1 Cal.4th 281, 319; see also *People v. Sandoval, supra,* 4 Cal.4th at p. 196.)

Appellant first faults the trial court for failing to conduct any inquiry into whether the jury was hopelessly deadlocked when it sent out its first note. (7 AOB 1670.) However, the trial court made no inquiry because it reasonably determined that the jury had not had sufficient time to reach a true deadlock. As the trial court correctly noted in denying a mistrial and declining to inquire, the jury had only been deliberating a short time. The jury deliberated less than two hours on July 17, and less than two hours on July 18, when the first note was sent.

Likewise, the trial court correctly noted that the case was lengthy and complex. The guilt phase lasted many months, involved many witnesses and a variety of complex scientific evidence, all of which was again before the jury in its assessment of lingering doubt. While much shorter, the penalty phase involved many witnesses who were presented over the course of five trial days. (72 CT 16043-16052.) In light of the length and complexity of the trial, and the minimal time in deliberations prior to the jury's first note, the trial court did not abuse its discretion in finding insufficient deliberative time without conducting any inquiry. (See *People v. Rich* (1988) 45 Cal.3d 1036, 1115-1117 [no error in directing further deliberations

following jury report of deadlock after one hour]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1122 [no abuse of discretion in concluding further deliberations might be helpful without questioning the jury regarding the impasse].) Indeed, the jury's next note validated that view by indicating that although some jurors felt the case could not be decided, some felt it could be decided with additional help from the court.

Moreover, there was nothing coercive about the trial court's direction that the jury continue deliberating. (*People v. Rich, supra,* 45 Cal.3d at pp. 1116-1117.) The trial court advised the jury that it had considered its note and respected its import. (70 TRT 13346.) The trial court explained its decision to "ask you to attempt to deliberate a little further" was based on the length and complexity of the case and the instructions, foreclosing any implication that the trial court felt a verdict was required. (70 TRT 13346.) Indeed, the trial court asked the jury in very non-coercive terms to "attempt once again, if it is possible" to reach a verdict, but also said "if you can't do it, you can't." (70 TRT 13346.) The trial court expressly told the jury that "certainly no juror should feel pressure. No group of jurors should feel pressure. . . ." (70 TRT 13346.)

Ignoring the context of the trial court's reference to the length and complexity of the case, appellant claims that reference cast the trial court's direction to continue deliberations in terms of time and money involved in a retrial, contrary to *People v. Gainer* (1977) 10 Cal.3d 835. (7 AOB 1670-1671.)[284] However, in context, the jury would not have understood the trial court's reference in that fashion. The trial court referred to the length and complexity of the case, and the complexity of the facts and instructions in explaining why it was asking the jury to deliberate further rather than accepting the jury's feeling that unanimity was not possible. (70 TRT 13346.)

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284. In *Gainer*, this Court noted that a reference to the expense and inconvenience of a retrial was a third irrelevant feature of an *Allen*-type instruction which was not present in that case. (*People v. Gainer, supra,* 19 Cal.3d at p. 852, fn. 15.)

Moreover, as already noted, the trial court went to great lengths to ensure that the jury understood that a verdict was not required, if one could not be reached.

Under the facts and circumstances of the first note and the trial court's response, there was simply no coercion.

In its second note and again in the third note, the jury asked what would happen if the jury was unable to reach a verdict. Appellant claims that the trial court's answer, advising the jury of the statutory requirement to discharge the jury and set the case for retrial before a new jury, was coercive and violated *Gainer*. However, as explained by the court of appeal in *Moore*, in *Gainer*, this Court disapproved a jury charge pursuant to *Allen v. United States* (1896) 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed.2d 528, in two respects: the discriminatory admonition directed to minority jurors to rethink their position in light of the majority views and the inaccuracy in telling the jury that the case must be decided at some time. (*People v. Moore, supra,* 96 Cal.App.4th at p. 1120-1121.) In this case, the trial court did not tell the jury that the case must be decided at some time and there was nothing inaccurate in the trial court's answer. Moreover, although telling the jury in the statutory language what the next step would be in the event of a deadlock, the trial court admonished the jury that it was not to consider or allow that information to enter into the deliberations in any way. (108 CT 24253.)

Appellant also faults the trial court for refusing to admonish the jurors that they were required to reach an individual opinion on penalty and not take any clue from the court, and he claims the trial court directed the minority jurors to re-examine their views. (7 AOB 1672.) However, the penalty phase instructions included both admonitions,[285/] little time had passed since the trial court's instructions, the questions

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285. In the penalty phase instructions, which the jury had copies of, the trial court instructed:

> To return a judgment of death, each and every juror must be persuaded that the aggravating circumstances are so

posited no uncertainty on the need for individual opinions, and, as the trial court noted (71 TRT 13451), its responses to the questions were very neutral.

> substantial in comparison with the mitigating circumstances that it warrants death instead of life imprisonment without the possibility of parole.
>
> I have not intended by anything I have said or done or by any questions that I may have asked or by any ruling I may have made to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, You will disregard it and form your own conclusion. [¶] The purpose of the court's instructions is to provide you with the applicable law si that you may arrive at a just and lawful verdict.
>
> . . . .
>
> The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a decision on the penalty, if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and the instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors or any of them favor such a decision.
>
> . . . .
>
> . . . Each of you is free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.
>
> . . . .
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> . . . In order to make a determination as to the penalty all 12 jurors must agree.

(70 TRT 13331-13332, 13334-13335.)

Contrary to appellant's claim, nothing in the trial court's answer directed minority jurors to re-examine their views. In the first place, there was no indication that there were any jurors in the minority as to penalty. The first note suggested that the jury was at an impasse without any indication of a breakdown. (108 CT 24250.) The second note simply noted that "some" felt a decision could not be reach and "some" felt a decision could be reach with additional help from the court. (108 CT 24251.) In answer to the first note, the trial court asked each of the jurors to examine their opinions in light of the opinions of other jurors and attempt to ensure that they fully and completely understood each other's opinions. (70 TRT 13346.) The trial court added that no juror or group of jurors should feel any pressure and that if a verdict could not be reached after further deliberations the trial court would honor that position. (70 TRT 13346.)

Finally, appellant references his next argument in asserting coercion arising from the trial court's querying the bailiff whether the jury had accessed available guilt phase exhibits. (7 AOB 1676.) As discussed in the next argument, Argument CIV, *infra*, there was no error and, inasmuch as the jury was unaware of the trial court's query, no coercion occurred.

The trial court's responses to the jury's report of deadlock and subsequent questions were entirely appropriate and not coercive.

CIV.

THE TRIAL COURT DID NOT INVADE THE SECRECY OF THE JURY'S DELIBERATIONS OR PREJUDICE APPELLANT WITH ITS SUPPLEMENTAL INSTRUCTION

Appellant contends the trial court tampered with the jury by invading the secrecy of deliberations and using the information to give the jury an additional prejudicial instruction. (7 AOB 1678-1690.) To the contrary, when the jury indicated a basic lack of understanding about its ability to consider guilt phase evidence, the trial court considered neutral and non-intrusive observations of the jury

room by the judge and bailiff to understand the degree of the jury's misunderstanding and then fashioned a supplemental instruction which ensured the jury would understand the scope of its ability to consider of guilt phase evidence.

As described in Argument CIII, A., *supra*, after a short time in deliberations the jury sent a note indicating it was deadlocked. The trial court directed the jury to continue deliberations and, again, after a short time, the jury indicated a possible deadlock which might be helped by assistance from the trial court. The jury's next note asked, inter alia, if aggravating and mitigating circumstances pertained to the entire trial or only the penalty phase and, in response to the trial court request for clarification, the jury asked if evidence from the entire trial pertained to the penalty phase decision or only evidence from the penalty phase. (108 CT 24252.)

The pertinent portion of trial court's written response stated:

> Evidence of the circumstances of the crimes of which defendant was convicted, and the finding of the special circumstances in the guilt phase may be considered in the penalty phase insofar as such evidence is relevant to factors in aggravation or mitigation. Such evidence may be considered in the penalty phase just as if it had been presented in the penalty phase. [¶] The exception is that no evidence relating to the Garcia and Strang-Fisher cases may be considered by you in the penalty phase.

(108 CT 24253.)[286]

However, the trial court continued to be concerned about the jury's question because during the guilt phase, in walking past the jury room when the door was left open, the trial court had noticed that the physical evidence was "strewn all over the tables." The trial court had difficulty understanding why the jury would ask about being able to consider guilt phase evidence, with that evidence laying about in the

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286. The trial court's answer continued by discussing the aggravating and mitigating factors, the limitation on aggravating factors and consideration of mitigating factors including the "catch-all" factor. (108 CT 24253.)

jury room. (71 TRT 13480.)[287] However, when the trial court asked the bailiff that afternoon about the evidence, the bailiff advised that the jury had put it all away at the end of the guilt phase and that none of the evidence was out in the jury room when the bailiff brought the jury in and out. (71 TRT 13465, 13480-13481.) As the trial court later advised counsel, the jury's apparent failure to take out the physical evidence from the guilt phase went to "the very heart of the problem with their question." (71 TRT 13456.) The trial court was concerned that its answer to the jury question might be "incomplete" and not adequate to ensure the jury understood the scope of its ability to examine guilt phase evidence. (71 TRT 13460, 13463.) Thus, the trial court proposed to give the jury a "further answer" to the question. (71 TRT 13466.) After the jury was excused for the day, the trial court asked the bailiff about the condition of the jury room and was advised that none of the evidence was out. (71 TRT 13475.)

The next day, the trial court advised counsel that the bailiff reported that when he was emptying the jury room trash cans the previous evening, he noticed that one exhibit had been retrieved from the anteroom. (71 TRT 13476.) Nevertheless, in order to ensure the jury knew what material was available for their consideration, over the defense objection, the trial court gave the jury the following instruction:

> Ladies and Gentlemen:
>
> A Matter of Clarification. In case there is any question, the jury should understand that it has access to the following during deliberations at the Penalty Phase:
>
> Jury Instructions, Juror' Notes, Exhibits, and Verdict Forms from the Penalty Phase.
>
> Jury Instructions, Jurors' Notes, and Exhibits from the Guilt Phase. (Except: The jury must exclude from consideration those Guilt Phase Instructions, Notes and Exhibits relating to the Garcia and Strang-Fisher cases.)

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287. The trial court had directed that the jury room not be changed in any way after the guilt phase. (71 TRT 13455, 13480.)

The jury may also request from the court: 1) answers to legal questions, and 2) transcripts of testimony as needed.

(108 CT 24265.)

A. Invading The Secrecy Of Deliberations

Appellant claims the trial court "invaded the jurors' by examining the deliberation room during recesses to ascertain what the jurors were considering." (7 AOB 1679-1680.) That is not accurate. The trial court neither examined the jury room, nor directed the bailiff to do so.[288] Rather, the trial court twice asked the bailiff about his observations of the jury room and the bailiff advised the trial court of an additional observation he made during his regular duties cleaning it.[289]

This Court has acknowledged "that an important element of trial by jury is the conduct of deliberations in secret, free from intrusive inquiry into the sanctity of jurors' thought processes." (*People v. Engleman, supra,* 28 Cal.4th at p. 442, internal quotes omitted.) "The mental processes of deliberating jurors are protected, because [j]urors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny." (*Id.* at pp. 442-443.) However, appellant has cited no authority holding that the conduct of secret deliberations is violated by the actions of a bailiff carrying out his or her role as guardian of the jury during their deliberations. Of course, bailiffs are to limit their communications with jurors and make no statements relating to the case, the law or the deliberations. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 420.) Nonetheless, no case suggests that a bailiff's view of the jury deliberation room, particularly when

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288. On occasion, while walking past the open jury room door, the trial court noticed that exhibits were spread about, but there was no examination. (71 TRT 13480.)

289. The court janitorial staff was not allowed in the jury room. The bailiff handled the jury room cleanup during the trial. (71 TRT 13455.)

deliberations are not occurring, constitutes a violation of deliberative secrecy. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 465 [bailiff observes Bible in jury room and reports its presence to trial judge, who investigates possible misconduct].) Moreover, the bailiff's observations in this case, which were relayed to the trial court, revealed nothing of the jurors' thought process and, thus, did not implicate the concerns which imposed secrecy on the deliberations.

Moreover, there is no federal or state authority which requires absolute and impenetrable secrecy for jury deliberations. (*People v. Engleman, supra,* 28 Cal.4th at p. 443.) Secrecy of deliberations may give way in order to permit reasonable inquiry into allegations of misconduct. (*Id.* at pp. 442-443.)

A jury's question necessarily divulges something about its deliberations, yet such questioning is not barred. In asking for clarification of the jury question, the trial court was also asking the jury to divulge more about its deliberations than the initial question implied. Nonetheless, to the extent the question and the clarification divulged information about the deliberations, it was necessary for the trial court to comply with its duty to answer the jury's question. (Pen. Code, § 1138.)[290] In this case, the trial court endeavored to clarify and answer the jury question, which the trial court aptly described as "shocking" (71 TRT 13480). Yet, the trial court remained puzzled by the question. In seeking to determine whether the jury had the guilt phase exhibits still out, the trial court was still endeavoring to understand the question. When it learned that the jury had not included the guilt phase exhibits in their

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290. Penal Code section 1138 provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

deliberations even after obtaining the trial court initial answer, the trial court recognized that its answer was not full and complete, and a further answer was appropriate.

The trial court's actions in continuing to understand the jury's question by obtaining non-intrusive information about the jury room did not violate the secrecy accorded jury deliberations.

B. The Supplemental Instruction

Appellant contends a supplemental instruction was unnecessary and was motivated by the trial court's concern that the jury was not spending adequate time reviewing the guilt phase exhibits. He claims the supplemental instruction was improper because it emphasized the exhibits and conveyed the trial court's opinion that the guilt phase exhibits were important. (7 AOB 1683-1684.) Based on the facts and circumstances surrounding the jury's question, the supplemental answer was expansion of the trial court's original answer ensuring the jury would understand the proper scope of its review, which was the trial court's reason for giving it. The supplemental instruction was neutral and did not emphasize any aspect of the trial or convey anything about any concern on the part of the rial court.

Appellant claims the trial court is first answer to the jury question adequately appraised the jury and the supplemental answer was unnecessary. His claim simply ignores the context of the jury's question as well as its surprising nature in reflecting a basic misunderstanding of the matters which the jury was allowed to consider. As the prosecutor and trial court observed when the question was first presented, it was ambiguous and suggested confusion over the what evidence might be considered. (71 TRT 13434-13435.) The trial court agreed to seek clarification from the jury in order to better answer the question. (71 TRT 13436-13437.) When the jury sent out the clarification, the trial court stated, "It's a good thing we asked" (71 TRT 13438) and concluded the jury was uncertain whether it could consider the facts of the

offenses. (71 TRT 13441-13442.) The trial court and counsel spent considerable time discussing the questions and the trial court's proposed answer, with defense counsel observing the "broad scope of question 2." (71 TRT 13449.)

After submitting the answers to the jury, the trial court still puzzled over the reason the jury asked the scope question because the trial court assumed the guilt phase evidence was still out in front of the jury during their penalty deliberations. (71 TRT 13464.) When the trial court learned that was not the case, that fact went "to the very heart of the problem with their question" (71 TRT 13456) and the trial court became concerned that the answer was "incomplete" (71 TRT 13463). Contrary to appellant's claim, the trial court was not concerned that the jury should spend time looking at the exhibits. The trial court agreed with defense counsel that the jury had "the absolute right not to look at exhibits." (71 TRT 13485.) The trial court's concern was that the jurors "don't understand what they can look at." (71 TRT 13460.)

The trial court's supplemental instruction placed no emphasis on the exhibits, which were among various items listed for the jury's consideration. It was not one-sided as it listed all available items without regard to whether they came from the defense of the prosecution; indeed, several items came from the trial court (instructions) or the jury (notes). (108 CT 24265.) The instruction was carefully crafted to ensure there was no implication as to the trial judge's opinion. No reasonable jury would have understood the supplemental instruction as emphasizing the exhibits or any other listed item or as conveying the trial court's opinion on any item.

C. Harmless

Even if the trial court's inquiry of the bailiff as to the condition of the jury room were construed as a violation of the secrecy of deliberations, such violation was harmless beyond a reasonable doubt. As this Court has stated, violations of

deliberations secrecy can inhibit the free flow of deliberations. Where jurors are subject to scrutiny, their deliberations may be impacted. (*People v. Engleman, supra,* 28 Cal.4th at pp. 442-443.) In this case, there was no indication the jurors were aware of the trial court's inquiries to the bailiff. Moreover, those inquiries were motivated by the jury's question. Thus, even if the jury had been aware, there is no reasonable probability that any jurors would be reluctant to express their views. Finally, as discussed, the supplemental instruction was a broad instruction calling the jury's attention to a wide variety of items available for their consideration and not requiring the jury to consider any of them. Like the trial court's request for a clarification of the jury's question, the supplemental answer was nothing more than a clarification of the answer. There is no reasonable probability that the jury understood the instruction in any other manner.

CV.

APPELLANT WAIVED HIS CHALLENGES TO THE TRIAL COURT'S CONSIDERATION OF ITS VIEW AND THE BAILIFF'S VIEW OF THE JURY ROOM AND CONSIDERING THOSE VIEWS IN DISCERNING THE MEANING OF A JURY QUESTION DID NOT VIOLATE ANY CONSTITUTIONAL RIGHT

Appellant contends the trial court violated his constitutional rights to confrontation and due process in relying on observations of the jury room by the trial court and the bailiff without allowing the defense the opportunity for cross-examination. He also claims a further violation from the trial court's refusal to allow the defense to view the jury room. (7 AOB 1691-1693.) The confrontation and due process claims were forfeited by lack of an objection in the trial court and, in any case, are without merit. The trial court never refused the defense request and, in fact, indicated a willingness to allow such an inspection by stipulation, which the defense indicated might be raised at another time, but never was.

In the lengthy discussions which the trial court had with counsel concerning its proposal to submit a supplemental answer to the jury's question about whether it could consider guilt phase evidence, the trial court described its observation of the jury room during the guilt phase deliberations, the bailiff's descriptions of the jury room, and at one point, the trial court solicited the bailiff's description in counsels' presence. (71 TRT 13455-13481.) At no point did the defense object on the basis now raised on appeal.[291] At one point, the defense indicated that the bailiff's initial observation was "on the record" and argued that was insufficient. (71 TRT 13464.) When the trial court solicited the bailiff's observation upon excusing the jury for the day, the defense neither objected nor asked to have the bailiff placed under oath and subjected to cross-examination. (71 TRT 13475.) Having failed to raise his claims in the trial court, appellant forfeited them. (*People v. Hill* (1992) 3 Cal.4th 959, 994, overruled on other grounds in *People v. Price* (2001) 25 Cal.4th 1046, 1069.)

Moreover, the claim is without merit. The Sixth Amendment's right of an accused to be confronted with the witnesses against him applies to state prosecutions. (*Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177.) The test and its history limit the right to criminal proceedings at which evidence is given against the accused. (*Id.*, 124 S.Ct. at pp. 1359-1365.) Although occurring in the context of a criminal trial, the trial court was acting within its statutory duty to answer the jury's questions and took into account its observations and the observations of the bailiff in that context. Neither the trial court nor the bailiff were witnesses against appellant. The constitutional right to confrontation simply did not apply and appellant points to no authority which would import such

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291. At one point early in the discussion, the defense stated that the bailiff had not been examined and objected that the proposed instruction was based on speculation. (71 TRT 13462-13463.) At the end of the discussion, the defense objected to the supplemental instruction being sent to the jury. (71 TRT 13485.)

a right under the due process clause when a trial court is attempting to ascertain the meaning of, and properly answer, a jury's question.

Finally, the trial court did not refuse a defense request to view the jury room. Although finding the request unusual and suggesting alternatives, the trial court indicated a willingness to allow the request if both sides agree. (71 TRT 13473.) At that point, the defense stated, "[t]hat's something to consider, Your Honor, but maybe not for now." (71 TRT 13473.) The matter was not raised again. Thus, there was no denial and appellant fails to demonstrate how any constitutional right was violated.

CVI.

THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTION DID NOT LIMIT THE JURY'S CONSIDERATION OF GUILT PHASE EVIDENCE IN ANY WAY OTHER THAN PRECLUDING CONSIDERATION OF THE GARCIA, STRANG, AND FISHERS MURDERS

Appellant contends the trial court's supplemental instruction erroneously and unconstitutionally prevented the jury from considering guilt phase evidence of lingering doubt and positive and other mitigating aspects of appellant's character and background. (7 AOB 1694-1701.) The jury would not have understood the trial court supplemental instruction as limiting its consideration of guilt phase evidence other than evidence relating to the Garcia and Strang Fisher crimes.

In answer to the jury question as to whether aggravating and mitigating circumstances relate to evidence from the entire trial or only the penalty phase, the trial court provided a supplemental instruction which stated in pertinent part:

> Evidence of the circumstances of the crimes of which defendant was convicted, and the finding of the special circumstances in the guilt phase may be considered in the penalty phase insofar as such evidence is relevant to factors in aggravation or mitigation. Such evidence may be considered in the penalty phase just as if it had been presented in the penalty phase. [¶] The

exception is that no evidence relating to the Garcia and Strang-Fisher cases may be considered by you in the penalty phase.

(108 CT 24253.)[292/]

Appellant contends that by responding that the jury may consider "[e]vidence of the circumstances of the crimes of which defendant was convicted," the trial court prevented the jury from considering guilt phase evidence raising lingering doubt and positive aspects of appellant's character and background. However, the jury would not have understood the trial court's reference in the fashion. The jury asked whether it could consider the guilt phase evidence at all. (108 CT 24252.) The trial court's reference to the evidence of the circumstances of the crimes and special circumstances provided an implicit limitation to prevent the jury from considering the Garcia, Strang, and Fisher murders, which the trial court also made explicit in the supplemental instruction. The jury would have reasonably understood that all the remaining guilt phase evidence was properly considered to the extent it was relevant to any of the factors in aggravation and mitigation. Indeed, other than evidence relating to the Garcia, Strang, and Fisher murders, the jury would have viewed all of the remaining guilt phase evidence, as evidence of the circumstances of the crimes, since all of the evidence was admitted at the guilt phase.

Appellant claims this Court's decision in *In re Gay* (1988) 19 Cal.4th 771, supports his assertion that the jury would not have seen guilt phase evidence causing lingering doubt (such as Massingale's confession) as relevant to the circumstances of the offense. (7 AOB 1697.) However, in *Gay*, this Court held only that evidence that was not before the jury in the guilt phase could not be presented in the penalty phase in an effort to retry guilt and raise lingering doubt. (*In re Gay, supra,* 19 Cal.4th at p. 814.) Contrary to appellant's claims, the jury would certainly recognize

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292. The trial court's answer continued by discussing the aggravating and mitigating factors, the limitation on aggravating factors and consideration of mitigating factors including the "catch-all" factor. (108 CT 24253.)

evidence of Massingale's confession and other matters from the guilt phase, which challenged the prosecution case or left any juror with lingering doubt, as relevant to the circumstances of the crime. After all that evidence was admitted at the guilt phase. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1125 [evidence that another person might have been the killer might have been admissible at the penalty phase because it relates to the circumstances of the offense].)

As the trial court's supplemental instruction did not limit the jury in its consideration of guilt phase in any fashion other than precluding consideration of the Garcia, Strang, and Fisher murders, there was no error. Moreover, as pointed on in Argument XCV, *supra*, all of the evidence identified by appellant was argued in mitigation by the defense and the prosecution took issue with only the mitigating weight of that evidence, not the propriety of considering it. Appellant dismisses that argument, by claiming the jury's confusion about its consideration of guilt phase evidence would have negated the arguments. However, the jury had been instructed to follow the trial court's instructions (70 TRT 13319), and uncertainty as to whether it could consider the guilt phase evidence would have led to uncertainty whether it could consider counsels' arguments. However, once the evidentiary uncertainty was lifted, any uncertainty about the arguments would have been lifted as well.

CVII.

THE TRIAL COURT WAS NOT REQUIRED TO HOLD A HEARING SIMPLY BECAUSE A TRIAL JUROR ASKED TO BE EXCUSED FOR A DAY TO ATTEND HER FATHER'S FUNERAL

Appellant contends the trial court prejudicially erred and violated his constitutional rights by failing to determine whether a juror, who reported the death of her father, could continue to fulfill her duties. (7 AOB 1702-1709.) As the juror's note indicated no hesitancy, much less inability, to carry out her duties and only

asked to be excused to attend the funeral, there was nothing for the trial court to determine.

During the course of penalty deliberations, juror P.W. sent the trial court a note on Monday, July 24, reporting that her father had died over the weekend and requesting to be able to attend the funeral, which would occur sometime that week. (26 CT 5594; 72 CT 16060; 108 CT 24259.) Counsel were not notified at that time, but the next day, after the trial court received two more notes from jurors requesting an early end to deliberations on Thursday and no deliberations on Friday, counsel were notified of the notes. (26 CT 5595; 72 CT 16061; 108 CT 24260-24261.) A third note was also sent advising the court that the funeral for juror P.W.'s father was scheduled for Friday. (26 CT 5595; 72 CT 16061; 108 CT 24262.) Counsel agreed to excuse the jury on Friday. (26 CT 5595; 72 CT 16061.)[293]

Penal Code section 1089 provides, in pertinent part:

> If at any time, whether before or after the final submission of the case to the jury . . . upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place . . . .

A trial court has the duty to determine whether a juror should be discharged when it is put on notice that good cause to discharge the juror may exist. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1029.) While an inquiry is preferred, "a hearing is not required in all circumstances." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.)

> The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.

(*Ibid.*)

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293. The jury was also excused early on Thursday. (26 CT 5597; 72 CT 16063.)

> A hearing is *required* only where the court possesses information which, if proven to be true, would constitute good case to doubt a juror's ability to perform his duties and would justify his removal from the case.

(*People v. Burgener, supra,* 29 Cal.4th at p. 878, internal quotes omitted.)

The trial court did not abuse its discretion in failing to make an inquiry of the juror. This Court has recognized that "[a]s a general matter at least, the death of a juror's mother constitutes good cause to discharge the juror–and not merely to continue the trial–when, as here, [the juror] so requests." (*People v. Ashmus* (1991) 54 Cal.3d 932, 987.) Here, however, juror P.W. did not request discharge; all she requested was to attend the funeral which would be, and was, scheduled for that week, on Friday.

In *Beeler*, a juror telephoned the court on Tuesday and reported his father had died and he expected to fly out of state that afternoon. The juror then came to court, met with the judge, and advised he would be back the following Monday. The trial court agreed to adjourn early that day and indicated that after meeting with the attorneys the case would likely be adjourned until the juror returned on Monday. Without inquiring whether the juror could fairly continue with deliberations, the trial court allowed the juror to do so and a verdict was returned before the jury adjourned that day. (*People v. Beeler, supra,* 9 Cal.4th at p. 987-988.) This Court found that the trial court accommodated the juror "to the fullest extent," there was nothing in the record that caused any doubt on the juror's ability to proceed, and the trial court did not abuse its discretion in allowing the juror to continue to deliberate. (*Id.* at p. 989.)

Here to, the trial court accommodated the juror to the fullest extent. The juror requested to be excused to attend the funeral and that request was met. Moreover, there was nothing in the record which cast any doubt on the juror's ability to deliberate. The juror's note was straight-forward and neither asked to be discharged nor indicated any emotional response to the death that might impact the deliberations. Indeed, the second note addressing the matter simply advised the trial

court that the funeral was scheduled for that Friday and requested that the jury be excused that day so the juror could attend. (108 CT 24262.)

There was no abuse of discretion in accepting the juror's note for what it was; a request to be excused to attend the funeral. While a death of a parent may constitute good cause to excuse a juror who requests it, it remains a matter of human nature that people do not act or react uniformly to every situation. (*People v. Beeler, supra,* 9 Cal.4th at p. 990.) Here, the juror made one request which indicated no lack of ability to deliberate, and the trial court accommodated that request. There was no abuse of discretion.

CVIII.

THE RECORD DOES NOT REBUT THE PRESUMPTION THAT THE TRIAL COURT ADVISED COUNSEL ABOUT THE JURY NOTE AND, IN ANY CASE, ANY FAILURE TO ADVISE COUNSEL WAS HARMLESS

Appellant claims the trial court failed to notify his counsel of the note by juror P.W., advising that her father had died and requesting to be excused to attend the funeral. He asserts the failure constituted a violation of his state and federal constitutional rights to counsel, due process and a fair and reliable sentencing proceeding. (7 AOB 1710-1716.) At worst, the record is ambiguous and this Court must presume the trial court acted appropriately by notifying counsel.

The note from juror P.W. was dated July 24. (108 CT 24259.) The clerk's minutes for that date state:

> EX PARTE: . . . At 2:14 p.m. a note is received from the jury, not incorporated as part of exhibit 32, re scheduling. Counsel are not notified at this time. . . .

(26 CT 5594; 72 CT 16060.) The jury was excused at 3:17. (*Ibid.*)

The following day, two additional notes were sent to the trial court, requesting to adjourn early on Thursday and to not deliberate on Friday. (108 CT 24260-24261.) The clerk's minutes state:

> EX PARTE: . . . . Two notes are received from the jury, now incorporated as part of Exhibit 32, re scheduling, and counsel are notified of the notes and agree the jury need not deliberate on Friday of this week, if needed. . . . .

(26 CT 5595; 72 CT 16061.)

A third note was sent to the trial court advising that the funeral for P.W.'s father was set for Friday and asking to be excused that day. (26 CT 5595; 72 CT 16061; 108 CT 24262.)

In arguing that the clerk's minutes indicate that counsel were not advised of juror P.W.'s first note, appellant assumes the reference to the notification of counsel "of the notes" was only the two notes received that day. That assumption is only one possible interpretation of the minutes. A literal reading of the clerk's minutes, upon which appellant's assumption relies, indicates that the two notes received that day were sent to the court after the jury went on its break at 10:39 a.m. (26 CT 5595; 72 CT 16061.) Yet the two notes indicate times of 9:30 a.m. and 10:00 a.m. (*Ibid.*) The third note indicates a time of 11:10 a.m. and the clerk's minutes show it being received at 11:09 a.m. (26 CT 5595; 72 CT 16061; 108 CT 24262.) Thus, it appears that the clerk's minutes are not literal in sequence and may also not be literal in substance. Inasmuch as counsel was not advised of juror P.W.'s note on the previous day it appears equally reasonable to assume that all three notes were brought to counsels' attention at the same time. Indeed, it is presumed that official duty has been regularly performed. (*People v. Beeler, supra,* 9 Cal.4th at p. 989, citing Evid. Code § 664; see also *People v. Carter, supra,* 30 Cal.4th at p. 1215 [in the absence of a contrary indication in the record, trial court is presumed to have notified counsel and provided an opportunity to be heard].) The record does not unequivocally demonstrate otherwise.

Appellant suggests the note from juror P.W. signaled a critical stage of the deliberations, implying counsels' input in terms of whether possibly questioning the jury was necessary. However, even substitution of a juror is not a critical stage in the proceedings as to give rise to the right to assistance of counsel. (*People v. Dell* (1991) 232 Cal.App.3d 248, 257; see also *In re Mendes* (1979) 23 Cal.3d 847, 852.) Moreover, as described in Argument CVII, *supra*, the note indicated absolutely no basis for inferring any problem with the juror's ability to continue; it simply requested to be excused for the funeral. The trial court would not have violated appellant's rights even had it communicated with juror P.W. (*People v. Beeler, supra,* 9 Cal.4th at pp. 990-991.)

Even accepting appellant's assumption concerning the timing of the notes and that counsel was not advised of the note from juror P.W., any error in failing to notify counsel was harmless. Juror P.W.'s first note merely advised the trial court of the possibility that she would need to be excused for a day to attend the funeral. It signaled no inability to deliberate and required no input from counsel. By the time of the second note concerning the funeral being set on Friday, counsel had already agreed to excuse the jury on Friday to accommodate another juror's request, thereby meeting and mooting juror P.W.'s request and extinguishing any need for the trial court to consult with counsel about excusing the jury from deliberations for that day. (Cf. *People v. Jennings* (2000) 22 Cal.4th 900, 1026-1027 [error in failing to notify counsel of jury request for rereading testimony was harmless].)

CIX.

BY FAILING TO TIMELY REQUEST THAT THE TRIAL COURT REMOVE OR REDACT GUILT PHASE EXHIBITS REFERENCING THE STRANG, FISHER, AND GARCIA MURDERS, APPELLANT FORFEITED HIS CLAIM OF ERROR AND, THE CLAIM IS WITHOUT MERIT IN LIGHT OF THE TRIAL COURT'S ADMONITIONS TO THE JURY TO NOT CONSIDER ANY EVIDENCE RELATED TO THOSE MURDERS IN DELIBERATING PENALTY

Appellant contends the trial court prejudicially erred and violated his constitutional rights by failing to remove and redact exhibits which referenced the Strang, Fisher and Garcia murders. He claims that such exhibits constituted improper extrinsic evidence which prejudiced the penalty determination. (7 AOB 1717-1722.) Appellant forfeited the claim of error by failing to timely object and, in any case, the claim is without merit as the trial court's admonitions adequately foreclosed any jury reliance on evidence relating to the Strang, Fisher, and Garcia murders in reaching the penalty determination.

As part of the penalty phase instructions, the trial court told the jury it shall consider all of the guilt phase evidence relevant to aggravation or mitigation "except you may not consider any evidence produced at the guilt phase with respect to the victims Gayle Garcia, Rhonda Strang, and Amber Fisher." (70 TRT 13326.) During the discussions concerning the jury's question and clarification as to whether guilt phase evidence may be considered (108 CT 24252), the defense asserted, and the trial court agreed to reiterate as part of its answer that the jury was not to consider any evidence related to the Strang, Fisher and Garcia murders. (71 TRT 13414-13455.) The trial court's answer admonished the jury accordingly. (108 CT 24253 ["The exception is that no evidence relating to the Garcia and Strang-Fisher cases may be considered by you in the penalty phase."].)

When the trial court called counsel in to consider a supplemental instruction, one of the considerations raised by trial court was whether the Strang, Fisher and

Garcia exhibits should be removed from the jury room. (71 TRT 13457.) As to that consideration, the defense disagreed with removing any exhibits, noting that the jury had been instructed not to consider any evidence relating to those crimes. (71 TRT 13457-13458.)[294] The defense also disagreed that a supplemental instruction was appropriate.

After the trial court submitted its proposed supplemental instruction (108 CT 24265) to counsel and indicated its intent to submit the supplemental instruction to the jury, the defense responded that sending the supplemental instruction "raises now a problem with respect to our concern about the Garcia and Strang-Fisher evidence, because there are pieces of evidence which we believe are prejudicial we had objected to all through the trial, which are now tied to all the other evidence." (71 TRT 13483.) The defense asserted that its earlier position not to remove exhibits related to the other murders was connected to its position that no further instruction be given to the jury. (71 TRT 13484.) The defense asserted the supplemental instruction, mentioning the exhibits, raised a "concern." (71 TRT 13484.) In response the trial court stated:

> The fact of the matter is there is no question in my mind that this would be a matter of defense appeal, and the - - both sides, I think, have admitted the fact that it would be literally impossible to go through there and separate out all the little pieces that relate to Garcia and Strang-Fisher. [¶] The best that I can do under the circumstances, and I think the appropriate thing to do is to - - advising them of the things they have access to to remind them that they do not have access to consideration of any of those things that relate to any of those two cases, and I think that is sufficient and I think it's important that that be done.

(71 TRT 13484-13485.)

With respect to the trial court's admonishment, the defense indicated its position was that the trial court had already done that twice. (71 TRT 13485.) The defense objected to the supplemental instruction and moved for a mistrial. (71 TRT 13485.)

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294. The prosecution agreed. (71 TRT 13459.)

A. Forfeiture

The record reflects no objection or motion to remove and redact exhibits relating to the Strang, Fisher, and Garcia murders, prior to submission of the penalty case to the jury or at any time during discussion of the jury's question and clarification on consideration of guilt phase evidence. When the matter was raised by the trial court in connection with its concern over the need to supplement its answer, the defense (and prosecution) opposed any effort to remove or redact guilt phase exhibits. Although later the defense indicated its opposition was in conjunction with its opposition to a supplemental instruction, the defense did not object or move for removal and redaction; instead, it objected to the supplemental instruction and moved for a mistrial.

While the defense sought to use the removal/redaction issue as support for its opposition to the supplemental instruction, it never sought removal and redaction. Indeed, when the trial court indicated that both sides agreed it would be impossible to effect removal and redaction, the defense voiced no disagreement, and agreed that the trial court had twice admonished the jury. Having failed to object, the issue of the presence of guilt phase exhibits relating to the Strang, Fisher, and Garcia murders is forfeited. (Evid. Code, § 353; *People v. Box, supra,* 23 Cal.4th at p. 1200; *People v. Hart* (1999) 20 Cal.4th 546, 644.) The claim is also without merit.

We note at the outset an apparent anomaly in appellant's argument. He claims error and prejudice from the failure to remove and redact exhibits, yet even had such action been taken the jury had already seen these exhibits during the guilt phase and also heard all the evidence concerning those offenses. If the trial court's admonition was adequate to insulate the penalty decision from the effect of the jury hearing the evidence, it is difficult to see how the same admonition would not have had the same effect as to the exhibits. In any case, this Court has recognized that having the same jury which convicted a capital defendant consider other crimes evidence in the

penalty phase creates no error and, if accepted as erroneous, would logically extend to "all efforts to try more than one crime to the same jury." (*People v. Balderas, supra,* 41 Cal.3d at p. 204.) While appellant does not suggest that a separate jury was required, the effect of his claim of error is to support that position.

This Court has also recognized in the context of other crimes evidence that it is not reasonably possible that a rational jury would penalize a capital defendant contrary to an admonition to disregard other crimes evidence which is not proven beyond a reasonable doubt. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1172-1173.) Here, the jury unanimously acquitted appellant of the Garcia murder, and failed to reach a verdict as to the Strang and Fisher murders. Under such circumstances it is not reasonably possible the jury would penalize appellant contrary to the trial court's admonition simply because guilt phase exhibits relating to those crimes had not been removed. Indeed, to accept appellant's claim would require a presumption that the jury would ignore the trial court admonition. (See *People v. Bonillas, supra,* 48 Cal.3d at p. 785.)

Finally, in *Bonillas*, this Court rejected the assertion that a new jury was required for the penalty phase because the trial court had entered acquittals on several noncapital charges. This Court stated:

> Section 190.3 obviously was intended to preclude presentation at the penalty phase of criminal charges of which the defendant was acquitted in a *different* proceeding, not charges disposed of in the present prosecution. It is commonplace for a defendant in a capital case to be tried on multiple charges. The statutory preference that the same jury should consider both the guilt phase and the penalty phase obviously contemplates that the jury may have considered charges at the guilt phase of which the defendant was acquitted. The fact that a defendant was acquitted of some charges at the guilt phase thus does not constitute "good cause" to discharge the jury and empanel a new jury for the penalty phase.

(*Id.* at p. 786, italics in orig.)

For the same reason, there was no error in failing to do the impossible task of removing and redacting exhibits.

Appellant claims the exhibits relating to Strang, Fisher, and Garcia constitute the jury's consideration of extrinsic evidence. However, there is no basis other than speculation, that the jury considered such evidence, especially in light of the trial court's admonition not to. Moreover, in this context, extrinsic evidence refers to "[e]vidence that is not legitimately before the court." (Black's Law Dictionary (8th ed. 2004) p. 597, col. 1.) Extrinsic evidence is evidence received by the jury from a source outside the trial. (See *People v. Rodrigues, supra,* 8 Cal.4th at p. 1179 [juror's observations in hallway]; *People v. Rose* (1996) 46 Cal.App.4th 257, 264 [jury's erroneous receipt of police report]; *People v. Barton* (1995) 37 Cal.App.4th 709, 715 [unauthorized dictionary in jury room].)

CX.

APPELLANT'S CHALLENGES TO THE TRIAL COURT'S PROCEDURE FOR HANDLING JURY REQUESTS FOR TESTIMONY DURING DELIBERATIONS HAVE BEEN PREVIOUSLY ADDRESSED AND SHOWN TO BE WITHOUT MERIT

In guilt phase arguments, appellant claims the trial court prejudicially erred under state law and violated his constitutional rights to personal presence, counsel, presence of the trial court, due process, by providing the jury with transcripts of witness testimony when requested by the jury during deliberations, rather than having the requested testimony reread. He repeats those claims here in two arguments, citing also the trial court similar handling of readback requests during the penalty phase. (7 AOB 1723-1756.) As respondent has already addressed these claims in an earlier argument, that argument will not be repeated here. Rather, respondent refers the Court to Argument LXXI, *supra*.

CXI.

APPELLANT'S CHALLENGE TO THE TRIAL COURT'S ALLEGED FAILURE TO INSTRUCT THE JURY ON THE PROPER USE OF TRANSCRIPTS HAS BEEN PREVIOUSLY ADDRESSED AND SHOWN TO BE WITHOUT MERIT

In earlier guilt phase arguments, appellant claimed the trial court prejudicially erred under state law and violated his constitutional rights in failing to adequately instruct the jury on the proper use of transcripts. He repeats that claim here, citing also the trial court's similar handling of transcripts given in response to readback requests during the penalty phase. (7 AOB 1757-1760.) As respondent has already addressed this claim in an earlier argument, that argument will not be repeated here. Rather, respondent refers the Court to Argument LXXII, *supra*.

CXII.

APPELLANT FORFEITED HIS CLAIM OF ERROR BY FAILING TO OBJECT AND THERE WAS NO ERROR WHEN THE TRIAL COURT SUBMITTED AN ANSWER TO A JURY QUESTION TO THE JURY IN WRITING WITHOUT ALSO READING IT

Appellant contends the trial court prejudicially erred and violated his constitutional rights by submitting the answer to a jury question to the jury in writing without reading the answer to the jury. (7 AOB 1761-1764.) By failing to object, appellant forfeited the claim of error, which is also without merit.

After discussing how to answer questions posed in a note from the jury and drafting written answers, the trial court proposed to submit the answers to the jury in written form rather than reading the answers to the jury. (71 TRT 13451-13452.) The defense had "no objection." (71 TRT 13452.) After making final changes to the written answers, the trial court advised counsel that it would have "a copy of exactly what you have sent into the jury room." (71 TRT 13453.) The trial court and counsel then discussed the need for counsel to keep the matter of the jury questions

to themselves and to stay close in the event of additional notes from the jury. (71 TRT 13454-13455.)

Appellant agreed that the answers to the jury questions be sent to the jury and did not object to the trial court's failure to read those answers. Thus, the claims of error is forfeited. (*People v. Roldan* (2005) 35 Cal.4th 646, 729; *People v. Box, supra,* 23 Cal.4th at p. 1213.) The claim is also without merit.

This Court has held that the rereading of testimony is not a critical stage of the proceedings. (*People v. Box, supra,* 23 Cal.4th at pp. 1213-1214.) While notification of counsel and an opportunity to be heard are important whether in response to a jury's request for testimony or information on a point of law, the actual delivery of the testimony or the instruction are not critical stages.

This Court has held that although Penal Code section 1138[295] requires testimony to be furnished when requested, the form in which it is furnished is in the trial court's discretion. (*People v. Box, supra,* 23 Cal.4th at p. 1214.) The code section also requires the jury be informed on any point of law and, similar to the furnishing of testimony, the form, whether written or oral, is in the discretion of the trial court. No abuse of discretion appears. As the trial court aptly noted, the answers to the jury questions were complicated and the jury would not likely be able to follow those answers if the trial court read them. (71 TRT 13452; see 108 CT 24253-24254.)

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295. Penal Code section 1138, provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

Finally, even if providing the answers in written form rather than reading them violated the statute, "[a] conviction will not be reversed for a violation of section 1138 unless prejudice is shown." (*People v. Frye, supra,* 18 Cal.4th at p. 1007.) Given the complexity of the trial court's answers and the better understanding the jury would have in getting the answers in written form, it is not reasonably probable that the outcome would have been different had the answers been read.

CXIII.

THE JURY DID NOT COMMIT MISCONDUCT IN ASKING ABOUT THE CONSEQUENCES OF A DEADLOCK, THE TRIAL COURT HAD NO DUTY TO INQUIRE, AND THE TRIAL COURT PROPERLY ANSWERED AND ADMONISHED THE JURY

In two arguments, appellant contends the jury engaged in misconduct by considering the consequences of a deadlock during deliberations, the trial court erroneously failed to inquire as to the misconduct when put on notice by the jury's question about the effect of a deadlock, and the trial court prejudicially erred and violated his constitutional rights in its answer to the jury's question. (7 AOB 1765-1769.) There was no misconduct and no need to inquire, and the trial court accurately answered the jury's question and properly admonished the jury to disregard the consequences of a deadlock.

In its first note, the jury reported that a unanimous decision was not possible, but the trial court properly directed the jury to continue deliberating. (See Argument CIII, *supra*.) In its second and third notes, the jury asked, among other things, what happens in the case of a deadlock. (108 CT 24251-24252.) In response to that question, the trial court wrote:

> The Penal Code provides that "if the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be."

> The issue of what happens next in the event of a deadlock is a matter that should not concern you nor should it enter into your deliberations in any way.

(108 CT 24253.)

To begin, although the jury reported being unable to reach a verdict, contrary to appellant's claim, there is no indication, much less, evidence that the jury discussed the consequences of a deadlock. This Court has held that "[m]ere questions from individual jurors prior to actual deliberations do not constitute jury misconduct." (*People v. Davis,* 10 Cal.4th at p. 548.) Here, of course, the question came from the jury while it was in deliberations. However, the jury had reported a possible deadlock and the question indicated nothing more than that one or more jurors wanted to know the consequences of a deadlock. While the jury might have considered the consequences of a deadlock if they had been advised and permitted to do so, they had not reached that point. There is simply nothing but speculation supporting appellant's claim of misconduct.

Nor was the trial court required to inquire at that point. The decision to investigate the possibility of juror misconduct rests within the sound discretion of the trial court. (*People v. Burgener, supra,* 29 Cal.4th at p. 878.) Both in terms of context and content, the question indicated the jury wanted to know the consequences of a deadlock and might have considered those consequences had they been permitted to do so. However, the jury was not in a position to consider the consequences of a deadlock when they did not know what those consequences were. As there was nothing to investigate beyond speculation, there was no abuse of discretion in failing to inquire. In addition, this Court has held that rather than inquiring into the possibility a juror might not be deliberating in good faith, the trial court acts appropriately in reminding the jury of its duties. (*People v. Burgener, supra,* 29 Cal.4th at p. 879.) Here, in answer to the jury's question, the trial court advised the jury of the statutory consequence of a deadlock and admonished the jury

that it was not to consider that consequence in its deliberations, thereby removing the possibility of any improper consideration.

Finally, appellant faults the trial court for advising the jury of the statutory consequence of a deadlock. Although this Court has repeatedly held that a trial court does not err in refusing to answer a jury question about the consequences of a deadlock (*People v. Gurule, supra,* 28 Cal.4th at p. 648; *People v. Hughes, supra,* 27 Cal.4th at p. 402), this Court has also "agree[d] that, as a general matter, the superior court *may* instruct a deliberating jury in response to a request going to the consequences of its ability to reach a unanimous verdict as to penalty." (*People v. Waidla* (2000) 22 Cal.4th 690, 746, italics in orig.)

As this Court has held in cases where a jury questions the possibility of commutation, which also raises the potential for misleading the jury, a trial court does not err in properly advising the jury on the commutation power and directing the jury not to consider such possibilities in its deliberations. (*People v. Hart, supra,* 20 Cal.4th at p. 656; *People v. Hines* (1997) 15 Cal.4th 997, 1071-1074.) Here, the trial court properly advised the jury of the statutory consequence of a deadlock, but also strongly admonished the jury it was not to consider such consequence in its deliberations. Thus, there was no error.

CXIV.

APPELLANT'S CHALLENGE TO THE TRIAL COURT'S ALLEGED FAILURE TO INSTRUCT THE JURY ON THE SELECTION DUTIES AND POWERS OF THE FOREPERSON HAS BEEN PREVIOUSLY ADDRESSED AND SHOWN TO BE WITHOUT MERIT

In a guilt phase argument, appellant claimed the trial court prejudicially erred under state law and violated his constitutional rights in failing to adequately instruct the jury on the selection, duties and power of the foreperson. He repeats that claim here as to the penalty phase instructions. (7 AOB 1770-1773.) As respondent has

already addressed this claim in an earlier argument, that argument will not be repeated here. Rather, respondent refers the Court to Argument LXXIII, *supra*.

CXV.

THE FEW ERRORS IN APPELLANT'S TRIAL WERE HARMLESS AND DID NOT UNDERMINE THE RELIABILITY OF THE DEATH JUDGMENT

Appellant contends the effect of the errors in the guilt and penalty phases rendered his sentence unreliable and a violation of due process. (7 AOB 1774-1776.) However, as described in Argument LXXIV, *supra,* there was little error in the guilt phase and it was harmless. In the penalty phase, there was no error. "Defendant was entitled to a fair trial but not a perfect one." (*People v. Cunningham, supra,* 25 Cal.4th at p. 1009.)

CXVI.

THIS COURT HAS CONSIDERED AND REJECTED APPELLANT'S VARIOUS CHALLENGES TO THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY LAW

Appellant challenges the constitutionality of California's death penalty on a variety of grounds. (7 AOB 1777-1830.) As he acknowledges, this Court has considered and rejected each of his assertions.

Appellant contends the death penalty scheme is unconstitutional because the special circumstances fail to provide adequate constitutionally required narrowing. (7 AOB 1778-1782.) It is not. (*People v. Dunkle* (2005) 36 Cal.4th 861, 939, citing *People v. Morrison, supra,* 34 Cal.4th at p. 730.) Appellant's assertion that the voters enacted the 1978 Death Penalty Law intending to make every murderer death-eligible, thereby not expecting to satisfy the constitutional narrowing requirement is incorrect. (*People v. Gray* (2005) 37 Cal.4th 168, 237, fn. 23.)

Appellant contends that factor (a), the circumstances of the crime, is overly broad, permitting contradictory and generic facts to be found aggravating. (7 AOB 1783-1790.) It is not. (*People v. Morrison, supra,* 34 Cal.4th at p. 729, citing *People v. Lewis, supra,* 26 Cal.4th at p. 394.).)

Appellant argues the statute is constitutionally deficient for failing to require aggravating factors be proven beyond a reasonable doubt, that aggravation be proven to outweigh mitigation beyond a reasonable doubt, and that the jury make those findings unanimously. (7 AOB 1790-1804.) However, jury neither unanimity nor proof beyond a reasonable doubt apply to those determinations. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939.) Moreover, the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2348, 147 L.Ed.2d 435], do not change that conclusion. (*People v. Gray, supra,* 37 Cal.4th at p. 237.)

Alternatively, appellant claims some burden of proof was required under Evidence Code section 520, or the jury should have been instructed that there was no burden of proof. (7 AOB 1805-1808.) Neither contention has merit. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939.)

Appellant contends the lack of written findings by the jury denied him meaningful appellate review. It did not. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939, citing *People v. Smith, supra,* 30 Cal.4th at p. 939.)

Appellant contends lack of inter-case proportionality review violates the Eighth Amendment and equal protection. It violates neither. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Horning* (2004) 34 Cal.4th 871, 913, and *People v. Morrison, supra,* 34 Cal.4th at p. 731.)

Appellant claims reliance on previously unadjudicated criminal activity violates the constitution. It does not. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Kraft, supra,* 23 Cal.4th at p. 1078.)

Appellant claims the use of restrictive adjectives in several of the mitigation factors imposed an unconstitutional barrier to the jury's consideration of relevant

mitigating evidence. It did not. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939, citing *People v. Monterroso* (2004) 34 Cal.4th 743, 796.)

Appellant contends the failure to advise the jury that mitigating factors could only be considered mitigating violated the constitution. It did not. (*People v. Moon* (2005) 37 Cal.4th 1, 42, citing *People v. Morrison, supra,* 34 Cal.4th at p. 730.)

Finally, appellant contends use of the death penalty as a "regular" form of punishment violates international norms as well as the constitution. It does not. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)

CXVII.

THE FEW ERRORS IN APPELLANT'S TRIAL WERE HARMLESS WHETHER EVEN WHEN CONSIDERED CUMULATIVELY

Appellant contends the cumulative effect of the errors in the guilt and penalty phases requires reversal of the death judgment. (7 AOB 1831-1834.) However, as described in Argument LXXIV, *supra,* there was little error in the guilt phase and it was harmless. In the penalty phase, there was no error. Despite the size of this case, it was tried with skill and professionalism by both sides, before a judge meticulous in her fairness. "The few errors that occurred during [appellant's] trial were harmless, whether considered individually or collectively. [Appellant] was entitled to a fair trial but not a perfect one." (*People v. Cunningham, supra,* 25 Cal.4th at p. 1009.) Appellant received a fair trial.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: January 5, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 182,316 words.

Dated: January 5, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL - CAPITAL CASE

Case Name: **PEOPLE v. LUCAS**
Case No.: **S012279**

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 and 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 **January 9, 2006**, I served the attached **RESPONDENT'S BRIEF** 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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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 **January 9, 2006**, at San Diego, California.

Terri Garza
Declarant

Signature