SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOE EDWARD JOHNSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S029551

Sacramento County Superior Court Case No. 58961
The Honorable Peter Mering, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

In 1982, a jury convicted appellant, Joe Edward Johnson, of the murder of Aldo Cavallo (Pen. Code, § 187, subd. (a))[1] committed during a home-invasion robbery (former § 190.2, subd. (a)(17)(i)), and with the forcible rape (§ 261, subd. (a)(2)) and assault with intent to commit murder of Mary S. (former § 217).[2] The jury returned a death verdict. (*People v. Johnson* (1988) 47 Cal.3d 576, 582.)

On appeal, this Court reversed the conviction for the rape and assault with intent to commit muder of Mary S., finding that her post-hypnotic identification of appellant during an in-person line-up was inadmissible under *People v. Shelly* (1982) 31 Cal.3d 18;[3] it affirmed the special-circumstance murder verdict, but reversed the penalty, finding that the jury was erroneously instructed on the possibility of future commutation or parole of a life sentence under *People v. Ramos* (1984) 37 Cal.3d 136, 153-154. (1 CT 2, 33-38, 40-43; 31 RT 10510-10513.)

Retrial of the penalty phase commenced in the Sacramento Superior Court on November 13, 1990. (2 CT 573; 31 RT 10510-10516.) The prosecutor elected to present evidence of the rape and the assault with intent to commit murder of Mary S. at the penalty-phase retrial as a circumstance in aggravation (§ 190.3). (1 CT 71-73; 2 CT 458-467; 31 RT 10513.) The trial court declared a mistrial on February 7, 1991, after the

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[1] Further undesignated statutory references are to the Penal Code.

[2] Upon retrial the prosecutor elected to present this crime as an assault with a deadly weapon. (§ 245(a)(1)).)

[3] The Legislature's 1984 enactment of Evidence Code section 792 superseded the holding in *People v. Shelly*. (*People v. Alexander* (2010) 49 Cal.4th 846, 879-884.)

jury indicated that it was hopelessly deadlocked with 11 jurors favoring the death penalty. (4 CT 983-984, 1076; 31 RT 10514.)

The matter now before this Court on appeal, the third penalty phase trial, began on July 6, 1992. (4 CT 1138.) On September 22, 1992, the jury returned a verdict of death. (6 CT 1368, 1370-1374.) On October 28, 1992, the judge denied appellant's motion to modify the verdict, and imposed the death sentence. (6 CT 1362-1374.)

STATEMENT OF FACTS

I. PROSECUTION CASE

A. Facts And Circumstances Of Appellant's Special-Circumstance Murder Conviction

On Tuesday, July 24, 1979, Aldo Cavallo conversed on the phone with a friend between the hours of 7:45 and 9:00 p.m., before going to sleep for the night. (42 RT 13564; 43 RT 13893-13897.) Sometime thereafter, appellant removed the screen from an open kitchen window of Cavallo's condominium, propped the screen against a piece of patio furniture, and reached through the window to unlock the kitchen door to enter the residence. (41 RT 13441, 13364, 13368-13371, 13396-13397, 13468-13469, 13473; 43 RT 13893-13895.)

Appellant took a barbell from a second bedroom and proceeded into the master bedroom where he bludgeoned the sleeping man in the right temple once or twice. (41 RT 13394-13400, 13470; 42 RT 13560-3563.) A 12-pound barbell was found at the foot of Cavallo's bed coated in his hair and blood. (42 RT 13562-13694.) Pathologist David Clary performed the autopsy on Cavallo's body. (42 RT 13850-13852.) Cavallo suffered a concomitant skull fracture (in which bone is pulverized into tiny pieces), in a three-by-four inch area over his right temple, eye, and cheek. (42 RT

13582.) The shards of bone were depressed into macerated brain tissue. (42 RT 13582-13584.) Clary concluded that the pattern of injuries Cavallo sustained were consistent with being struck extremely forcefully in the right temple area once or twice with the barbell found at the scene. (43 RT 13849, 13853-13854, 13867-13869, 13882.)

Appellant ransacked Cavallo's residence[4] and left a pile of items stacked in the front hallway, as if he intended to return for them at a later time. (41 RT 13347-13349, 13399-13340, 13454, 13467-13568.) It was later discovered that appellant took a Bohsei television set, ammunition, and a handgun from the home. (42 RT 13565-13567, 13573-13574, 13764.) It appeared that appellant let himself out through the door that he entered because officers found the front door closed and double-locked with an interior chain lock. (41 RT 13470.)

On Thursday, July 26, 1979, Cavallo's body was discovered after a neighbor asked the police to do a welfare check. (41 RT 13391.) When Officer Root arrived, he noticed that the kitchen screen door was closed, but the door was ajar. (41 RT 13396-13398.) Root looked through the open kitchen window and immediately noticed that the residence appeared to have been ransacked. (41 RT 13392-13393.) He thought that he might be interrupting a robbery in progress. (41 RT 13393, 13399-13400.) He entered the master bedroom and saw a body on the bed, lying under tightly-tucked blankets pulled up to the chin, entirely covered by the bedspread. (41 RT 13393-13394.) Root demanded that the person come out, but he received no response. (41 RT 13394.) He approached the bed and pulled back the bedspread to discover a pillow covered with blood and brain matter. (41 RT 13394-13395.)

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[4] Cavallo's friend testified that he was an extremely orderly person and a meticulous housekeeper. (42 RT 13764.)

Santa Rosa Crime Scene Investigator Officer Roy Fain was called to collect evidence at the scene of the Cavallo murder scene. (41 RT 13337-1339, 13441-13442.). Fain was working as a peace officer and crime scene investigator when he collected evidence in the Cavallo murder and Mary S. rape cases. (41 RT 13339.) Officer Fain had prior employment experience working for the California Department of Justice (DOJ) as a certified latent print examiner. (41 RT 13339-13340.) Fain had testified as an expert in the area of latent print comparison approximately 35 times, mostly prior to 1979. (41 RT 13339-13340.) Fain lifted a latent fingerprint from the inside bottom corner of the metal portion of the screen, in a location where a person might have placed his hand to lift the screen from the window casing. (41 RT 13340-13342, 13364, 13368-13371.)

The latent prints from the scene were sent to DOJ for further analysis along with appellant's prints. (41 RT 13342.) Criminalist Angelo Rienti concluded that the thumbprint lifted from Cavallo's window screen matched appellant's right thumbprint. (41 RT 13403-13404, 13406.)

At the scene, investigators found a purchase receipt and warranty paperwork for a Bohsei color television set that they did not locate in the residence. (42 RT 13565-13566.) They contacted the manufacturer and used the warranty paperwork to identify the serial number of the television set Cavallo had purchased. (42 RT 13566.) On August 9, 1979, officers conducted a parole search of appellant's apartment and located the Boshei television set with a corresponding serial number in his residence. (42 13566, 13573-13574, 13764, 13889-13891; 43 RT 13885-13891.) Cavallo's close friend, Mary Olson, confirmed that this television set appeared to be the same television set that she had seen many times in Cavallo's kitchen. (42 RT 13764.)

The jury was read testimony from prior trials in which Cavallo's friends and relatives testified that he had owned a semi-automatic .22-

caliber High Standard handgun that appeared similar to a Field King or Sport King model. (42 RT 13614; 43 RT 13910-13917, 13923-13935, 13940-13946, 14031-14037.) In the early to mid-1960s, Cavallo had called his friend Ludwig Saccomano to ask whether he could come out to the firing range at their ranch to try out the new firearm that he had purchased. (42 RT 13915-13916.) Saccomano recalled that Cavallo had purchased a firearm similar to Saccomano's own .22-caliber High Standard semiautomatic pistol. (42 RT 13909-13911, 13917-13918, 13922, 13945.) When Cavallo ran out of ammunition, Saccomano and his son loaned him more .22-caliber bullets from their stock. (42 RT 13942-13947.)

The prosecution also presented prior testimony from Cavallo's deceased friend and co-worker, Richard Caniff. (43 RT 13900.) The men became friends through their work as teachers at the same school, and the friendship deepened when Caniff's wife died, leaving him a widower with two boys to raise on his own. (42 RT 13897-13899.) Caniff and his sons had dined at Cavallo's residence the Saturday before he was murdered. (42 RT 13899.) Cavallo had said that he would call on Tuesday or Wednesday to arrange to take the boys fishing, but he did not call, which was unusual. (42 RT 13899-13900.) In the past, the friends had disagreed about the need to keep a firearm in one's home for safety. (42 RT 13900.) Cavallo told Caniff on multiple occasions that he kept a handgun in his nightstand "for protection." (43 RT 13900-13902.)

Investigators did not locate a handgun in Cavallo's residence.[5] (43 RT 13902.) They did find two open boxes of Monark .22-caliber cartridges on Cavallo's dining room table, one box containing 24 of 50 cartridges, and an unopened box of the same ammunition in Cavallo's bedroom closet.

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[5] But investigators located two shotguns, a shotgun case, and three boxes of shotgun shells in a hallway closet. (41 RT 13348.)

(41 RT 13473, 13543-13545; 42 RT 13567-13568.) Detective McMahon requested that Lieutenant Thompson photograph the markings on the cartridge boxes. (42 RT 13568.)

On cross-examination, Detective McMahon acknowledged that James Curry's girlfriend, Ollie Mae Smith, told him that Curry had brought a Boshei television to their apartment in late July for approximately a week. (42 RT 13605-13606.) McMahon also acknowledged that appellant's friend, Robert Ferroggiaro, claimed to have delivered the television set to appellant's home on the day it was searched, after appellant called him from jail and asked him to pick up a television set that he had purchased from Curry and bring it to his wife, Ruth Johnson. (42 RT 13613-13614, 13645; see also 47 RT 15106-15108.)

However, McMahon eliminated Curry as a suspect in the murder because two witnesses confirmed Curry's account that he had originally received the television set from appellant during a transaction that occurred in the employee parking lot of the hospital. (42 RT 13608, 13613-13614, 13645-13645, 13649-13650; see also 47 RT 15022.) McMahon testified that although he found a connection between Curry and the television set; he did not find any connection between Curry and the crimes. (42 RT 13608.) Furthermore, appellant's fingerprints were found at the Cavallo residence and the weapon used to assault Mary S., whereas Criminalist Rienti also compared Curry's prints to those found at the crime scenes and he did not find a match. (42 RT 13613-13614, 13615.) Furthermore, Curry's head was shaved at the time, and that was not consistent with Cavallo's neighbor's description of a man she saw outside her window on the night of the murder.[6] (42 RT 13648.)

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[6] Cavallo's neighbor Jackey Wilkey testified at the first trial that she observed a tall man with a dark complexion outside her apartment at around (continued...)

B. Evidence of other crimes

1. The rape, robbery, and assault with a deadly weapon causing great bodily injury

On Sunday, July 29, 1979, Mary S. attended a morning mass at Saint Eugene's Cathedral in Santa Rosa. (41 RT 13273-13275.) She stayed in her pew to pray after the sermon ended. (41 RT 13279.) She observed appellant enter the church from the street door, pause in the doorway, and look around the church. (41 RT 13278-13279.) She described appellant as a dark complected man at least 6 feet tall, weighing about 180 pounds, with a scraggly beard or a goatee and side burns. (41 RT 13291, 13295-13296, 13316, 13482-13483.) Appellant entered the pew where Mary S. was praying and he politely asked for directions to the priest's residence. (41 RT 13279.) She responded by pointing out the direction and explaining that the priest resided across the courtyard. (41 RT 13279.) Appellant turned and took a few steps in the opposite direction, but then he turned back toward Mary S. and pushed open his jacket to reveal a gun pointed at her through the opening in his coat. (41 RT 13279, 13297-13298.) Appellant told her that she would not be harmed if she went with him quietly. (41 RT 13279.)

Appellant took Mary S. to the back of the church, through the vestibule, and into a room set aside for the care of young children, commonly referred to as the "baby room" or "crying room." (41 RT 13279-13281.) He directed Mary S. into the bathroom. (41 RT 13280-13282.) Once in the bathroom, he shot the gun into the toilet seat, where the bullet lodged. (41 RT 13285-13286; 13537, 13552.) Mary S. was

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(...continued)
10:00 p.m. on the night in question, but that he fled when she tried approach him. (*People v. Johnson, supra,* 47 Cal.3d at p. 583.)

petrified. (41 RT 13285-13286; 42 RT 13587-13538.) He again assured her that he would not hurt her if she remained quiet and did not cry. (41 RT 13286.) He ordered her to take off her pants and underwear and directed her to mount the toilet. (41 RT 13286.) He then raped her. (41 RT 13286.) During the assault, appellant asked Mary S. if she had "ever fucked a black man," and when was the last time that "her husband fucked her." (41 RT 13286.)

Afterwards, appellant told Mary S. to redress herself. (41 RT 13287.) He asked if she had any money, and she responded that she had only change. (41 RT 13287.) He grabbed Mary S.'s purse from where it rested on the back of the toilet and rifled through it. (41 RT 13287.) He shoved the purse into her hands and told her to put her sweater over her head so that she could not see him. (41 RT 13288.) He then used the gun to bludgeon Mary S.'s head. (41 RT 13378- 13386, 13475-13482.) The firearm broke into pieces, which remained at the scene of the crime. (41 RT 13378-13382.) A .22-caliber cartridge clip and an expended jacket of the same caliber were found in the bathroom of the crying room. (42 RT 13570.)

Mary S. next remembered crawling or stumbling out of the crying room and blindly feeling her way into the church. (41 RT 13288.) She approached a woman who was still inside the church and asked for help. (41 RT 13288-13289.) The woman helped her to the rectory, where the priest gave her last rites before the ambulance arrived. (41 RT 13289.)

Mary S. was rushed into emergency surgery. (41 RT 13378, 13381.) She suffered a skull fracture that was a little over one inch in diameter and about 3/4 of an inch across, with a 1/2 inch depression pressing into the dura, or outer envelope of her brain, located next to the area of the brain that controls motor function and sensation. (41 RT 13381-13383.) Neurosurgeon David Sheetz lifted the fractured pieces of Mary S.'s skull

and reset them above her brain and sutured the cut in the dura. (41 RT 13378-13380, 13383.) The wound above the depression was a satellite laceration, a type of ragged contusion or bruising that is caused when a blunt force object strikes the skull with tremendous force, essentially shattering the bone in a pattern that looks like a shattered windshield. (41 RT 13384, 13386.) Dr. Sheetz also sutured 10 separate scalp wounds that appeared to be caused by blunt force trauma mixed with sharp force trauma. (41 RT 13383.) After being shown a photograph of the firearm appellant was believed to have used in the crime, Dr. Sheetz opined that the wounds he observed were consistent with being struck with the butt and gun sight of the firearm in the photograph. (41 RT 13384.) Mary S. suffered a permanent loss of smell, severe post-operative vertigo, and temporary amnesia regarding some aspects of the attack. (41 RT 13385.)

Dr. Howe collected sexual-assault evidence, including a vaginal swab, using a standardized kit. (2 CT 213; 41 RT 13483-13484; 42 RT 13689-1373.) DOJ Criminalist Arlo Waller concluded that the vaginal swab contained a mixture of vaginal and seminal fluid. (42 RT 13653, 13689-13690, 13696-13697.) In 1979, blood typing was the most sophisticated testing available to determine the source of bodily fluids. (42 RT 13690-13692.) The combination of vaginal and seminal fluid taken from the vaginal swab was contributed by a donor or donors with type-O blood. (42 RT 13697.) At that time, there was no method to separate vaginal fluid from seminal fluid. (42 RT 13697-13698.) Appellant and Mary S. both have type-O blood. (42 RT 13697-13698.) Therefore, it was impossible to exclude or to include appellant as a possible donor of the fluid on the vaginal swab. (42 RT 13690-13692, 13697-13698.) Waller had been contacted by defense experts over the years to check out the material for additional testing and to discuss the evidence. (42 RT 13694-13695.) DOJ had only started testing samples for the presence of deoxyribonucleic acid

(DNA) about a month prior to Waller's testimony in this matter; however, private laboratories and the Federal Bureau of Investigation had been performing DNA testing for a few years.[7] (42 RT 13704-13705.) Waller had not been asked to retest the sample using more sophisticated methods, and to the best of his knowledge, no one from law enforcement had tested the sample for the presence of DNA. (42 RT 13702-13703.)

Mary S. could only vaguely remember the week that she spent hospitalized. (41 RT 13289.) Mostly, she recalled that she had to remain prone and to lay extremely still or she would be overcome with dizziness and nausea. (41 RT 13290-13291.) While she was hospitalized, the detectives showed her more than 50 photographs of suspects, but she did not recognize the face of her assailant among these images. (41 RT 13308-13309, 13313-13314.) She was shown several photographs shortly after she was released from the hospital, but she again did not recognize her assailant among these photographs.[8] (41 RT 13313.)

After Mary S. was released from the hospital she helped a sketch artist draw a composite based on her description of her assailant. (41 RT 13291-13292, 13310; 49 ART 10699; see also 2 CT 227; 1 RT 275.) A poster board containing the composite and posted alongside appellant's California

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[7] Prior to the trial, the defense took custody of the rape kit evidence and other physical evidence for the purpose of having it tested for the presence of DNA by a private laboratory. (49 ART 10584, 10591-10594, 10686, 10691-10692.) However, the defense did not present any expert testimony on this subject.

[8] A few days later, Mary S. identified appellant as her assailant based on his appearance and voice (after each said phrases that her assailant had used during the rape), from a line-up of individuals personally selected by appellant. (1 CT 4-7.) This identification was excluded because Mary S. participated in the line up after undergoing hypnosis to help her recall the events that occurred during the attack. (1 CT 33-39.)

driver's license photograph taken on December 8, 1978, was admitted into evidence. (41 RT 13292, 13318; 42 13571-13573; 43 RT 14065.)

Detective Peruzzo processed the crime scene where Mary S. was attacked and raped. (41 RT 13475.) He collected the pieces of the firearm from the floor of the crying room bathroom and surrounding areas. (41 RT 13477-13479, 13482.) Criminalist Waller examined the pieces of the firearm and concluded that the magazine and grip found at the scene were from a High Standard firearm, and the other smaller pieces were also consistent with being from a High Standard firearm. (42 RT 13653, 13658-13660, 13665.) Waller believed that the firearm was either a Sport King or a Field King semiautomatic .22-caliber pistol. (42 RT 13360-13361.) He found traces of human blood on or near the base of the magazine and on a piece of metal from the front sight of the firearm. (42 RT 13662.)

Officer Fain found two latent prints on the firearm's magazine. (41 RT 13343-13345, 13358, 13363, 13542.) He photographed them prior to lifting because they were located in an area where the lifting might destroy them. (41 RT 13344-13345.) Officer Fain also located and lifted a latent palmprint from the back of the toilet and a fingerprint from the crying room door handle. (41 RT 13375-13376.) He thought at the time that these prints might have been too smudged for comparison. (41 RT 13374-13375.) Officer Fain made initial comparisons between suspect's prints and the latent prints found at the crime scenes. He matched appellant's thumbprint to the latent print on the magazine, and eliminated other potential suspects, including James Curry and J. Walker, because their prints did not match those found on the gun used to bludgeon Mary S. (1 CT 225; 41 RT 13488; 42 RT 13570-13571, 13615-13616.)

The firearm, photographs, and original photographic film were sent to the DOJ for further analysis. (41 RT 13345.) Criminalist Rienti concluded that appellant's prints matched the latent prints found on the magazine. (41

RT 13405, 13412.) Rienti also compared the latent right thumbprint from the Cavallo murder scene to the latent right thumbprint left on the firearm magazine. (41 RT 13412-13413.) He concluded with certainty that the right thumbprints taken from both crime scenes were identical. (41 RT 13412-13413.) He did not compare the palmprint or fingerprint lifted from the door of the Mary S. crime scene, but he opined that the latent prints were usable if he had the correct subject print with which to compare.[9] (41 RT 13419-13426.) Detective Peruzzo did not remember if law enforcement had obtained appellant's palmprint for comparison. (41 RT 13532.)

Criminalist Waller compared the cartridges in the magazine and the spent cartridge found at the Mary S. crime scene to the live ammunition recovered from the kitchen table of Cavallo's residence. (42 RT 13665-13666, 13700.) Waller found that all of the cartridges had been manufactured by the Federal Cartridge Company with no observable differences in type, caliber, or overall characteristics. (42 RT 13667.) Each cartridge had an "F" headstamp with distinctive identifying tool marks or characteristics. (42 RT 13667-13669.) Waller compared the headstamp and the tool marks on the cartridges recovered from both crime scenes under a microscope. (42 RT 13367-13368, 13684-13685.) He found that six of the live rounds and one spent cartridge case found at the Mary S. scene were actually struck with the same bunter and imprinted with the same dye as cartridges found in one or both boxes found on the kitchen table of Cavallo's home. (42 RT 13665-13668, 13684-13689.)

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[9] The defense investigator took custody of the fingerprint cards at the end of the day, presumably for the purpose of having a defense expert compare the latent prints with appellant's prints. (41 RT 13415-13416.) However, the defense presented no expert testimony on the subject of latent print analysis.

Detective McMahon went to Minnesota to investigate Federal's process of manufacturing ammunition. (42 RT 13568-13569.) He met with Dean Kuntz, a local ammunition collector with a particular interest in Federal ammunition. (42 RT 13569-13570.) At trial, Kuntz explained Federal's process of code marking the ammunition boxes after manufacture. (42 RT 13711-13715.) Kuntz brought a typed internal company memorandum from November 7, 1940, entitled "Code Mark for .22 Cartons," which explained the coding system that Federal used for marking .22 cartridge boxes. (42 RT 13711-13717.) The markings on all of the boxes of ammunition recovered from the Cavallo crime scene indicated that the cartridges inside the box were packaged on April 1, 1952. (42 RT 13716.) Federal stopped manufacturing cartridges under the brand name "Monark" in 1952. (42 RT 13713.)

On cross-examination, Detective Peruzzo testified that the police had arrested one J. Walker as a possible suspect on the evening of the day that appellant raped Mary S. because Walker was a tall African-American man, found about a mile from the church, who wore a blue jacket and blue pants, which was consistent with Mary S.'s description of the clothing that the suspect had worn. (41 RT 13446, 13486.) Walker's jacket had two dots or smears of a red substance that he said were either ketchup or his own blood from a cut on his finger. (41 RT 13452, 13486.) The substance was swabbed, but the swab was contaminated and therefore not tested. (41 RT 13486-13487.) Walker's fingerprints and palmprint were taken at Peruzzo's direction, and he was released after Officer Fain found that his prints did not match the latent fingerprints recovered from the crime scene. (41 RT 13488, 13531, 13551-13552; 42 RT 13615-13616.)

A woman named Marilyn Swift was arrested for driving under the influence the day after the Mary S. rape. She claimed that she had been drinking because she was upset after being raped in the park by a tall Black

man with a firearm. (41 RT 13490-13493.) After investigating and finding no evidence to support Swift's claim, Peruzzo concluded that she had read about the Mary S. rape in the paper and then lied about being raped to avoid prosecution. (41 RT 41 RT 13551-13553.)

2. The Stabbing of Verna Olsen on December 2, 1978

In 1978, Verna Lynette Olsen worked with appellant as a janitor at Sonoma State Hospital.[10] (42 RT 13725-13726.) They had a casual sexual relationship. (42 RT 13726-13727.) One day, appellant sought out Olsen at her home. (42 RT 13726.) He moved into Olsen's apartment shortly thereafter. (42 RT 13726-13727.) After about two weeks, Olsen wanted him to leave because she had come to fear his threatening and controlling behavior. (42 RT 13727-13728.) Specifically, he threatened to decapitate her children and grandchildren in front of her if she "ever did anything against him." (42 RT 13735-13736.)

On December 2, 1978, Olsen and her friend Lisa were at home drinking beer or cocktails. (42 RT 13736.) Earlier that day, appellant had told Olsen that he wanted to invite friends over that night and he did not want her to be at the apartment. (42 RT 13729.) Olsen had arranged to spend the night at her daughter's home. (42 RT 13729.) However, when appellant started yelling at her, she insisted that the apartment belonged to her and she would not leave. (42 RT 13729.) When the argument became more heated, Olsen told him that they would leave the apartment. (42 RT 13729.) He then told her she was not going anywhere. (42 RT 13279.) Appellant told Lisa to leave, but she refused. (42 RT 13729.) He then hit Olsen in the face. (42 RT 13279.) She screamed that they were leaving

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[10] When asked to examine Prosecution Exhibit 43 (appellant's driver's license photograph), Olsen confirmed that it accurately depicted him during the time period that she knew him. (42 RT 13734, 13742-13743.)

and she was not going to let him "hit her no more." (42 RT 13729-12730.) Still screaming at Olsen, appellant left the living room and returned holding a knife. (42 RT 13729-13730.) She had her jacket slung over her arm. (42 RT 13730.) He tried to stab her in the stomach, but she deflected the knife with her arm. (42 RT 13730.) He stabbed Lisa in her hand and she fled the apartment. (42 RT 13731.) Appellant then stabbed Olsen repeatedly in her neck and chest. (42 RT 13730-13731.) He told her that he had stabbed her in the heart and she would die within two minutes. (42 RT 13731.) She begged him to go away and let her die in peace. (42 RT 13731.) He then went into the bedroom and Olsen managed to stagger out of the apartment to find Lisa waiting just outside the door. (42 RT 13731, 13734.) They went to the hospital where Olsen remained for five or six days receiving treatment for her wounds and transfusions to recover from severe blood loss. (42 RT 13731.)

Later that same day, appellant was spotted driving a white Pinto and arrested. (42 RT 13756.) Inside the car was a sheathed fixed-blade hunting knife and a length of metal pipe underneath the driver's seat. (42 RT 13758-13759.)

Sometime in June or July of 1979, appellant parked his white Pinto in the hospital staff parking lot near where Olsen had parked her vehicle.[11] (42 RT 13737-13738.) Olsen felt terrified and threatened and she refused to go to her car. (42 RT 13737-13738.)

Appellant pleaded guilty to assaulting Olsen with a deadly weapon (former § 245, subd. (a)(1)). (42 RT 13825; 44 RT 14209; see also Pros. Exh. 76 [certified record].)

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[11] Appellant had been released on bail pending trial for his assault on Olsen, notwithstanding the fact that he was still on parole for escape and assault on Correctional Officer Laughlin. (42 RT 13737-13738; see discussion, *infra.*)

3. The Attack on Correctional Officer Laughlin and Escape from Prison on April 29, 1974

In 1974, appellant was incarcerated at the California Department of Corrections (CDC) at Chino for the assault on fellow inmate Scott. (42 RT 13767.) On April 29th of that year, Correctional Officer Steven Laughlin was supervising appellant and two other inmates while they worked on landscaping in an area between the prison buildings and the fenced perimeter of the grounds. (42 RT 13766-13768.) As Laughlin led the three inmates back to the prison, he was jumped from behind by one of them and struck in the head. (42 RT 13769.) Laughlin immediately tried to rise from the ground, but appellant came around and struck him several times in the face and head. (42 RT 13769-13770.) One inmate walked away from what was happening, but appellant and the third inmate dragged Laughlin's body to the side of a building where they tied his hands and gagged him. (42 RT 13769-13770.) They continued to beat him while he was restrained. (43 RT 13770-13771.) Laughlin remembered feeling one of the inmate's boots pressing down on his neck and telling his attackers that he would do what they wanted. (42 RT 13771.) After the beating stopped, Laughlin observed appellant and the other inmate running toward the fence and climbing over it. (42 RT 13771-13772.) Laughlin received 19 stitches to close wounds on his face and head. (42 RT 13772.)

Appellant was apprehended in a stolen vehicle within 24 hours of escaping. (42 RT 13788.) He was committed to Patton State Hospital (PSH) for treatment after pleading guilty to committing an escape with force (former § 4530, subd. (a)). (40 RT 13264-13268; 42 RT 13787-13789; 44 RT 14210; see also Pros. Exh. 60 [certified record].) About 18 months later, appellant escaped from PSH with the assistance of a nurse who later became his common-law wife, Ruth Johnson. (See Pros. Exh. 80, at pp. 1-2; 87 at pp. 4-6.)

Appellant was returned to Chino to serve his sentence about 18 months after he escaped. (42 RT 13788-13789.) During his disciplinary hearing, he denied any intent to harm Laughlin and he blamed Laughlin's injuries entirely on his co-assailant. (42 RT 13796.) Appellant only admitted that he had helped to gag and restrain Laughlin in order to effectuate their escape. (42 RT 13796-13797.)

4. The Assault on Inmate Thomas Scott on January 23, 1973

According to his prior sworn testimony, Thomas Scott was housed with appellant in the same dormitory at Atascadero State Hospital (ASH) in Vacaville. (42 RT 13837; 43 RT 13975-13976.) Scott was in his bed when appellant called him a "vulture" who owed him a box of cigarettes and a jar of coffee. (43 RT 13977-13980, 13993-13994.) About 20 minutes later, appellant approached Scott with a chair raised above his head and brought it down full force on Scott's head, causing injuries to his chin and left eye. (43 RT 13977-13978, 13980-13981, 13993-13994, 14003.) Scott lost consciousness after the first blow with the chair. (43 RT 13977-13978, 14007.) He was taken to the infirmary, where he received stitches to his wounds. (43 RT 13978-13979, 13982.) Scott initially told the hospital staff that he had fallen out of bed. (43 RT 13991, 13995.) However, he later disclosed the truth after learning that he had suffered permanent nerve damage to his eye. (43 RT 13990-13997, 14002, 14008-14009.)

After a jury trial, appellant was convicted of assault with a deadly weapon on Scott. (40 RT 13204-13205; 44 RT 14209-14210; see also Pros. Exh. 61 [certified record].)

5. The Attempted Murder of Florence M. and Dissuading a Witness

In late September of 1971, after serving time in a juvenile detention facility in Indiana, appellant was released to California into the care and

custody of his half-brother, Priestley. (42 RT 13802-13803.) Priestly worked at Harvard General Hospital in Carson, California. (42 RT 13803.) He lived with his wife, Florence M., in a one-bedroom apartment in Los Angeles. (42 RT 13801-13803.) Florence M. was several months pregnant with their first child and she had just started maternity leave from her job. (42 RT 13803.)

Appellant assaulted Florence M. for the first time about three weeks into his stay with the couple. (42 RT 13803-13804.) Appellant came home after being involved in a fight on the street and he asked Florence M. to drive him back to the fight. (42 RT 13803-13804.) She refused, appellant became angry and she fled the apartment for her car to try to get away from him. (42 RT 13804.) After she started the car, appellant reached through the window, seized her arm, and pulled it through the steering wheel hard. (42 RT 13804.) He told her he would break her arm if she did not give him the car keys. (42 RT 13804.) Fearful for her unborn child, Florence M. gave him the keys and exited the car. (42 RT 13804.)

On December 7, 1971, Florence M. was in her kitchen talking to her sister on the phone. (42 RT 13805.) Appellant demanded that she hang up because he needed to make a phone call. (42 RT 13805.) She agreed, but said that she wanted to finish her conversation first, and she walked with the phone to her bedroom. (42 RT 13806.) Appellant seemed agreeable, and he politely asked her for a key to the front door, saying that it was drafty and he wanted close the front door. (42 RT 13806-13807.) The front door latch was broken and the door would not remain closed unless it was locked. (42 RT 13806-13807.) Florence M. gave appellant her key. (42 RT 13806.)

A few moments later appellant returned, holding Florence M.'s largest kitchen knife above his head in a stabbing position. (42 RT 13806-13807.) She was so shocked that she immediately hung up the phone. (42 RT

13807.) Her sister called back. (42 RT 13807.) Florence M. did not move to answer it, but appellant told her to pick up the phone and to tell her sister calmly that she could not talk right now and "don't sound funny." (42 RT 13808.) Florence M. tried to do what he asked. (42 RT 13808.) When she hung up the phone, appellant moved toward her, and she tried to get away from him. (42 RT 13808.) Appellant started beating Florence M. around the face and head with his fists.[12] (42 RT 13808-13809.) At some point Florence M. rolled from the bed and curled up on the floor protectively sheilding her stomach while appellant cut her multiple times on her forehead, her eyebrow area, across the eyelid, and twice on her legs. (42 RT 13809.) She managed to get away from appellant for a few moments and she crawled from the bedroom down a hallway and into the living room, but her body gave out, and she collapsed in a heap on the living room floor. (42 RT 13810.)

Appellant approached Florence M. as she lay helpless on the ground and he stabbed her repeatedly in her back. (42 RT 13810-13811.) In an attempt to stop him, Florence M. grabbed the blade of the knife with her right hand, causing a deep cut in her hand which left a significant scar. (42 RT 13809-13810.) Florence M. screamed out to Jesus for help. (42 RT

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[12] Appellant raped Florence during the beating, but before the stabbing. She was prepared to testify about the rape; however, the trial court excluded the evidence in the first retrial because the prosecution failed to provide the defense with sufficient notice. (2 CT 768-772; 23 RT 8000-8001, 8090-8091; 31 RT 10523-10525.) Here, the trial court excluded testimony about the rape pursuant to Evidence Code section 352, finding that the fact appellant has raped before might influence the jury's assessment of whether or not he was the person who raped and tried to murder Mary S. (32 RT 11017-11022.) In 1995, the Legislature enacted Evidence Code section 1108, which deviates from the historical practice of excluding "propensity" evidence of sex offenses where a defendant is accused of committing a sex offense. (See, e.g., *People v. Soto* (1998) 64 Cal.App.4th 966, 983-984.)

13811.) Appellant responded, "That's not going to do you any good." (42 RT 13811.) The blade of the knife broke into three pieces and the handle broke into a fourth while appellant was stabbing her. (42 RT 13811-13812.) Priestly's key turned in the lock and he opened the front door at the same time that appellant returned to the living room holding a steak knife. (42 RT 13812.) Appellant saw his brother and fled the apartment. (42 RT 13812.) Florence M. was rushed into emergency surgery where she spent eight days recovering at the hospital before being released into her sister's care. (42 RT 13812.)

Nine days later, California Highway Patrol (CHP) Officer Lance Erickson stopped appellant for a traffic violation and then arrested him for possession of a stolen automobile. (42 RT 13671-13672.) Appellant told Erickson that he thought he had killed his pregnant sister-in-law by stabbing her from her neck down to her stomach. (42 RT 13673.) He claimed that it occurred during an argument about her "coming on to him." (2 RT 13673-13674.)

After being arrested, appellant telephoned Florence M. at her sister's home and threatened to harm her if she testified against him. (42 RT 13814.) Although terrified, Florence M. still testified at the preliminary hearing. (42 RT 13814-13815.) Later that year, appellant pleaded no contest to attempted murder in exchange for a dismissal of the remaining charges, including rape. (3 CT 666-671, 768-771; 40 RT 13207, 13824-13825; 44 RT 14209; see also Pros. Exh. 65 [certified record].)

Florence M. and her husband Priestly visited appellant while he was ostensibly receiving mental health treatment at PSH to regain competence to stand trial on pending in an unrelated violent crime. (40 RT 13204; 42 RT 13789, 13815-13816.) Appellant did not apologize to Florence M., nor did he ask after the welfare of her baby, who was now a toddler. (42 RT

13816.) Florence M. wrote a story about surviving the attack entitled: "The Miracle of The Broken Knife." (42 RT 13816-13817.)

II. DEFENSE CASE

A. "Lingering Doubt" Evidence

Ollie Mae Smith, testified that in late July, her boyfriend at the time, James Curry, obtained a Boshei television from appellant. He brought it to her apartment where it remained for about a week. (43 RT 14108-1415.) Smith also testified that her memory had been affected by a car accident in 1982 that resulted in a coma which lasted for several days. (43 RT 14018-14019.) When asked to identify appellant in the courtroom, Smith said that she did not recognize him. (43 RT 14019-14020.)

Cavallo's ex-wife, Geraldine Lawson, testified that they were married in 1957 for about three years. (43 RT 14031-14032.) Cavallo purchased a .22-caliber revolver to practice target shooting with her. (43 RT 14031-14037.) She did not know if he kept the firearm after the property settlement in 1961, or if he purchased any other firearms after their divorce. (43 RT 14040-14042.)

Appellant's friend, Robert Ferroggiaro, testified that appellant called him from jail on August 2, 1979. Appellant said he had purchased a television set from James Curry and he asked to have it delivered to his wife, Ruth Johnson. (43 RT 14128; 44 RT 14133.) Ferroggario said that Curry dropped off the television at work that day and he delivered it to appellant's apartment a few hours before the parole search. (44 RT 14130-14132.) Ferroggario said that he contacted law enforcement about his connection with the television after Ruth Johnson called to tell him that it was seized during a search of the apartment. (44 RT 14131-14132.) Johnson told him that she did not mention to the officers that Ferroggario had brought over the television earlier that day because she did not want

him to get into any trouble. (44 RT 14131-14132.) Ferroggario wanted to let law enforcement know about his involvement because he thought that they might "find his fingerprints" on the television set. (44 RT 14132.) He acknowledged on cross-examination that he had remained friends with appellant even after appellant was accused of stabbing their co-worker, Lynette Olsen. (44 RT 14137-14138.) He also acknowledged telling an officer that he thought appellant was "as sane as anyone." (44 RT 14137-14138.)

Gerald Gourley, a former Federal employee with 24 years of experience, testified that Federal cartridges are always marked with an "F" headstamp, also known as a hob mark. (42 RT 13719; 43 RT 14102-14105.) Each "F" mark is made by a tool called a bunter. (42 RT 13719-13721; 43 RT 14105.) Bunters are manufactured in Federal's machine shop by a tool called a hob. (43 RT 14105.) In 1952, Federal had 12 machines, each using a bunter, manufacturing ammunition at any given time. (43 RT 14108.) Each bunter lasted between 65,000 to 80,000 strikes, or approximately one daily shift of work. (43 RT 14124-14125.) After being stamped, cartridges from the machines are commingled when they are washed and annealed. (43 RT 14110-14111.) Cartridges are packed 50 per box. (43 RT 14119.) This process can take a few weeks. (43 RT 14122-14123.) Federal produces approximately four million cartridges per day. (43 RT 14108.)

Gorley agreed with Criminalist Waller that every bunter will have individual flaws, making it possible to determine whether a cartridge was struck by the same bunter if examined under magnification, but he disagreed that there would be differences between bunters created by the same hob. (43 RT 14107-14108, 14126-14127.) Gourley also agreed that

several cartridges depicted in certain prosecution exhibits appeared to be struck by a bunter created by the same hob.[13] (43 RT 14112.) A hob makes about 1,000 bunters in its lifetime, which could take anywhere between 25 days to six weeks. (43 RT 14108, 14127.) Gourley also confirmed that the coding on the Federal Cartridge boxes in question showed the date that the ammunition was packaged. (42 RT 14117, 14120-14121, 14123.)

B. Childhood and Family History

Sacramento State University Professor, Dr. Addison Somerville, testified on behalf of the defense as an expert psychologist with a focus of study on the structure and migration patterns of African-American families. (44 RT 14211-14217, 14223-14225.) Dr. Somerville interviewed appellant and a few of his family members. (44 RT 14229-14234.) Based on this information, he formed an opinion as to how the sociological, cultural, and economic circumstances of appellant's childhood might have influenced his personality development. (44 RT 14226-14227.)

Dr. Somerville discovered that appellant was born in Canton, Mississippi, but the family moved to Detroit, Michigan, when appellant was two years old. (44 RT 14231, 14243.) Appellant's mother was frequently absent from the home and leaving appellant and his younger siblings in the house with little or no food or adult supervision. (44 RT 14244-14250.) Appellant did not know his father. (44 RT 14250.) His older brother, McClenton, physically punished him by stripping him, beating him with a belt, slapping him, and bouncing his head on the floor. (44 RT 14247.) Dr. Somerville believed that the absence of parental

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[13] Assuming that each hob produces approximately 1,000 bunters in 42 days, it follows that each machine would use approximately 23 to 24 bunters per day.

support and guidance caused an overall emotional void in appellant's development. (44 RT 14248.)

By the age of six, appellant was stealing food and storing it in the basement. (44 RT 14249.) He also fraudulently collected money using an Easter Seals container. (44 RT 14249.) He had sexual intercourse for the first time at age eight and engaged in multiple casual sexual encounters thereafter. (44 RT 14250-14251.) By age nine, he was frequently truant or suspended from school for fighting. (44 RT 14249-14251.) By 10 years of age, appellant had developed a habit of consuming significant quantities of alcohol and smoking four to five marijuana cigarettes daily. (44 RT 14250-14251.)

Following his commission of an armed robbery at age 10, the juvenile court referred him to the Clinic for Child Study in Wayne County, Michigan. (44 RT 14344, 14378, 14251; see also Pros. Exh. 89; Def. Exh. P at pp. 1-7.) The referral was also based on "incorrigibility" at home and at school, a reported attempt to drive away in a car, suspected fire-setting in his apartment building, and seven police reports related to burglary. (44 RT 14402.) Psychiatrist Sheldon Siegel recommended removing appellant from his home and placing him in a "very controlled," but "non-punitive residential environment." (Pros. Exh. 81 at pp. 1-2.) He concluded that "Although there is no evidence for [*sic*] any psychotic behavior in this child, the history and interview I had with him indicates that he is very disturbed." (44 RT 14404; see also Pros. Exh. 81 at pp. 1-2.) Dr. Siegel noted that appellant had an extremely low threshold for frustration, he was prone to outbursts of rage, and he had "extreme difficulty" controlling his impulses. (44 RT 14402-14405; see also Pros. Exh. 81 at p. 2.) Dr. Siegel noted that despite appellant's above-average intelligence, he was nevertheless doing very poorly in school. (Pros. Exh. 81 at p. 2.)

On April 5, 1961, the juvenile court committed appellant to Ypsilanti State Hospital (YSH), a secure psychiatric hospital caring for children, adolescents, and adults. (42 RT 13742-13746, 13754; Def. Exh. P at pp. 1-12.) The hospital housed children with issues ranging from mental illness, cognitive and developmental delay, autism, and behavioral problems ranging from juvenile delinquency to psychosis or borderline psychosis. (42 RT 13746, 13748.) Appellant's former teacher, Dwayne Martin, believed that he fell somewhere between juvenile delinquent and borderline psychotic. (46 RT 13749.) Upon arrival at Ypsilanti, appellant was also treated for syphilis. (42 RT 13749.) Martin knew that appellant was infected with syphilis when he arrived at Ypsilanti, but he did not know how appellant had acquired the disease. (42 RT 13794, 13753.) Appellant had been sexually active for two to three years prior to his commitment. (Pros. Exh. 81 at p. 1.) Martin did not know if appellant acquired the disease congenitally or through sexual contact. (42 RT 13753.)

According to Martin and another former teacher, Margaret Yates, appellant seemed to do well in the safe and structured environment of YSH. (42 RT 13748.) He joined the Boy Scouts, became a scout leader, started to take an interest in school, and improved his academic performance. (42 RT 13744-13745, 13750.) Yates observed that appellant showed an interest in caring for the animals in the classroom. (42 RT 13745, 13750, 14679-14680.) Appellant was discharged from YSH to his family on October 16, 1963. (See Def. Exh. P at pp. 13, 18; see also Pros. Exh. 89 at pp. 7-8 [Indiana Reformatory Packet, Letter from YSH Adolescent Director, Dr. J.N.P. Struthers].)

On March 26, 1964, appellant was re-committed for the sixth or seventh time to the Wayne County Youth Home, Detroit's secure juvenile detention facility, for breaking and entering on three different occasions. (Def. Exh. P. at p. 22.) From the records, it appears that appellant returned

to the Clinic for Child Study via the juvenile court system in June of 1964. (See Def. Exh. P at p. 20.) On June 30, 1964, the Youth Home petitioned to have appellant recommitted as a mentally ill person to a secure state hospital. (See Def. Exh. P at p. 20.) On June 10, 1964, Dr. Komisaruk wrote a letter to the juvenile court judge recommending recommitment to a state hospital. (See Def. Exh. P at p. 28.) Although the record is not entirely clear, it appears that appellant entered the juvenile court system again sometime around October 20, 1964. (See Def. Exh. P at p. 30.)

On April 14, 1965, Youth Home social worker Kenneth Peterson wrote a letter to the supervisor of the Social Service Unit at YSH urging him to assist in getting appellant admitted to the hospital because the Youth Home did not have the means to treat seriously ill youths. (44 RT 14351-14352; see Def. Exh. N.) Appellant was briefly readmitted to YSH from the Wayne County Youth Home on July 9, 1965. (44 RT 14379; Pros. Exh. 82 at pp. 1-3; Pros. Exh. 89 at pp. 8-9.) The staff at YSH evaluated appellant and determined that he did not suffer from a mental illness, but rather a behavioral problem and that his "anti-social behavior requires more of a correction [*sic*] setting than it does a mental hospital." (Pros. Exh. 83 at p. 2; Pros. Exh. 89 at p. 9.) Appellant was released from YSH into his mother's custody on July 31, 1965. (Pros. Exh. 83 at p. 2; Pros. Exh. 89 at p. 9.)

On October 17, 1966, when he was 16 years old, appellant was committed to the Indiana State Reformatory. (45 RT 14655- 14657.) Appellant was initially housed in a minimum-security dormitory outside the walls of the facility. (45 RT 14664-14665.) Within 16 days, appellant had escaped and been returned to serve the remainder of his sentence in a more restrictive placement. (45 RT 14655.) He was subsequently transferred to Indiana State Prison after multiple disciplinary reports, including escape, an attack on a correctional officer, running from and attempting to assault a

correctional officer, destruction of state property, and having a knife in his cell. (45 RT 14658; see also Pros. Exh. 89.)

Charles Miller worked as the Superintendent of the Correctional Industrial Complex in Indiana. (45 RT 14643-14644.) He began his career on April 1, 1976, as a counselor at the Indiana State Reformatory and continued to work there in increasingly more managerial capacities through 1982, and he returned briefly in 1988 as Acting Superintendent. (45 RT 14644, 14645-14647.) Superintendent Miller testified that in the late 1960s the reformatory was a maximum-security walled facility that housed people who ranged in age from 13 to 60 years old for a variety of felony offenses, up to and including murder. (45 RT 14649.)

C. Evidence of Mental Disease or Defect

On June 24, 1974, PSH psychologist James Ramsaran prepared a report on appellant's competence to stand trial for forcible escape and assault upon Correctional Officer Laughlin. (45 RT 14561-14564; Def. Exh. R.) After interviewing appellant, Dr. Ramsaran concluded that appellant suffered from paranoid schizophrenia based on his self-reported auditory hallucinations. (45 RT 14569-14571.) Dr. Ramsaran did not have access to any previous records and appellant was not particularly cooperative or forthcoming during the interview. (45 RT 14571-14586.)

On July 8, 1974, PSH staff psychiatrist James Kerns evaluated appellant for admission. (45 RT 14423, 14426-14429, 14436-14437.) Admission evaluations last between a half-hour up to one hour. (45 RT 14436-14437.) Dr. Kerns's diagnostic impression was that appellant suffered from paranoid schizophrenia. (45 RT 14427-14430.) When admitted to PSH, appellant was not receiving psychotropic medications; he was then medicated with anti-psychotic medications for about two months until September 12, 1974. (45 RT 14431, 14437-14438, 14440-14441.) Psychiatrist and neurologist Richard Finner evaluated appellant one time on

July 11, 1974. (44 RT 14168; 45 RT 14595, 14602-14608.) Dr. Finner formed the opinion that appellant suffered from paranoid schizophrenia, but upon reviewing his report, he characterized appellant's presentation as an undifferentiated type of schizophrenia. (45 RT 14604-14605.)

Dr. Finner had none of appellant's prior criminal or psychiatric records, and appellant was not forthcoming during the interview. (45 RT 14618-14626.) After reading some additional records, Dr. Finner noted that appellant's diagnosis seemed to "wax and wane" between antisocial personality disorder and schizophrenia. (44 RT 14631-146322.) Dr. Finner believed that his diagnosis of appellant might have been different if he had more background information. (45 RT 14632, 14640-14641.) Had he read some of the prior reports that Drs. Lobb and Chapman relied upon when they assessed appellant, he would certainly have investigated the information further and he might have diagnosed appellant differently. (45 RT 14632.)

On January 6, 1975, appellant was informed that his sanity had been restored and that he would be returned to court to face his pending charges. (45 RT 14446-14447.) Dr. Kerns did not have appellant's previous psychiatric records, with the exception of a brief admission report from San Bernardino County Jail. (45 RT 14455-14457.) PSH administrator Dr. Monroe Fairchild ordered appellant's psychiatric records on January 7, 1975. (45 RT 14441-14444.) On February 2, 1975, appellant escaped from PSH with the help of a nurse who later became his common-law wife. (45 RT 14447-14450, 14634-14635; see also Pros. Exh. 87.)

In 1980, in anticipation of appellant's first capital trial, defense counsel hired psychologist Grant Hutchinson to evaluate appellant for evidence of organic brain damage using standardized tests to assess his personality and emotional functioning. (44 RT 14277-14230, 14283-14284, 14298, 14305.) Dr. Hutchinson conducted a "blind" evaluation in

that he reported his conclusions based on the results of a battery of diagnostic tests without considering any background information. (44 RT 14305-14306.) He explained that he could form a diagnostic impression from this information; however, a practitioner would need to consider past history to diagnose a mental illness. (44 RT 14298.) Dr. Hutchinson's purpose was to administer a series of relatively standardized neuropsychological and personality tests to determine whether appellant suffered from any neurological deficits. (44 RT 14284-14286, 14298.)

Dr. Hutchinson found no evidence of any deficit in functioning that would indicate brain damage. (44 RT 14295.) Appellant's memory functioning was normal and he functioned at a level of average intelligence. (44 RT 14298.) However, his personality profile was extremely atypical. (44 RT 14298.) The results of the Minnesota Multiphasic Personality Inventory (MMPI) showed that appellant's scores were elevated in the areas of mania, schizophrenia, and paranoia. (44 RT 14296.) Based on the test results, Dr. Hutchinson believed that appellant might be paranoid schizophrenic in a "chronic, residual phase." (44 RT 14298.) Dr. Hutchinson acknowledged that practitioners' understanding of schizophrenia had changed since the time these tests were administered and that the standards to diagnose the disease had changed significantly over time. (44 RT 14315.)

Neurologist Sidney Kum evaluated appellant, in preparation for trial, for any evidence of a neurological deficit or disease. (4 CT 1088-1089; 46 RT 14698, 14702.) Appellant reported the following childhood history of head injuries: falling off a bicycle at age 10, hitting his head on a door jamb at 13, and being hit with a blackjack in the occipital region at 14, which rendered him unconscious for several minutes. (44 RT 14329.) Appellant also reported being rendered unconscious by a blow to the right temporal region while boxing when he was 18 years old. He reported

receiving many blows to the head while boxing between the ages of 17 and 20. (44 RT 14330.) Appellant reported that when he was 26 years old, he accidentally dropped a 45-pound dumbbell on his head while lifting weights. (44 RT 14328.)

Dr. Kum's examination showed that appellant had some mild neurological deficits in motor functioning. (46 RT 14706.) Appellant did not feel a pin prick on his right side as strongly as he felt the same stimulus on his left side, and his reflexes on his left side were slightly depressed in the legs. (46 RT 14704.) A blood test indicated that appellant had been previously treated for syphilis. (46 RT 14707- 14708.) A Magnetic Resonance Imaging test (MRI) showed a small lesion in the basal ganglia of appellant's brain, an area that controls planning motor activity. (46 RT 14712, 14716-14717; Def. Exh EE.) Another abnormality, possibly a healed lesion, appeared in the pons area of the brain.[14] (46 RT 14719, Def. Exh. EE.) Motor fibers run through the pons, bringing awareness of sensation from the nerves of the body to the brain; the motor fibers connecting and translating the brain's commands to move the nerves and muscles of the body also run through the pons. (46 RT 14720.)

Dr. Kum mapped appellant's pattern of brain activity with an electrocardiogram (EEG), which yielded normal results. (46 RT 14606-14607, 14721-14722.) He subsequently conducted a computerized EEG, commonly called "brain-mapping," which showed an usually high amplitude of Alpha brain-wave activity in the frontal lobes of appellant's brain. (46 RT 14724, 14728-14729.) The frontal lobes control decision-

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[14] The radiologist who interpreted the results of the MRI indicated that the findings were "non-specific," but were most consistent with small vessel infarcts;" however, he could not rule "other etiologies such as infection or a demylating process." (Def. Exh. EE.)

making, judgment, and motivation. (46 RT 14729.) Dr. Kum noted that a typical pattern of brain-wave activity in an adult would show higher levels of brain activity in the rear portions of the brain, which represent "higher functioning," rather than in the frontal lobes. (46 RT 14724.) Unusually high Alpha wave activity in the frontal lobes of the brain may correspond with difficulty controlling impulses. (46 RT 14733.)

The EEG also revealed an unusually strong and slow response to auditory stimulus. (46 RT 14731-14732.) Delayed or diminished response to sensory stimulus may be the result of damage to the brain, a congenital structural defect in the brain, epilepsy, or dysfunction in the balance of neurotransmitters regulating brain activity. (46 RT 14731-14732.) The results of appellant's MRI and EEG suggested that he might show impairment in certain areas of personality functioning, such as judgment, foresight, and self-control. (46 RT 14743.) Dr. Kum explained that the differences in appellant's brain did not directly cause criminal conduct, but provided context in which to understand his behavior. (45 RT 14820-14821.)

On cross-examination, Dr. Kum agreed that appellant did not have any of the physical markers for congenital syphilis, for example a "saddle nose," malformed teeth, or deformities to the corneas. (46 RT 14747-14749.) Dr. Kum also acknowledged that Dr. Reiter, a neurologist in Santa Rosa, performed similar tests on appellant (but not MRI or brain mapping) in 1980 and found no evidence of neurological impairment or disorder. (46 RT 14751-14752.)

Dr. Robert Bittle, a specialist in neurology and psychiatry, testified on behalf of the defense as an expert in the area of brain disease and dysfunction. (46 RT 14673-14674, 14757-14762.) Dr. Bittle agreed with Dr. Kum that the result of the MRI of appellant's brain showed evidence of two small lesions (probably caused by vascular events secondary to trauma,

although a virus could not be ruled out), in the area of the basal ganglia and the pons, respectively. He also agreed that appellant's EEG showed evidence of left-sided electrical abnormalities (possibly caused by prior traumatic brain injury that had healed or had not caused bleeding), and abnormally increased electrical activity in his frontal lobes. (46 RT 14790-14791.) Dr. Bittle opined that people who have abnormal electrical activity in the frontal lobes tend to be hyperactive, emotionally over-responsive, and to have a low tolerance for stress. (46 RT 14795.) He believed that the structural and functional abnormalities of appellant's brain helped to explain his history of difficulty controlling his impulses. (46 RT 14797-14798, 14821.) Although Dr. Bittle did not personally meet appellant, he opined based on his review of appellant's records dating back to childhood, that appellant unquestionably had antisocial personality disorder, but he believed that appellant also suffered from paranoid schizophrenia. (46 RT 14772-14773, 14799.)

D. Behavior in custody

Appellant also presented evidence of his institutionalization while at San Quentin State Prison. Former CDC Director Jerry Enomoto testified as an expert in corrections and inmate management. (47 RT 14973-14985.) Enomoto had reviewed appellant's CDC file from 1979 through the present and found that appellant had only two infractions while at San Quentin. (47 RT 14986.) He explained that inmates with long-term sentences tend to adjust to life in prison and the predictability and structure of the controlled environment. (47 RT 14989-14990.) Correctional records between 1981 and 1992 suggested to Enomoto that appellant became institutionalized and learned to conform his behavior to the expectations of an extremely controlled environment. (47 RT 14990-14991.) Enomoto did not see any evidence of referrals to a psychiatrist, mental health issues, or drug withdrawal in appellant's prison records. (47 RT 14995-14998.)

III. PROSECUTION REBUTTAL

James Curry was unavailable as a witness. (5 CT 1209.) The trial court swore the Deputy District Attorney for the sole purpose of reading Curry's prior sworn testimony from the 1981 guilt phase trial. (5 CT 1209.) Curry testified that he and appellant had worked as janitors at Sonoma State Hospital in 1978 and some portion of 1979. (47 RT 15010-15011.) Appellant asked Curry to hold a color television set for him sometime near the end of July. (47 RT 15013.) Curry took the television set to his girlfriend's house. (47 RT 15014.) Curry identified the Boshei television set seized from appellant's apartment as appearing to be the same television. (47 RT 15013.) Appellant's wife and his friend and former supervisor, Bob Ferrogiaro, called Curry and asked him to return appellant's television set. (47 RT 15030-15035.) Curry denied selling the television set to appellant, and further denied having any conversation with Ferrogarrio about a television set. (47 RT 15035.) Curry testified that had Ferrogarrio said something to him about his belief that appellant obtained the television from him, that he would have corrected the misimpression. (47 RT 15035.) Ferrogarrio testified that Curry brought the television to him at work and he gave it to appellant's wife. (47 RT 15015.)

Dr. Ronald Byledbal has been a board certified neurologist and psychiatrist for over 30 years, including several years of practice as a doctor and administrator at Napa State Hospital. (46 RT 14849-15851.) Dr. Byledbal evaluated appellant in his office on July 11, 1979, for the purpose of determining his competency to stand trial on pending charges for assaulting Lynette Olsen. (46 RT 14853-14854; Pros. Exh. 92.) Appellant was oriented and comfortable during the interview. (46 RT 14864, 14874-14875.)

Appellant told Dr. Bylebdal that he had ingested cocaine prior to arguing with Olsen, and he recalled ingesting more cocaine after the

argument and taking the car keys and a knife in a sheath and leaving the apartment. (46 RT 14855-14856.) Appellant did not recall stabbing Olsen, and he suggested that maybe she stabbed herself. (46 RT 14856-14857.) Appellant believed that if he had stabbed Olsen, that he would have done a better job of it, in that he would have "gotten rid" of the weapon and left town. (46 RT 14856-14857.) At the time of the assessment the doctor did not have much background information regarding appellant, other than what appellant himself provided, the police reports relating to the Olsen stabbing, and a few penal records to review; therefore, he wanted additional testing to rule out physiological causes of "blackouts." (46 RT 14854-14855, 14859-14865.)

In preparation for his testimony in this trial, Dr. Byledbal reviewed the following: appellant's records from the Michigan juvenile court, including Ypsilanti State Hospital records and the Indiana State Reformatory records; Patton records; reports by Drs. Kurn, Hutchinson, Somerville, Siegel, Finner, Lobb and Chapman; a transcript of Florence M.'s testimony, her husband Priestly's testimony from the 1991 penalty phase retrial,[15] Officer Erickson's testimony; additional penal records; and a summary of Dr. Bittle's testimony. (46 RT 14864-14867, 14873-14874.) Dr. Bylebdal concluded that appellant did not suffer from paranoid schizophrenia, but he did have a personality disorder. (46 RT 14867-14868.)

Dr. Bylebdal opined that appellant's history was consistent with anti-social personality disorder, which has previous been termed sociopath or psychopath. (46 RT 14867-14869.) Generally, people with antisocial personality disorder manifest the traits at a very young age. (46 RT 14867.)

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[15] Respondent refers to Florence's husband by his first name to protect her privacy as a victim of sexual assault.

The disorder in a child would be characterized by difficulty behaving at school, difficulty getting along with relatives, neighbors, friends, and peers, vandalism, fire-setting, cruelty to animals, lying, cheating, and stealing, sometimes coupled with hyperactivity. (46 RT 14868-14869.) A hallmark characteristic of a person with antisocial personality disorder is the ability to manipulate and "con" others when it suits a purpose; for example, using flattery or pretending to be empathetic to manipulate another person into believing what he wants them to believe or doing what he wants them to do. (46 RT 14869-14870.) Another hallmark characteristic of a person with antisocial personality disorder is an inability to accept responsibility for his own misconduct, but instead blaming others or circumstances. (46 RT 14870, 14877-14878.) A person with antisocial personality disorder may or may not be aggressive, but aggressiveness is not uncommon. (46 RT 14879.)

Dr. Byledbal agreed with Dr. Bittle's objective neurological findings, but disagreed with him and the PSH doctors who had diagnosed appellant with paranoid schizophrenia because they had no independent background information from which to assess appellant's presentation. (46 RT 14882.) Dr. Byledbal stated that he had previously been fooled by a prisoner with knowledge of and the ability to mimic the symptoms of mental illness; and he believed that without prior records that any mental health professional, including himself, could be fooled for a period of time. (46 RT 14882-14884, 14886-14887.) Dr. Byledbal acknowledged that if a person were susceptible to psychosis he or she could suffer from an acute schizophrenic or psychotic incident brought about the abuse of alcohol or drugs; however, if the person had antisocial personality disorder, he or she would have a long history of antisocial behavior preceding the psychotic incident. (46 RT 14885-14886.)

Psychiatrist, Dr. Donald Apostle, had practiced for over 30 years as a psychiatrist; he had been on the teaching faculty at the University of California, San Francisco, and he was a medical director at a private hospital before he opened a private practice. (46 RT 14892-14894.) The Santa Rosa Superior Court hired Dr. Apostle to assess appellant's sanity to stand trial for stabbing Olsen. (46 RT 14892.) Prior to interviewing appellant, Dr. Apostle had reviewed the police reports from the Olsen stabbing, multiple past criminal records, which included records from Ypsilanti State Hospital and a letter from appellant's wife. (46 RT 14895-14896.) Appellant again claimed to have no memory of stabbing Olsen, but stated that he could not possibly have done it and opined that she had probably tried to kill herself. (46 RT 14896-14897.) Appellant did not report "losing time," and he had a clear recollection of the events both preceding and following the stabbing. (46 RT 14898-14899.)

Appellant told Dr. Apostle that he was an orphan who had been raised by a foster/step mother, along with a step brother and step sister. (46 RT 14899.) Appellant said that he was often in trouble at school, he had started stealing at a young age to help support his step mother, and he was sent to a mental hospital at the age of 10 after committing an armed theft. (46 RT 14899-14900.) Appellant was returned home at age 13, but he continued to get in trouble and spent his time in and out of juvenile hall until he stole a car and drove to Indiana, where he was incarcerated until 1971. (46 RT 14900.)

Appellant told Apostle that he was paroled to the custody of his brother in California, and shortly thereafter, he attacked his sister-in-law, Florence M., after which he pleaded guilty to assault with intent to commit murder. (46 RT 14900.) At Chino state prison, appellant became involved in a physical altercation with another inmate and became paranoid that he would be killed, so he attacked a guard, escaped from prison, and stole a

car. (46 RT 14900.) Appellant was returned to custody and committed to Patton, where he befriended a nurse and convinced her to help him to escape and flee to Michigan. (46 RT 14900-14901.) At one point in the interview, appellant said, "I'll be honest with you, Donald, I learned how to get around in prison. I learned how to be sociopathic." (46 RT 14903.) Dr. Apostle requested a sleep-deprived EEG to determine if he might be overlooking any organic malformation or physical dysfunction that might explain appellant's behavior. (46 RT 14904-14905.) Appellant's EEG results were normal both awake and asleep. (46 RT 14905.)

Prior to testifying in this matter, Dr. Apostle reviewed appellant's juvenile court records from Michigan, which included a history of uncontrollable behavior, theft, alcohol abuse, etc.; his juvenile records from Marion, Indiana; hospital records from Ypsilanti and PSH; reports by Drs. Hoaglund, Bradfield, Craig, Komisaruk, Ramsarun, Robertson, Fairchild, Byledbal, Paradis, Kasti, Kurn, Reiter, Kastl, Luch, and Somerville; he also considered the testimony of Dr. Somerville, Florence M., Dr. Bittle, Dwayne Martin, Dr. Kerns, Dr. Finner, Dr. Cobb, Dr. Chapman, and Dr. Rasmaran; and he listened to the audiotapes of interviews with three of appellant's sisters. Based on all this information, Dr. Apostle disagreed with a diagnosis of paranoid schizophrenia because appellant did not show any symptoms consistent with the typical progression of that disease. (46 RT 14908-14910.) He concluded that appellant was unquestionably sociopathic. (46 RT 14892, 14905, 14908, 14918; see also Pros. Exh. 93.) He did not believe that appellant suffered from paranoid schizophrenia.

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ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S UNTIMELY REQUEST TO REPRESENT HIMSELF

Appellant argues that the trial court's denial of his request for self-representation pursuant to *Faretta v. California* (1975) 422 U.S. 806, 835-836 (*Faretta*) constituted structural error requiring reversal. (AOB 33-63.) On the contrary, the trial court was well within its discretion to deny appellant's untimely request for self-representation. Furthermore, even if appellant could show error, he could not demonstrate prejudice.

A. Background

During the first penalty phase retrial, appellant filed a motion requesting to substitute his attorney, Sonoma County Public Defender Elliot Daum. (32 RT 10955.) After the jury could not reach a unanimous verdict, the trial court declared a mistrial and appellant filed a second motion to substitute attorney Daum, which was denied. (32 RT 10956-10957.) Attorney Daum then declared a personal conflict with appellant that prevented him from resuming representation; however, the trial court did not relieve the Sonoma County Public Defender's Office. (30 RT 10081.) Assistant Public Defender Charles Ogulnick was appointed as lead trial counsel and attorney Donald Masuda was reappointed as advisory counsel (see *Keenan v. Superior Court* (1982) Cal.3d 424, 428) to assist Ogulnick. (30 RT 10081-10084.)

On June 8, 1992, 12 days before the date set down for trial,[16] appellant filed a motion in pro per asserting, *inter alia*, the following:

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[16] Appellant cites *People v. Clark* (1992) 3 Cal.4th 41, 99 (*Clark*), for the proposition that as a matter of law "trial begins with the start of jury selection." (AOB 53.) Nothing in *Clark* stands for this proposition; rather, (continued...)

1. Defendant has removed counsel of record and needs considerable time to reveiw documents, investigate possible defense strategys, interveiw attorneys for advisory counsel postion, as well as others that will part of the defense team. To deal with any and all matters pretaining to putting forth a credible defense.

[¶] . . . [¶]

5. To interveiw and contact attorneys that would secure an advisory counsel. This is critical because I realize that there are areas of this case and presentation [that] will require the knowledge and service of an attorney

6. To hire a Investigator, legal runner, law clerk and conduct the interviews required.

(4 CT 1123-1137, spelling and syntax *sic*; see also 30 RT 10091-10092.) On the same date, appellant filed a motion to substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), a motion to continue the trial and a motion that his attorney discover documents related to attorney Ogulnick's California State Bar disciplinary hearing. (4 CT 1122.1, 1125-1139; 32 RT 10507-10508.)

The prosecutor filed a written opposition to appellant's motion to continue the trial, the motion to represent himself, and his request to substitute counsel. (4 CT 1137.3.)

On July 6th and 7th, the Court heard and denied appellant's motion to substitute counsel pursuant to *Marsden*, *supra*, 2 Cal.3d at p. 118. (4 CT 1139; 32 RT 10507-10508.) Appellant requested a substitution of counsel because he felt that the defense attorney did not comply with his demand to

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(...continued)
in that case, as in most other cases, the court looked at this factor by using as a measure the time between the filing of the *Faretta* motion and the day that trial was "scheduled to begin" or the day that jury selection was scheduled to begin. (*Clark, supra,* at p. 99.)

have control over all aspects of the case presented to the jury and his desire to pursue a lingering-doubt defense more vigorously than a defense based on mitigation. (49 ART 10545-10561; 50 ART 10672-10713.)

On July 14, 1992, the trial court "reopened" the *Marsden* motion at appellant's request. (4 CT 1141.) Appellant drew the court's attention to a letter he wrote informing counsel that he expected copies of all documents filed in the matter to be submitted to him and his wife for approval prior to filing, and that he wanted to "retain the final word on whether or not there is to be any case presented to a jury during or before the People put on their case." (50 ART 10684-10685.) Appellant felt that insufficient resources had been directed at undermining the prosecution evidence of guilt, and he was concerned that mitigation evidence would conflict with the lingering doubt defense. Further, appellant felt that he could "do a better job than anybody at the table." (49 ART 10560, 10613.) Appellant expressed particular concern about retaining an expert to test the blood found on the gun clip from the Mary S. rape because he thought that DNA might show that blood did not belong to Mary S., and thus, the weapon was not used to bludgeon her.[17] (49 ART 10678.) The defense team had hired an expert to re-examine the firearm evidence from the Mary S. rape; however, appellant was not satisfied by the result of that investigation. (49 ART 10678.) The defense team also consulted an expert in the area of DNA testing, but the blood found on the firearm was insufficient for DNA testing, and they

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[17] At the first trial, the defense admitted evidence that Bruce Cooper was arrested on July 29, 1979, in possession of a High Standard Sport King weapon without grips; however, the prosecution introduced testimony from criminalist Waller establishing that the cartridge casing collected from the Mary S. rape scene was not fired by this weapon. (*People v. Johnson*, *supra*, 47 Cal.3d at p. 586.) During pretrial motions, the prosecution successfully excluded the evidence of Cooper's arrest and firearm. (2 CT 469-470, 483-484; 3 CT 874.)

decided against presenting expert testimony regarding the presence or absence of DNA on other biological evidence from the Mary S. case because the result of such testing could establish appellant's identity as the rapist, rather than rule him out as a suspect. (49 ART 10584, 10591-10594, 10692.)

On July 21, 1992, the court heard and denied appellant's motion for self-representation. (4 CT 1148.) The court reasoned as follows:

> I will deny the *Faretta* Motion as untimely in this case. I have considered the factors in the *Windham*[18] Case, which provides that such a motion, if it is untimely, it ceases to be made as a matter of right, and as I say, I conclude this is untimely being made, approximately, two weeks before the commencing of the trial. [¶] . . [¶]
>
> Here we have the defendant who was represented by Mr. Ogulnik from July of '91 [*sic*], and the motion comes eleven months later. . [¶] . . . [¶] The factors that concern him that he recited in criticizing the performance of Mr. Ogulnik were known to him for a substantial period of time. Those factors, very frankly, are in many rather striking ways similar to the objections he had against the earlier attorney, Mr. Daum. So, one would expect having had a series of difficulties with Mr. Daum, which caused him to be dissatisfied and [he] actually made two *Marsden* motions, one in January and one filed in April, that those factors would have caused him to file his *Marsden* motion earlier and his alternative motion for self-representation earlier than two weeks before this trial. [¶ . . ¶]
>
> In this case, of course, he has filed contemporaneously with the *Marsden* and [*Faretta*] Motion, a Motion to Continue, in which he indicates in his pleadings that a substantial significant time period would be required for him to prepare himself for trial. So, the result of granting this motion would be a disruption of this trial for an extended period of time. [¶] That from his motion, certainly, many months would of necessity be what he is seeking and very likely what would be required for him to prepare himself for presenting this trial.

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[18] *People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*).

Now, the . . . . factors in *Windham* say I should look at[,] in using my discretion . . . . whether to grant the motion[,] is, first, the quality of the counsel's representation of the defendant. Interestingly enough, I will point out that Mr. Daum's performance, which led to the two *Marsden* motions . . . was praised very strongly by Judge Harpham when he denied [appellant's *Marsden* motion] in January[;] and . . . . the quality of Mr. Daum's examination of witnesses and legal arguments, have impressed me as those of a competent and prepared lawyer.

[. . . .] [O]ur focus at this point is the performance of Mr. Ogulnik and Mr. Masuda, and I've reviewed their qualifications here on the record in the absence of the District Attorney, and I have found them to be[,] and do find them to be qualified and experienced. And I found the motions that they have offered and argued in this case, the written motions and the oral argument has clearly been adequate and effective representation of the issues in question. [¶] So, I do not find that there is a[n] inferior quality, or poor, or marginal in any respect the quality of the representation that has been displayed here by counsel for the defendant. I find it clearly to be satisfactory and of good quality.

The second factor is the defendant's prior proclivity to substitute counsel. [¶] I have recited that during the last trial, I believe at the end of the jury selection process[,] a *Marsden* Motion was made in January of '91. Obviously, if that had been granted, a trial delay would be inevitable, and the *Marsden* Motion was, again, offered against Mr. Daum in late April of '91, and he was ultimately relieved for reasons not related to the *Marsden* Motion. [¶] Of course, that motion resulted in some delay, and the case was then scheduled in November, and leading up to that then, because of the fact new counsel came on board, Mr. Ogulnik in July of '91, the continuance beyond November became apparent, or became apparent that was necessary, and the delay was made, I believe early in November. A date was obtained on June 22nd. So, there is a history and to a degree a pattern of the defendant moving to remove his counsel.

The next factor is the reason for the request. Having denied the *Marsden* Motion, I do not find the reasons to be persuasive, and the criticisms I do not find to be justified[.]

The fourth factor is the length and stage of the proceedings. This case is a relatively long case to try. It is certainly a long case to get through the legal issues that arise in it in the way of pretrial in limine motions, and of course, it was protracted in the jury selection process. Its preparation is something that takes a long time involving review of the transcripts of two trials, and I am sure voluminous police reports as well. [¶] So, it's a lengthy proceeding, and here we are on the eve of the trial with a motion to first replace counsel and then to represent himself, with no persuasive explanation given for this delayed filing.

As I mention[ed], many of the matters complained of have pre-existed. They have existed over a period of months, and one emphasized a lack of trust related to an incident that occurred late last year, so these are not new events that might explain why someone has felt the need to make this motion as to what amounts to about the eleventh hour.

Finally, the Court is to consider the disruption and delay which might reasonably be expected to follow the granting of the motion. As I have indicated, in this case, the delay would be considerable, and it certainly would interrupt any kind of orderly litigation of this case. [¶. . . .¶] While the defendant certainly is not responsible for the nine or ten-year hiatus while this case was on appeal, still, this case is vulnerable in the sense that years are passing effecting the availability of witnesses and the recall of witnesses—and if this case has to go off and start over again for the defendant to prepare himself, the delay and the loss of witnesses could well continue. [¶] So, the People run the risk of being significantly prejudiced if this case is continued for a significant period of time.

So, under those principles of *Windham*, the Court feels that the motion clearly should be denied. I am satisfied that the defendant is being adequately represented and will be adequately represented during these trial proceedings, and accordingly, that's—that's the finding of the Court.

(32 RT 10955-10960.)

Appellant then requested that the trial court waive his presence during the trial. (4 CT 1144-1145; 32 RT 10962.) During this motion, appellant made the following statements in open court:

> Now, I believe that the presentation that's going to be made is not going to be beneficial to me. I don't want to be present. I don't want to sit and act like I am interested, because I am not. I don't care about what they think of me. I have real—I have, basically, no respect for any human that sits up there, if they sit there in judgment of me. They don't know me, so I have no respect for them, period, you know, for their life at all. If I kill them, I wouldn't even—[.]

(32 RT 10975.) Further:

> I say, the two choices here is [*sic*] quick death or slow death. You get quick death by cyanide or you spend the next 20 years with a bunch of idiots which you might commit a murder that you are guilty of[,] with the behavior of some of the people I been around for the last thirteen years, so that's my choice.

(32 RT 10978.)

Shortly thereafter, the court allowed attorney Masuda to make a record in camera responding to appellant's assertion made during the hearing that Masuda advised his against filing an earlier motion to relieve counsel. (49 ART 10651-10654; 50 ART 10981-10982.) Attorney Masuda did not have a specific recollection of telling appellant that he should wait to file a motion to substitute counsel, but he did recall reassuring appellant that his counsel were doing everything necessary to prepare for the trial. (50 ART 10985.) Attorney Masuda opined that the relationship between appellant and defense counsel waxed and waned, but he generally thought that the relationship was somewhat better than appellant's relationship with his prior counsel, Mr. Daum. (50 ART 10985; see also 2 CT 134, 579, 590-594; 3 CT 610.) At times the defense team functioned well together, but at other times appellant became confrontational with attorney Ogulnik or investigator Dixon. (50 ART 10985.) Appellant told the court that in April

of the prior year he wrote the Sonoma County Public Defendant Marteen Miller to discuss his dissatisfaction with attorney Ogulnik, and they spoke about the case, which "smoothed" things over for a period of time. (50 ART 10988.)

On July 28, 1992, during jury selection, the court made a record that it had received and considered appellant's numerous post-hearing requests and letters submitted by appellant in pro per in support of the *Faretta* motion that the court had already denied; however, these letters did not cause the court to reconsider its denial of his untimely motion for self-representation. (34 RT 11341-11342.) At the same time, the court offered appellant an opportunity to explain how the State Bar disciplinary matter against attorney Ogulnik had affected his representation; however, appellant did not believe it was necessary to comment. (34 RT 11342.)

B. Legal Standards

> A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself.

(*People v. Marshall* (1997) 15 Cal.4th 1, 20, citing *Faretta*, supra, 422 U.S. at p. 819.) An erroneous denial of a timely *Faretta* request is reversible per se. (*People v. Butler* (2009) 47 Cal.4th 814, 824.) However, "'[w]hen a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959; *Windham, supra*, 19 Cal.3d at pp. 127-128 ["to invoke the constitutionally mandated unconditional right of self-representation a

defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial"].)

There is no bright line rule for determining when a motion is timely. (*Clark, supra,* 3 Cal.4th at p. 99.) In *People v. Lynch* (2010) 50 Cal.4th 693 (*Lynch*), overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 636-643, the California Supreme Court held that a *Faretta* motion filed approximately 45 days prior to trial was untimely. (*Lynch, supra*, at pp. 719, 726.) The court held:

> [A] trial court may consider the totality of the circumstances in determining whether a defendant's pretrial motion for self-representation is timely. Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation.

(*Id.* at p. 726.) The court may also consider such factors as the quality of counsel's representation, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of the motion. (*Id.* at p. 722, fn. 10; *Windham, supra*, at p. 128.) "This analysis comports with the purpose of the timeliness requirement, which is 'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'" (*Lynch, supra,* at p. 724; *People v. Burton* (1989) 48 Cal.3d 843, 852.)

> The fact that the granting of the motion will cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent. Similarly, the defendant's pretrial delays, in conjunction with a motion for continuance for the purpose of self-representation, would be

> strong evidence of a purpose to delay. [Citation.] In most of the cases finding a motion timely as a matter of law, no continuance would have been necessary.

(*Id.* at p. 854.)

Finally, "a reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made." (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

C. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Untimely Request

Appellant's claim fails outright because his request to represent himself 12 days prior to the first scheduled day of trial was not timely. It is well-established that a court has discretion to grant or deny a request to exercise the right to self-representation made on the eve of trial.[19] (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 102-103 [*Faretta* motion made moments before jury selection was set to begin was untimely and properly denied by the trial court]; *Clark, supra*, 3 Cal.4th at pp. 99-100 [*Faretta* motion made when trial was being continued on a day-to-day basis, in effect on the eve of trial, was subject to denial as untimely]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [*Faretta* motion made on eve of trial was untimely and denial was within trial court's discretion]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 625-626 [*Faretta* motion made on Friday before trial scheduled to begin following Monday did not give rise to unqualified right to self-representation].)

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[19] Appellant provides a lengthy description of various federal jurisdictions' application of *Faretta*. (AOB 50-52.) He later requests that, if this Court finds no abuse of discretion under its own precedent, that it should instead adopt what he considers to be the more lenient standard employed by the federal courts. But he provides no reason for this Court to depart from over 30 years of well-reasoned precedent.

As this Court reasoned in *Windham*, "a defendant should not be permitted to wait until eve of trial before he moves to represent himself, and requests a continuance in order to prepare for trial, absent a showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court . . . ." (*Windham, supra,* 19 Cal.3d at p. 128, fn. 5.) The trial court had discretion in deciding whether to grant the request because appellant's request was filed 12 days before the trial was scheduled to start and after the case had been transferred to the court for pretrial motions.

Appellant argues that this Court should find that his motion to represent himself was timely as a matter of law because he filed it while pretrial motions were still pending and several weeks prior to the swearing in of the jury. (AOB 53-55, 57-58.) In reaching its decision, the trial court noted that pretrial motions were pending, but the trial was scheduled to begin on June 20, 1992, and the motion was filed eight days earlier. (32 RT 10955-10956.) Fifty days elapsed between appellant filing his *Faretta* motion and the swearing in of the jury; that length of time differed little from the 45 days in *Lynch*, where the case was complex and the pretrial motions lasted several weeks. (*Lynch*, 50 Cal.4th at pp. 719, 726.) The trial court's analysis was entirely consistent with this Court's precedent. (*Id.* at p. 722; *Clark, supra*, 3 Cal.4th at pp. 99-100.)

Appellant suggests that his motion to represent himself might not have substantially delayed the proceedings because the matter was not particularly complex; and further, that a delay would not have prejudiced the prosecution because a decade had already passed since the guilt trial. (AOB 55-56, 61.) He asserts that the matter was not particularly complex because the prosecution case relied primarily on evidence of prior convictions. (AOB 55-56.) However, the record demonstrates that the prosecution case consisted of much more than the mere introduction of

certified prior convictions. In any event, the complexity of the case can be inferred from appellant's contemporaneous request for a continuance for an unspecified period of time. Furthermore, the trial court opined that appellant would require several months at least to prepare, noting that it would take weeks merely to review the "voluminous" records from past trials and that the extent of the pretrial trial motions suggested a very complex matter. (32 RT 10955-10960.) In contrast, attorney Ogulnik had indicated that he was ready to proceed to trial and the district attorney strongly opposed continuing the matter. (31 RT 10645; 49 ART 10587.) Furthermore, the court considered the fact that the Public Defender's Office had represented appellant in the prior penalty-phase retrial and that attorney Ogulnik had been lead counsel for 11 months. (32 RT 10956, 10959; 49 ART 10587.)

Moreover, the court considered the fact that a decade had already passed since the crime was committed and several witnesses had already died or been lost; thus, a further delay could result in additional prejudice to the prosecution. (32 RT 10960.) Appellant turns this argument upside down by arguing that witness's memories had already faded and several witnesses had died or been lost; therefore, any additional delay would be unlikely to prejudice the People's case further. (AOB 57, 61.) Appellant is merely urging this Court to do what it cannot, namely, to review the record de novo and substitute its own judgment in place of the trial court's judgment. (*Lynch, supra*, 50 Cal.4th at p. 722; *People v. Howze, supra*, 85 Cal.App.4th at pp. 1397-1398.)

Appellant next asserts that the trial court abused its discretion to deny his request because it was filed at the earliest possible date after "diligently" working with counsel to resolve their differences. (AOB 58-60.) However, the trial court reviewed the history and found that it suggested a pattern of purpose to delay and disrupt the proceedings. (32

RT 10959-10960.) Appellant had a long history of expressing dissatisfaction with the services of appointed counsel and their support staff, leading him to file multiple motions to substitute counsel and/or to represent himself. (2 CT 544-545, 588, 595; 4 CT 1019-1025; 32 RT 10598-10599; see also 49 ART 10555 [during *Marsden* hearing, appellant told court, "I went through three attorneys, four investigators, okay"].) The court appropriately considered appellant's tendency to file *Marsden* motions, coupled with his request for a continuance, as a factor tending to indicate that his motion for self-representation was brought with the intent to delay or to disrupt the trial. (32 RT 10958; see e.g. *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206; *People v. Burton, supra*, 48 Cal.3d at p. 854.) Further, it noted that appellant's *Marsden* motions to relieve attorney Daum were grounded in exactly the same types of complaints that he later had about attorney Ogulnick, namely that appellant did not trust his counsel because he felt that counsel failed to develop evidence undermining his guilt and he disagreed with counsel's allocation of resources toward investigating and presenting mitigation evidence. (32 RT 10955-10960.) Finally, appellant had known for several months that Dr. Sommerville interviewed his family members (many of whom had been interviewed for past trials), yet he did not file a motion until a few days before trial was scheduled to begin. (49 ART 10545-10561; 50 ART 10672-10713, 10864-10865.) Likewise, he had known for several months, if not from the beginning, that attorney Ogulnick, like attorney Daum, felt he had a legal obligation to thoroughly investigate evidence in mitigation and to present relevant mitigation evidence because he believed it to be in appellant's best interest. The court noted that a disagreement with counsel's trial strategy and methods is not a persuasive reason to grant an untimely *Faretta* request. (*People v. Scott, supra*, at p. 1206). Therefore, the court

concluded that appellant's justification for the delay was not persuasive. (32 RT 10956-10957, 10959.)

The court also considered that counsel could provide appellant with competent representation based on its inquiry into their experience and qualifications and the quality of the motions and arguments they had already submitted. (32 RT 10958.) Further, the record shows that attorney Ogulnick conscientiously undertook his responsibilities and that he investigated every possible line of defense, which included lingering-doubt evidence as well as mitigation evidence.

Finally, while the trial court did not specifically consider this factor, it is clear that the overall delay and disruption would have been increased by appellant's inability to control his impulsive outbursts. (32 RT 10975, 10979 [appellant's statement that he had no respect for lives of jurors who would sit in judgment of him and his comment suggesting that he could kill them, followed by his statement that the people surrounding him for last 13 years would drive him to commit murder]; see also 40 RT 13250-13251 [appellant slammed his hand on counsel table and interrupted his attorney's opening statement, stating among other things, that "this has nothing to do with a fucking 187, your Honor . . . .I don't care if you do give me the death penalty," and causing the judge to excuse the jury from the courtroom]; 42 RT 13630 [appellant yells "you fucking liar" at CHP officer testifying in front of the jury]; 47 RT 15245-15246 [defense counsel in summation commenting about appellant's inappropriate laughter and outbursts in trial as evidence of a mental defect].)

"'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.'" (*People v. Welch* (1999) 20 Cal.4th 701, 734, quoting *Faretta, supra,* 422 U.S. at pp. 834-835, fn. 46.) Accordingly, "a trial court must undertake the task of deciding whether a

defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*People v. Welch, supra*, at p. 735.) Here, appellant's tendency to interrupt the proceedings with angry outbursts further supports the trial court's decision to deny his untimely request.

Appellant requests a new trial, arguing that the trial court committed structural error by denying his "unequivocal request to represent himself." (AOB 63.) On the contrary, there is no absolute right to make an untimely request to represent oneself; and therefore, the structural-error argument does not apply. (*People v. Jenkins, supra*, 22 Cal.4th at p. 959.) Appellant is not entitled to relief unless he can show prejudice under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058 ["erroneous denial of an untimely *Faretta* motion is reviewed under the [*Watson*] harmless error test"]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050 [although trial court erred in ruling on untimely request for self-representation, "this error is not automatically reversible, but is reviewed under the 'harmless error' test of *Watson*"].)

Appellant cannot show prejudicial error. In general, a defendant who represents himself or herself rarely, if ever, could achieve a better result than competent counsel could obtain. (See *Faretta, supra*, 422 U.S. at p. 834 ["It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."]; *People v. Rivers, supra*, 20 Cal.App.4th at p. 1051 ["It is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel"].) Appellant interrupted the orderly trial proceedings and undermined his defense by several graphic displays of temper in court. (32

RT 10979; 40 RT 13250-13251; 42 RT 13630.) His conduct in the courtroom suggested that he would not have been able to abide by the rules of court or to comport himself well in front of the jury. And although appellant disagreed, counsel's tactical decision to present mitigation evidence in addition to lingering doubt evidence was clearly supportable. Here, the jury would learn that appellant had been found guilty of murdering Cavallo and the special circumstances had been found true. Further, counsel had to assume that the jury would credit the certified prior felony convictions for violent crimes. Nowhere in his pleading does appellant claim that his representation by counsel was incompetent, nor would the record support such a claim. Indeed, appellant devotes 15 pages of his opening brief explaining the "five themes" of defense evidence presented at trial. (AOB 17-31.) Thus, any error in denying appellant's request for self-representation was clearly harmless.

The trial court reasonably concluded that appellant's "eleventh hour" request to represent himself was untimely. (32 RT 10960.) Moreover, appellant cannot demonstrate any prejudice because he received perfectly able representation by counsel. (*People v. Rivers, supra*, 20 Cal.App.4th at p. 1050.) For both these reasons, his first claim fails.

II. APPELLANT FAILED TO MAKE A PRIMA FACIE SHOWING THAT THE PROSECUTION USED PEREMPTORY CHALLENGES IN A DISCRIMINATORY MANNER

Appellant's counsel made three motions under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*), claiming the prosecutor used peremptory challenges to purposely exclude African-American women from the jury. The trial court found no prima facie case of discrimination was shown. (AOB 64-89.) Appellant further asserts that the trial court's ruling violated his federal constitutional rights to due process and equal protection of the laws under

the Eighth and Fourteenth Amendments. (AOB 64-89.) Appellant contends that the trial court's second denial on appeal constituted reversible error.

On the contrary, the trial court properly denied the motion by finding that it could discern no pattern of discrimination from the prosecutor's use of peremptory challenges where five out of 40 of the prospective jurors called into the box were African-American, three of whom the prosecutor excused, and two of whom remained in the box. Ultimately, three African-American jurors served as trial jurors. Moreover, the prosecutor accepted the jury with three peremptory challenges remaining. Thus, the record supports the trial court's finding of no prima facie case of discrimination.

A. Background

1. *Batson/Wheeler* Motions

After the trial court granted hardship waivers, the jury pool consisted of 54 people. (4 CT 1154-1158.) Seven members of the pool identified themselves on their jury questionnaire as African-American. (4 CT 1163; 14 CT 3901, 3929, 4044, 4275; 15 CT 4393, 4343; 16 CT 4533; 40 RT 13090, 13114.) Appellant is African-American.

The first 12 prospective jurors called into the box identified themselves as a race other than African-American. (4 CT 1166; 40 RT 13096-13097.) The prosecutor challenged prospective juror George Fox, after which D.D., the first prospective African-American juror, was seated. (40 RT 13103.) The prosecutor exercised its next three strikes against prospective jurors Dennis Curry, Lawrence Lawson, and Denise Powers, before passing. (40 RT 13144.) The defense exercised two challenges, and the prosecutor passed once before using his fifth challenge to strike prospective juror Tammy Boman. (40 RT 13107- 13108.) The defense exercised another challenge, after which H.D., the second African-

American prospective juror, was seated in the box. (4 CT 1166.) The prosecutor again passed. (40 RT 13108-13109.) The defense exercised additional challenges, prompting the prosecutor to challenge three more potential jurors, Anthony Tadena, Scott Vice and Sandra Antrim, before using its tenth challenge to excuse Lois Graham, the third African-American panelist to have been seated in the box. (40 RT 13111-13114.)

At sidebar, defense counsel objected that under *Wheeler*, supra, 22 Cal.3d at pp. 276-277, the prosecutor's use of a peremptory strike to remove prospective juror Graham represented a pattern of race-based exclusion of jurors. (40 RT 13112-13114.) The court did not find that the defense had articulated a prima facie case of race-based exclusion, explaining that three of the seven African-American potential jurors had been called to the jury box, and two remained seated after the prosecutor had exercised 10 of its 20 peremptory challenges. The court did not see in the prosecutor's challenge to Graham evidence of a pattern of discriminatory intent. (40 RT 13113-13115.)

The prosecutor exercised two more peremptory challenges to excuse prospective jurors Marsha White and Lori Novotny. (40 RT 13119-13121.) The prosecutor exercised his thirteenth challenge to remove Sharon Harrison, the fourth African-American panelist who had been seated in the box. (40 RT 13121.) The defense exercised three more strikes and the prosecutor used his fourteenth challenge to excuse prospective juror Marlene Ono. (40 RT 13122-13124.) The prosecutor exercised his fifteenth challenge to remove Shanna Holmes, the fifth African-American prospective juror to be seated. (40 RT 13124, 13130.)

At side bar, defense counsel again objected that the prosecutor's use of peremptory challenges reflected a pattern of race-based exclusion of jurors. (40 RT 13125.) Counsel acknowledged that prospective jurors D.D. and H.D. remained seated; however, he felt that the prosecution's

challenge to more than half of the prospective African-American panelists demonstrated a systematic process of exclusion. (40 RT 13125-13128.) Counsel also pointed out that each of these three prospective jurors indicated a willingness to vote for the death penalty. (40 RT 13125-13126.)

The trial court again found no prima facie case of race-based exclusion merely by pointing out that the prosecution had used three out of 15 peremptory challenges to excuse prospective African-American jurors where two African-Americans remained seated in the box. The court reasoned that 29 out of 40 panelists had been challenged and excused; therefore, in an entirely unbiased process approximately two-thirds of any group would be excluded. (40 RT 13128.) More to the point, nine panelists remained seated and two were African-American, making that group overrepresented in the jury pool. (40 RT 13128-13129.) The court found no evidence from the prosecutor's use of peremptory challenges of any intent to minimize or exclude African-American representation on the jury. (40 RT 13128-13129.)

Defense counsel countered that the use of peremptory challenges on any prospective African-American panelist takes on greater significance where a defendant is also African-American. (40 RT 13129.) The trial court did not disagree but noted that a defendant did not have to be a minority to bring a *Wheeler* motion, and it opined that appellant's race was a peripheral issue where he had failed to make out a prima facie case of discriminatory intent. (40 RT 13129.) The court reiterated that it could find nothing statistically significant about the prosecution's use of three of 15 challenges to remove potential African-American jurors where two of the nine jurors who remained seated in the box were African-American. (40 RT 13120-13130.)

The prosecution used its sixteenth challenge to excuse prospective juror Michelle Snyder. (40 RT 13130- 13132.) Both sides passed, but

before the court swore the panel, Shahina Haq asked to be excused from service because her feelings about the death penalty had changed since voir dire. (40 RT 13133-13134.) The court and the parties agreed to reopen jury selection and the prosecution used its seventeenth challenge to excuse Haq. (40 RT 13137-13147.) The defense used four remaining peremptory challenges, which resulted in the seating of Wade Byrd, the third African-American member of the jury. (40 RT 13148-13150.) The prosecution did not use its three remaining peremptory challenges. African-American jurors represented one-fourth of appellant's venire.[20] (40 RT 13150.)

B. The Trial Court Correctly Concluded That The Totality Of The Relevant Facts Did Not Give Rise To An Inference Of Discriminatory Intent

Under California law, both the prosecution and defense are entitled to 20 peremptory challenges of prospective jurors where an offense is punishable by death or life imprisonment. (Code Civ. Proc., § 231.) While peremptory challenges are intended to allow parties to reject a certain number of jurors for any reason at all, both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race or ethnicity. (*Wheeler, supra*, 22 Cal.3d at 276-277; *Batson*, 476 U.S. at p. 89.) In other words, the prosecution may not exercise peremptory challenges solely on the basis of presumed group bias, i.e., on the presumption "jurors are biased merely

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[20] The court denied a third *Wheeler* motion during the selection of alternate jurors after the prosecutor challenged Kenneth Malloy, a prospective juror who had become the subject of an earlier dispute after the prosecutor discovered that he had misrepresented his criminal history on the jury questionnaire by investigating his criminal background. (40 RT 13155-13157; see also AOB 65-67.) Appellant's claim challenges the trial court's denial of his second *Wheeler* motion, after the prosecutor exercised peremptory challenges to exclude Harrison and Holmes as prospective jurors, not the trial court's denial of his third *Wheeler* motion.

because they are members of an identifiable group distinguished on racial . . . or similar grounds[.]" (*Wheeler, supra*, at p. 276.)

A *Batson/Wheeler* motion initiates a three-step process. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.) "Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.]" (*Id.* at p. 168, fn. omitted.) These reasons must relate to the particular individual jurors and to the case at issue. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) "'But the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, internal quotations omitted.) "Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California, supra,* at p. 168.)

A party's use of peremptory challenges is presumed to be valid. (*People v. Williams, supra*, 16 Cal.4th at p. 187; *Wheeler, supra,* 22 Cal.3d at p. 278.) Counsel may develop a distrust for a potential juror's objectivity "'on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" [citation].'" (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1216; accord, *People v. Turner* (1994) 8 Cal.4th 137, 171, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Counsel may excuse potential jurors based on hunches or for arbitrary reasons, so long as the reasons are unrelated to impermissible group bias. (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6, overruled on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 11 (*Martinez*); *People v. Turner,*

supra, at p. 165.) Thus, the burden is on the complaining party to make a prima facie showing that peremptory challenges have been exercised in violation of the Constitution. (*People v. Johnson, supra*, at p. 1216; see *People v. Crittenden* (1994) 9 Cal.4th 83, 115.)

"When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling. [Citations.] [The reviewing court] will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1101, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 74 [where trial court finds no prima facie case, appellate court reviews voir dire to determine whether totality of relevant facts supports inference of discrimination].)

Appellant asserts that this Court must presume that trial court used the "strong likelihood" standard. He further claims that the trial court's ruling is entitled to no deference because the court employed the incorrect standard. (AOB 81.) This Court has held that "[r]egardless of the standard employed by the trial court, and even assuming without deciding that the trial court's decision is not entitled to deference, we have reviewed the record and, like the United States Supreme Court in *Johnson* . . . [we] are able to apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Cornwell* (2005) 37 Cal.4th 50, 73, italics omitted.)

The court in *Wheeler* provided examples of the type of evidence defendant could use to establish a prima facie case of improper use of peremptory challenges. It stated,

> Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic-their membership in the group-and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all.

(*Wheeler, supra,* 22 Cal.3d at pp. 280-281.) A trial court may reasonably determine that the defendant failed to make the requisite showing when there are "obvious race-neutral grounds" for excusing the prospective juror. (*People v. Davis* (2009) 46 Cal.4th 539, 584; see *People v. Howard* (2008) 42 Cal.4th 1000, 1118 [voir dire provided prosecution with "ample grounds" for excusing juror]; *People v. Williams* (2006) 40 Cal.4th 287, 313.)

In this case, a review of the record fails to show that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Appellant, an African-American man, argues that the prosecutor's use of three peremptory challenges to excuse African-American women, coupled with an assertion that the members of this group were otherwise heterogeneous, was sufficient to state a prima facie case. (AOB 81-84.) On the contrary, the trial court correctly concluded that no inference of discrimination could be discerned from the prosecution's use of its peremptory challenges.

The trial court correctly observed that the prosecutor's exercise of three out of 15 peremptory challenges to remove prospective African-American panelists, while two African-Americans remained in the box, did

not by itself suggest a pattern of using peremptory challenges to minimize or exclude African-American representation on the jury. Appellant argues that an inference of discrimination can be found in the fact that the prosecution had used 20 percent of its challenges (three out of 15) to remove prospective African-American panelists when African-Americans constituted approximately 12.5 percent of the 40 potential jurors who had been seated in the box. (AOB 71.) Appellant bolsters this point with the statistic that the prosecutor exercised his peremtory challenges to exlude two-thirds of the prospective African-American jurors, but he had only exercised 34.2 percent of his peremtory challenges (12 of 35) to remove jurors of other races. (AOB 71.)

Appellant makes much of cases from federal jurisdictions discussing the prosecution's "strike" and "exclusion" rate compared to the prosecution's "strike" and "exclusion" rates in this matter. (AOB 81-84.) His analysis fails to take into account that African-American prospective jurors represented about 13 percent of the eligible pool of 54 jurors, from which a jury was selected with African-American representation comprising 25 percent of the panel. In other words, African-American representation in the final jury was almost twice that reflected in the eligible pool of jurors. The presence of minority jurors on the panel is an indication of a prosecutor's good faith in exercising his or her challenges. (*People v. Lewis* (2008) 43 Cal.4th 415, 480.)

Furthermore, appellant's second *Wheeler* motion focused almost exclusively on the fact that the prosecutor had excused three out of five African-American jurors; however, he made little effort to describe any other relevant circumstances suggesting a pattern of discrimination. The only circumstances counsel relied upon were that the challenged jurors were African-American, they indicated that they could vote for the death penalty, and some had been victims of crime and/or had friends in law

enforcement. (AOB 85-86.) However, the fact that the jurors said they could vote for the death penalty only means that they could not be excused for cause. Furthermore, the mere fact that some of the excused jurors may have had some traits that the prosecution could have viewed favorably is relevant only to the analysis of a claim based on the third stage of *Wheeler*, when the prosecutor cites factors that would generally be viewed favorably to the prosecution as reasons for excusing the juror.

Furthermore, even the removal of most or all the members of a cognizable group of which the defendant is a member[21] would not in itself establish a prima facie case of discrimination. (See, e.g., *People v. Johnson* (2003) 30 Cal.4th 1302, 1325-1326, overruled on another point in *Johnson v. California, supra*, 545 U.S. 162 [the removal of all three African-American prospective jurors did not present a prima facie case of discrimination]; *People v. Crittenden, supra*, 9 Cal.4th at p. 119; *People v. Howard, supra*, 42 Cal.4th at pp. 1154-1155 [defendant relied solely on fact that prosecutor challenged only two African-American prospective jurors and made no effort to set out other relevant circumstances; such a showing was "completely inadequate"]; *People v. Sanders* (1990) 51 Cal.3d 471, 500; *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536 [defendant's prima facie showing was based solely on fact that "'there were only two blacks on the whole panel, and they were both challenged by the district attorney'"; this "statement was not a prima facie showing of systematic exclusion"].) Here, the prosecutor's use of peremptory challenges did not suggest a pattern of removing all or most of a cognizable class of jurors. Accordingly, the record supports the trial court's

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[21] At the same time, sex is also a cognizable status (see *J. E. B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 129) that appellant did not have in common with the excused jurors.

conclusion that no discrimination could be inferred from the prosecutor's use of his peremptory challenges.

Nor is it the case, as set forth more fully below, that the three challenged jurors shared only the characteristic of being African-American and were otherwise "as heterogeneous as the community as a whole." (AOB 86-87.) Rather, the prosecution consistently challenged jurors with backgrounds that he could have reasonably believed would make them more sympathetic to mitigation evidence of childhood abuse and mental illness. At the same time he showed a clear preference for jurors, regardless of race, who possessed traits he could reasonably have believed would make them more likely to return a death verdict in this case.

Lois Graham was a 59-year-old African-American middle school administrator with two grown children. (15 CT 4275; 37 RT 12306-12309.) She had previously taught children in grades four through six, and had taught evening classes to college students. (37 RT 12311.) She had completed the coursework for a doctorate in education, but had not completed her dissertation. (37 RT 12311.) Graham belonged to a variety of groups and organizations: the parent-teacher association, the National Association for the Advancement of Colored People (NAACP), the American Association of University Women (AAUW), the National Association of University Women (NAUW), the Comstock Club, and the River City Repertory Club. (15 CT 4275-4278.)

Graham had many responsibilities as the vice president of a middle school, but she primarily functioned as the campus disciplinarian. (37 RT 12309.) She assisted teachers when problems arose and interacted with the police when necessary. (37 RT 12309-12310, 12323.) Graham opined that physical fighting is pretty typical among kids in the 12- to 14-year-old age group because they are at a stage developmentally where they lack perspective and they tend to be emotionally labile; however, students who

were members of a criminal street gang, and those who brought knives, guns and drugs on campus presented particular challenges. (37 RT 12314-12315.) Graham's current school drew primarily on students from a fairly high socioeconomic background, but she had worked at schools that drew from all backgrounds, and was familiar with gang issues even at the elementary school level in some areas of the city. (37 RT 12320-12322.)

Graham expressed her feelings on the death penalty as follows: "If it is the law and the system we are using—I am not for or against exception based on evidence of case." (2 CT 4284.) She intended to be fair and to listen to all the facts before coming to a decision. (37 RT 12307-12308.) She felt that it might be difficult for her to serve on the jury because the school year was about to begin, but she acknowledged that she would attend to the trial if selected. (37 RT 12316.) Graham had been the victim of a burglary and a car theft. (15 CT 4280.) She equivocally responded to the question about whether criminal offenders are sentenced appropriately, stating that in cases she had heard about the sentences "seemed to be fair," but it is "difficult to judge" if not directly involved. (15 CT 4281.) Graham believed that psychological evidence could be helpful in providing context and explanations for behavior, but she was inclined to rely more on facts than opinions because facts are less susceptible to bias. (37 RT 12317-12138.)

Sharon Harrison was a 39-year-old African-American who worked for Pacific Bell and had founded and directed a non-profit organization that provided housing and care for abused adolescents who become wards of the juvenile court. (15 CT 4343-4345; 38 RT 12653-12657.) The children that she cared for generally had a history of emotional and behavioral issues and some criminal background. (15 CT 4345; 38 RT 12653-12664.) During voir dire, Harrison explained that she just has "a heart" for those whom people tend to think of as "throw away" kids. (38 RT 12599.) She had

worked closely with psychologists and psychiatrists who treated her kids. (38 RT 12654.) In her experience, some mental health professionals were very astute and effective at treating troubled children, while others were not. (15 CT 4349, 38 RT 12654.) Harrison knew some attorneys, but "not on a friendly basis." (15 CT 4348.)

Harrison believed that criminal sentences were generally fair, but she was not sure that the verdicts were accurate. (15 CT 4351-4352.) She said that she could consider the aggravating and mitigating factors before making a decision about the penalty. (38 RT 12651-12652.) She wanted to know about the circumstances of the crime in aggravation, and she would be interested in the defendant's background, his family circumstances, and how that background contributed to his psychological state, in mitigation. (38 RT 12662-12663.)

Shanna Holmes was a 40-year-old auditor for the Franchise Tax Board who lived with her adult son and adolescent child. Her 19-year-old son had been arrested twice for drug possession and rape. (15 CT 4398.) Holmes indicated on her questionnaire that her feelings were "unknown" about the manner her son had been treated by law enforcement. (15 CT 4398.) However, during voir dire, she explained that she did not feel that the system had treated her son fairly in his rape case. (39 RT 12750-12751.) She believed that the prosecutor had compelled her son to plead guilty because he offered such a lenient sentence as compared to the sentence he could receive if he proceeded to trial and lost. (39 RT 12751-12752.) Holmes previously believed that all criminal defendants were tried by a jury and found guilty or not guilty. She had not realized that "they could plea bargain with your life." (39 RT 12752.) Notwithstanding her feelings about her son's rape conviction, Holmes maintained that she could be fair and impartial in this case. (39 RT 12752-12756, 12761.) Twice, she had been the victim of theft. (15 CT 4398.) Her response to the question

about whether Black people commit more crimes than white people was, "I believe that [is] what society wants us to think and believe." (15 CT 4403.)

While defense counsel may not establish a prima facie case of *Wheeler* error simply by stating that all members of a cognizable class have been excluded (see *People v. Box, supra*, 23 Cal.4th at pp. 1188-1189), a prima facie case of discrimination may be established where it is shown there was no apparent, legitimate reason to excuse the juror in question. (*Id.* at pp. 1187-1188; *People v. Gray* (2001) 87 Cal.App.4th 781, 789.) A trial court may reasonably conclude that no prima facie case of discrimination has been established when there are obvious race-neutral grounds for excluding the jurors. (*People v. Davis, supra*, 46 Cal.4th at p. 584.)

In this case there were clear and legitimate race-neutral reasons for challenging each of the three African-American women excused by the People. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1173-1174.)

The prosecutor could have reasonably believed that prospective jurors Harris and Graham harbored a certain skepticism or distrust regarding the fairness of the criminal justice system. Harris indicated a belief that verdicts might not always be accurate (15 CT 4351-4352), and Graham responded equivocally to the question about the fairness of criminal sentencing. (15 CT 4281.) The prosecutor could have reasonably preferred jurors with less skepticism about the fairness of the justice system.

Moreover, the prosecutor could reasonably believed that Graham's and Harrison's responses during voire dire suggested that they would be particularly sympathetic to the mitigating evidence of childhood abuse and alleged mental illness. Harrison devoted much of her life to helping abused children who became juvenile wards after criminal proceedings. Graham had also devoted her career to educating and trying to improve children's lives. These career choices suggested that Graham and Harrison might be

more receptive to mitigation evidence to evidence suggesting that appellant had been abused as a child and that he might have suffered brain damage. (See e.g., *People v. Ervin* (2000) 22 Cal. 4th 48, 75 [juror was a juvenile counselor with a belief in rehabilitation; properly excused in death penalty case]; *People v. Barber* (1988) 200 Cal. App. 3d 378, 389–394 [juror excused because spouse worked for a liberal attorney was a valid use of a peremptory challenge; another juror properly excused because juror was a teacher; prosecutor believed teachers tend to be "'liberal'" and "'less prosecution oriented'"]; *People v. Landry* (1996) 49 Cal.App.4th 785, 789–790 [juror was a teacher and was on board of a drug treatment program; another juror had an education background in psychiatry or psychology, and worked in a youth services agency; both properly excused by prosecutor]; *People v. Turner* (1994) 8 Cal.4th 137, 168–172 [juror had trained with Department of Social Services], abrogated on other grounds in *People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.)

Likewise, Holmes's son had been convicted of possessing narcotics and rape. (15 CT 4398; 39 RT 12750-12751.) She felt that he had been railroaded into accepting a plea to the rape charge, and on voir dire she revealed a strong distrust of the criminal process. (39 RT 12750-12761.) A family member's negative contact with the criminal justice system is a reason that justifies a peremptory challenge against a *Batson/Wheeler* claim. (See *People v. Garceau* (1993) 6 Cal.4th 140, 172 [family members had "run afoul of the law" and been incarcerated]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [panelist's brother had been convicted of crime possibly prosecuted by another deputy in same office]; *People v. Walker* (1988) 47 Cal.3d 605, 626 [juror believed police had followed her husband home and harassed him by stopping him without cause]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690 [son convicted of grand theft auto].) Therefore, the responses Holmes provided on her questionnaire and

during voir dire supported obvious and legitimate race-neutral reasons for excusing her from the jury.

Another concern about Holmes was her response in the questionnaire suggesting that she viewed law enforcement as an indivisible "they," and "society" as a homogeneous group of people whose goals and views were all identical and generally opposed to her own. (15 CT 4403.) A juror's assertion that the justice system discriminates against certain groups is a valid, race-neutral basis for a peremptory challenge. (*People v. Cornwell, supra,* 37 Cal.4th at pp. 69-70; *People v. Walker, supra*, 47 Cal.3d at pp. 625-626.) Thus, Holmes's opinion that "society" as a whole had an interest in making people believe that African-American people committed more crimes than Caucasian people showed that she had a blanket belief that discrimination permeates the decisions of people who have influence and/or authority, which furnished another basis for the prosecutor's challenge.

Moreover, the prosecutor did not engage in "desultory" questioning on voir dire (*Wheeler, supra,* 22 Cal.3d at p. 281), but instead probed these prospective jurors about topics such as any negative experiences with law enforcement and prior work history with abused and troubled children. Further, while a comparative analysis is not required when the trial court denies the motion in the first stage of the *Wheeler/Batson* review (*People v. Hawthorne* (2009) 46 Cal.4th 67, 80, fn. 3, abrogated on other grounds in *People v. McKinnon, supra*, 52 Cal.4th at p. 637), such a comparison would not support appellant's claim.

The prosecution excused several jurors whose friends or relatives had negative experiences with law enforcement and/or who expressed a distrust of the criminal justice system. The prosecutor challenged prospective juror George Fox, who stated on his questionnaire that he had been arrested for driving under the influence and that his brother had a negative experience with law enforcement when he was arrested and convicted for the same

crime. (15 CT 4300-4307, 4313.) The prosecution also excused prospective juror Marlene Ono, whose friend or family member had been accused of being a felon in possession of a weapon, burglary, and possession of controlled substances. (15 CT 4596-4609.) The prosecution challenged prospective juror Michelle Snyder, whose family member had been prosecuted for burglary and who indicated that a person close to her had a drug abuse/addiction problem. (15 CT 4803-4813.) The prosecutor excused Marsha White, whose 17-year-old son had been arrested for being a minor in possession of alcohol, and who expressed equivocal feelings about the death penalty. (17 CT 4896-4908.) The prosecution also excused Lori Novotny, whose ex-husband had been prosecuted for driving under the influence and whose brother had issues with alcohol addiction, and who also expressed equivocal feelings about the death penalty. (16 CT 4573-4582.)

Similarly, the prosecution excused several prospective jurors whose life experience might tend to make them more sympathetic to mitigation evidence of child abuse and possible mental illness. The prosecution excused prospective juror Lisa Saylor, who wrote that her childhood was extremely abusive and that her biological father had spent most of his life in prison. (16 CT 4752-4762; 37 RT 12238.) The prosecution also excused juror Scott Vice, whose friend worked with extreme cases of emotionally disturbed children. (38 RT 12957.) Vice opined that it seemed ineffective for psychologists to provide mental health treatment for emotionally disturbed children who remained in abusive or deprived environments. (38 RT 12598.) The prosecution also excused Denise Powers, whose sibling was the director of a school for emotionally disturbed children. Furthermore, Powers's brother-in-law had been convicted of driving under the influence and she wrote in her questionnaire that she had "mixed

emotions" about the fairness of criminal penalties imposed by the courts. (16 CT 4658-4664.)

Here, the record shows that the prosecutor exercised peremptory challenges to excuse three out of six prospective jurors who were African-American.[22] But, here the record also shows that the final jury was comprised of people from ethnically diverse backgrounds, including three African-American jurors. The record also demonstrates that the prosecution sought out jurors, regardless of race, whose backgrounds and responses during voir dire suggested a favorable view of the death penalty and a likelihood of being less sympathetic to mitigation evidence of childhood abuse and alleged mental illness. (14 CT 3901-3911, 3907, 3927, 3938, 3956, 3967, 3973, 3982, 3987-3988, 4030-4031, 4044, 4052.) Finally, a party's use of peremptory challenges is presumed to be valid. (*People v. Williams* (1997) 16 Cal.4th 153, 187; *Wheeler*, *supra*, 22 Cal.3d at p. 278.)

These facts do not show a pattern from which a discriminatory intent could be inferred. There was no *Batson/Wheeler* error. Therefore, appellant's second claim should be denied.

III. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S DISMISSAL OF PROSPECTIVE JUROR COLOZZI FOR CAUSE

Appellant contends that the trial court's excusal of prospective juror Colozzi for cause based on her views toward the death penalty violated his right to a fair and impartial jury and to due process. (AOB 90- 112.) On the contrary, the trial court's decision was supported by substantial

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[22] Because no alternate jurors were asked to serve, respondent does not include the prosecutor's use of peremptory challenges to excuse one prospective African-American juror.

evidence that her views on the death penalty would substantially impair her performance as a juror in a death penalty matter.

A. Legal Standards

The proper standard for exclusion of a juror based on bias concerning the death penalty is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 (*Witt*); see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting *Witt* review standard in California].) This standard does not require that a juror's bias be proved with "unmistakable clarity." (*Witt, supra,* at p. 424.) To the contrary, as this Court has recognized,

> frequently voir dire examination does not result in an "unmistakably clear" response from a prospective juror, but nonetheless "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror."

(*People v. Ghent, supra,* 43 Cal.3d at p. 767, quoting *Witt, supra*, at pp. 425-426.)

"[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court." (*People v. Ghent, supra*, 43 Cal.3d at p. 768; see also *People v. Jones* (1997) 15 Cal.4th 119, 164, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [same].) If there is no inconsistency, "the trial court's judgment will not be set aside if it is supported by substantial evidence." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285.)

B. Substantial Evidence Supports The Trial Court's Finding Of Cause To Excuse Juror Colozzi

Here, substantial evidence supports the trial court's finding that prospective juror Colozzi's views on the death penalty would "prevent or substantially impair" her performance as a juror. (*Witt, supra*, 469 U.S. at p. 424.)

Laura Colozzi was an observant Catholic who worked for the State of California as a legal secretary. (15 CT 4216-4219.) On her questionnaire, she indicated that she could be fair and impartial and that she could consider all the facts before voting to impose either a sentence of life without possibility of parole or death. (15 CT 4224-4225.) When asked about her feelings regarding the death penalty, she responded:

> I would prefer a society where people lived happily together and no crimes ever happened—but that is not the real world—so I understand that for those people who commit crimes—or who think about it, the death penalty must be there as a reminder of what the consequence might be because of their actions—this penalty thus protects the peaceful people.

(15 CT 4225.)

When asked whether she had religious objections to imposition of the death penalty, Colozzi answered:

> Yes/No- I believe people should live their lives for as long as God lets them, despite what kind of life that may be—a person should experience his whole life; however, I believe the death penalty needs to be a reminder to all who would endanger others.

(15 CT 4225.)

On voir dire, Collozzi clarified that if the law allowed it, she would always exercise an option to vote for life without possibility of parole, regardless of the relative weight of aggravating and mitigating evidence presented. The following exchanges occurred:

THE COURT: Okay. All right. You understand that the law does not—well, in a sense it mandates a result in some situations. If you find that the mitigating circumstances are substantial, that they outweigh the aggravating or that they're equal to the aggravating, they are balanced. Then, in that situation, the law says you cannot return a death penalty, but you can only return life without parole.

PROSPECTIVE JUROR COLOZZI: Yes. I am happy for that.

THE COURT: Okay.

PROSPECTIVE JUROR COLOZZI: That's fine.

THE COURT: If, on the other hand, the aggravating circumstances substantially outweigh the mitigating, at that point, the law does not mandate the death penalty, but it says the jurors at that point may impose the death penalty, but they still have the option of choosing not to impose the death penalty, if they feel that that is not the most appropriate penalty. Okay.

PROSPECTIVE JUROR COLOZZI: Okay.

THE COURT: [I]s there anything in that structure that would cause you any problems?

PROSPECTIVE JUROR COLOZZI: No.

(37 RT 12330-12333.)

Defense counsel asked Colozzi the following questions:

MR. OGULNIK: What are your feelings regarding the death penalty? And the judge went through this with you, and what you did was you marked "Yes" and then slash "No," and you underline both, and your comment to the right says, "I believe people should live their lives for as long as God lets them, despite what kind of life that might be. A person should experience his whole life."

And then you go on, "However, I believe the death penalty needs to be a reminder to all who would endanger others." Are you of the belief that only God can take a life?

PROSPECTIVE JUROR COLOZZI: That would be my number one belief.

MR. OGULNIK: Okay. Well, but that's not the state of the law in California. [¶ . . . ¶] The judge, a little bit earlier, told you that even if you found the evidence that the district attorney put on was—was substantially greater, the aggravating evidence was substantially greater than the mitigating evidence, you could still return a life without possibility of parole verdict, and that would still be following the law.

Do you feel comfortable with that concept?

PROSPECTIVE JUROR COLOZZI: Yes, I do.

MR. OGULNIK: And if eleven other jurors were to tell you quite candidly, and with no reservation, that the district attorney has proven—has met his burden, and they all feel the death penalty is appropriate, and that's the way they desire you to vote or give your individual opinion. If you still felt that this was a life without possibility of parole, could you stand by your individual conviction?

PROSPECTIVE JUROR COLOZZI: I am glad you brought that up because I would, of course, very candidly take the lesser, life imprisonment without parole. I would like—I would prefer that judgment over the death penalty in this particular situation if aggravating circumstances were more, so, and I have that choice. I have the freedom of choice, and that's not against the law. I have that choice, and it's legal, and I would go for the life imprisonment.

MR. OGULNIK: So, no matter what evidence the district attorney put on, you would only feel life without possibility of parole would be suitable?

PROSPECTIVE JUROR COLOZZI: If that is my legal choice, if I have a choice legally to do that, that's the way I would vote, yeah.

MR. OGULNIK: Okay. I thought we kind of worked around that a little bit earlier, and you said you'd also feel comfortable following the law because the law is there for [a] particular reason. Let me ask you this: There are some

circumstances where you would apply the death penalty, correct?

PROSPECTIVE JUROR COLOZZI: I would apply the death penalty? I see what you are saying. If it lent more over to the aggravating side, and that's a very good question, possibly not. I would prefer the life imprisonment without parole.

(37 RT 12348-12349.)

The prosecutor then challenged Colozzi for cause. (37 RT 12350.)

Before ruling, the court asked her the following questions:

THE COURT: Ms. Colozzi, correct me if I am wrong, but I get the impression from the discussion we've had here, this morning, that you could return a death penalty if the law basically compelled it?

PROSPECTIVE JUROR COLOZZI: (Nods head.)

THE COURT: Because you're willing to and feel the obligation to follow the law?

PROSPECTIVE JUROR COLOZZI: That's right.

THE COURT: Okay. But in this case, in fact, in any death penalty case, the law never does compel a death verdict. Even when the aggravating factors clearly and substantially outweigh the mitigating factors, the law allows the juror—the law says jurors may impose the death penalty, but the law does not compel it. It allows a juror to or a jury to decide, in spite of the heavy aggravating factors that for whatever reason might be mercy, they choose to give life without the possibility of parole, so, there is always an option. The law never compels the death penalty.

PROSPECTIVE JUROR COLOZZI: Okay.

THE COURT: And what it strikes me is since you prefer, you made it clear you prefer, significantly prefer, life without the possibility of parole to the death penalty, and if the law is never going to force you, or direct you, or compel you to return a death penalty, is it true that, in effect you would be returning a life without possibility of parole? That would be your vote in virtually every case?

PROSPECTIVE JUROR COLOZZI: I would have to say, yes.

THE COURT: You have to say "Yes" to that?

THE COURT: Okay.

PROSPECTIVE JUROR COLOZZI: I didn't realize that, you know. It went over my head that there isn't a law that said that compels you. There are not guidelines. There are no factors.

THE COURT: There are guidelines, but they don't reach the level of compulsion. It just permits it. The guidelines tell you when you can't give it, and it tells you when you may consider it, and possibly give it, but it never compels you to do it.

PROSPECTIVE JUROR COLOZZI: I see. Okay.

THE COURT: Okay.

PROSPECTIVE JUROR COLOZZI: My answer is just, yes.

(37 RT 12352.)

The prosecutor renewed his challenge for cause, and defense counsel "submitted" on the issue.[23] (37 RT 12352.) The court then excused Colozzi. (37 RT 12352.)

Appellant argues that the record does not substantially support the trial court's decision to excuse Colozzi for cause because she merely expressed a strong preference for imposition of life without possibility of parole based on her religious beliefs, but overall her responses indicated

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[23]In *People v. McKinnon, supra,* 52 Cal.4th at page 643, this Court held that counsel "must make either a timely objection, or the functional equivalent of an objection, such as a statement of opposition or disagreement, to the excusal stating specific grounds under *Witherspoon/ Witt* in order to preserve the issue for appeal." However, the rule is not applied retroactively. (See *ibid.*)

that she could follow the law and impose the death penalty under some circumstances. (AOB 90-111.) Appellant further argues that the trial court improperly explained the scope of a juror's discretion, causing Colozzi to provide inaccurate responses during voir dire. (AOB 110-111.) Not so.

A review of the entire record on voir dire shows that Colozzi's views on the death penalty substantially impaired her ability to act as a juror in this matter because she indicated that if the law always gave her an option to vote for imposition of life without possibility of parole, she would exercise that option regardless of whether the aggravating evidence substantially outweighed that presented in mitigation. (37 RT 12352; see *People v. Cox* (1991) 53 Cal.3d 618, 647-648 [noting that defendant based his objections "on excerpted portions of the voir dire, isolating particular answers out of context, or fail[ed] to accord due deference to the court's fact-finding role"].) As set forth above, Colozzi stated repeatedly that she would follow the law and that she could be fair and impartial; however, she also indicated that she would always vote to impose life without possibility of parole even where "the aggravating factors clearly and substantially outweigh the mitigating factors." (37 RT 12352.) Here, the court correctly excused Colozzi because she could not consider imposition of the death penalty as a reasonable possibility where the law also provided a juror with the option of voting to impose life without possibility of parole. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262, abrogated on another ground in *People v. McKinnon, supra*, 52 Cal.4th at p. 637.)

To the extent that Colozzi gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. (*People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because

prospective juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"].)

Because substantial evidence supported the trial court's determination that Colozzi's views on the death penalty would prevent or substantially impair her performance as a juror, that finding binds this Court. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115.)

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT SUBSTANTIAL EVIDENCE SUPPORTED THE INTRODUCTION OF EVIDENCE UNDER FACTOR (B) THAT APPELLANT HAD RAPED, ROBBED, AND ATTEMPTED TO MURDER MARY S.

Appellant argues that the trial court abused its discretion to admit evidence under section 190.3, factor (b), that he had robbed, raped, and attempted to murder Mary S. because the prosecution's evidence as to identity was insubstantial. (AOB 113-123.) He further argues that admission of this evidence violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I of the California Constitution. (AOB 122-123.) On the contrary, the trial court reviewed the evidence introduced at the prior penalty phase trial and reasonably concluded that the prosecution's evidence of identity was sufficient for a jury to find that appellant committed these acts beyond a reasonable doubt. Consequently, no error occurred.

A. Background

Pursuant to section 190.3, factor (b), the prosecution presented evidence that appellant used a .22-caliber High Standard semi-automatic pistol and bullets stolen from Cavallo's residence to commit a robbery, rape, and assault with a deadly weapon causing great bodily injury of Mary

S. four days after Cavallo was murdered. (See Statement of Facts, Prosecution Case, *supra.*)

During motions in limine, appellant's attorney requested that the court either hold a separate jury trial to determine appellant's guilt for the crimes against Mary S., or else summarily exclude evidence of these crimes because the evidence of identity was so insubstantial that it was more prejudicial than probative pursuant to Evidence Code section 352, and its admission would be fundamentally unfair such that it would deprive him of the right to due process under law. (5 CT 1138.55-1138.59; 31 RT 10726-10734; 32 RT 10951, 10996-11016.)

After reviewing transcripts from the prior penalty retrial and the motions and arguments submitted by counsel, the trial court denied the defense motion:

> I am going to permit the people to introduce the evidence on [the Mary S.] case. I do not think that a separate jury is required to be assembled. There is no authority for that principal [*sic*], and I think there is a sufficient evidentiary basis so that a rational juror or rational jurors could find beyond a reasonable doubt that the defendant was the guilty person in that case.

(32 RT 11016-11017.)

At the close of the prosecution's case, defense counsel brought a motion requesting that the court acquit appellant of the crimes against Mary S. under section 1118.1, arguing "that an appellate court reviewing the evidence would be [un]able to find that Joe Edward Johnson is the person who committed that offense." (43 RT 13963-13964.) The prosecution responded to the motion as follows:

> There is more evidence than just—if you want to use that word "just"—a fingerprint on a magazine found in the church. The defendant's fingerprint is on this particular magazine, which is found in the church, and there is no argument that a magazine is, in a sense, a moveable object, and the reason that is important

is because of some case law that I will allude to in a minute. [¶] However, a magazine is an object that normally is not one that is touched by someone in a casual fashion. The magazine clip belongs inside the weapon and is normally carried there. And in fact, if you will recall the testimony of Mr. Waller, he was demonstrating to the jury how you load that particular magazine. And if you look at the photograph where the fingerprint is on the magazine, you can see that the digit that is used is in a position to push down on the spring and load the magazine. So, first of all, the magazine is not in a position where it's casually touched, as though someone were handing around a weapon at a weenie roast somewhere, and you happen to just touch it. All right. It's inside the handle of the weapon, and the fingerprint is on a place where it would normally be to load a weapon.

Number two, this magazine, it clearly may be inferred[,] was inside the weapon when it was used to bludgeon Mary S. It only came outside the weapon as a result of the force of the blows and the destruction to the weapon, itself, which again is another argument for it wasn't just a casual touching by this defendant at some other time, in some other place, but occurred at or near the place itself.

Two, Mr. Fain testified that although you cannot age fingerprints, the powder, quote, "leaped out" at him. That is, it immediately became apparent. I think his testimony was corroborated by the general testimony on this subject by Mr. Rienti. It appeared insofar as this particular technique is available to be a fresh print.

Number three, this particular magazine contains peculiar cartridges, cartridges [*sic*] which ceased to be manufactured for some period of time, certainly, under the brand had ceased to be manufactured for over 20 years . . . . [T]hat is, six of the eight cartridges in the magazine were matched by the headstamps with other cartridges found at the scene of the homicide barely four days before.

[The prosecutor summarized the testimony from prior trials, including Canniff's testimony, from which a jury could infer that Cavallo owned a semi-automatic .22-caliber High Standard handgun that appeared similar to a Field King or Sport King model.]

> Even finally, if you add into the equation that composite, itself, which was completed by Mary [S.], that composite, if you look at an exhibit we prepared, that exhibit has a picture of the defendant as he appeared in December 1978, and had the composite right next to it. It is a remarkable similarity between that composite and the defendant.

(43 RT 13966-13972.)

The trial court denied the motion, finding that "it is a question for the jury, and that there is sufficient evidence upon which a reasonable jury could find that the defendant did, in fact, commit the rape on [*sic*] Mary [S.]." (44 RT 13974.)

B. The Trial Court Reasonably Exercised Its Discretion To Admit Evidence Of The Crimes Against Mary S.

Appellant argues that the trial court erred in admitting the evidence of the crimes against Mary S. under section 190.3, factor (b); and furthermore, that admission of this evidence constituted prejudicial error under the state and federal Constitutions.

Section 190.3, factor (b), allows the jury to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence." Evidence "admitted under this provision must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime." (*People v. Moore* (2011) 51 Cal.4th 1104, 1135 [internal citations omitted].) However,

> the penalty phase of trial [is not] the equivalent of a criminal prosecution for purposes of due process ... analysis. Evidence of prior unadjudicated violent conduct is admitted not to impose punishment for that conduct, but rather, in part, to give the jury in the capital case 'a true picture of the defendant's history since there is no temporal limitation on evidence in mitigation offered by the defendant.' [Citation.] As this court noted in *People v. Balderas* [(1985)] 41 Cal.3d 144, 205, footnote 32 [222 Cal. Rptr. 184, 711 P.2d 480], the "penalty phase is unique, intended

> to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes."

(*People v. Stanley* (1995) 10 Cal.4th 764, 822-823.) It is a question for the jury to determine whether the evidence of other crimes is significant enough to be given weight in the penalty determination. (*People v. Smith* (2005) 35 Cal.4th 334, 369.) Finally, there is no requirement that a capital sentencing jury unanimously find the existence of a violent criminal offense to be proved beyond a reasonable doubt before an individual juror may consider such evidence in aggravation under factor (b). (*People v. Griffin, supra*, 33 Cal.4th at p. 585.)

> In *People v. Phillips* (1985) 41 Cal.3d 29, 71, this Court admonished that "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element" of other violent crimes the prosecution intends to introduce in aggravation under section 190.3, factor (b). [Citations.] As we have clarified, such a hearing is not required, but if it is held, it need not include the presentation of live testimony. [Citation.] "Moreover, a trial court's decision to admit 'other crimes' evidence at the penalty phase is reviewed for abuse of discretion, and no abuse of discretion will be found where, in fact, the evidence in question was legally sufficient." [Citation.]

(*People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.)

Here, at the request of the defense, the court conducted a preliminary inquiry into the prosecution's evidence of the criminal elements and found the evidence of identity legally sufficient for a jury to determine that appellant committed the robbery, rape and assault with a deadly weapon causing great bodily injury of Mary S. (32 RT 11016-11017.) Although uneccessary, the court reaffirmed this decision at the close of the prosecution case. (44 RT 13974.)

It is well-settled that substantial evidence is evidence sufficient to deserve consideration by a jury—evidence from which a jury composed of

reasonable persons could find the elements of the offense satisfied. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200.) That was certainly the case with respect to the evidence that appellant committed the robbery, rape and assault with a deadly weapon causing great bodily injury of Mary S. Contrary to appellant's argument (AOB 115, 118-119), the prosecution not only presented uncontroverted[24] expert testimony matching appellant's right thumbprint to the latent print lifted from the magazine clip found at the scene of the Mary S. crime. It also presented for the jury's consideration a composite drawn at Mary S.'s direction a few days after the crime was committed, juxtaposed with appellant's driver's license photograph from the relevant time period; and expert testimony establishing that ammunition found at the Mary S. crime scene was consistent with the same open box of distinctive ammunition found at the Cavallo crime scene. (See Statement of Facts, Prosecution Case, *supra.*)

Although appellant correctly notes that the ammunition clip is a moveable object (AOB 119), his argument and the case law upon which it rests, fails to address the prosecution's point that the thumbprint was located in an area suggesting that appellant loaded the ammunition into the firearm that was unquestionably used during the rape, robbery, and assault with a deadly weapon causing great bodily injury of Mary S. (44 RT 13972.) The fingerprint evidence, considered in conjunction with the other evidence cited above, was certainly sufficient for a reasonable jury to find beyond a reasonable doubt that appellant committed the crimes. As the trial court noted, it is within the purview of the jury to determine whether

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[24] The defense presented no evidence contradicting or disputing the fingerprint evidence presented by the prosecution. (44 RT 13962; see also 47 RT 15243 [defense summation].)

other-crimes evidence is significant enough to be given weight in the penalty determination. (*People v. Smith, supra,* 35 Cal.4th at p. 369.)

Finally, appellant urges that the erroneous admission of this evidence entitles him to a fourth penalty phase trial. (AOB 122-123.) "Error in the admission of evidence under factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.'" (*People v. Collins* (2010) 49 Cal. 4th 175, 220 [internal citations omitted].) Assuming for the sake of argument that the trial court erroneousy admitted the evidence in question, the admission was harmless beyond a reasonable doubt in light of the jury instructions. The court instructed the jury that before they "may consider [the Mary S.] crimes as an aggravating circumstance in this case, that [*sic*] juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts" and that the "defendant may be found guilty or not guilty of any or all of the crimes charged." (5 CT 1247-1248; 47 RT 15184-15186.) Furthermore, the jury was instructed as to the elements of robbery, rape, and assault with a deadly weapon causing great bodily injury, the standard of proof as to each element, the definition of reasonable doubt, and to apply a presumption of innocence as to these criminal offenses. (5 CT 1249-1255, 1260-1262.) It must be presumed o that the jury followed the instructions given. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1121.) Thus, there is no reasonable possibility that any juror would have considered this evidence in aggravation unless he or she had found that appellant's identity as the perpetrator had been proven beyond a reasonable doubt.

In conclusion, there was no error; and therefore, no prejudice under any standard of review. Undoubtedly, a jury could find that the evidence of appellant's fingerprint found on an interior component of the very weapon

used to commit the crimes was sufficient, standing alone, to establish identity. Here, the fingerprint evidence, the correspondence between the unique ammunition found at both crime scenes, and the composite drawn at Mary S.'s direction were more than sufficient to establish beyond a reasonable doubt that appellant was the person who robbed, raped, and attempted to murder Mary S. But in any event, no juror would have considered this evidence in aggravation had it not found every element of the crime true beyond a reasonable doubt. So there is no possibility that improper admission of the evidence could have affected the verdict.

Appellant fails to show that the trial court abused its discretion in admitting this evidence under state law; for this reason, his evidentiary claim fails. And because "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights" (*People v. Prince* (2007) 40 Cal.4th 1179, 1229, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1035), the constitutional component of appellant's claim also fails.

V. THE TRIAL COURT PROPERLY ADMITTED CANNIFF'S PRIOR SWORN TESTIMONY, AND ANY POSSIBLE ERROR WAS HARMLESS

Appellant contends that the trial court abused its discretion in admitting Caniff's prior sworn statement because he had testified to a hearsay statement made by the victim, and furthermore that its admission constituted prejudicial error under the State and Federal Constitutions. (AOB 124-134.) These contentions lack merit.

A. Background

In limine, the defense sought an order excluding Richard Canniff's prior sworn testimony regarding, among other things, discussions he had with the victim about keeping a gun in his nightstand for protection. (5 CT 1138.67-1138.70.) The prosecution argued that it was entitled to show the

circumstances in aggravation of the underlying death penalty crime, and Canniff's testimony tended to show the victim was asleep when he was killed because he had a habit of sleeping near a handgun, and he intended to use it to protect himself if he were threatened. (42 RT 10930-10932.) This testimony, considered with the evidence that Cavallo's body was wrapped in sheets and the blood pooled underneath his backside, strongly suggested that appellant killed Cavallo in his sleep. (32 RT 10930-10941.)

After jury selection, the court indicated that its tentative decision was to admit Canniff's testimony, with the exception of testimony that the victim told Canniff he was deaf in one ear. (40 RT 13210-13211.)[25]

Just prior to admitting the evidence, the court inquired if defense counsel objected to the reading of the prior sworn testimony, and counsel indicated that there was no objection. (43 RT 13838.) The conclusion that defense counsel opted to withdraw their objection to that portion of Canniff's testimony is reinforced by comments that attorney Ogulnick made during the motion to strike the prosecution's evidence related to the crimes against Mary S.. Specifically, counsel stated:

> Canniff's testimony, which is being introduced here, cuts on two cases [*sic*]. Mr. Canniff says, well, you know, Mr. Cavallo said he kept a gun loaded in a drawer, I guess, or a nightstand, so he could defend himself.
>
> Well, if that's true, why would there be bullets found that one can infer were loaded into a gun clip somewhere? [¶] Why would one have to load a loaded gun? It's an interesting question.

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[25] Although the transcript from the proceedings is not entirely clear, it appears that defense counsel replied that they do not have "a strong objection" to admission of Canniff's testimony generally. (40 RT 13211-13212.) However, respondent acknowledges that counsel may have also been responding that it did not object to testimony that Cavallo told Canniff he was deaf in one ear. (40 RT 13211-13212.)

(43 RT 13973.)

B. Appellant Forfeited His Challenge To Admission Of The Evidence

To preserve an evidentiary issue on appeal, the objecting party must make a timely objection that "make[s] clear the specific ground of the objection or motion." (Evid. Code, § 353.) In this case, it appears that defense counsel abandoned any objection to Canniff's testimony. Directly before the testimony was admitted, the trial court inquired whether defense counsel had any objections to the admission of the proposed prior sworn testimony and counsel indicated that he did not. (43 RT 13838.) Furthermore, counsel made statements indicating that he believed Canniff's testimony could also be used for the benefit of the defense. (43 RT 13838, 13973.) Under these circumstances, appellant's challenge on appeal must be deemed forfeited.

C. Even If The Hearsay Objection Were Not Forfeited, Any Error Was Harmless

Appellant argues that the trial court abused its discretion in admitting specific portions of Canniff's sworn statement that Cavallo slept near a handgun for protection because the testimony was hearsay without an exception. (AOB 128-134.) Respondent disagrees; moreover, any error was harmless.

The question whether habit evidence is admissible is essentially one of threshold relevancy (*People v. Wein* (1977) 69 Cal.App.3d 79, 91) and it is addressed to the sound discretion of the trial court. (*People v. Green* (1980) 27 Cal.3d 1, 19.) Here, the evidence was admitted for two purposes. The first was a non-hearsay purpose to show that the victim was asleep when he was killed. Evidence Code section 1250, which authorizes the admission of out-of-court statements to prove the declarant's state of mind, permits the admission of such evidence if the evidence is offered to prove

or explain acts or conduct of the declarant. (Evid. Code, § 1250, subd. (a)(1), (2).) Here, the evidence was offered because it had a tendency in reason to prove the disputed fact that the victim had no chance to defend himself. (Evid. Code, §§ 210, 351.)

The second purpose was the the discussions Canniff tended to show that the victim had a habit of sleeping near a handgun that he owned for protection. (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1178; disapproved on another point in *People v. Clark* (2012) 52 Cal. 4th 856, 937-941 [under Evid. Code, § 1105, evidence of habit or custom is admissible to prove conduct in conformity with the habit or custom, where there were repeated instances of similar conduct sufficient to conclude there was a habit].) As appellant points out, evidence of custom and habit has to be "otherwise admissibile," and hearsay evidence without an exception is not admissible. However, even if the court improperly admitted the statement as evidence of habit and custom, the court still did not abuse its discretion to admit as it tended to show that the sleeping victim had no opportunity to defend himself.

In any event, appellant cannot prevail on his claim because any error was harmless. Generally, the trial court is vested with discretion in admitting proffered evidence and its discretion will not be reversed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice. (Cal. Const., Art. VI, § 13; Evid. Code, §§ 352, 353; *People v. Wein, supra,* 69 Cal.App.3d at p. 90.) Claims of constitutional violations such as due process or deprivation of the right to present a defense do not generally arise from the mere application of ordinary rules of evidence, including the laws concerning hearsay. (*Lynch, supra,* 50 Cal.4th at p. 752; *People v. Hawthorne* (1992) 4 Cal.4th 43, 55-58.)

Here, any error in admitting Canniff's hearsay statement did not result in a miscarriage of justice. First, the testimony of Officer Root and the

coroner provided strong evidence that the victim was sleeping when he was bludgeoned. (See Statement of Facts, *infra.*) Second, Paul and Ludwig Saccomano recalled that appellant had a semi-automatic pistol similar to Ludwig's when he came out to the firing range at their ranch, and Paul recalled that he loaded Cavallo's gun with his father's ammunition when Cavallo ran out of his own. Furthermore, officers found boxes of .22-caliber bullets in Cavallo's home, which also suggested that Cavallo had possessed a .22-caliber weapon. Moreover, the expert testimony demonstrating a correspondence between the unique ammunition found at Cavallo's residence and the ammunition found at the scene of the Mary S. crime was far stronger evidence of a connection between the two crimes than Canniff's testimony suggesting that Cavallo kept a handgun in his nightstand. Furthermore, this evidence could hardly have prejudiced appellant when the jury could also consider properly admitted evidence that appellant left a thumbprint on an internal component of the weapon that was used to assault Mary S., and he also left a thumbprint on the screen removed from the window at the scene of the Cavallo murder.

In sum, the defense forfeited this evidentiary claim by failing to make a timely and specific objection at the time it was admitted. Furthermore, the court was within its discretion to admit the statement, and any error in doing so was harmless both because other evidence proved the same point, and in light of the other evidence admitted. For all these reasons, this evidentiary claim fails.

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VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING RELEVANT EVIDENCE THAT APPELLANT DID NOT APOLOGIZE TO FLORENCE M. OR ASK ABOUT HER CHILD DURING A SUBSEQUENT VISIT AT PSH

Appellant argues that the trial court abused its discretion to admit evidence that appellant spoke only to Florence M.'s husband, Priestly, but he did not acknowledge Florence M., much less apologize or inquire about the fate of her child, during a visit to PSH, where he was receiving treatment to regain competence to stand trial. (AOB 135-142.) Appellant concurrently asserts that the trial court's admission of Florence M.'s testimony on this point was inconsistent with California's death penalty statute and the state and federal Constitutions. (AOB 138-142.) Appellant's contentions are without merit.

A. Background

On February 11, 1991, the prosecutor filed notice that he intended to introduce evidence of appellant's prior conviction for attempting to murder Florence M. pursuant to section 190.3, factor (c), and of his past violent criminal conduct pursuant to section 190.3, factor (b), relating to Florence M. and her unborn child. The notice alleged that in November of 1971, appellant robbed Florence M. by pulling her arm through her steering wheel and threatening to break it if she did not give him her car keys; that on December 7, 1971, appellant raped Florence M. at knifepoint, and repeatedly stabbed her in the midsection with the intent to commit murder, knowing that she was seven months pregnant with child; and that on December 20, 1971, he communicated a threat of violence over the phone to dissuade Florence M. from testifying about these acts. (4 CT 994-995.)

During the prosecution's penalty case-in-in chief, Florence M. testified that in November of 1971, appellant followed her to her car and pulled her arm through the steering wheel and threatened to break it if she

did not give him the car keys; on December 7, 1971, appellant attempted to murder her by stabbing her multiple times while she was seven months pregnant; appellant called her on the telephone in December of 1971 and threatened to harm her if she testified against him; and when she and her husband visited appellant at PSH, where he was receiving mental health treatment, he did not apologize for attacking her or inquire about the fate of her unborn child. (42 RT 13816-13817.)

Specifically, the prosecutor asked Florence M. whether appellant apologized to her or inquired about the baby at any time during the visit at PSH. (42 RT 13815.) Defense counsel objected that the inquiry was irrelevant and leading and called for hearsay. The court overruled appellant's objection, finding that the question called for a relevant circumstance that could provide context for the jury's consideration of the underlying offense. (42 RT 13815.) Florence M. responded to the question: "No, no way at all." (42 RT 13816.)

Section 190.3, factor (b), allows the jury to consider, as an aggravating circumstance, a capital defendant's prior criminal acts involving the use or attempted use of force or violence or the expressed or implied threat to use force or violence. The prosecution may also introduce evidence of related circumstances to provide context for the conduct; including evidence of a capital defendant's additional criminal activity that would not be admissible by itself (*People v. Wallace* (2008) 44 Cal.4th 1032, 1081 (*Wallace*)), and evidence of the "direct impact on the victim or victims of that conduct." (*People v. Demetruilias* (2006) 39 Cal.4th 1, 39; see also *People v. Holloway* (2004) 33 Cal.4th 96, 143; *People v. Mendoza* (2000) 24 Cal.4th 130, 185-186; *People v. Garceau, supra,* 6 Cal.4th at pp. 200-202.) Furthermore, the law permits the prosecution to introduce, under section 190.3, factor (b), the violent circumstances of a prior felony

conviction introduced under section 190.3, factor (c). (*People v. McDowell* (1988) 46 Cal.3d 551, 566-568.)

Recently, in *People v. Jones* (2012) 54 Cal.4th 1, 72, this Court reiterated its holding in *People v. Mickle* (1991) 54 Cal.3d 140, 187, that "'[t]he foreseeable effects of defendant's prior violent sexual assaults upon the victims—ongoing pain, depression, and fear—were . . . admissible as circumstances of the prior crimes bearing on defendant's culpability.'"

Moreover, to the extent that Florence M.'s testimony showed that appellant lacked remorse, the law is well-settled that "the presence or absence of remorse is a factor relevant to the jury's penalty decision." (*People v. Ghent, supra*, 43 Cal.3d at p. 771 ["The concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal"].)[26] A prosecutor may properly "suggest that evidence of remorselessness, or an absence of evidence of remorse, weighs against the finding of remorse as a mitigating factor." (*People v. Keenan* (1988) 46 Cal.3d 478, 510, citations omitted.) This Court has noted that "there is nothing inherent in the issue of remorse which makes it mitigating only. The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232.) "Remorse is universally deemed a factor relevant to penalty. The jury, applying its

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[26] However, a prosecutor may not refer to the absence of post-crime remorse or failure to take responsibility where the comment implicates a defendant's constitutional right to remain silent and not to implicate himself. (See *People v. Boyd* (1985) 38 Cal.3d 762, 771-776; *People v. Fierro* (1991) 1 Cal.4th 173, 244 ["there appears to be little practical difference between a failure to confess and a claim of innocence; neither should be cited as evidence of lack of remorse"]; *People v. Gonzalez, supra*, 51 Cal.3d at p. 1232.)

common sense and life experience, is likely to consider that issue in the exercise of its broad constitutional sentencing discretion no matter what it is told." (*People v. Enraca* (2012) 53 Cal.4th 735, 767, citing *People v. Keenan, supra*, at p. 510.)

Appellant recognizes that a jury may consider "overt remorselessness" i.e., a murderer's callous attitude toward his actions and the victims of his offense, during the commission of a capital crime as a relevant circumstance to consider in aggravation. (*People v. Gonzalez, supra*, 51 Cal.3d at pp. 1231-1232.) However, he argues that evidence of overt remorselessness is irrelevant to the jury's assessment of appellant's prior acts of violence offered under section 190.3, factor (b). (AOB 137-140.) Specifically, appellant argues that the trial court used the incorrect standard to admit the evidence because the jury was later told to consider this evidence only under factor (c). (AOB 139-140.) On the contrary, as discussed in Argument VIII, *infra*, the court properly admitted the evidence of prior violent criminal conduct that also resulted in a conviction.

Furthermore, admission of appellant's post-crime callousness to the victim posed no greater constitutional issue than the admission of victim impact testimony under factor (b), which this Court has long upheld. (*People v. Jones, supra*, 54 Cal.4th at p. 72; *People v. Mickle, supra*, 54 Cal.3d at p. 187.) Similarly, the trial court here did not abuse its discretion to admit as a circumstance of the crime that appellant showed no remorse for or insight into his attempt to murder his pregnant sister-in-law, even while receiving mental health treatment, because the testimony could assist the trier of fact to assess the relative weight to give to evidence of appellant's prior acts of violence against Florence and her child as an aggravating circumstance.

Finally, appellant's prejudice argument fails to acknowledge that he opened the door to rebuttal evidence that showed his callous disregard for

his victims when he presented evidence of a mental disease or defect as a mitigating factor. Florence's testimony tended to show that mental health treatment did not improve appellant's ability to accept responsibility for his actions or improve his inability to feel empathy for his victim. It therefore suggested a defect in appellant's personality, rather than evidence demonstrating that his callousness was the result of mental confusion caused by an untreated brain injury or schizophrenia.

Assuming, for the sake of argument, that the trial court improperly admitted Florence M.'s testimony on this point during the penalty phase case-in-chief, appellant still cannot show that he was prejudiced because the court could have admitted the same testimony during the prosecution's rebuttal case. Furthermore, it is difficult to conceive how admission of this evidence might have changed the outcome of the trial where appellant himself presented evidence that his deprived childhood caused him to develop a "variety of defenses" that caused him to be dishonest and to commit crimes while experiencing only minimal guilt or remorse for his conduct. (44 RT 14256.) In any event, a jury could infer appellant's lack of remorse from the fact that he committed every violent act testified about during the proceedings while he was either in custody, awaiting trial, and/or on a conditional grant of parole for the commission of another felony.

Likewise, appellant's constitutional claim is thoroughly undermined by this Court's precedent holding that a prosecutor may comment upon the defendant's lack of remorse. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1346; accord, *People v. Brady* (2010) 50 Cal.4th 547, 585 ["If defendant had appeared sorry in front of another person, performed an act of contrition, apologized to any of his victims, or otherwise demonstrated any remorse, a witness other than he could have testified about such acts or statements, but none did"].) Under this line of precedent, appellant cannot demonstrate that his state and federal constitutional rights were implicated

by the trial court's admission during the penalty phase that even while receiving mental health treatment, appellant spoke only with Priestly, and he showed no remorse for his crimes against Florence and her unborn child.

Moreoever, admission of the evidence did not implicate appellant's right to remain silent because he was not exercising that right when he spoke with Priestly and Florence M. at PSH. Nor did its admission implicate his rights to a fair trial, due process, or a reliable penalty determination. The trial court did not admit this evidence for the jury to consider independently as a factor in aggravation, nor did the prosecutor suggest to the jury that they could consider it for this purpose. Rather, it was admitted to provide context for the jury to assess appellant's propensity toward violence based on his attitude toward his crime. Furthermore, the jury could properly consider this evidence when evaluating appellant's mitigation evidence that his culpability for his criminal conduct was diminished by untreated schizophrenia and/or brain damage, and the juvenile court system failed to recognize and to provide treatment for these conditions. (AOB 23-31.) Therefore, its admission did not implicate appellant's constitutional rights.

Accordingly, appellant's claim of prejudicial error based fails.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING APPELLANT'S STATEMENT TO OFFICER ERICKSON

Appellant argues that the trial court abused its discretion by admitting evidence that when arrested, he told CHP Officer Lance Erickson that he had stabbed and probably killed his pregnant sister-in-law because he was irritated after she "came on to him," on the ground that the prosecution failed to provide adequate notice and the testimony was more prejudicial than probative. (AOB 143-156.) Appellant asserts error under the State

and Federal Constitutions. (AOB 155-156.) These contentions also lack merit.

A. Background

On February 11, 1991, the prosecutor filed notice that he intended to introduce evidence of appellant's prior conviction for attempting to murder Florence M. pursuant to section 190.3, factor (c), and of his past violent criminal conduct pursuant to section 190.3, factor (b), relating to Florence M. and her unborn child. The notice alleged that in November of 1971, appellant robbed Florence M. by pulling her arm through her steering wheel and threatening to break it if she did not give him her car keys; that on December 7, 1971, appellant raped Florence M. at knifepoint, and repeatedly stabbed her in the midsection with the intent to commit murder, knowing that she was seven months pregnant; and that on December 20, 1971, he communicated a threat of violence over the phone to dissuade Florence M. from testifying about these acts. (4 CT 987-999.) The notice further alleged that on April 13, 1972, the same day appellant was convicted of attempting to murder Florence M., he was also convicted of felony grand theft of an automobile. (4 CT 997.)

The People sent a letter in 1991 informing the defense about CHP Officer Erickson as a potential witness; furthermore, in discovery, the defense received a Los Angeles County Police Report which referred to a statement appellant made to the arresting CHP officers; and Officer Erickson's name was on the People's witness list. (4 CT 985-986; 42 RT 13586, 13590.)

On August 26, 1992, the day before he was scheduled to testify, the prosecutor spoke with Officer Erickson and learned about facts not

mentioned in the LAPD report for grand theft automobile.[27] (42 RT 13554-13555.) Specifically, the LAPD report did not include the fact that appellant ran from the officers, struggled with the officers, made statements to the effect that he would shoot them if he had a gun, and said that he had stabbed, raped, and killed his pregnant sister-in-law during an argument. (42 RT 13554-13555, 13619-13635.)

The prosecutor offered appellant's statement to Erickson that Florence M. had made sexual advances toward him as a lie demonstrating his consciousness of guilt. (42 RT 13596-13597.) The prosecutor further argued that appellant's lie would be relevant to rebut the anticipated defense claim that he suffered from paranoid schizophrenia. (42 RT 13596-13599.)

Defense counsel objected that he had not received adequate notice of Officer Erickson's testimony. (41 RT 13556-13558.) The defense noted that the statement in question was not included in the LAPD report from the arrest for grand theft automobile. (42 RT 13591.) The defense also requested that the court exercise its discretion under Evidence Code section 352 to exclude the testimony because its prejudicial effect outweighed its probative value. (42 RT 13593.)

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[27] Appellant pleaded guilty to this crime in conjunction with his guilty plea to the attempted murder of Florence M. (Pros. Exh. 65.) Although the prosecution could have introduced evidence of appellant's non-violent felony theft convictions under factor (c), it relied on violent felony convictions as circumstances in aggravation under factor (c). (5 CT 1245-1246.) The felony conviction for grand theft automobile was not discussed in summation by either counsel, nor was the jury instructed to consider it as a factor in aggravation.

The trial court held an evidentiary hearing outside the presence of the jury to determine the admissibility of Officer Erickson's testimony. (42 RT 13596, 13620-13629.)

Officer Erickson testified that he was patrolling with his partner, Officer Aldon Summers, when they observed appellant commit a traffic violation. (42 RT 13620-13623, 13627.) The officers attempted a traffic stop, but appellant led them in a high speed automobile chase before abandoning his vehicle and fleeing on foot. (42 RT 13554.) While the officers pursued, appellant yelled that they should shoot him and he also said that he would shoot them if he had a gun. (42 RT 13555.) Appellant was apprehended after a struggle. (42 RT 13554-13556.) Appellant told the officers he had stabbed, raped, and killed his pregnant sister-in-law during an argument because she had "come on to him." (42 RT 13554-13555, 13619-13635.) Officer Erickson immediately passed this information on to the LAPD, and he was told later that LAPD officers investigated and had found no one present at the residence, but they did find blood from "one end of the house to the other." (42 RT 13623.) Officer Erickson testified that Officer Summers was present during all of these events. (42 RT 13628-13629.)

The court admitted appellant's statement explaining his reasons for stabbing his sister-in-law, finding that the LAPD report mentioned that appellant made a statement to the arresting CHP officers, and that information, combined with Officer Erickson's name on the witness list, provided the defense with adequate notice such that they could have contacted and interviewed him well before trial. (42 RT 13639.) The court also denied the defense request for a substantial delay in the proceedings to allow them to contact Officer Summers and to investigate the matter

further.[28] (42 RT 13638-13639.)

The court ruled,

> I am going to permit the officer to testify in the limited area of the statement. And I think the information he offers is very relevant to the state of mind of the defendant concerning this incident and his attitude toward this incident, how he feels about the violence he visited upon his sister-in-law. It all goes to character and the quality of the criminal conduct involved.

(42 RT 13640-13641.)

Defense counsel objected to admission of the evidence in the prosecution's case-in-chief to show appellant's mental state or to rebut a mental defense that might be presented. (42 RT 13641.) The court responded that the evidence would be admitted because "it's [*sic*] highly relevant evidence as to the defendant's criminality and state of mind and attitude toward the violent conduct upon his sister-in-law, whether or not any psychiatric issues surface in this case at all." (42 RT 13642.)

At trial, Officer Erickson testified that on December 16, 1971, he stopped appellant for a traffic violation and then arrested him for possession of a stolen automobile. (42 RT 13671-13672.) Appellant told Officer Erickson that he thought he had killed his pregnant sister-in-law by stabbing her from her neck down to her stomach. (42 RT 13671-13672.) He claimed that this occurred during an argument because she was "coming on to him." (42 RT 13673-13674.)

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[28] The prosecution investigator subsequently located Officer Summers and provided defense counsel with the contact information to facilitate an interview. (43 RT 13844.) Furthermore, the prosecutor represented to the court that Officer Summers confirmed with him that he had spoken to defense counsel about his recollection of the events. (43 RT 13844.)

B. The Trial Court Did Not Abuse Its Discretion In Finding The Prosecution Provided Adequate Notice To Introduce Erickson's Limited Testimony

This Court has long held that

> "'the state has a legitimate interest in allowing a jury to weigh and consider a defendant's prior criminal conduct in determining the appropriate penalty, so long as reasonable steps are taken to assure a fair and impartial penalty trial.' [Citation.] We identified those 'reasonable steps' as including notice of the evidence to be introduced, the opportunity to confront the available witnesses, and the requirement of proof beyond a reasonable doubt."

(*People v. Yeoman* (2003) 31 Cal.4th 93, 136-137.)

Unlike the notice required in a criminal charging document, which must allege with sufficient specificity particular offenses, the notice required under factor (b) is a more general "notification of the evidence to be introduced." (§ 190.3.) Notice that evidence will be presented regarding a specific prior crime or crimes should alert counsel that evidence of all crimes committed as part of the same course of conduct may be offered; and therefore, substantially complies with the notice requirement of section 190.3. (*People v. Cooper* (1991) 53 Cal.3d 771, 842.) Notice of factor (b) evidence "is sufficient if the defendant has a reasonable opportunity to respond." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1051.)

In making this determination, the court must "balance the competing interests at issue—on the one hand, the defendant's interest in having a fair opportunity to respond to the accusations and ensuring the reliability of the evidence offered against him, with, on the other hand, the state's interest in presenting the sentencing jury with a complete picture of the defendant's character." (*People v. Rundle, supra,* 43 Cal.4th at p. 184, internal citations omitted.) The introduction of evidence under factor (b) is not the equivalent of a criminal prosecution for purposes of assessing due process

because the evidence is admitted in part to provide "a true picture of the defendant's history since there is no temporal limitation on evidence in mitigation offered by the defendant." (*People v. Jennings* (1988) 46 Cal.3d 963, 982.) As this court has previously noted, "the 'penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes.'" (*Ibid.*, quoting *People v. Balderas, supra*, 41 Cal.3d at p. 205, fn. 32.)

Moreover, the trial court did not abuse its discretion to deny defense counsel's mid trial request for a continuance to further investigate. "Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) In ruling on a motion to continue, the court must consider not only the benefit that the moving party anticipates, but also the likelihood that such benefit will result, the burden on other witnesses, jurors, and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037.) The trial court's decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*Ibid.*) Defendants bear a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.)

Here, appellant utterly fails to demonstrate that it was an abuse of discretion for the trial court to find that the prosecution had provided adequate notice under section 190.3 or for the trial court to deny the defense request for a continuance. Appellant's analysis dismisses facts relied on by the trial court in its decision (AOB 148-151), including Officer Erickson's presence on the prosecution witness list provided a year earlier and the LAPD report provided during discovery which mentioned appellant's statement to the arresting CHP officers. (42 RT 13639.) He instead relies heavily on the record indicating that defense counsel made several requests to continue the trial to locate and interview Officer

Summers. (AOB 150-151.) However, he omits that pursuant to the court's order, the prosecution investigator had located Officer Summers, who contacted defense counsel to relate his recollection of the events in question. (43 RT 13844.) Presumably, if Officer Summers's recollection contradicted Officer Erickson's testimony, the defense would have called him as a witness.

For all these reasons, appellant fails to show that the trial court abused its discretion in admitting Officer Erickson's testimony.

C. The Trial Court Did Not Abuse Its Discretion By Admitting Probative Evidence That Appellant Had Lied About Florence Making Sexual Advances

As noted earlier, section 190.3, factor (b), allows the jury to consider as an aggravating circumstance a capital defendant's prior criminal acts involving the use or attempted use of force or violence or the expressed or implied threat to use force or violence. The prosecution may also introduce evidence of related circumstances to provide context for the episode, including evidence of a capital defendant's additional criminal activity that would not be admissible by itself. (*Wallace, supra*, 44 Cal.4th at p. 1081; see *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013-1014, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th 390, 421, fn. 22.)

Moreover, as noted in Section VI, a defendant's callousness toward his actions and the victims of his offenses is a relevant circumstance of a crime. (*People v. Gonzalez, supra*, 51 Cal.3d at pp. 1231-1232.)

Appellant argues that the underlying circumstances of the crime were irrelevant to the jury's assessment of his prior act of violence because the stabbing was offered under section 190.3, factor (c), which is limited to evidence of the fact of a prior conviction. And his remorse or lack thereof was unrelated to appellant's uncharged criminal act of threatening Florence to dissuade her from testifying against him offered under section 190.3,

factor (b). (AOB 154-155.) Assuming *arguendo* appellant's premise, the jury was nevertheless instructed that: "An aggrevating [*sic*] factor can also consist of a prior felony conviction or prior criminal activity which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (5 CT 1263.) Furthermore, as will be discussed in greater detail below, the jury was entitled to consider the circumstances of appellant's attempted murder of Florence M. both as prior violent conduct under factor (b), and as a conviction demonstrating an undeterred propensity toward criminality under factor (c). (*People v. Melton* (1988) 44 Cal.3d 713, 764 [finding that a jury may consider a prior felony conviction involving violence or threat of violence for its relevance under both factor (b) and factor (c)].)

Thus, the trial court properly admitted the testimony because evidence of appellant's attitude toward his crime and the victim reflected both on his undeterred criminality as well as his propensity to commit violent crimes. In short, it was a circumstance of the crime that could assist the trier of fact in assessing the relative weight to give evidence of appellant's prior acts of violence against Florence and her unborn child as an aggravating circumstance. Consequently, the court did not abuse its discretion in admitting relevant evidence that appellant attempted to shift the blame for his conduct to the victim of his crime by suggesting that she made sexual advances toward him while pregnant with his brother's child.

Finally, appellant argues that admission of Officer Erickson's testimony on this point was prejudicial under the state and federal Constitutions. (AOB 154-155.) Appellant's prejudice argument once again fails to acknowledge that when he offered evidence of a mental disease or defect in mitigation, he opened the door to evidence suggesting that upon arrest he made calculated statements attempting to shift the blame to the victim. (*People v. Valdez* (2012) 55 Cal. 4th 82, 121 ("As explained

above, the trial court properly admitted France's testimony as rebuttal evidence. Thus, regardless of whether the evidence was admissible under factor (b), the jury properly learned about the high school incident."].)

Moreover, when appellant apparently believed that he had successfully killed Florence when he told Erickson that he stabbed her during an argument where she was making sexual advances toward him. (42 RT 13554-13555, 13619-13635.) In context, appellant's comment suggested that he was anticipating the discovery of evidence of sexual intercourse on Florence M.'s body, and he was laying the groundwork to claim that it was a consensual encounter. Because this trial predated the passage of Evidence Code section 1108, the trial court did not admit evidence that appellant raped Florence M., fearing that it might unduly prejudice the jury's determination of whether or not he also raped Mary S. However, even without this additional context, appellant's comments to Erickson were relevant to show his inability to accept responsibility for his actions or to feel empathy for his victims. Thus, it was relevant to the jury's assessment of whether he deserved the death penalty.

Furthermore, appellant's act of shifting blame to the victim again suggested that his violent act was a result of a defect in his personality, rather than the result of mental confusion caused by an untreated brain injury or schizophrenia. Assuming for the sake of argument that the trial court improperly admitted Officer Erickson's testimony during the procecutor's penalty phase case-in-chief, appellant still cannot show that he was prejudiced because the court could have admitted the same testimony during the prosecution's rebuttal case. (*People v. Valdez*, supra, 55 Cal. 4th at p. 121.)

Finally, as appellant acknowledges, he "did not contest the fact of his conviction in the [Florence M.] incident." (AOB 153.) Given that his commission of the assault was uncontested, appellant's comments to

Erickson were relatively inconsequential when considered next to the properly-admitted evidence that Florence M. and her husband gave appellant a place to live and tried to help him, and appellant, in return, showed his gratitude by trying to murder her and her unborn child. In fact, appellant's reason for committing the crime, whether one believes that it was because Florence M. did not get off the telephone fast enough or because he was angered by her sexual overtures toward him, does not really add to or detract much from the horror of his crime.

Accordingly, appellant's claim of prejudicial error fails.

VIII. APPELLANT ABANDONED HIS OBJECTION TO THE NON-PREJUDICIAL FACTOR (C) INSTRUCTIONAL ERROR

Appellant claims that the trial court erroneously instructed the jury to consider his conviction for assaulting Olsen as a factor in aggravation under section 190.3, factor (c). (AOB 158-162.) Respondent agrees. However, appellant abandoned his objection to the instructional error; and furthermore, he was not prejudiced by it.

At trial, the court received without objection evidence that appellant had been convicted of four violent felonies and the circumstances of the crimes through witness testimony and copies of certified convictions. The prosecutor requested that the court instruct the jury to consider these four convictions and the underlying circumstances of the crimes using CALJIC No. 8.86, the pattern instruction related to factor (c) evidence. (45 RT 14520-14527 [Pros Exhs. 60, 61, 65 & 76]; see also 6 CT 1245-1246.) However, appellant's conviction for assaulting Olsen was entered nine days after the jury found him guilty of committing the capital crime. (Pros. Exh. 65.) Accordingly, the fact of the conviction was not admissible as a prior felony conviction under factor (c). (*People v. Balderas, supra*, 41 Cal.3d at p. 201 [felony convictions described in factor (c) of section 190.3 "are limited to those entered before commission of the capital crime"].)

Defense counsel objected to the inclusion of the Olsen conviction in the factor (c) instruction because it was entered after the guilt verdict in the capital matter. (Pros. Exh. 76; 45 RT 14520.)

The prosecutor believed and the court agreed that the jury could consider evidence of a felony conviction entered after the capital verdict under factor (c), so long as it finds the fact of the conviction has been proven beyond a reasonable doubt. (45 RT 14520.) Thus, the court suggested modifying the pattern instruction to omit the word "prior" from "prior conviction." (45 RT 14520-14521.) Neither party objected to the proposed modification. (45 RT 14520-14521.)

Moreover, the prosecutor agreed with defense counsel that factor (b) evidence was limited to *unadjudicated* felony criminal acts of violence or threatened violence, and therefore, the jury should be instructed on the presumption of innocence as to factor (b) evidence.[29] (45 RT 14526-14527, 14532-14533-14538; 47 RT 15059-15067; 15071-15080, 15086-15087, 15090-15092.)

During the hearing to finalize the jury instructions, the court provided counsel with a packet of proposed instructions and reviewed each to determine whether counsel agreed that it accurately reflected the earlier hearings and to memorialize objections to the instructions as they were now constituted. (47 RT 15051-15131 [the court reviewed each of the proposed

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[29] The prosecutor believed that the relevant distinction between evidence offered under factors (b) and (c) was a conviction or lack thereof, thus he also believed that only evidence of past violent felony conduct or felony conduct threatening violence could be introduced under either factor. (45 RT 14520-14521; 47 RT 15059-15060.) As a consequence, the prosecutor did not perceive an issue with the court omitting the word "prior" from the pattern instruction; moreover, he could have, but but did not rely on copies of certified convictions showing appellant's prior non-violent felony convictions to demonstrate recidivism under factor (c).

instructions, discussed any modifications with counsel, inquired whether the instruction reflected counsels' recollection from earlier hearings, and if either party objected to the instruction as it was now constituted].)

The following exchange occurred between court and counsel regarding the proposed modified versions CALJIC Nos. 8.85, 8.86, and 8.87:

> THE COURT: Okay. Okay. Moving along, the next one in the order that comes to mind and would appear reasonable is 8.85. And, specifically, I address myself to the A, B, C, factors, and rather than struggle with the phrase, because we have the unusual situation, or relatively unusual situation, in which we are retrying the penalty phase, rather than struggling with under (a), the circumstances of the crime of which the defendant was convicted in the present proceeding, which is ambiguous to the jury.
>
> I chose to identify and describe it in this way. "The circumstances of the crime of which the defendant was convicted in the prior court proceeding in this matter."
>
> "In addition, you shall consider the existence of any special circumstances found to be true in that prior proceeding."
>
> I have also modified B and C to, once again, because of the same inherent problem of identifying the proceeding and what convictions we're talking about and which ones we aren't.
>
> Now, does anybody have a problem with A, B, and C, as I have modified it?
>
> MR. MASUDA: No, your honor.

(47 RT 15059-15060.)

Based on counsels' represenations during the hearing to finalize the instructions, the trial court instructed the jury with a modified version of CALJIC No. 8.86 as follows:

> Evidence has been introduced for the purpose of showing that the Defendant, Joe Edward Johnson, has been convicted of the following 4 felony crimes:

1. The assault with intent to commit murder on Florence [M.] on December 7, 1971, in Los Angeles County;

2. The battery on the person of another, Thomas Scott, on January 23, 1973, in Solano County;

3. The escape from State prison by force and violence on April 29, 1974, in San Bernardino County;

4. The assault with a deadly weapon on Verna Lynette Olsen on December 2, 1978, in Sonoma County.

Before you may consider any of such alleged crimes 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 crimes. You may not consider any evidence of any other felony convictions as an aggravating circumstance pursuant to factor (c).

(6 CT 1245-1246; see also 47 RT 15183-15184.)

It further instructed the jury to consider factor (b) evidence using the following modified version of CALJIC No. 8.87:

Evidence has been introduced for the purpose of showing that the Defendant Joe Edward Johnson has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence:

1. The forcible rape and rape by threat of Mary [S.] in Santa Rosa, California, on July 28, 1979;

2. The robbery of Mary [S.] in Santa Rosa, California, on July 28, 1979;

3. The assault with a deadly weapon; a firearm; upon Mary [S.] in Santa Rosa, California, on July 28, 1979;

4. The threat to dissuade Florence [M.] from testifying against the defendant in 1972.

Before each juror may consider any of such criminal acts as an aggravating circumstance in this case, that [*sic*] juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. It is not necessary for all

> juror's [*sic*] to agree. If a juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that [*sic*] juror must not consider it for any purpose. You may not consider any evidence of any other criminal acts as an aggravating circumstance pursuant to factor (b). Each of the crimes is a distinct offense. Each of you must decide each crime separately. The defendant may be found guilty or not guilty of any or all of the crimes charged.

(5 CT 1248; 47 RT 15184-15186.)

Furthermore, the court instructed that: "An aggrevating [*sic*] factor can also consist of a prior felony conviction or prior criminal activity which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (5 CT 1263.)

Respondent agrees that the trial court incorrectly instructed the jury to consider the Olsen conviction under factor (c) because the conviction was entered after the verdict in the capital crime. (*People v. Thomas* (2012) 53 Cal.4th 771, 820; *People v. Balderas, supra*, 41 Cal.3d at p. 201.) However, the parties agreed to multiple modifications of the proposed instructions over the course of several hearings, including the instructions related to the jury's consideration of factor (a), (b), and (c) evidence. (47 RT 15059-15060.) Appellant abandoned his objection to the inclusion of the Olsen conviction in the factor (c) instruction by failing to object to the court's deletion of the word "prior" from the pattern instruction. (45 RT 14520-14521; 47 RT 15059-15060.) Furthermore, when reviewing the modified instructions, defense counsel explicitly stated that it did not object to the modified instructions. (45 RT 14520-14521; 47 RT 15183-15184.) A party who fails to press an objection and secure a ruling fails to preserve the point and forfeits or abandons any claim of error on appeal (*People v. Rowland* (1992) 4 Cal.4th 238, 259; *People v. Jacobs* (1987) 195

Cal.App.3d 1636, 1650.) Accordingly, appellant forfeited his claim of error by abandoning his objection.

In any event, an error during the penalty phase is harmless unless there is a reasonable possibility that appellant might have received a more favorable result in the absence of the error. (*See People v. Wallace* (2008) 44 Cal.4th 1032, 1092; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Under this standard, the court's instructional error here was not prejudicial. In addition to the circumstances of appellant's capital crimes, the prosecution also introduced evidence of appellant's assault, rape, and robbery of Mary S., as well as his threat to dissaude Florence M. from testifying against him. Moreover, the prosecution also introduced evidence that appellant had been convicted of three other violent felonies, including a forcible escape, before he committed the capital murder in this case. The jury was properly instructed on its consideration of the other violent felony crimes for which appellant had been convicted, and at trial appellant did not contest the evidence or the facts of any crime for which he had been convicted. Furthermore, the circumstances of the Olsen assault were testified about at trial by both defense and prosecution psychiatrists who had examined appellant. (46 RT 14928-14932.) Finally, the Olsen assault and conviction merited no more than a brief mention in either the prosecution or defense summation. (47 RT 15241 [defense summation]; 48 RT 15270, 15287 [during summation the prosecutor's only references to the Olsen stabbing in her neck and stomach are two separate one-sentence summaries].) In short, appellant's violent background, including a violent recidivist behavior, were amply established by other evidence—not including the evidence of the Olsen conviction. Thus, it is not reasonably possible that the exclusion of this one conviction would have altered the jury's balancing of the aggravating evidence in this case.

Of course, the evidence of the Olsen assault and and the fact of the conviction were admitted without objection, and the jury was entitled to consider this evidence under factor (b) as yet another example of appellant's prior violent criminal conduct. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 427 ["We have observed a prior felony conviction for a violent crime could fulfill both section 190.3 factors (b) (violent criminal activity) and (c) (prior felony conviction)"]; *People v. Ray* (1996) 13 Cal.4th 313, 369 (conc. opn. of George, C. J.) ["the prosecution may rely upon a prior conviction of a crime involving the use or threat of force or violence to establish the presence of criminal activity involving the use or threat of force or violence for purposes of section 190.3, factor (b)"].) Indeed, the facts of all his prior convictions were admissible under factor (b).

Appellant argues that this is of no consequence because the court in his case specifically instructed the jury that it could only consider the fact of the convictions and it limited the jury's consideration of factor (b) evidence to the crimes specifically enumerated in the court's instructions. (AOB 160.) His argument overlooks the fact that the jury was also instructed that an aggravating factor "can also consist of a prior felony conviction or prior criminal activity which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (5 CT 1263.) But assuming for the sake of argument that the jurors did not consider the underlying facts of the four felony convictions, all this shows is that appellant received a windfall. Under his argument, the evidence of the circumstances of appellant's violent felony offenses was properly received at trial without objection, but the jury did not consider the underlying circumstances of his various prior adjudicated crimes, even though they should have been instructed to do so under California law. Rather, the jury was limited to considering only the four convictions, and of those, only one was inadmissible. Thus, even on appellant's own terms, his

argument about the court's instructions leads to the same harmless error result—the jury's erroneous consideration of one lone prior conviction out of four could not have affected the verdict in this case. Appellant's overall good fortune overwhelms any claim of prejudice.

Here, the evidence of the circumstances of the crime, specifically that appellant brutally stabbed Olsen and taunted her with her own death, was damaging. However, in *People v. Streeter* (2012) 54 Cal.4th 205, 267, this Court found it was harmless error to instruct the jury to consider the circumstances of a prior felony assault under factor (c), which was subsequently reduced to a misdemeanor conviction, because the jury could properly consider the violent criminal conduct underlying the offense, i.e., shooting into a house with adults and children, under factor (b). (*Id.*, citing *People v. Bunyard* (2009) 45 Cal.4th 836, 857 [§ 190.3, factor (b) applies to misdemeanor violent activity as well as felony activity]; *People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 [evidentiary and instructional error allowing jury to consider subsequent felony conviction under § 190.3, factor (c) harmless; underlying violent criminal conduct properly admitted under § 190.3, factor (b)].) The jury was also entitled to consider the conviction under factor (b) because it was relevant to their consideration of the weight to assign to Olsen's testimony. (*People v. Homick* (2012) 55 Cal.4th 816, 889 [prior felony conviction for violent crime is "admissible under section 190.3, factor (b) as proof of criminal activity by" defendant], *citing People v. Hinton* (2006) 37 Cal.4th 839, 910.)

In short, if the jurors were entitled to consider the evidence related to the conviction under factor (b), then a defendant is not prejudiced by a court's incorrect instruction to consider the conviction under factor (c). (*People v. Kelly* (1992) 1 Cal.4th 495, 549-550 ["Once the facts of the Danny O. murder were disclosed, '"[t]he additional fact that defendant was

convicted of that offense could have added very little to the total picture considered by the jury . . . ."""].)

Appellant acknowledges that the erroneous admission of a conviction under factor (c) is generally harmless, but he points out that the trial court instructed the jury only to consider the enumerated offenses under factor (b) (which did not include the Olsen stabbing); and thus, he argues that the factor (c) instructional error was prejudicial in this matter because without it the "evidence [of the Olsen assault and conviction] could not have been used at all as [*sic*] aggravation." (AOB 160.) Not so.

It is true that the trial court instructed the the jury that it could only consider the evidence related to the Mary S. crimes and the threat against Florence M. under factor (b). But as noted above, the jury was also instructed that it could consider in aggravation "criminal activity which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (5 CT 1263.) Certainly, the conduct of each of the four felony convictions consisted of "criminal activity that involved the use of violence." It is presumed that jurors have and use intelligence and common sense in construing the instructions. (*People v. Coddington* (2000) 23 Cal.4th 529, 594, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Here, the instructions did not explicitly conflict with each other. The jurors could have reasonably construed the latter instruction to mean that in addition to factor (b) and (c) evidence, they were also entitled to consider "criminal activity that involved the use of violence," regardless of whether it was also factor (b) or (c) evidence.

Furthermore, to the the extent that the factor (b) instruction omitted offenses that should have been included, appellant did not object to the modified version of CALJIC No. 8.87. Moreover, he did not request that the jury be instructed to consider the evidence related to the Olsen stabbing

under factor (b). In *People v. Lewis* (2001) 25 Cal.4th 610, 666, the defendant argued that the trial court omitted an incident in instructing the jury on the his prior "other" violent incidents that it could consider in aggravation if the jury found the facts proved beyond a reasonable doubt. This Court held:

> Respondent argues that because a trial court is under no obligation to specify for the jury the violent criminal activity that could be considered (*People v. Medina* [(1995) 11 Cal. 4th 694, 770-771), it was incumbent on defense counsel to point out the omission of the Greene incident and request a more complete instruction on the subject. We agree. The instruction as given was not erroneous, only incomplete, and "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

(*Ibid.*)

In *People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4, the defendant similarly complained that the trial court only instructed the jury to consider a prior murder conviction in relation to factor (c), but at trial the prosecutor introduced evidence of the circumstances of the crime, and in summation he argued that the jury should consider the evidence for both propensity to commit violent crime and recidivism. Relying on *People v. Lewis, supra*, this Court found that the defendant had forfeited this contention by failing to object to the court's factor (b) instruction and request modification. (*Ibid.*) Furthermore, it found that there can be no prejudice from the erroneous instruction to consider the conviction under factor (c) because appellant's commission of the crime was undisputed and the evidence in question directly related to the conduct that formed the basis of the conviction. (*Bacon, supra*, 50 Cal.4th at pp. 1123-1124.)

Here, as in *Bacon*, appellant here did not dispute that he had stabbed Olsen, and her testimony directly related to conduct that formed the basis of

the conviction, not some additional crime with which he could have been charged but was not. In *Bacon* this Court found that even had the trial court not so instructed, the jury was still entitled to consider the conviction and the evidence of the circumstances of the crime as it showed appellant's propensity to commit violent crime. Therefore, as in *Bacon*, here "there was no reasonable possibility that, had the jury been instructed regarding factor (b) with respect to the [Olsen assault], it would have accorded it less weight, much less a possibility that the additional instruction would have influenced the outcome of the penalty phase." (*Bacon, supra*, at p. 1124.) .

Finally, the record shows that defense counsel wanted to modify the pattern instructions to put increased emphasis and weight on the people's burden of proof as to appellant's prior violent criminal acts that did not result in a conviction, specifically, the rape, robbery, and assault with a deadly weapon causing great bodily injury of Mary S. and the threat to dissuade Florence M. from testifying. (45 RT 14526-14527, 14532-14533-14538; 47 RT 15059-15067; 115061- 15065, 5071-15082, 15086-15087, 15090-15099, 15119-15129, 15184-15186.) Appellant could only benefit by the court singling out the conduct for which he was not convicted under factor (b), and the corresponding instruction that he was entitled to a presumption of innocence. Had the trial court properly instructed the jury to consider appellant's four violent convictions and the underlying conduct under factor (b), it could not have given defense counsel's requested instruction to apply a presumption of innocence to the the factor (b) evidence. (6 CT 1260; 47 RT 15078-15080.)

In short, appellant now complains of an error that his counsel below optimized fully to his benefit. An instructional error that benefits the defendant is treated as harmless beyond a reasonable doubt. (See *People v. Prieto* (2003) 30 Cal.4th 226, 255 [trial court's misreading of instruction "could only have benefited defendant because it narrowed the elements of

murder"]; *People v. Frye* (1998) 18 Cal.4th 894, 959 ["Under any standard of proof, the effect of the instruction is beneficial to defendant"]; *People v. Osband* (1996) 13 Cal.4th 622, 688 [any possible misunderstanding of instruction "could only have benefitted defendant"]; *People v. Mayfield* (1993) 5 Cal.4th 142, 180 ["the instruction could only have benefitted defendant"]; *People v. Jackson* (1954) 42 Cal.2d 540, 548 [because disputed instruction was "more favorable to the defendant than the evidence justified he has no just cause for complaint"]; *People v. Adan* (2000) 77 Cal.App.4th 390, 394 [because disputed instructions were favorable to defendant, they could not have prejudiced him]; *People v. Keith* (1960) 184 Cal.App.2d Supp. 884, 887 ["confusing and erroneous" instruction not prejudicial because it "was still too favorable to the defendant"]).

Thus, it is not reasonably possible that the jury's balancing of the aggravating evidence would have been different had the Olsen conviction been excluded at trial because appellant's history of violent recidivism was amply established by other evidence properly submitted in aggravation. Furthermore, appellant's claim of prejudicial error fails because the jury was entitled to consider the circumstances underlying the crime and the fact of the conviction under factor (b), notwithstanding the trial court's erroneous instructions to the contrary. Moreover, the jury was properly instructed to consider past criminal acts of violence in aggravation. Finally, the record shows that appellant benefited from the erroneous instructions related to the jur's consideration of factor (a), (b), and (c) evidence. For all these reasons, appellant's claim of prejudicial error must fail.

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IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED ON THE OMISSION OF EXHIBIT N FROM THE EXHIBITS TRANSFERRED TO THE JURY ROOM DURING DELIBERATIONS

Appellant argues that he this Court must overturn the jury's penalty determination because the "trial court lost" an exhibit, and thereafter abused its discretion in denying a new trial motion on this basis. (AOB 163-171.) Appellant asserts error under the State and Federal Constitutions. (AOB 168-171.) These contentions also lack merit.

A. Background

On September 4, 1992, social worker Kenneth Peterson testified on behalf of appellant. (44 RT 14343-14344.) Peterson worked with Dr. Komisaruk at the Clinic for Child Study. (44 RT 14345-14346, 14379.) Defense counsel introduced a letter that Peterson wrote on April 14, 1965 to the Chief Social Worker at YSH, noting that appellant had been in the Youth Home for eight months and urging the hospital to accept him as a patient. (44 RT 14352-14354.) During cross-examination, the prosecutor read the majority of the letter to Mr. Peterson, and he specifically questioned Peterson about his assertion that appellant suffered from hallucinations. (44 RT 14357-14359.) Peterson replied that he only coordinated care and that he had no personal contact with appellant. (44 RT 14359.) The exhibit was moved into evidence. (44 RT 14376.)

The same day, Dr. Komisaruk, a former director of Clinic for Child Study also testified on behalf of the defense. (44 RT 14377-14378.) Dr. Komisaruk agreed with Peterson's testimony that mental health resources were limited, and during this time period there had been a long waiting list of children waiting to be accepted at the few state hospitals offering mental health treatment. (44 RT 14372, 14385-14386.) Dr. Komisaruk testified of ethnic minority children being diagnosed as having antisocial personality

disorder so that they would be incarcerated rather than receive mental health treatment, thereby freeing up more hospital placements for Caucasian children. (44 RT 14350-14352, 14380-14390.) The prosecution also showed Dr. Komisaruk Prosecution Exhibit 82, which contained ward notes written on July 30, 1965, approximately three months after Peterson wrote his letter. The ward notes indicated that Dr. Komisaruk had arranged for appellant to be admitted and discharged to his mother's care, and that if he were to violate the law again he would be admitted to the Boy's Training School. (44 RT 14405-14406; Pros. Exh. 82 at p.2.) The ward notes indicated that appellant would not benefit from hospitalization because he had a sociopathic/antisocial personality disorder and no apparent mental illness. (44 RT 14405-14410; Pros. Exh. 82 at pp. 2-3.)

Apparently, Dr. Komisaruk unintentionally took Exhibits N and P with him when he left the courtroom. (45 RT 14473; 48 RT 15121, 15392.) Defense counsel realized shortly after Dr. Komisaruk departed that he had inadvertently taken with him Exhibit P, the juvenile court records, and brought this to the attention of the court and counsel. (45 RT 14473-14474, 47 RT 15143-15144.) Dr. Komisaruk died shortly after returning to Michigan. (47 RT 15144; 48 RT 15401.) Defense counsel reproduced Defense Exhibit P, and the parties stipulated that the copy could replace the original Exhibit P. (45 RT 14473-14474, 47 RT 15121.) But somehow the fact that Dr Komisaruk also took Defense Exhibit N was overlooked by the parties and the court; therefore, it was not among the documentary exhibits transferred to the jury during deliberations. (48 RT 15398-15400.) After the verdict, defense counsel recovered Exhibit N. (48 RT 15392.)

Appellant filed a motion for a new trial relying, in part, on the failure to provide the jury with a copy of Exhibit N during deliberations. (6 CT 1333-1336.) The prosecution filed a response, but referred to the replaced Exhibit P, not Exhibit N. (6 CT 1354-1355.) However, upon a review of

the record, the prosecution agreed that Dr. Komisaruk took both exhibits, but only Exhibit P had been reconstituted. (48 RT 15398-15400.)

On October 28, 1992, the trial court head and denied the motion for a new trial. (6 CT 1362; 48 RT 15396-15401.) The court found that appellant was not prejudiced by the absence of the letter during jury deliberations because Peterson and Dr. Komisaruk testified about the sympathetic aspects of the juvenile court system's treatment of children who were mentally ill and the services that were provided to youth at the time through the State of Michigan (48 RT 15402); also, Peterson read a large portion of the letter into the record (48 RT 15400).

Neither party may require the jury to view or consider trial exhibits during deliberations. Exhibits that may be transferred to the jury during deliberations are limited to documents and clothing. Section 1137 provides, "Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession . . . . " The jury may also take clothing that had been introduced in evidence into the jury room. (*People v. Lyons* (1958) 50 Cal.2d 245, 272-273 [internal citations omitted].) Thus, there is no right to have exhibits transferred to the jury, nor is there a way to determine whether the jurors viewed or considered the exhibits that have been transferred during their deliberations.

As an initial matter, appellant frames his claim as one of constitutional error because the jury was not allowed to give "meaningful consideration" to what he characterizes as powerful mitigation evidence. (AOB 167-168.) Yet appellant details rather extensively the mitigation evidence admitted on this point and the arguments counsel made during summation. (AOB 164-167.) The possibility that Exhibit N might have

bolstered the testimony on this point does not mean that the jury did not consider the evidence admitted at trial or counsel's argument that the juvenile court system had failed to provide appellant with the mental health care assistance that he needed. (48 RT 15236.)

"'On appeal, a trial court's ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard. [Citation.] Its ruling will not be disturbed unless defendant establishes 'a "manifest and unmistakable abuse of discretion."'" (*People v. Homick, supra*, 55 Cal.4th 894, citing *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) No such abuse occurred here.

The trial court carefully considered appellant's arguments in favor of a new trial. It reiterated and clearly understood the reasons that the defense believed they were prejudiced by the failure to transfer Exhibit N to the jury room during deliberations. (48 RT 15236, 15401.) However, the court disagreed that the inclusion of Exhibit N during the transfer of exhibits to the jury room could have made a difference to the outcome of the trial. (*Ibid.*) Specifically, the court noted that the jury did have the opportunity to consider the mitigating circumstances of appellant's deprived childhood, and particularly, they had been asked to consider the failure of the court system and the State of Michigan to provide mental health assistance to appellant during his childhood. (*Ibid.*) The jury knew of the letter and its contents; the letter itself added little information. (*Ibid.*) Finally, the jury did not request to view the letter, thus implying that they did not notice its absence.[30] (*Ibid.*)

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[30] Without citation to the record, appellant claims that the trial court told the jury that all exhibits would be transferred to the jury room for deliberations. (AOB 163.) In fact, the trial court specifically told the jury that some exhibits had not been transferred to the jury room. (28 RT 15202.)

The court's ruling is supported by substantial evidence. Defense counsel developed their theory of racial preference during diagnosis with Dr. Komisaruk during his testimony. (44 RT 14409-14410.) Counsel argued to the jury that appellant had been "warehoused" at the Youth Home awaiting transfer to YSH, but did not receive mental health treatment after the first commitment. (47 RT 15303, 15305.) Defense counsel made this argument in the context of a long soliloquy regarding the failures of the juvenile court system to provide appellant, a mentally disturbed child, with the treatment that he needed, culminating in the incarceration of appellant as a teenager in a maximum-security facility intended for adults. (47 RT 15300-15307.) The prosecution countered this argument with evidence of hospital notations and ward notes concluding that appellant would not benefit from further mental health treatment because he is a sociopath, and pointing out that it might present a danger to children who do suffer from a mental illness to be mixed in with a child whose primary issue is criminality. (48 RT 15276-15277, 152851-15282.)

In sum, the trial court did not abuse its discretion in denying a new trial based on the fact that one exhibit was not transferred to the jury room during deliberations.

X. APPELLANT WAS NOT PREJUDICED BY THE CUMULATIVE IMPACT OF ANY ALLEGED ERRORS DURING THIS CASE

Appellant argues that he was prejudiced by the cumulative impact of the alleged errors set forth in the preceding arguments and was deprived his due process right to a fair penalty phase. (AOB 172-177.) He seeks a reversal of the judgment of death. (*Ibid.*) However, he cannot show that he was denied a fair penalty phase because he failed to show that he suffered prejudice as a result of any particular error or combined errors.

Because appellant has failed to show error, or failed to show that he suffered prejudice as a result of any particular error or combined error in

the penalty phase, he has failed to show that he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. (See, e.g., *Martinez, supra,* 47 Cal.4th at p. 968 [finding cumulative impact of two arguable errors in prosecutor's argument, which were harmless when considered separately, did not result in prejudice to defendant in penalty phase]; *People v. Panah* (2005) 35 Cal.4th 395, 479-480 [no cumulative error in penalty phase where court identified few errors and such errors are harmless].) As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box, supra,* 23 Cal.4th at p. 1214; *People v. Barnett, supra,* 17 Cal.4th at p. 1182; see also *People v. Horning* (2004) 34 Cal.4th 871, 913 [no denial of right to fair trial where there was "little, if any error to accumulate"].)

At best, appellant has shown two non-prejudicial instructional errors. But as noted above, the modified instructions as a whole inured to appellant's benefit. Thus, there is no reasonable possibility of a result more favorable to appellant in the absence of a showing a reasonable possibility that any errors and their cumulative impact could have possibily affected the verdict in this matter. (*People v. Brown, supra,* 46 Cal.3d at p. 448; *Chapman, supra,* 386 U.S. 18, 24.)

XI. CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL IN GENERAL AND AS APPLIED

Appellant repeats challenges to California's death penalty scheme that have been rejected by this Court in order to preserve them for review by the United States Supreme Court and/or federal habeas review. (AOB 178-205.) This Court has consistently and repeatedly rejected these claims.

None of appellant's claims, which are discussed below, warrant reconsideration by this Court.[31]

A. Factor (A) Of Section 190.3 Is Constitutional

Appellant claims that factor (a) of section 190.3, which directs jurors to consider the "circumstances of the crime," results in the arbitrary and capricious imposition of the death penalty. (AOB 178-179.)

In permitting jurors to consider the "circumstances of the crime," section 190.3, factor (a), does not result in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; accord, *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

B. California's Death Penalty Statute Sets Forth The Correct Burden Of Proof; Written Findings Are Not Required; The Standard Pattern Instructions Are Not Unconstitutional

Appellant complains in Section B, subsections (1), (2) and (7), that the jury was not instructed that it had to find aggravating factors true beyond a reasonable doubt and that the aggravating factors outweighed any mitigating factors beyond a reasonable doubt in violation of his right to a jury determination, right to due process, and prohibition against cruel and unusual punishment (AOB 180-183, 188); in subsection (3) the aggravating factors and the unadjudicated criminal activity as a factor in aggravation must be found by a jury unanimously and true beyond a reasonable doubt (AOB 183-185); in subsection (4) the penalty determination was based on

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[31] The following arguments by no means contain an exhaustive list of decisions addressing these claims.

an impermissibly vague and ambiguous standard (AOB 186); in subsection (5) the instructions failed to inform the jurors that the central determination is whether death is appropriate (AOB 186); in subsection (6) the jury was not instructed that if they found the factors in mitigation outweighed the factors aggravation that they were required to return a sentence of life without the possibility of parole(AOB 187); in subsection (8) the jury should have been instructed on the presumption of life (AOB 189). In section C, appellant argues that the jury was not required to make written findings regarding the finding of aggravating factors in violation of his rights to due process and meaningful appellate review, (AOB 190-191.) In section D, that the instructions on mitigating and aggravating factors violated his constitutional rights. (AOB 191.) In subsection E, that California's capital sentencing scheme violates the Equal Protection Clause. (AOB 192-193.) This Court has consistently rejected each and every one of these claims.

Appellant claims that his death sentence is unconstitutional because it is not premised on findings beyond a reasonable doubt. (AOB 180.) Not so.

This Court has found that section 190.3 is not unconstitutional,

> for failing to require unanimity as to the applicable aggravating factors. [Citation.] Nor is the law unconstitutional for failing to impose a burden of proof except as to other-crimes evidence. The existence of other aggravating circumstances, the greater weight of aggravating circumstances relative to mitigating circumstances, and the appropriateness of a death sentence are not subject to a burden-of-proof qualification. [Citations.]

(*People v. Elliot* (2005) 37 Cal.4th 453, 487-488.) "'Nothing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New*

Jersey (2000) 530 U.S. 466 []) compels a different answer to these questions.' [Citation.]" (*People v. Thomas, supra,* 51 Cal.4th at p. 506 [citation omitted]; see also *People v. Lee* (2011) 51 Cal.4th 620, 651-652.)

Appellant asserts that the unadjudicated criminal activity as a factor in aggravation must be found by a jury unanimously and true beyond a reasonable doubt. (AOB 182-185.) He is incorrect. "The jury may properly consider evidence of unadjudicated criminal activity under section 190.3, factor (b) [citation], jury unanimity regarding such conduct is not required [citation], and factor (b) is not unconstitutionally vague. [Citation.]" (*People v. Lee, supra*, 51 Cal.4th at pp. 652-6533; *People v. Thomas, supra*, 51 Cal.4th at p. 504; *People v. Murtishaw* (2011) 51 Cal.4th 547, 596-597.) Appellant claims that the penalty determination was based on an impermissibly vague and ambiguous standard. (AOB 186, 191.) This Court has found that it is not impermissibly broad or vague to direct jurors to determine whether the aggravating factors were "so substantial in comparison with the mitigating factors that it warrants death instead of life without parole." (See *People v. Carter* (2003) 30 Cal.4th 1166, 1226.) Furthermore,

> [t]he use of adjectives such as 'extreme' and 'substantial' does not prevent the jury from considering relevant evidence. [Citation.] 'The jury need not be instructed that section 190.3, factors (d), (e), (f), (g), (h), and (j) are relevant only as possible mitigators. [Citation.] Nor is the trial court required to instruct that the absence of a particular mitigating factor is not aggravating. [Citation.].

(*People v. Thomas, supra*, 51 Cal.4th at pp. 506-507.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting these same challenges to California's death penalty scheme.

In section B, subsections 5, 6, 7, 8, and section D, appellant argues that the instructions failed to inform the jurors that: the central

determination is whether death is appropriate (AOB 186-187); that if the factors in mitigation outweighed the factors aggravation that they were required to return a sentence of life without the possibility of parole (AOB 187);[32] the court's instruction that unanimity was required to "acquit" appellant any charge or circumstance "impermissibly foreclosed the full consideration of mitigating evidence" (AOB 188)[33]; the presumption of life (AOB 189-190); and that mitigating statutory factors may only be considered in mitigation (AOB 191-192).

This Court has held that the trial court need not instruct jurors that: (1) the central determination is whether death is the appropriate penalty (*People v. Boyette* (2002) 29 Cal.4th 381, 465); (2) they should impose life imprisonment without the possibility of parole if they find that the mitigating circumstances outweigh the aggravating circumstances (*People v. Catlin* (2001) 26 Cal.4th 81, 174); and (3) they must find beyond a reasonable doubt that aggravating circumstances exist, that the aggravating factors outweigh the mitigating factors, and that the aggravating factors are so substantial as to make death the appropriate punishment (*People v. Mendoza* (2007) 42 Cal.4th 686, 707), or that their findings regarding aggravating factors must be unanimous (*People v. Prieto, supra*, 30 Cal.4th at p. 275); they may not consider acts of prior unadjudicated criminality as an aggravating circumstance unless they unanimously find that defendant

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[32] Although the court here did instruct the jury that if they found the "factors and circumstances in mitigation outweigh or equal those in aggravation, you must return a verdict of life without possibility of parole." (6 CT 1263.)

[33] First, appellant fails to identify the instruction about which he complains with a citation to the record; second, to the extent that he does identify it, he indicates that it was read to the jury during the guilt phase. (AOB 188-189.) Any error as to an instruction during the guilt phase is obviously harmless in this matter because it was not heard by this jury.

committed those criminal acts (*People v. Ward* (2005) 36 Cal.4th 186, 221-222); (4) they should hold a "presumption of life," or that the jurors should presume life imprisonment without the possibility of parole is an appropriate sentence (*People v. Arias* (1996) 13 Cal.4th 92, 190); and (5) certain sentencing factors are only relevant as mitigating (*People v. Farnam* (2002) 28 Cal.4th 107, 191.)

In Section C, appellant argues that the jury should have been was not required to make written findings regarding the finding of aggravating factors in violation of his rights to due process and meaningful appellate review. (AOB 190-191.) Not so. "The death penalty law is not unconstitutional for failing to require that the jury base any death sentence on written findings. [Citation.]" (*People v. Elliot, supra*, 37 Cal.4th at p. 488; see also *People v. Thomas, supra*, 51 Cal.4th at p. 506-507.)

C. California's Death Penalty Law Does Not Deny Capital Defendants Equal Protection Under The Law

Appellant claims that California's death penalty scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it denies procedural safeguards to capital defendants that are afforded to noncapital defendants. (AOB 192-193.) Specifically, appellant claims that the death penalty scheme is unconstitutional because there is no requirement of juror unanimity on the aggravating factors, no standard of proof in the penalty phase, and no reasons need be given for a death sentence. On the other hand, sentencing allegations in a noncapital case must be found unanimously, beyond a reasonable doubt, and a trial court must orally state its reasons on the record for selecting an upper-term sentence. (*Ibid.*)

As this Court has stated, "The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two

categories of defendants are not similarly situated. [Citations.]" (*People v. Lee, supra*, 51 Cal.4th at p. 653.)

> "The availability of certain procedural protections in noncapital sentencing—such as a burden of proof, written findings, jury unanimity and disparate sentence review—when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]" [Citation.]

(*People v. Thomas, supra*, 51 Cal.4th at p. 507.)

Once again, appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

XII. CALIFORNIA'S DEATH PENALTY SCHEME DOES NOT REQUIRE AN INTERCASE PROPORTIONALITY REVIEW

Appellant argues that the lack of intercase proportionality review in capital cases violates appellant's Eight Amendment right to be protected from the arbitrary and capricious imposition of capital punishment and also violates his Fourteenth Amendment right to equal protection under the law. (AOB 194-202.) This claim has been rejected by this Court on multiple occasions.

This Court has consistently held that "[t]he absence of intercase proportionality review does not violate the Eighth and Fourteenth Amendments." (*People v. Lee, supra*, 51 Cal.4th at p. 651, and cases cited therein.)

Again, appellant provides no compelling reasons to depart from decades of prior precedent.

XIII. APPLICATION OF CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE INTERNATIONAL LAW

In this argument, appellant claims that California's use of the death penalty as a form of punishment violates international law and the Eighth

and Fourteenth Amendments to the United States Constitution. (AOB 203-205.) This claim has also been rejected repeatedly.

> California's use of capital punishment as an assertedly "'regular form of punishment'" for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does not offend the Eighth and Fourteenth Amendments by violating international norms of human decency. [Citation.]

(*People v. Lindberg* (2008) 45 Cal.4th 1, 54; see also *People v. Lee, supra*, 51 Cal.4th at p. 654; *People v. Thomas, supra*, 51 Cal.4th at p. 507; and see *People v. Demetrulias, supra,* 39 Cal.4th at p. 43 [California does not use capital punishment as "'regular punishment for substantial numbers of crimes'"].) Appellant offers nothing new that should cause this Court to reconsider its prior decisions.

XIV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION TO DENY APPELLANT'S APPLICATION TO MODIFY THE DEATH VERDICT; THE OUTCOME WOULD NOT BE DIFFERENT IF THE COURT HAD NOT CONSIDERED EVIDENCE IT HAD EXCLUDED AT TRIAL

On October 28, 1992, the trial court heard and denied appellant's motion to modify his death sentence. (48 RT 15402-15416.) In his final assignment of error appellant contends that he is entitled to a reversal of the death judgment and a remand for a new sentencing hearing because the trial court erroneously considered evidence not presented to the jury. (AOB 206-211.) Appellant's claim of prejudicial error is without merit.

Although appellant assiduously avoids the word "discretion," he essentially asserts that that the trial court abused its discretion to deny his motion to modify the death verdict because it considered evidence that had been excluded from the jury's consideration under section 352, and also it considered evidence that had been admitted at trial, but appellant contends *should not* have been considered by the jury.

Specifically, appellant contends that the trial court impermissibly relied on evidence showing that he raped Florence M.. This evidence had

been excluded from the jury's consideration *in limine* because the court found that prejudicial propensity evidence that appellant "was a rapist," might improperly the jury's consideration of whether the prosecution proved beyond a reasonable doubt that appellant raped Mary S. (32 RT 11017-11022; see also AOB 208, citing 48 RT 15411.) Likewise, appellant argues that the court should not have considered appellant's letter to the trial court in the Olsen matter in which he requested bail and denied his guilt for the Olsen assault. (AOB 208). The trial court had similarly exercised its discretion under 352 to exclude appellant's letter to the court in the Olsen matter.

In a related argument, appellant asserts that the trial court improperly considered evidence admitted at trial of the underlying circumstances of his attacks on Florence M. and Olsen. (AOB 208.) However, as noted in Argument VIII, *supra*, the jury was entitled to consider that evidence under factor (b).

Section 190.4, subdivision (e) provides that:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding .... In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

In ruling on the application to modify, the trial court does not make an independent penalty determination, but instead reweighs the evidence of aggravating and mitigating circumstances and then determines whether the weight of the evidence supports the jury verdict. (*Wallace, supra,* 44 Cal.4th at p. 1096 [internal citations omitted].)

As an initial matter, appellant failed to object on these grounds below. He argues that this claim was not forfeited because his sentencing here predated this Court's decision in *People v. Hill* (1992) 3 Cal.4th 1153, 1220. (AOB 210.) Regardless, his argument lacks merit.

Appellant's first argument is that the trial court should not have considered the evidence related to his stabbing Olsen, his attempt to murder Florence M. and her unborn child, or the circumstances of his crimes against Mary S. (AOB 206-211.) Appellant is incorrect. As noted above, this evidence was properly admitted and received at trial without objection. (See Arguments IV & VIII, *infra*.) Furthermore, appellant did not dispute attempting to murder Florence M. or stabbing Olsen. In fact, defense counsel requested a special instruction related to appellant's initial plea of not guilty by reason of insanity, and the jury's finding that he was sane. Therefore, the court was certainly entitled to consider this evidence in carrying out its "duty under section 190.4, subdivision (e), to independently review the evidence and determine whether it supported the jury's findings." (*Wallace, supra,* 44 Cal.4th at p. 1096.)

Appellant argues that the trial court improperly considered evidence that had been excluded from the purview of the jury. (AOB 206-209; citing Under *People v. Viscotti* (1992) 2 Cal. 4th 1, 78.) Respondent agrees that during the motion to modify the verdict that the trial court should not have considered evidence it had excluded from the jury's consideration under section 352. However, there is no reasonably possibility on this record that the trial court would have modified the death verdict absent consideration of the excluded evidence.

Appellant committed an armed robbery at 10 years of age and spent only a few months of his life out of custody from that point forward. His life details a progression from stealing and wrecking automobiles to stealing and wrecking lives. (48 RT 15407-15412; see also 48 RT 15243

[defense summation noting that appellant only spent a few months of his life out of custody between the ages and 10 and 30.) Moreoever, as the court pointed out, appellant's attacks on Florence M., Mary S., and Olsen did not result in their deaths, but it was not for lack of trying on his part. (48 RT 15412-15415.) Furthermore, while the trial court excluded appellant's letter; the court and the jury were nevertheless entitled to consider the fact that appellant committed all of these crimes either while in custody or while on parole, and/or awaiting trial for commiting another violent crimes. (48 RT 15407-14509 [prosecutor's summation]; see also 48 RT 15270 [prosecutor's argument at sentencing hearing].)

In short, there is no indication on this record that the trial court would have modified the death verdict even had it not considered the evidence that appellant raped Florence M. before attempting to murder her, or had it not considered the letter appellant wrote to the court denying his guilt of the Olsen charges and requesting bond. And even without the letter, the court was entitled to consider the fact that appellant used a grant of conditional freedom pending trial on the Olsen matter to committ the murder-robbery of Cavallo and the rape, robbery and assault with a deadly weapon causing great bodily injury of Mary S.

For these reasons, even absent consideration of evidence excluded at trial, on this record there is no reasonably possibility that the trial court would reconsider its decision to impose the jury's verdict in this matter.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Dated: February 4, 2013

Respectfully submitted,

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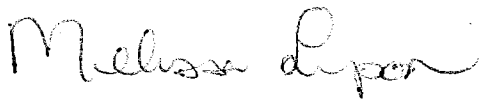

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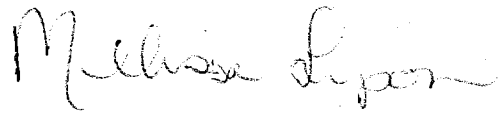
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 41,130 words.

Dated: February 4, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Joe Edward Johnson**
No.: **S029551**

I declare:

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

Respondent's Brief

On February 5, 2013, I served the attached [] by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, 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 February 5, 2013, at Sacramento, California.

_____
Signature

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