In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **BRIAN DAVID JOHNSEN,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S040704

Stanislaus County Superior Court Case No. R239682
Honorable David G. Vander Wall, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Sylvia Rudy lived alone in Modesto. Her parents Juanita and Leo Bragg came to visit her in March 1992. The Braggs arrived while Rudy was out of town, so they let themselves into her residence with a key that Rudy had left for them. Just hours before daylight, someone entered the Rudy residence using a key to open the front door. That person assaulted the Braggs with a hammer in their sleep and stole property from them and from the residence. Within hours, Mrs. Bragg died from massive blunt force injuries to her head. Mr. Bragg survived, but he was never the same.

This was not the first time Rudy's residence had been burglarized. Twice before in the preceding months of September 1991 and February 1992 her residence had been breached by the breaking of a back bedroom window. During one of these prior burglaries, the front door key was stolen. After the prior burglaries, Rudy secured the residence such that the only entry could have been through the front door.

On the day of that Mrs. Bragg died, an adjacent neighbor moved out. The neighbor was Brian Johnsen ("Johnsen"), who lived with his mother. Johnsen had a friend named Mickey Landrum who helped him and his mother move. Several weeks later, Landrum told the police that Johnsen had previously tried to recruit him to steal a television set from the Rudy residence in February 1992. Landrum also told the police that Johnsen had shown him stolen property from both break-ins at the Rudy residence. Johnsen was arrested and charged with both burglaries and the assault on the Braggs. While in jail, he attempted to solicit someone to kill Landrum for his betrayal of their friendship and to divert responsibility for the crimes. Eric Holland, who was in a jail cell next to Johnsen, pretended to be willing to arrange the murder. Johnsen could not pay for the contract killings immediately, so he gave Holland collateral in the form of a written confession to the crimes involving Rudy and the Braggs. He also confessed

to an earlier murder of his pregnant girlfriend Terry Holloway in San Diego. Holland gave the confessions to his attorney and became a witness for the prosecution.

STATEMENT OF THE CASE

On January 28, 1993, the Stanislaus County District Attorney filed an information charging appellant Brian David Johnsen in Count 1 with first-degree murder (Pen. Code, § 187), in Count 2 with attempted willful, deliberate, and premeditated murder, (Pen. Code, §§ 187, 664) in Counts 3 and 4 with first-degree robbery (Pen. Code, § 212.5), in Counts 5, 6, and 7 with burglary (Pen. Code, § 459), and in Counts 8, 9, 10, 11, 12, 13, and 14 with soliciting the commission of murder (Pen. Code, § 653f). The information also alleged as special circumstances that Johnsen committed the murder in Count 1 while engaged in the commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(A)) and while engaged in the commission of a burglary (Pen. Code, § 190.2, subd. (a)(17)(G)). The information further alleged that Johnsen personally used a deadly or dangerous weapon in the commission of the murder in Count 1 and the attempted murder in Count 2 (Pen. Code, § 12022, subd. (b)) and that he personally inflicted great bodily injury in the commission of the attempted murder in Count 2 (Pen. Code, § 12022.7). (3 CT[1]835-841.)

On March 10, 1994, a jury convicted Johnson as charged in Counts 1 through 8 and Counts 10 through 13. The jury also found all of the special-circumstance and sentence-enhancement allegations to be true as to those counts. The court granted the prosecution's motion to dismiss the

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[1] Throughout this brief "CT" stands for Clerk's Transcript, "CTJQ" stands for Clerk's Transcript Juror Questionnaire, "SCT" stands for Supplemental Clerk's Transcript and "RT" stands for Reporter's Transcript.

remaining charges in Counts 9 and 14 due to the jury's inability to reach a unanimous verdict on those counts. (8 CT 2199-2201, 2222-2236.)

On April 14, 1994, the jury returned a verdict of death for the special-circumstance murder in Count 1. (9 CT 2329, 2551-2552.)

On June 9, 1994, the trial court sentenced Johnsen to death for the first-degree murder in Count 1. (10 CT 2781, 2790.) For the attempted murder in Count 2, the court sentenced Johnsen to an indeterminate term of life imprisonment with the possibility of parole. (10 CT 2782.) The court also sentenced Johnsen to a determinate term of 43 years, 4 months imprisonment based on the verdicts on the remaining counts and allegations. (10 CT 2775-2778, 2781-2784.) The court stayed sentence on Count 5 pursuant to Penal Code section 654. (10 CT 2783.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Case

1. September 3, 1991 burglary of the Rudy residence

Sylvia Rudy lived in a residential complex at 121 Robin Hood Drive in Modesto, California (the Rudy residence). (15 RT 3160.) The complex consisted of four duplexes owned by Rudy's employer. (15 RT 3180.) Rudy collected the rent and was the point of contact for the other residents. (15 RT 3180-3181.) Rudy knew that Johnsen's mother, Faye Johnsen,[2] lived in one of the duplexes. (15 RT 3181.) Rudy also knew that Johnsen lived with his mother, though Rudy had never seen him. (15 RT 3182.)

[2] With the exception of appellant, individuals sharing the same last name will be referred to by their relationship to other individuals or by their first name solely for the sake of clarity. To disrespect is intended.

Faye's unit was directly behind Rudy's; there were no obstructions between the two units. (15 RT 3182-3183.)

On September 3, 1991, Rudy went to work in the morning, but returned home at lunchtime because her daughter had asked her to cash a check for her. (15 RT 3131, 3160.) Rudy left the cash on the dining room table and returned to work. (15 RT 3160.) When her daughter arrived at the residence around 3:00 p.m., the front door was wide open and the cash was gone. (15 RT 3131.) When Rudy returned home and inspected the residence, she found a large hole in the back bedroom window; her VCR and jewelry were missing. (15 RT 3160, 3162-3163.)

2. February 15, 1992 burglary of the Rudy residence

On February 15, 1992, Rudy left her residence.[3] (15 RT 3166.) Upon returning she discovered that her microwave oven and china were missing. (15 RT 3167, 3173.) The same back bedroom window that had been broken during the September 3, 1991, burglary was broken and a pillow was stuffed into the broken glass. (15 RT 3167-3168.) When Rudy attempted to call the police from her kitchen telephone, she discovered that it had been disabled. (15 RT 3168.) Rudy next tried to place the call from a combination clock-radio-telephone in her bedroom, but the unit was missing. (15 RT 3168.) Rudy later discovered that all of her liquor, a portable stereo or "boom box," and an answering machine had been taken during the burglary. (15 RT 3169-3170.) A portable bar, camera, Rudy's spare car keys, and spare residence keys were also taken either during this burglary or the previous burglary on September 3, 1991. (15 RT 3172, 3178.)

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[3] All subsequent dates in the statement of facts refer to 1992 unless otherwise stated.

3. Johnsen's activities on February 15, 1992

Johnsen and his mother lived at 103 Greenwich Lane (the Johnsen residence). (16 RT 3308.) On February 15, the day the Rudy residence was burglarized for the second time, Johnsen called his friend Mickey Landrum at around 10:00 a.m. and asked Landrum to help him move a television set. (15 RT 3259.) Landrum went over to the Johnsen residence at around 2:30 p.m. (15 RT 3259.) From a window inside the Johnsen residence, Johnsen pointed to the television he wanted to move. (15 RT 3260-3261.) The television was inside the Rudy residence. (15 RT 3260.) When Landrum realized the television was not Johnsen's, he refused to help Johnsen move it. (15 RT 3260.) Johnsen showed Landrum the items he had taken from Rudy's residence earlier that day. (15 RT 3261-3262.) The stolen property included a microwave, a boom box, a portable bar, china dishes, and jewelry. (15 RT 3261.) Johnsen also showed Landrum a key ring with about ten keys on it, including one key that Johnsen believed went to Rudy's car and one that went to her front door. (15 RT 3270-3271.) Johnsen told Landrum that he had broken into the Rudy residence once before. (15 RT 3262.)

4. Johnsen's activities on February 18, 1992

Three days later, on February 18, Landrum went to the Johnsen residence where he and Johnsen drank and smoked pot; Landrum spent the night. (15 RT 3262, 3265.) The next morning, a Modesto Police Department detective came to the Johnsen residence and left with Johnsen. (15 RT 3265.) Johnsen asked the detective if Landrum could stay behind inside the Johnsen residence. (15 RT 3265.) The detective agreed. (15 RT 3265.) Shortly thereafter, Johnsen called Landrum from the jail and asked him to hide the stolen property that he had shown Landrum on February 15. (15 RT 3265.) Johnsen told Landrum that he was concerned the police

would return with a search warrant and find the stolen property. (15 RT 3265.)

Landrum took the stolen property from the Johnsen residence, put it in his uncle's truck, and drove to a friend's house, but the friend refused to store the items. (15 RT 3266.) Landrum called Johnsen's mother and told her that Johnsen had left with the police and that, at Johnsen's request, Landrum had removed items from the Johnsen residence. (15 RT 3267.) Landrum drove back to the Johnsen residence and parked the truck. (15 RT 3266-3267.) He walked to a pool hall nearby to meet Johnsen's mother. (15 RT 3267.) Landrum and Johnsen's mother had dinner and then each drove separately to Landrum's friend's house where they transferred the stolen property to Johnsen's mother's car. (15 RT 3268.)

Johnsen's mother, who claimed she did not know the property was stolen, drove around for the next few days with it in the trunk of her car before asking her father to store the property in his garage. (16 RT 3312, 3319-3320.) Among the items were Rudy's microwave, portable bar set, china, a portable stereo unit, and possibly an answering machine. (16 RT 3308-3311.) When Johnsen's mother questioned Johnsen about these items, he told her: "As far as you know, I got it either at a garage sale or it was given to me," which made her suspicious. (16 RT 3314.) When Johnsen's grandparents told his mother that they no longer had room for these things, his mother took the items to the home of Carol and Ken Beucus, her aunt and uncle. (16 RT 3314.)

5. March 1, 1992 crimes at the Rudy residence

On Friday, February 28, Rudy left for work around 8:00 a.m. (15 RT 3173.) From there she went out of town for the weekend. (15 RT 3173-3174.) Rudy returned home on Sunday, March 1st around 3:00 p.m. (15 RT 3174.) Rudy was expecting her parents the weekend and had left a key to the front door hidden in the furnace closet outside her residence. (15 RT

3180.) Once a year for the last 30 years, Rudy's parents Juanita and Leo Bragg had travelled from Las Vegas to Modesto to visit Rudy, staying with her for seven to ten days. (15 RT 3189.) When Rudy pulled into her carport, she saw that her parents had arrived and had parked in her space. (15 RT 3174.) Rudy parked, went to the front door, unlocked it, and went inside. (15 RT 3178; 16 RT 3392-3393, 3400-3401.)

Inside, the house was very quiet; the drapes were drawn and the door to the back bedroom was closed. (15 RT 3174.) Rudy peeked into the bedroom and saw her parents, Juanita and Leo, who appeared to be sleeping. (15 RT 3174.) Rudy assumed that, because her parents were sleeping, they had encountered some difficulty travelling from Las Vegas to Modesto, had arrived late and were napping. (15 RT 3174.) Rudy returned to her car for her luggage, brought it into the residence and entered the kitchen where she saw her parents' laundry hanging to dry. (15 RT 3174.) The laundry hanging there struck her as odd because, if her parents had arrived late and needed to nap, they certainly would not have stopped to wash their clothes first. (15 RT 3174-3175.) Rudy returned to the back bedroom and heard her father moaning. (15 RT 3173.) When she approached him, he reacted fearfully and she could see a depression in his skull. (15 RT 3175-3177.) Rudy went around the bed and touched her mother; she was cold and damp and there was blood in her hair. (15 RT 3175-3177.)

Rudy began looking for the nearest telephone; she went into the den, but the telephone was missing. (15 RT 3176.) She went into her bedroom and that telephone was missing too. (15 RT 3176.) She went into the kitchen, but the telephone line had been severed. (15 RT 3176.) Rudy ran to a neighbor's who called the police. (15 RT 3177.)

6. The Victims' Injuries

Because Juanita Bragg was already dead when the police arrived, forensic pathologist Dr. William Ernoehazy was summoned. (15 RT 3231.) Dr. Ernoehazy determined that Juanita had suffered multiple blunt force injuries to her head and stab wounds to her neck, hands, wrist and abdomen. (15 RT 3232.) Dr. Ernoehazy also found multiple depressed skull fractures in Juanita's head. (15 RT 3233, 3247.) In all, Juanita suffered more than 15 blunt force injuries to her head, three superficial stab wounds to her abdomen, two superficial stab wounds to her neck, and a third that penetrated her airway. (15 RT 3233, 3236.) She had a long deep cut to her right wrist. (15 RT 3233, 3244.) She had smaller defensive knife wounds to her hands; one knife wound penetrated the fingernail on her left thumb; she had cuts on her middle and ring fingers, and on the back of her right hand. (15 RT 3233, 3238.) Some of the blows to Juanita's head caused skull fragments to be driven deep into her brain. (15 RT 3237) Dr. Ernoehazy opined that Juanita died from blunt force injuries to the front, top, and back of the head caused by a ball-peen hammer. (15 RT 3237, 3242-3243, 3249.) Dr. Ernoehazy put Juanita's time of death anywhere from between 10:00 am. to noon, with the injuries being inflicted two to three hours prior to death. (15 RT 3252-3253.)

Leo Bragg was taken to the hospital where he was operated on by Dr. Danielo Martinez, a board certified neurosurgeon, who treated Leo's traumatic injuries to his neck, head, and abdomen. (15 RT 3155-3156.) Leo had multiple skull fractures. (15 RT 3156.) Dr. Martinez removed bone fragments and a clot from Leo's brain, then repaired the skull fractures. (15 RT 3157.) Dr. Martinez also removed some of Leo's badly bruised scalp tissue. (15 RT 3158.) While Dr. Martinez was operating on Leo's head injuries, Dr. Ray Cimino was operating on Leo's abdominal injuries. (17 RT 3452.) Dr. Cimino first sutured Leo's lacerated inferior

mesenteric vein to keep him from dying. (17 RT 3453.) Dr. Cimino also repaired two potentially fatal holes in Leo's large intestine and colon. (17 RT 3453-3454.) Without these operations, Leo would have died. (15 RT 3158.)

7. The Johnsens move out on March 1st

On March 1, the same day that Johnsen killed Juanita and attempted to kill Leo, he and his mother moved out of their unit at 103 Greenwich into separate apartments. (16 RT 3316.) Johnsen was going to share an apartment with his friend Landrum. (16 RT 3316, 3284.) The move began at the Johnsen's residence at about 8:30 in the morning.

Landrum had agreed to help with the move. (16 RT 3317.) The night before the move, Landrum was at the Johnsen residence, but he did not spend the night there. (16 RT 3317.) He left around 9:00 p.m. (16 RT 3318.) He returned the following morning at 10:00 a.m. (16 RT 3318.)

Johnsen and Landrum's new apartment was located at 2427 Strivens Avenue in Modesto. (16 RT 3284, 3297-3298.) The new apartment was situated just behind an apartment rented by Linda Lee. (16 RT 3372, 3402.) On the evening of March 1, Johnsen went to Lee's apartment carrying a paper bag containing two telephones and a calculator. (16 RT 3366; 3403-3404.) Johnsen was shaking, he appeared scared and nervous. (16 RT 3404.) Johnsen told Lee to "put [the paper bag] up and forget about it;" then quickly left. (16 RT 3367, 3404.) Lee asked Johanna Oliver, who was present when Johnsen arrived, to go find him, but Oliver could not locate Johnsen. (16 RT 3405.) Then Lee told Oliver to go find Ella Pokorney, Landrum's mother who lived two doors down from Lee. (16 RT 3369, 3405-3406.) Pokorney took the bag to her apartment. (16 RT 3369, 3405-3406.) Two to three weeks later, Lee purchased a combination clock-radio-telephone from Johnsen. (16 RT 3406-3407.) Approximately two

weeks later, Lee turned the device over to Modesto Police Department Detective Bill Grogan. (16 RT 3407.)

After Johnsen was arrested for the March 1 crimes at the Rudy residence, he telephoned Lee. (16 RT 3408.) Lee told Johnsen that she had given the combination clock-radio-telephone to Detective Grogan. (16 RT 3408.) Upon learning this news, Johnsen replied: "[I'm] done for now." (16 RT 3408-3409.) Johnsen urged Lee to fain memory loss whenever she spoke to the police thereafter and assured her that they "couldn't do anything" to her. (16 RT 3409.) Johnsen also asked Lee if she knew anyone who would burglarize the Rudy residence while he was in jail so that the police would think someone else committed the crimes there. (16 RT 3410.) Johnsen told Lee that he had a key to the Rudy residence, because his mother used to rent that unit. (16 RT 3411.)

8. Criminal solicitation of Chester Thorne

After Johnsen was arrested on March 26 for the crimes committed at the Rudy residence, he called Chester Thorne and asked him if he knew anyone who could kill Landrum and a second person, a woman. (16 RT 3333-3334.) Thorne said he would check into it. (16 RT 3334.) Thorne did not intend to assist Johnsen, but responded in this way because he was curious and wanted to find out "for sure" whether Johnsen "really did kill them two old people." (16 RT 3334, 3336.) Johnsen told Thorne that he wanted Landrum and the woman killed with a hammer and stabbed; he wanted it to be as "bloody" as possible. (16 RT 3334.) Johnsen also wanted the killer to take a telephone and some other "stuff" and place it in a dumpster outside the house. (16 RT 3334-3335.) Johnsen wanted the police to think that the person who attacked Juanita and Leo Bragg "was still out there killing people." (16 RT 3335.) Johnsen also asked Thorne to commit the murders and offered to repay him with "a favor," but Thorne declined. (16 RT 3335.) Thorne took no steps to find a contract killer for

Johnsen, but he also failed to give this information to the police because at that time he was wanted for receiving stolen property. (16 RT 3336.)

9. Police investigation

Detective Bill Grogan of the Modesto Police Department was assigned as the lead investigator for the crimes committed at the Rudy residence. (17 RT 3612-3613.) He was assisted by fellow Modesto Police Department Detectives Jon Buehler and Ray Taylor. (15 RT 3113-3114, 16 RT 3377-3378.)

All of the windows and doors in the Rudy residence were closed and locked when Rudy returned home on March 1. (15 RT 3178; 16 RT 3392-3393.) Around March 6 or 7, Rudy realized that a spare key to her residence had been taken during one of the pre-March 1 burglaries. (15 RT 3178; 16 RT 3401.) Rudy came to this conclusion after a friend, to whom Rudy had lent the key, reminded Rudy that she had returned the key to Rudy on February 6 or 7. (15 RT 3179; 16 RT 3401.) Rudy then recalled that she had either left that spare key on the kitchen window sill or had put it on the ring with the two sets of spare car keys that had been taken during one of the February burglaries. (15 RT 3179-3180.) Rudy's parent's mobile telephone and calculator were also taken during the March 1 burglary. (15 RT 3188-3189.)

On March 1, Detective Buehler inspected all of the windows and doors in the Rudy residence. (16 RT 3392-3393.) There was no sign of forced entry into the residence. (15 RT 3118-3120, 3122, 3124-3128.) All of the windows and the sliding glass doors, in addition to being closed and locked, were secured with dowels in the tracks or screws in the frames so that they could not be opened at all. (16 RT 3392-3393.) The only way in and out of the residence was through the front door. (16 RT 3393.) The front door was equipped with a key operated dead bolt. (16 RT 3393-

3394.) There were no signs that the front door lock had been opened by anything other than a key. (15 RT 3129.)

Inside Rudy's residence, Detective Buehler found a pair of pantyhose laying across an arm chair in the living room. (16 RT 3375-3376, 3390-3392.) The pantyhose seemed out of place to him because the residence was otherwise extremely clean, neat, and tidy. (16 RT 3375-3376.) Rudy confirmed that the pantyhose were the brand that she wore almost exclusively and confirmed that all of her pantyhose were in the dresser drawer in her bedroom when she left for the weekend. (16 RT 3401-3402.) Detective Taylor carefully picked up, folded, and placed the pantyhose into and evidence envelop. (16 RT 3390-3392.) Based on his years of experience, Detective Buehler suspected that the pantyhose have been used by the perpetrator as a disguise and might contain trace evidence. (16 RT 3390-3392.)

Dr. Richard Lynd, a Department of Justice (DOJ) criminalist, examined the interior of the pantyhose and found a human head hair inside. (17 RT 3455, 3458-3459, 3465.) The hair was from a Caucasian person. (17 RT 3456-3457.) Dr. Lynd compared the hair to known hair samples from Johnsen, Juanita Bragg, Rudy, and Landrum. (17 RT 3457–3458.) All, except Johnsen, were eliminated as possible sources of the pantyhose hair. (17 RT 3463-3465.) The pantyhose hair was similar to Johnsen's hair in color, length, texture and microscopic characteristics. (17 RT 3464-3465.) Johnsen's hair and the pantyhose hair both had the same microscopic characteristic known as cortical fusi. (17 RT 3463.) Landrum's hair did not have this characteristic. (17 RT 3468.)

DOJ senior criminalist John Yoshida attempted to extract enzymes called phosphoglucomutase (PGM) from the pantyhose hair using a methodology that was not ideal, but was one which would preserve any DNA that might be present. (16 RT 3434-3436; 18 RT 3757-3759, 3776,

3805-3806.) The PGM test did not produce any results. (18 RT 3758.) The pantyhose hair was then sent to Cellmark Diagnostics in Germantown, Maryland for DNA testing. (18 RT 3773.) There were two major types of DNA testing at that time. (18 RT 3665-3666.) One called restrictive fragment length polymorphism (RFLP) and one called polymerase chain reaction (PCR). (18 RT 3666.) The hair in the pantyhose was PCR tested and determined to be DQ-Alpha type 2,4, the same as Johnsen's. (18 RT 3744, 3780.) No more than 9 percent of the population has DQ-Alpha type 2,4. (18 RT 3683-3684.) Juanita and Leo Bragg, Rudy, Landrum and Romo all have different DQ-Alpha types. (18 RT 3743-3744, 3790.)

Detective Buehler recovered a bloody knife from the knife block in the kitchen of the Rudy residence. (16 RT 3374, 3376; 19 RT 4147; 8 CT 2040.) The blood on this knife was tested using PCR analysis and identified as DQ-Alpha type 1.3,2. (18 RT 3752, 3783.) Juanita Bragg's DQ-Alpha type is 1.3,2. (18 RT 3743, 3752-3753, 3781, 3783.) Only three percent of the general population has this DQ-Alpha type. (18 RT 3685.)

On March 10th, Ralph Beck, a mover with May Transfer and Storage was packing up the Rudy residence when he picked up a dried-flower vase in a bedroom being used as a den.[4] (16 RT 3380, 3432-3433.) After removing the flowers, Beck saw a knife covered in dried blood point down in the vase. (16 RT 3433.) Beck immediately called Detective Taylor, who was at the Rudy residence that day. (16 RT 3379-3380.) Detective Taylor looked at the knife, photographed it, and booked it into evidence. (16 RT

[4] The den was furnished with a couch, television set and a coffee table but no bed. (16 RT 3380.) There are reference in the record to the den knife being the knife found in the bedroom. But the only knives that were tested were the one found in the kitchen and the one found in the den/bedroom.

3379-3381, 3433.) Detective Taylor observed that both sides of the knife blade were covered in dried blood, and the blade was bent. (16 RT 3381.)

A blood sample from the den knife was labeled swab number two. (18 RT 3746.) PGM testing showed that the blood on the den knife was consistent with a combination of Juanita and Leo Bragg's PGM type. (16 RT 3438-3439.) Landrum's PGM type is the same as Juanita's, so PGM testing did not exclude Landrum as a possible contributor to the blood on the den knife. (16 RT 3439-3440.)

Julie Cooper, a molecular biologist at Cellmark Diagnostics proficient in PCR and RFLP blood typing, tested the blood on the den knife and found that the DNA was consistent with Juanita and Leo Bragg and a third person, but that third person was not Landrum, not Jorge Romo, and not Johnsen. (18 RT 3738, 3746-3747, 3749-3751, 3753, 3781.)

On March 25, Landrum and Detective Jolene Gonzales went to Pokorney's residence and retrieved three telephones, a calculator, and jewelry. (16 RT 3279-3281, 3441-3444.) A few days before, Pokorney had shown the items to Landrum and told him that she wanted them removed from her home. (16 RT 3279-3281.)

On March 26, Detective Taylor recovered more of Rudy's stolen jewelry when he travelled to San Jose, picked up Johnsen's mother and drove with her to her mother's house. (16 RT 3381-3382.) Detective Taylor and Johnsen's mother proceeded to the Beucus residence where she asked her aunt and uncle for "Brian's property." (16 RT 3383.) The police took possession of a box of china, a boom box, a video recorder, a portable bar set, and a microwave oven. (16 RT 3383-3384.) Robert Call, an evidence technician with the Modesto Police Department, collected and identified Rudy's daughter's latent fingerprints from the china collected from the Beucus's garage. (16 RT 3323-3325.)

Two weeks after he committed the March 1 crimes, Johnsen and Landrum drove to San Jose to visit Johnsen's mother and grandparents. (16 RT 3276.) On the way, Johnsen offered Landrum the keys he had taken from the Rudy residence. (16 RT 3276-3277.) After Landrum declined, Johnsen threw the keys out the car window. (16 RT 3277-3278; 6 CT 1422.) Johnsen also threw a ball peen hammer rolled-up in a blue sweatshirt out the car window. (16 RT 3278; 17 RT 3504-3505; 18 RT 3878; 6 CT 1422, 1490.)

Sometime between March 1 and March 25, Johnsen and Landrum gave a pair of yellow dish-washing gloves to Jorge Romo. (16 RT 3282-3285; 3421.) Romo gave the gloves to detectives working on the case. (16 RT 3421.) The blood found on the yellow gloves could have been Juanita Bragg's. (18 RT 3753-3754.) The DQ-Alpha type of the blood stain on the gloves was 1.3,2, the same as hers. (18 RT 3753-3754.)

10. Johnsen's criminal solicitation of Eric Holland

In June 1992, while Johnsen was confined in the Stanislaus County Jail, he was placed in a cell next to Eric Holland. (17 RT 3484.) Holland had overheard Johnsen trying to convince other inmates to kill the witnesses in his case, specifically Landrum and Landrum's girlfriend. (17 RT 3485-3486.) Holland was tired of listening to Johnsen and wanted to "shut Johnsen up," so he told Johnsen that he knew "a colonel in San Diego that could take care of it," but that it would "cost a lot of money." (17 RT 3486-3487.) After making this statement, Holland intended to let Johnsen "blow his smoke" and then just put him off indefinitely expecting "that would be the end of it." (17 RT 3488.)

Johnsen, however, continued to pursue the arrangement. (17 RT 3488.) Johnsen told Holland that he had no money, but he had a Harley-Davidson motorcycle and some commissary credit. (17 RT 3488.) Johnsen also told Holland that he would perform any favor Holland specified

unconditionally as consideration for the deal. (17 RT 3488.) Johnsen offered to write out a signed confession as collateral. (17 RT 3494.) If Johnsen thereafter failed to repay Holland, Holland could give the confession to the prosecution. (17 RT 3494, 3511-3512.) Holland agreed. (17 RT 3494.) In addition to Landrum and Landrum's girlfriend, Johnsen also wanted Holland to arrange for the killing of Detective Grogan, Officer Fred Vaughn, Ella and Virgil Pokorney (Landrum's mother and uncle) Virgil's girlfriend, Chester Thorne, and Linda Lee. (16 RT 3279, 3290; 17 RT 3494-3495.)

Johnsen gave Holland three different versions of his involvement in Juanita Bragg's murder. (17 RT 3502-3503.) First Johnsen said that Landrum was involved in the murder, then Johnsen admitted that he was involved in the murder. (17 RT 3502-3503.) Later he said that both he and Landrum were involved in the murder. (17 RT 3502-3503.) Finally, Johnsen admitted that he was the only one involved in the murder. (17 RT 3503.) After this final admission, Johnsen told Holland how he had committed the murder. (17 RT 3503.)

Johnsen first told Holland that he had burglarized the lady's house twice before. (17 RT 3503.) Johnsen was living with his mother at the time. (17 RT 3503.) His mother had a roommate and the roommate had a daughter who also lived with them. (17 RT 3503.) Johnsen and his mother were moving out of the residence on March 1. (17 RT 3503.) Landrum and Johnsen were going to move into an apartment together; Johnsen's mother was going to help pay the rent. (17 RT 3503.) The evening before the move, Johnsen and Landrum were sitting around "getting stoned" and playing board games. (17 RT 3503.) After Landrum left, Johnsen watched television. (17 RT 3504.) He fell asleep and woke up around 5:30 a.m. (17 RT 3504.) Then he "got dressed to kill." (17 RT 3504.) He knew that

this was his last night to kill, because he was moving the next day, and he wanted to see if he could "do it." (17 RT 3504.)

Johnsen went into the kitchen and retrieved a pair of yellow dish-washing gloves, a knife, a ball-peen hammer, and the keys to Rudy's residence. (17 RT 3504.) He entered Rudy's residence through the front door. (17 RT 3504.) He went to Rudy's bedroom first and then the quest bedroom where he saw two elderly people sleeping. (17 RT 3504.) He stood over the couple for three minutes trying to decide whether he had the nerve to kill them. (17 RT 3505.) Then he hit them both with the hammer and stabbed them with the knife. (17 RT 3505.) The knife that he had brought with him bent when he tried to stab the couple through the blanket, so he went to the kitchen and retrieved more knives. (17 RT 3505.) After stabbing the couple, Johnsen hit the elderly man in the head with the hammer and saw his skull depress an inch; he assumed at that point the man was dead. (17 RT 3505.) The woman however "wouldn't die" so Johnsen slit her wrist and throat and repeatedly stabbed her. (17 RT 3505.) Then he took four dollars from the man's wallet and seven dollars from the woman's purse. (17 RT 3505.) He went around the house looking for things to steal. (17 RT 3505.) He found a calculator in a closet, telephones, and a camera. (17 RT 3505-3506.) He went back into the bedroom and discovered that the woman was still alive. (17 RT 3506.) Concerned that she would be able to identify him, Johnsen disguised himself by taking a pair of pantyhose from a dresser drawer and placing them over his head. (17 RT 3506.) Johnsen returned to the bedroom and continued to stab the elderly woman. (17 RT 3506.) By this time, it was starting to get light outside, so Johnsen grabbed his bag of stolen items, forgetting something on the kitchen counter. (17 RT 3506.) He set the bag by the dumpster and entered his residence. (17 RT 3506.) When his mother asked where he had been, he told her that he had been out jogging.

(17 RT 3506.) Johnsen, his mother, and the roommates all went to McDonald's for breakfast, before returning to start the move. (17 RT 3506.) Around 3:00 p.m., an ambulance came to the complex. (17 RT 3506.)

Johnsen told Holland that he had burglarized the residence in September 1991. He saw cash on the counter inside, broke in, and took it. (17 RT 3507-3508.) During the second burglary in February 1992, Johnsen called Landrum and asked him to help remove a television set from the Rudy residence. (17 RT 3508-3509.) Johnsen told Holland that Landrum could not make it. (17 RT 3508.) When Johnsen broke into the residence on March 1, his intention was to rape and kill Rudy. (17 RT 3509.) When he entered the residence, Johnsen did not know that Rudy was away because her car and her parents' car looked similar. (17 RT 3509.)

Holland and Johnsen also exchanged written notes about the crimes. (17 RT 3509.) Johnsen drafted several written accounts of the crimes. (17 RT 3510.) In the first written account, Johnsen reported that Landrum had committed the crimes. (17 RT 3510.) This document was thrown away. (17 RT 3510.) In the second written account, Johnsen reported that both he and Landrum committed the crimes. (17 RT 3510.) Finally, Johnsen wrote a 14 page account with two supplements that Holland kept. (17 RT 3510-3511.) In the final account, Johnsen stated that he was the only one involved in the crimes. (17 RT 3510.)

Holland intended to give the information he had obtained from Johnsen to the district attorney because he felt that Johnsen was "sick" and that Johnsen might "get off." (17 RT 3520.) He further believed that if Johnsen were released, he might kill again. (17 RT 3520.) He gave the information to his attorney and expected that his attorney would give the information to the authorities. (17 RT 3521.) Holland himself did not want to be involved directly because he did not want to be labeled an informant

while he was still serving time in local custody. (17 RT 3521.) He felt that being labeled an informant while in local custody would endanger his life. (17 RT 3521.) Holland told his attorney "not to say anything about me." (17 RT 3522.) Holland believed he would never have to testify because he had Johnsen's signed confession and that was enough in his mind. (17 RT 3522.)

In late June 1992, Holland met with Stanislaus County District Attorney Investigator Fred Antone. The meeting was arranged by Holland's attorney. (17 RT 3522-3533.) Holland learned at this meeting that, without his testimony, Johnsen's written confession was worthless. (17 RT 3525-3526.) Holland decided that if he had to testify, he wanted any state time he was facing to run concurrent with his federal prison sentence. (17 RT 3525-3526.) In that way, he would be protected from the danger of being an informant in a California prison. (17 RT 3526.) The District Attorney's Office was willing to consider the arrangement, but did not promise Holland anything. (17 RT 3526-3529.)

When Antone visited Holland in September 1992 no arrangement was forthcoming and Holland refused to cooperate. (17 RT 3530-3531.) A search warrant was obtained and served on Holland in his jail cell. (17 RT 3530-3531.) As a result of the execution of the search warrant, the notes passed between Holland and Johnsen and Johnsen's written 14 page confession were seized. (17 RT 3531.) After Holland was told he would be subpoenaed to testify, he agree to sign an agreement with the District Attorney's Office. (17 RT 3532-3533.) In the agreement, he promised to tell the truth during Johnsen's trial and in exchange he would received a promise that his state time would run concurrent with his federal prison sentence. (17 RT 3536.) However, by the time of Johnsen's trial, Holland had yet to receive the benefit of this bargain, because he had not been sentenced in his state cases. (17 RT 3536-3537.)

Johnsen's fingerprints were found on all but one of the pages of his written confession. (17 RT 3575-3577, 3582-3593.) His fingerprints and Holland's were also found on the notes passed between Holland and Johnsen while they were celled next to one another. (17 RT 3509, 3512-3519, 3593-3599.) Johnsen's fingerprints were also found on documents that were taken from Johnsen's cell. (17 RT 3599-3604; 18 RT 3835.)

David Moore, a handwriting expert, testified that Johnsen's confession was in his handwriting and that Johnsen's handwriting was on the notes passed between Holland and Johnsen. (17 RT 3614, 3625-3626, 3648; 18 RT 3652-3656.)

B. Defense Case

Landrum testified that on the day Johnsen "went away with the police" Johnsen left him a key to the Johnsen residence so that he could lock it up. (19 RT 3959.) Landrum returned the key to Johnsen's mother that same evening, when she meet him at the pool hall. (19 RT 3959.) Landrum denied having a key to the Johnsen residence at any other time. (19 RT 3959.)

Landrum helped Johnsen and his mother pack for the upcoming move during the daytime on February 29. (19 RT 3963.) Landrum denied being at the Johnsen residence during the evening, however; he repeated his prior testimony that he had spent the night at his own mother's house. (19 RT 3959-3962.) Landrum denied attempting to fabricate a story that he had spent the night with two people identified only as Daniel and Effie. (19 RT 3961-3962.) Landrum also denied having a cut on his hand or wearing a bandage the day of the move. (19 RT 3961-3962.)

In an attempt to impeach Holland's credibility, the defense called Simon Ellis. (19 RT 3964-3967.) Ellis confirmed that he had been taken in

by Holland's forged cashier's check for $20,600 and had sold him a Porsche in exchange for the check. (19 RT 3966-3967.)

Dr. Ernoehazy was recalled to further explain his testimony concerning how long before her death Juanita Bragg's injuries were inflicted; he opined that his "educated guess" was not less than an hour or two before death and as much as four hours before her death. (19 RT 3974-3976.) He also reiterated that he had examined Juanita's body after she had been dead between six and eight hours. (19 RT 3972.) Prior to this autopsy, Dr. Ernoehazy had performed more than ten thousand autopsies and had testified several hundred times. (19 RT 3970-3971.)

David Johnson, who is no relation to appellant Johnsen, was moving into the residence the Johnsens were vacating on March 1. (19 RT 3986-3987.) Johnson had met appellant Johnsen and Landrum the day of the move. (19 RT 3988.) He remembered Landrum looking different on March 1 than he did at the time of trial. (19 RT 3988.) He remembered him as skinnier, longer haired, and clean shaven. Landrum might also have been wearing a gauze bandage wrapped around his left hand. (19 RT 3988, 3992, 3997-3998.) Johnson admitted that he had a discussion with Johnsen's mother's roommate Ray Gresham and defense investigator Steve Blanusa a week before the trial concerning whether or not Landrum was wearing a bandage on March 1. (19 RT 3994-3996, 3398, 4001.)

Gresham testified that he sometimes lived in the Johnsen residence. (19 RT 4002.) He stayed there in his room on February 29 with his six-year-old stepdaughter Julie. (19 RT 4003-4004.) Gresham and his step-daughter, arose the next morning around 6:30 to 7:00 a.m. and went into the kitchen. (19 RT 4004.) Johnsen and his mother were already there. (19 RT 4004.) They all left to have breakfast at McDonalds, then they returned and commenced the move. (19 RT 4004-4005.) According to Gresham,

Johnsen helped with the entire move and only left for thirty minutes to buy sodas. (19 RT 4006-4007.)

Faye testified that, on the day of the move, Landrum had a bandage on his left hand. (19 RT 4014.) She also testified that, when she awoke on March 1, Johnsen was just waking up on the couch in front of the television. (19 RT 4012.) She also testified that Johnsen only left that day for about ten minutes with Landrum to buy beer and sodas. (19 RT 4015.)

Johnsen's mother also testified that, on the same day that Landrum gave her the property he had removed from the Johnsen residence at Johnsen's request, she gave him a key to her residence so that he could take care of her cats for four days. (19 RT 4015-4016.) She testified that Landrum returned the key to her four days later, on what date she did not know, but she knew it was prior to March 1.[5] (19 RT 4016-4017.)

In violation of the trial court's order not to discuss her testimony with anyone, Johnsen's mother spoke to him about the case during the trial. (19 RT 4020-4021, 4026, 4028.) Johnsen told her that, during the trial, evidence was admitted establishing that a third person's blood was found on the bloody knife located in the Rudy residence. Thereafter, she "recalled" that she had seen a bandage on Landrum's hand the day of the move. (19 RT 4021-4022.)

District Attorney investigator Antone testified that he saw a healed quarter inch scar on Landrum's left hand between the thumb and forefinger. Landrum said the scar came from playing a knife game called mumbley peg. (19 RT 4105.) Eight years earlier, while playing mumbley peg, Landrum accidentally hit his hand with the knife and cut it. (19 RT 4106.)

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[5] Landrum testified that he gave the stolen property to Faye on February 19, 1992. (15 RT 3262, 3265.) If Landrum gave the key back to Faye four days later, then he gave it back on February 23rd or 24th depending on whether the day of the return is counted.

C. People's Rebuttal

Detective Grogan testified that, when he saw Landrum at 7:00 p.m. on March 1, Landrum did not have a bandage on his hand. (19 RT 4107.) Detective Grogan also testified that Landrum had a blondish-red mustache, which was apparent in a photograph that he took of Landrum on March 25. (19 RT 4108-4109.) This testimony contradicted Johnson's testimony that Landrum was clean shaven. (19 RT 3992.)

Detective Taylor testified that Johnsen's mother was unequivocal when she told him that she arose at 7:00 a.m. on March 1, 1992. (19 RT 4113.) Detective Grogan also testified that Gresham did not equivocate when Gresham told Grogan that he arose at 7:30 a.m. on March 1, an hour later than he testified to at trial. (19 RT 4108.)

Both sides rested, but before closing arguments, the defense was allowed to reopen its case and recall Dr. Ernoehazy to further explain his testimony concerning how he reported Juanita Bragg's time of death on a Stanislaus County Sheriff-Coroner's pathologist report. (19 RT 4113; 20 RT 4377-4385.) Deputy Coroner Rex R. Cline, Jr., who signed Juanita's death certificate, was also called by the defense to explain the use of the pathologist report to prepare the death certificate. (20 RT 4385-4388.)

II. PENALTY PHASE

A. Prosecution Case

1. Johnsen's previous violent criminal activity

On May 17, 1991, Joseph Hedley he discovered the lifeless body of Theresa Ann "Terry" Holloway in a drainage ditch in San Diego and called the police. (22 RT 4773-4774.) Dr. Mark Super, a forensic pathologist and a Deputy Medical Examiner for the San Diego County Medical Examiner's Office responded to the scene. (22 RT 4776.) Upon seeing Holloway's

body, Dr. Super observed head injuries and rigor mortis. (22 RT 4777.) Dr. Super performed an autopsy of Holloway's body and discovered extensive injuries, primarily to the face and scalp. (22 RT 4778.) Holloway's head was disfigured from the impact injuries to her face. (22 RT 4778.) There were multiple abrasions, laceration, and scrapes to her head and face. (22 RT 4778-4779.) All of the facial bones were fractured. (22 RT 4779.) There were defensive wounds on the back of Holloway's left hand. (22 RT 4779.) The shape and character of Holloway's injuries was consistent with having been struck with a scissor jack. (22 RT 4781-4782.) There was also evidence that she had been strangled: she had hemorrhages in the whites of her eyes; fractures of the larynx and hyoid bone; and deep neck bruising. (22 RT 4782-4783.) There were also marks that could have been ligature marks around her neck. (22 RT 4782-4783.) Both sides of her brain were bruised from the force that fractured her skull. (22 RT 4773-4774.) The cause of death was blunt force head injury and strangulation. (22 RT 4784.) Holloway was four months pregnant with a male fetus. (22 RT 4784.)

Mark Schmidt and Johnsen were friends. (22 RT 4785-4786.) They met in San Diego in 1989. (22 RT 4786.) On May 15, 1991, Johnsen called Schmidt from the San Diego jail and told Schmidt that he wanted to talk with Robert Jurado. (22 RT 4786.) Schmidt hung up the telephone and went to Jurado's apartment. (22 RT 4786.) Denise Shigemura and Holloway were also at Jurado's apartment. (22 RT 4786-4787, 4798.) They all went to Schmidt's apartment to await Johnsen's call. (22 RT 4787.) As Schmidt was leaving Jurado's apartment, Anna Humiston drove up. (22 RT 4787.) Schmidt told Humiston they were all going to go to his apartment to wait for a call from Johnsen. (22 RT 4787.) Everyone except Humiston went to Schmidt's apartment. (22 RT 4787.) Johnsen called, Schmidt accepted the charges and handed the phone to Jurado. (22 RT

4787-4788.) Jurado and Shigemura went into Schmidt's bedroom and closed the door. (22 RT 4788.) After a "long while," Jurado and Shigemura emerged from the bedroom and handed the telephone to Holloway. Holloway took the telephone, went into the bedroom and closed the door. (22 RT 4788.) At some point Humiston also arrived at Schmidt's apartment. (22 RT 4789.) When Holloway ended her telephone conversation with Johnsen, everyone, except Schmidt, left the apartment. (22 RT 4789.)

Before leaving, Jurado asked Schmidt for a chain, but Schmidt did not have one and offered him "weed eater wire" instead. (22 RT 4790.) Schmidt described the weed eater wire as clear thin plastic line used in a lawn trimmer device. (22 RT 4790-4791.) Before he left, Jurado placed the wire around his neck, tightened it and said: "That will do." (22 RT 4791.) Jurado also told Schmidt to say something to Holloway to get her to leave with them, so Schmidt told Holloway that he needed to go out and that she could not stay behind in his apartment. (22 RT 4791-4792.) After that, all four visitors left around 8:45 p.m. (22 RT 4792-4793.)

Melissa Andre spoke with Humiston by telephone on May 16, 1991. (22 RT 4848.) Humiston told Andre that there was something very bad that she really wanted to talk to Andre about; something that she had done with Shigemura and Jurado the night before. (22 RT 4848-4849.) In a second telephone call that same day, Humiston admitted to Andre that the night before, she, Jurado and Shigemura had murdered Holloway. (22 RT 4849.) Humiston explained that the four of them were in a car on Highway 163 in San Diego. (22 RT 4850.) Shigemura was driving, Holloway was in the front passenger seat, Jurado was sitting behind Holloway and Humiston was sitting behind Shigemura. (22 RT 4850.) Humiston was punching Holloway in the face while Jurado strangled her with a wire. (22 RT 4850.) When Holloway would not die quickly enough, Shigemura pulled over and

Jurado threw Holloway into a drainage ditch and beat her to death with a tire jack. (22 RT 4850.) During the struggle, Holloway asked them why they were killing her and her baby; she also asked, "What did I do?" (22 RT 4850-4851.) The next day Humiston asked Andre to watch the news to learn whether Holloway's body had been found and if not, Humiston wanted Andre to go with her to see if Holloway could still be alive. (22 RT 4851.)

Mia Rodigues also spoke with Humiston on May 16, 1991. (22 RT 4852.) Humiston told Rodigues that the night before she had helped kill a girl named "Terry." (22 RT 4852-4853.) Terry was murdered inside Humiston's car in San Diego. (22 RT 4853.) Humiston pinned Terry's arms down while Jurado strangled her. (22 RT 4853.) Jurado also hit Terry with a car jack. (22 RT 4853.) Rodigues spoke with Humiston the next day, and Humiston talked about the murder again. (22 RT 4854.) Humiston said she kept hearing Terry's voice in her head asking why they were doing this to her. (22 RT 4854-4855.)

A homicide detective for the San Diego Police Department, Ronald Larmour, testified regarding an in-custody interview he had with Shigemura in May 1991. (22 RT 4856-4858.) Shigemura told Larmour that Jurado strangled Holloway and then beat her with a jack. (22 RT 4858-4859.) Prior to the murder, Shigemura, Jurado, Humiston and Holloway had all been over at Schmidt's residence where they spoke by telephone to Johnsen who was in the San Diego jail. (22 RT 4858.) Shigemura became aware that Holloway was going to be killed when Jurado told her, at Schmidt's residence, that Holloway had to be "taken out." (22 RT 4861.)

Holland testified that Johnsen gave him a written confession concerning the murder of Holloway in exchange for Holland's agreement to kill certain people. (22 RT 4869-4870; People's Exhs. 161-168.) A

handwriting expert David S. Moore confirmed that the handwriting on the confession was Johnsen's and a fingerprint expert Donna Mambretti found latent prints from both Johnsen and Holland on the notes. (22 RT 4799-4806.) Johnsen and Holland sent notes back and forth discussing the murder of Holloway. (22 RT 4871-4880; People's Exhs. 169-180.) David Moore again testified concerning the handwriting on these notes and identified them as Johnsen's. (22 RT 4799-4801.) Donna Mambretti also identified Johnsen's and Holland's latent fingerprints on the notes. (22 RT 4801-4810.)

Johnsen admitted to San Diego District Attorney criminal investigator Anthony Bento that he was involved in a plot to murder Doug Mynatt. (22 RT 4884-4885, 4887.) Mynatt was a drug dealer who was doing things to upset Johnsen, Jurado, Shigemura and Humiston. (22 RT 4887-4888.) Johnsen arranged for Holloway to be killed because she was going to warn Mynatt about the plot to kill him. (22 RT 4766-4769, 4868-4870; People's Exh. 161-168 [Johnsen's confession to Deputy District Attorney Mark Pettine].) Johnsen had also threatened to throw Holloway out of the house if she continued to use crystal methamphetamine while she was pregnant with Johnsen's child. (22 RT 4886.) According to Bento, Johnsen's demeanor seemed sincere and he appeared sad when talking about Holloway and the baby. (22 RT 4921.)

Johnsen also wrote out a confession admitting his involvement in Holloway's murder and gave it to Holland as collateral. (22 RT 4868-4871.) They also exchanged notes about the details of Holloway's murder. (22 RT 4871-4880.)

2. Johnsen's prior domestic violence against Holloway

Edward Nieto work at Pizza Hut with Holloway. (22 RT 4889-4890.) In June 1990, Nieto tried to pick Holloway up to give her a ride to work

and Johnsen threatened to beat Nieto and damage Nieto's new car with a baseball bat. (22 RT 4890-4891.) After Johnsen threatened to kill Nieto, Nieto left without Holloway, but Nieto called Holloway from work to check on her. (22 RT 4891.) Johnsen answered the telephone and held it to Holloway's ear; Holloway could not answer the telephone herself because Johnsen had tied her up. (22 RT 4891-4892.) Holloway sounded scared, but told Nieto not to call the police and said that she would be into work later. (22 RT 4892-4893.) When Holloway came into work, her wrists were cut up and there were marks around her ankles. (22 RT 4893.) Later that night, Johnsen came to the restaurant and Nieto told Holloway to tell Johnsen he was not welcome there, but Holloway sat in a booth and talked to Johnsen anyway. (22 RT 4893-4894.) After Johnsen and Holloway talked for awhile, Johnsen stood up and approached Nieto with a gun and said that he was going to kill him. (22 RT 4894.) Nieto told Johnsen to leave and called the police, but the police never came and Johnsen left. (22 RT 4894-4895.) On an earlier occasion when Nieto and Holloway had been shopping at yard sales all day, Nieto saw Johnsen slap Holloway three times in the face. (22 RT 4900-4901.) Nieto was aware that Johnsen wanted Holloway to stop using methamphetamine. (22 RT 4904-4905.)

Investigator Antone recalled additional details about the Pizza Hut incident from his interview with Nieto. (22 RT 4906-4908.) He recalled that, during the incident in which Johnsen threatened Nieto with the baseball bat, Holloway had to hold Johnsen back to keep him from going after Nieto. (22 RT 4906.) Antone also recalled that, during the incident at Pizza Hut, Johnsen told Holloway that he would kill Nieto if Holloway refused to talk to Johnsen. (22 RT 4907.) Nieto also never told Antone about the slapping incident. (22 RT 4907.)

3. Victim impact in the present case

Dr. Lloyd Brown, who assisted in Leo Bragg, Sr.'s rehabilitation, testified that Leo entered rehabilitation on June 1, 1992, and left on December 4, 1992. (22 RT 4909, 4914.) Leo had already completed the rehabilitation for his acute physical injuries and was in Dr. Brown's care mainly for rehabilitation of his communication and cognition skills. (22 RT 4915.) Leo could not talk except for a word here and there and his gestures and facial expressions were not appropriate to communicating. (22 RT 4915.) Leo's ability to take in and understand information was severely impaired. (22 RT 4915.) His ability to express himself was even more impaired. (22 RT 4519.) Leo could feed himself, he could walk, and he was regaining his ability to control his bowels and bladder. (22 RT 4916.) He could not touch his nose, ear, or knee when asked to do so. Leo would not know what to do if the house caught on fire. (22 RT 4916.) He could not be left alone at any time. (22 RT 4917.) Leo had trouble with impulse control. (22 RT 4918.) He could not count to ten. (22 RT 4918.) Leo could take cards with the days of the week on them and sequence them properly, but not say them. (22 RT 4918.) He could not write his name, address, or phone number consistently on command. (22 RT 4918.) Leo's rehabilitation was modest at the facility and, when he left, he was still very severely impaired. (22 RT 4919.) He was not able to carry on a conversation either orally or in writing. (22 RT 4919.) In Dr. Brown's opinion, Leo was never going to be able to live alone or make decisions for himself. (22 RT 4920.)

Rudy testified about how her mother's death had affected her. (22 RT 4923.) Rudy had been devastated by the loss and every day she saw in her mind the picture of her mother's bloody body in her bed. (22 RT 4924.) At times, while at work, she was overcome by the image and had to find a place to be by herself. (22 RT 4924.) Before her murder, Rudy had weekly

telephone conversations with her mother. (22 RT 4924.) Rudy was her parents' "baby" and they worried about her because she was single. (22 RT 4924.) Rudy suffered from guilt about the weekend her mother was murdered, believing that she should not have gone away that weekend, that she should have realized her key was missing, and that if she had only come home sooner, then maybe her mother could have been saved and her father would not have suffered so much pain and agony before receiving help. (22 RT 4925.) She experienced fear and she avoided people for a long time after her mother's murder. (22 RT 4925.)

Rudy had essentially lost her father too because she could not communicate with him. (22 RT 4925-4926.) Prior to the attack, Rudy had a wonderful relationship with her father. (22 RT 4926.) He was always helping out around her place and he wanted her to have a project for him to do whenever he visited her. (22 RT 4926.) He was a very physically active man and played 18 holes of golf every morning. (22 RT 4927.) He would often play another nine hole later in the day with Juanita. They were both very active and loved to travel. (22 RT 4926.) They had no financial worries and loved life. (22 RT 4926.)

Leo Bragg was a decorator and still sold drapes and hung them for people even though he was retired. (22 RT 4927.) He had no problems communicating both in writing and orally. (22 RT 4927.) Leo was in the hospital for three months after the attack, and Rudy visited him once or twice a day until he was released to rehabilitative therapy in Tennessee. (22 RT 4927.) Leo stayed at Rudy's home for just a few days before going to Tennessee. During that time he could not be left alone, his actions were completely unpredictable and he had no control over his bodily functions. (22 RT 4927.) Communicating with him was not possible, there was no way to tell if he understood what was said to him and no way for him to communicate back. (22 RT 4928.)

Leo's son, Leo Bragg, Jr. (Leo, Jr.) described his mother as an active woman who loved life. (22 RT 4929-4930.) She played golf regularly. (22 RT 4929.) At least twice a year Leo, Jr. and his family would visit his parents or they would visit him. Juanita and Leo lived in Missouri; Leo, Jr. and his wife lived in Tennessee. (22 RT 4928-4729.) Juanita would talk with Leo, Jr. and her daughter-in-law on the telephone at least once a month and both Leo, Jr. and his wife miss that interaction. (22 RT 4930.) When Leo was released from the hospital, he went to live with Leo, Jr., but he could never be left alone. He could not communicate and Leo, Jr. and his wife worried that he might wander off if left alone. (22 RT 4930-4931.) If Leo, Jr. and his wife went out by themselves for the evening, they hired an adult sitter, which Leo resented, but finally accepted after Leo, Jr. and his wife explained that it would make them feel better. (22 RT 4931.) Leo, Jr.'s wife had to give up her part-time teaching job at a local college so that she could take Leo to and from his medical and rehabilitation appointments and care for him. (22 RT 4931.)

Leo had a business installing drapes and blinds before the attack and afterward he could no longer do it. He was active and Leo, Jr. enjoyed playing golf with him and his mother. He never used an electric cart, preferring to walk the course. (22 RT 4932-4933.) After the attack, they took him to a driving range and he showed interest at first, but when he found he could no longer hit the ball, he became disenchanted and would no longer try. (22 RT 4934.) Leo finally was able to move into an assisted living facility and three days a week he would do volunteer work with the rehabilitation center in Tennessee which consisted of opening the door for people in wheelchairs and collecting and stacking papers off of the floor. (22 RT 4934, 4941-4942.) Other than that he watched sports on television, but watched nothing else because he was afraid he might see something he did not want to see. (22 RT 4934.)

Leo, Jr.'s wife of 36 years Merriam Bragg testified concerning her relationship with Juanita and Leo. (22 RT 4935.) Merriam knew Juanita and Leo four years before she ever met Leo, Jr. (22 RT 4935-4936.) She described Leo as an active man, both physically and within the community. (22 RT 4936.) He played golf almost daily and maintained the couple's two acre property which included a 1600 square foot garden. (22 RT 4936.) He ran a drapery business out of his home in Missouri by himself after he retired. (22 RT 4936, 4943.) They made custom draperies and bedspreads. (22 RT 4943.) Before retirement, he owned and operated a store in Iowa that sold sundry items, gift wear, wallpaper, paints, vacuum cleaners, and sewing machines. (22 RT 4936, 4942-4943) He also repaired vacuums and sewing machines. (22 RT 4936.) Every year since they retired, Juanita and Leo would travel to California to visit Rudy and would also travel to Las Vegas to play golf and see friends. (22 RT 4936.) Twice a year they would travel to Tennessee to visit with her and Leo, Jr. (22 RT 4936-4937.) They spoke on the telephone every month. (22 RT 4936-4937.) After Juanita's murder, Leo came to live with them in May 1992. (22 RT 4937.) Merriam was Leo's primary caregiver because Leo, Jr. was out of town two to three nights each week. (22 RT 4937.) When Leo first came to live with them, he was childlike. (22 RT 4937.) Merriam had to teach him how to use the tools of daily life, like silverware, toothbrush, comb, hairbrush and razor. (22 RT 4937.) He would mistake his razor for a toothbrush and his comb for a razor. When trying to brush his teeth, he would wet his face, as if to shave. (22 RT 4937.) He was easily agitated and frightened by noises outside at night and would lock the doors because he was afraid. (22 RT 4938.) He would become emotional, cry, and leave the room if anyone tried to talk to him about Juanita. (22 RT 4939.) At a family reunion, when an image of Juanita appeared on a videotape, he had

to leave the room. (22 RT 4939.) He could not communicate orally or in writing. (22 RT 4939-4940.)

When he tried to play golf, the golf ball would just dribble off the end of the tee and Leo, who had been a very persistent man before the attack, would give up after a try or two. (22 RT 4941.) Aside from his volunteer work at the rehabilitation center, where he would open doors for those in wheelchairs and pick up and stack papers from the floor, his only other major activity was television watching. (22 RT 4941-4942.) Previously, Leo would have been in the garage helping with some project; he would never have simply sat in the house. (22 RT 4942.) He went from being able to put up Christmas lights on the house by himself to not being able to step up on a step stool or hold a curtain rod to help Merriam. (22 RT 4944.)

Leo moved into an assisted living facility and Merriam would see him three times a week when she drove him to the rehabilitation center; she also saw him most weekends. (22 RT 4943.) Leo's level of interaction and communication with his old friends consists of a smile and a hand shake and perhaps an occasional "bye." (22 RT 4943-4944.)

Johnsen had a prior felony conviction for possession of a controlled substance in San Diego in July of 1988. (22 RT 4769; People's Exh. 188.)

B. Defense Case

Gretchen White, Ph.D., a clinical psychologist, prepared a psycho-social history on Johnsen. (23 RT 5011, 5014.) Dr. White found warning signs in Johnsen from an early age with respect to his temperament, problem behaviors that could lead to psychological problems, and family discord. (23 RT 5016.) He was a "difficult" baby, colicky, cried a great deal, and was hard to soothe. (23 RT 5017.) His father was in the Navy and absent from the home a good deal of the time. (23 RT 5018.)

Counterbalancing the risk factors in Johnsen's childhood were protective factors such as being the eldest child and his musical talent. (23 RT 5018-5019.) The positive feed back he received for his musical talent helped his self-esteem. (23 RT 5100.) When Johnsen started kindergarten, he was placed on Ritalin in reaction to problems he had in school. (23 RT 5020-5021.) He was defiant, behaved erratically, and was difficult to supervise and discipline. (23 RT 5020.) Dr. White believed Johnsen had attention deficit hyperactivity disorder (ADHD), though she never found that diagnosis in any medical records, reports, or interviews she conducted. (23 RT 5021-5022, 5086.) Johnsen was taken off Ritalin in 1978. (23 RT 5087.) Dr. White stated that ADHD children need a structured and strict environment. (23 RT 5023.) According to Dr. White, Johnsen's father provided that structure when he was home, but his mother did not. (23 RT 5028.) Johnsen's parents separated when he was 12 or 13 years old, which was an important period in his development. (23 RT 5030.) Johnsen's father's engagement with him increased at this time. (23 RT 5031.) After Johnsen's father remarried, father-and-son time decreased. (23 RT 5032.) Johnsen's father continued to see him after he remarried. (23 RT 5082.) Johnsen communicated his dislike of his step-mother to his father. (23 RT 5083.) Johnsen was disrespectful to her and wanted his father to himself. (23 RT 5083.)

Johnsen started using marijuana in either the 6th or 8th grade and methamphetamine a year or two later, at age 14 or 15. (23 RT 5088-5089.) Johnsen went through a 45-day drug treatment program at Harbor View when he was 17 years old and another drug program when he was 19 years old. (23 RT 5033, 5036, 5078.) Nothing in the Harbor View report indicated that Johnsen had been on Ritalin. (23 RT 5033-5034.) The report also did not contain the experience of a neighbor Fred Miller whose daughter was taking a shower when someone slit the screen in the bathroom

window and stuck a hand through it. (23 RT 5034.) The neighbor went over to Johnsen's house where he saw a carpet knife on the table and Johnsen's brother Kevin said it was Johnsen's knife and that he had been cutting screens in the neighborhood. (23 RT 5034.) Miller told Johnsen's mother about the incident. Dr. White called this incident a red flag. (23 RT 5034.) When Johnsen was released from Harbor View, he returned to live with his mother. (23 RT 5036.) Johnsen felt rebuffed by his father according to Dr. White. (23 RT 5037.)

Johnsen took intelligence test and scored in the average range in 1987. (23 RT 5067, 5070.) Six years later, he tested in the high average range or 86 percentile of the general population. (23 RT 5070.) When Johnsen returned to Harbor View the second time, he did so on his own initiative. (23 RT 5078-5080.) At the time Johnsen's parents divorced, the divorce rate in the United States had reached 50 percent two decades earlier. (23 RT 5081.) Johnsen's grandparents were very much involved with him during the time his father and mother were absent, which Dr. White admitted as a positive factor. (23 RT 5081-5082, 5109.) This extended family support and the fact that "he was a bright kid" helped him develop coping skills. (23 RT 5082.) Johnsen's behaviors while using methamphetamine were the same as those attributable to ADHD. (23 RT 5090-5092.)

Johnsen's mother rented a room to Robert Remmer around the time she became separated from Johnsen's father. (23 RT 5095-5096.) Remmer watched the two Johnsen boys when she travelled for work. (23 RT 5095-5096.) Jack Minteer, a boyfriend of Johnsen's mother, was a positive male figure in Johnsen's life when he was going through difficulties. (23 RT 5096-5097, 5099.)

Johnsen's father tried to work with Johnsen's mother to get him some treatment after Johnsen stole some motorcycles when he was around sixteen years old. (23 RT 5084-5085.)

Johnsen's father Bruce Johnsen was a naval flight officer when Johnsen was born in 1970. (23 RT 5113.) Bruce described Johnsen as a bright, curious, fun loving child from birth to the age of five years old. (23 RT 5115.) Johnsen, however, cried at night, which affected Bruce's sleep. (23 RT 5115-5116.) Bruce's solution was to pick Johnsen up by the thighs and drop him from a height of 12 inches onto the pillow or mattress in the crib. This would cause Johnsen to "catch his breath" and stop crying. Johnsen's mother's approach was different; she would hold Johnsen and try to comfort his to stop his crying. When Johnsen was five years old, after Bruce learned that Johnsen was being disruptive in school, Johnsen was put on Ritalin and in Bruce's estimation it "worked out great." (23 RT 5118-5119.) Johnsen stayed on Ritalin for three or four years, but after Bruce observed that the drug was stunting Johnsen's growth Bruce discontinued the medication without consulting a doctor. (23 RT 5119-5120.) When Johnsen went off the Ritalin, his inattention and hyperactivity resumed. (23 RT 5125.) Bruce bought Johnsen a piano and piano lessons because Johnsen was always moving his fingers and Bruce wanted to see if Johnsen could put that energy to use. (23 RT 5125-5126.) At around age 8 or 9, Johnsen said he was no longer interested in playing the piano and Bruce sold it. (23 RT 5126-5127.)

Bruce believed that Johnsen's mother was accepting of people who used illegal drugs while he was not. (23 RT 5133-5134.) After Bruce separated from her, he met Gloria who became his second wife. (23 RT 5137.) Johnsen and Gloria did not get along. (23 RT 5141.) According to Bruce, Johnsen wrote his father an ultimatum letter in which he told Bruce to choose between him and Gloria. (23 RT 5138-5139.) Bruce did not

responded to the letter in a meaningful way and obtained an unlisted phone number which he did not give to Johnsen. (23 RT 5139-5141, 5144-5145.) Thereafter, he had no relationship with his son starting at around age 16 years old. (23 RT 5145-5148.) Bruce was also estranged from his sisters Ann McMasters and Carol Bassoni. (23 RT 5145.) Bruce was determined to make his second marriage work. (23 RT 5160.) At Christmas time Bruce sent Christmas cards to his two sons and would enclose $2 with each card but no note or personalized message. (23 RT 5148.)

Ann McMasters, Bruce's sister and Johnsen's aunt, testified that after her brother Bruce's second marriage she became estranged from him. (23 RT 5106.) Though she saw Johnsen with his parents infrequently, she believed that his mother was more lax as a parent and that his father was more authoritarian. (23 RT 5106-5107.)

Robert John Bauer, a marriage, family, and child therapist testified for the defense. (23 RT 5166.) Bauer counseled Johnsen, his mother, and his brother Kevin after the boys were released from Harbor View in 1987; when Johnsen was 16 years old. (23 RT 5167.) The boys and their mother attended pretty regularly for about 20 to 25 weeks. (23 RT 5172.) During these sessions, Johnsen's mother complained that she had no way to control the boys and that they did as they pleased. (23 RT 5169.) She also complained that she had little time to devote to them because of her work. (23 RT 5169.)

As part of the program, Johnsen wrote a letter to his father attempting to reestablish a relationship with him. (23 RT 5170.) Bruce responded in a cold matter-of-fact way asking for a demonstration that Johnsen would conform to Bruce's new rules for the relationship. (23 RT 5170.) Both boys, especially Johnsen, were offended by Bruce's response and felt cut off from him. (23 RT 5170.) Bauer thought that even though the letter was cold, it had "good elements." (23 RT 5174.) It was not offensive but very

matter-of-fact and militaristic. (23 RT 5219.) When given the proposition that Johnsen had in the opening letter offered his father a choice between him and his new wife, Bauer said he would have expected the type of response Bruce gave. (23 RT 5220.) He would see it as the father saying, "I am not going to play these games with you, I am going to have a relationship with my wife, and here are the terms of the relationship I will have with you." (23 RT 5220.)

In Bauer's opinion, Johnsen's mother was not able to parent, and he believed that she wanted someone else to fix the problems and blamed Bruce. (23 RT 5172-5173.) Bauer thinks she used Bruce's response to Johnsen's letter to further the distance between the Bruce and Johnsen. (23 RT 5175.) In Bauer's opinion Johnsen bought into this blaming attitude and was hostile toward his father, which interfered with Johnsen's recovery. (23 RT 5173-5174.) Johnsen did not cause problems at school, but he would not do the work and received only failing grades. (23 RT 5174-5175, 5177.) He had previously done well in school. (23 RT 5177.) Johnsen appeared depressed, but Bauer did not make a medical referral because he knew Johnsen was under the care of Dr. Sambs and felt that Dr. Sambs would have already considered whether to put Johnsen on antidepressants after taking into account Johnsen's drug abuse history. (23 RT 5176-5177, 5194.) Bauer described Johnsen as very good in music, but noted that Johnsen appeared to receive no pleasure in this. (23 RT 5193.) Bauer had no knowledge of Johnsen having ADHD. (23 RT 5171, 5178.) He thought Kevin should have been evaluated for ADHD, however. (23 RT 5179.) He thought Johnsen's mother presented with an overwhelmed parent pathology common to situation in which one parent was gone and the other parent left with the children. (23 RT 5190-5191.)

Bauer hypothesized that Johnsen had a borderline personality disorder and dysthymic disorder. (23 RT 5199, 5206.) He did not appear to trust

anyone and was emotionally distant. (23 RT 5199.) But there was no evidence that he had an anti-social personality disorder. (23 RT 5214.)

Jack Minteer, who was friends with Johnsen's mother, met Johnsen in 1986. (23 RT 5230-5231.) After Minteer started dating Johnsen's mother in 1988, he saw Johnsen frequently, two to three time per week. (23 RT 5231-5232.) Minteer also visited Johnsen once or twice a week after Johnsen entered drug treatment at Harbor View. (23 RT 5232-5233.) Minteer also participated in the family counseling sessions. (23 RT 5233.) He and Johnsen worked on electronic devices together; Minteer's background was in electronics and Johnsen was "very bright." (23 RT 5234, 5239.) They also played volleyball together at Harbor View. (23 RT 5234.) Minteer went to the high school football games where Johnsen played in the marching band and photographed Johnsen' s participation in town parades. (23 RT 5234-5235.) Minteer liked Johnsen and felt that all Johnsen needed was for someone to pay attention to him. (23 RT 5235, 5240.) Minteer thought Johnsen and his mother seemed "a little standoffish," but that she was reasonably affectionate toward him. (23 RT 5236.) Minteer never saw Johnsen with his father, but at an air show when Johnsen was 18 years old, he bought a belt for his father that had the image of the plane his father flew on the buckle. (23 RT 5236-5237.) The idea of being a stepfather to Johnsen caused Minteer no fear or anxiety, but his relationship with Johnsen's mother never progressed to an intimate level, and he eventually ended the relationship. (23 RT 5237-5238.) After that he saw Johnsen a few more times, but he lived 20 miles away and soon he stopped going to see Johnsen. (23 RT 5238.) He did not want to see Johnsen's mothe socially and told Johnsen it would be awkward for him to go to Johnsen's home, but said Johnsen could visit him. (23 RT 5240.) Johnsen did visit him a few times. (23 RT 5241)

Robert Remmer helped Johnsen's mother around the house in exchange for rent when Johnsen was 12 to 13 years old in 1983. (23 RT 5242-5244, 5247.) He also worked two nights a week in a card room. (23 RT 5244.) Remmer would be there when Johnsen and his brother came home from school. (23 RT 5246.) When Johnsen was 17 or 18 years old, his mother's employment required her to be gone two to three nights per week. (23 RT 5247.) Remmer used marijuana for pain. (23 RT 5244-5245, 5248, 5257.) Remmer tried as best he could to hide his marijuana use from Johnsen and his brother Kevin. (23 RT 5249.) Remmer attended football games at Johnsen's school and took him fishing, but never tried to discipline Johnsen. (23 RT 5246, 5252-5253.) He stayed with Johnsen and his brother when their mother went to Hawaii and Switzerland on trips that she won at work. (23 RT 5253-5254.) He visited Johnsen when he was in Harbor View. (23 RT 5256.)

Sue Corbett testified that she was a friend of Johnsen's mother. Corbett did not like to be present when Johnsen's father was around. (23 RT 5259-5260, 5266.) Corbett believed that after the divorce, Johnsen's father tried to spend as little time as possible with Johnsen and his brother. (23 RT 5262.)

Johnsen's younger brother Kevin testified. (24 RT 5281.) Kevin testified that when he and his brother were bad, his father was really hard on them and, when they were good, he just left them alone. (24 RT 5281.) Kevin believed that their father was a lot harder on Johnsen because he was older and should be setting an example. (24 RT 5282.) After his parents separated, their father "mellowed down." (24 RT 5282.) Still, Kevin felt that their father did as little as possible with them. (24 RT 5282.) After the separation, their father would see them every weekend for a year, then after that, every other weekend, and eventually, after he remarried, they never saw him again. (24 RT 5283.) Before the separation, their father played

tennis and racket ball with the boys, but after he married Gloria, they could only engage in activities that Gloria could participate in, like going to the movies. (24 RT 5284.) On cross examination, however, Kevin admitted that they also went to the zoo, Disneyland, and museums with Gloria and his father. (24 RT 5296.) Gloria "tried to tell them what to do" by encouraging them to get their hair cut, dress nicely, get good grades in school, go to college and not use drugs. (24 RT 5297-5298.)

Remmer smoked marijuana and gave Kevin some. (24 RT 5290-5291, 5294.) However, Kevin's initiation into marijuana was with Johnsen not Remmer because if Remmer had been around they would not have done it. (24 RT 5301-5302.) Though Remmer was not a father figure, he did look after them. (24 RT 5291-5292.) When he and Johnsen were in drug rehab, Johnsen wrote to their father and asked him to come to therapy sessions and their father said no. (24 RT 5294.) Johnsen was very hurt by this. (24 RT 5294.) After a period of sobriety, Kevin and Johnsen used methamphetamine. (24 RT 5306-5307.) Kevin never saw his father again after Kevin came out of rehab. (24 RT 5315.)

From Kevin's perspective, Johnsen loved Minteer and was happy when Minteer was around. (24 RT 5295.) Johnsen and Kevin felt comfortable going to Minteer with their problems and asking him for advice. (24 RT 5312-5314.) Even after Minteer and their mother broke up, Kevin and Johnsen knew that they could contact Minteer and go see him if they wanted to. (24 RT 5312-5314.)

Psychologist Dr. Mitchell Luftig testified that he performed a psychological evaluation of Johnsen in 1987, when he was almost 18 years old. (24 RT 5317-5318, 5373.) Dr. Luftig diagnosed Johnsen with "conduct disorder, under socialized, nonaggressive" and cannabis and amphetamine dependent. (24 RT 5373.) He did not diagnosis him with a borderline personality disorder, dysthymia, major depressive episode,

ADHD, psychosis or organic brain damage. (24 RT 5373-5378.) Johnsen demonstrated an affect consistent with being depressed, however. (24 RT 5382.)

Dr. Luftig was called in by Harbor View on a consultant basis to evaluate Johnsen's lack of impulse control and to assess how his psychological state would impact his return to the home and whether a residential treatment program would be appropriate. (24 RT 5320.) Dr. Luftig administered various tests to Johnsen. (24 RT 5323.) He found Johnsen's identity to be confused and unstable. (24 RT 5324.) Johnsen longed for affection and nurturance but at the same time was emotionally constricted. (24 RT 5325.) A pivotal event in Johnsen's life was his father leaving. (24 RT 5326.) Johnsen perceived it as the ultimate rejection and was angered and hurt by the loss of the relationship. (24 RT 5326-5327.) Johnsen took some of his anger out on his mother and was verbally abusive toward her when she tried to set limits. (24 RT 5326.) Johnsen blamed himself in part for the loss of his father and incorporated that into his world view that he would always be a screw-up. (24 RT 5327.) Johnsen had a damaged self-esteem and a deep unmet need for a relationship with someone who believed in him. (24 RT 5328.) He perceived the world as menacing and felt he had to protect himself. (24 RT 5328-5329.) Johnsen tried to cope with the loss of the father-son relationship through his relationship with another man in his life and the failure of this relationship exacerbated Johnsen's pathology. (24 RT 5328, 5330-5331.)

Dr. Luftig's review of his 1987 report, without any informational updates since then, lead him to believe Johnsen presented consistent with an axis-two borderline personality disorder. (24 RT 5352-5353.) Dr. Luftig testified that Ridalin had a calming effect on children diagnosed with ADHD and would help them to concentrate and perform better in the classroom setting. (24 RT 5354-5355.) He would have considered an

ADHD diagnosis of Johnsen important. (24 RT 5357.) He also thought Johnsen could benefit from family therapy to help improve his self esteem and individual therapy with a male therapist to repair the damage done by the loss of the relationship with his father. (24 RT 5359.) He also thought Johnsen could benefit from residential treatment and an opportunity to pursue music. (24 RT 5361.) Johnsen told Dr. Luftig that, because Mr. Minteer was in his life and liked him a lot, maybe he did not need his father. (24 RT 5380.) If Johnsen was ADHD, he could be emotionally and socially younger than his chronological age. (24 RT 5380-5381.)

Jerry Enomoto, a former director of the California Department of Corrections, testified that in his opinion Johnsen would not pose a danger to other inmates or prison guards if he were to be sentenced to life without the possibility of parole. (24 RT 5333, 5342.) In arriving at his opinion, he considered the fact that while held in the county jail awaiting trial on the present charges Johnsen solicited the murders of several individuals outside the prison who were investigating officers and witnesses in the case. (24 RT 5343.) Enomoto had no answer to the question what would prevent Johnsen from doing so again from prison. (24 RT 5343.) Enomoto viewed the prison environment to be more structured than that of the jail. (24 RT 5346-5347.) Enomoto finally conceded that Johnsen's solicitation of murders from jail to be an act of violence while incarcerated. (24 RT 5350-5351.)

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ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY DENYING JOHNSEN'S MOTION FOR A CHANGE OF VENUE

Johnsen claims the trial court violated his constitutional rights to due process and to an impartial jury by denying his motion for a change of venue. (AOB 85-146.) His claim is without merit because he fails to demonstrate a reasonable likelihood that a fair and impartial trial could not have been had in Stanislaus County at the time that the trial court denied his motion. Nor does he demonstrate a reasonable likelihood that he did not actually receive a fair trial.

A. Summary of Legal Principles

"The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury." (*Skilling v. United States* (2010) 561 U.S. 358, 377.) In furtherance of the right to an impartial jury, Penal Code section 1033 provides that a trial court "shall order a change of venue" if "it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (Pen. Code, § 1033, subd. (a).) "The phrase 'reasonable likelihood' in this context means something less than 'more probable than not,' and 'something more than merely "possible."'" (*People v. Smith* (2015) 61 Cal.4th 18, 39, internal quotation marks omitted.) "The relevant factors are settled: the nature and gravity of the offense, the nature and extent of the media coverage, the size of the community, and the community status of the defendant and the victim." (*Ibid.*)

"On appeal, the defense bears the burden of showing both error and prejudice. It must establish a reasonable likelihood both that a fair trial could not be had at the time of the motion, and that the defendant did not actually receive a fair trial." (*People v. Smith*, *supra*, 61 Cal.4th at p. 39.) The reviewing court will "accept the trial court's factual findings if

supported by substantial evidence, but independently review the court's determination as to the likelihood of a fair trial." (*Ibid.*; see *People v. Suff* (2014) 58 Cal.4th 1013, 1044-1045; *People v. Rountree* (2013) 56 Cal.4th 823, 837.)

B. Procedural Background

In November 1993, Johnsen moved for a change of venue pursuant to Penal Code section 1033. (7 CT 1760-1841.) He argued that there was a reasonable likelihood that a fair and impartial trial could not be held in Stanislaus County due primarily to "wide spread and prejudicial pretrial publicity concerning this action." (7 CT 1760.) He attached to his motion copies of 20 newspaper articles, at least one of which appears to have been a duplicate. (7 CT 1777-1826.) He also attached a report summarizing the results of a survey conducted by Professor Stephen J. Schoenthaler, Ph.D. (7 CT 1827-1841.)

The prosecution opposed the motion. (7 CT 1844-1855.) The prosecution argued, inter alia, that the Schoenthaler survey was deficient due to its "failure to ask interviewees if they could set aside any adverse opinion and decide the case on the basis of the evidence introduced at trial and the law enunciated by the court." (7 CT 1849.) The prosecution also observed that, although there were 35 known television newscasts about the case, all of them aired during the month of the murder in March 1992. (7 CT 1851.) Similarly, nine of the newspaper articles were printed that same month. (7 CT 1850.) And, the eight newspaper articles published closer to the trial in 1993 "were sporadically timed: one appeared in January, one appeared in June, four appeared in July . . ., one appeared in September, and the last article appeared in November." (7 CT 1850.) Moreover, "[o]nly five of the newspaper articles . . . and three of the newscasts . . . mention any evidence which purportedly linked defendant to the crime.

Only two newspaper articles . . . and one newscast . . . refer to statements, admissions, or confessions of the defendant." (7 CT 1852, exclamation mark omitted.)

The court held a four-day hearing on Johnsen's motion in January 1994. (7 CT 1907, 1927, 1946, 1960.) The court viewed the compilation of the known television newscasts, which it summarized as follows:

> Looking at the story on March 1st, 1992, I noted the words "an awful story," "viciously beaten," "tale too horrible to believe," "elderly couple." There were some pictures of the scene outside. And on March 2, 1992, another phrase, "savagely beaten" "vicious attack," "elderly woman dead," "man," "blunt instrument," "police case frustrating," "no motive," "no forced entry," "brutally attacked," description of the scene. There was a picture of the couple talking about four prior break-ins. "The husband's unconscious," "they were a happy couple," "it's a vicious and baffling crime." And they gave a contact number to call the police. And "there's no weapon," "no motive," "senseless crime," "particularly vicious," "wife beaten so viciously," "too terrifying to believe," "search is on for the killer," "no witnesses," "attacked in their sleep," "brutal crime against innocent people," "baffling." Also "vacation visit with death," "a neighbor said this couple lives in fear" -- "they lived in fear," I guess. There were a couple of interviews with neighbors. Can't read the next one.
>
> And I think there were some more. There may have been another one on March 3rd. But I think the next real series of tapes was on March 4th, and it indicated there was a $10,000 reward. Then apparently the media dropped the story at that point in time until Mr. Johnsen was arrested on March 27th, 1992.
>
> We then have some more stories on TV: "Johnson arrested" these are again are phrases that I noted -- "Modesto police believe he allegedly did something," "Mr. Johnson moved clear across town the day after the offense," "the police found some evidence," "Mr. Johnson stated 'What evidence do you have,'" "he's a suspect in other burglaries," "elderly neighbor remembered watching Mr. Johnson at the crime scene and she still shakes because of that," "he's being held without bail."

> Then there was a photo of Mr. Johnsen, a little picture. Talked about the bloody bodies of her parents. Another man stated that -- apparently a neighbor -- that Johnson was always acting very suspicious, and it said the police believe Johnson beat and stabbed.
>
> The Court notes also the Spanish station, although I don't speak Spanish so don't know exactly what they said, but I assume they repeated the same things that the other stations did.
>
> Then March 30th there was another media story on TV with regard to Mr. Johnsen's arraignment. They recapped his story and indicated that the search had turned up evidence linking him to the crime scene.

(5 RT 1266-1268.)

The court also heard testimony from Dr. Schoenthaler who opined that, based on his survey of 239 adults in Stanislaus County, Johnsen could not receive a fair trial due to pretrial publicity. (7 CT 1831; 3 RT 730, 793-794.) Seventy percent of respondents indicated that they had been exposed to at least some degree of pretrial publicity. (7 CT 1834.) Dr. Schoenthaler interpreted the survey results as indicating that pretrial publicity had caused 41 percent of all respondents to prejudge the issue of whether Johnsen was guilty. (7 CT 1838, 3 RT 783-784; 4 RT 862.) He also interpreted the survey results as indicating that 24 percent of all respondents had prejudged the issue of whether Johnsen deserved the death penalty based on pretrial publicity rather than on their own preexisting biases in favor of the death penalty. (7 CT 1838; 3 RT 783-784; 4 RT 862.)

The court also heard contrary testimony from Dr. Ebbe Ebbesen. (7 CT 1927, 1946.) Dr. Ebbesen opined that surveys like the one Dr. Schoenthaler conducted are dubious because "[i]n the huge majority of cases," jurors "do what the court instructs them to do and are willing to set aside their opinion and previously formed attitudes and the things they might have learned about the case and judge the case based on what's

presented during the course of trial." (5 RT 1049-1050.) In any event, Dr. Ebbesen opined that the particular survey Dr. Schoenthaler had conducted was flawed in several regards, which the trial court recited as follows:

> This survey was not conducted in a manner to ensure that the respondents were representative of the individuals who might serve on the jury for this case.
>
> This survey did not ask a sufficient range and variety of questions to provide good evidence about the meaning of the responses that different respondents gave to the key questions. No free recall questions were asked. No recognition test was given for knowledge of factual, probative, inadmissible, and inflammatory items.
>
> Whether the survey respondents would keep an open mind, whether they were willing to convict Johnsen on the basis of what they knew from the media are [*sic*] whether they knew enough to form an opinion about whether Johnsen was guilty beyond a reasonable doubt.
>
> The survey did not ask questions designed to measure the stability of respondent attitudes in the face of trial evidence.

(5 RT 1273-1274.) Even accepting the survey at face value, "[n]o more than 20 percent of the venire have knowledge and attitudes that might prevent them from serving in a fair manner." (5 RT 1274.) "Most of the respondents were not highly exposed to the media." (5 RT 1275.) "Most of respondents did not form an opinion that Johnsen is guilty before they responded to the survey." (5 RT 1275.) "Many of those who did believe that Johnsen was guilty were probably predisposed to believe in his guilt by other attitudes that they had toward the criminal justice system." (5 RT 1275.)

The court ultimately denied Johnsen's motion for a change of venue, concluding at length that the defense had not "met its burden in demonstrating that there is a reasonable likelihood that the defendant could not get a fair and impartial trial in Stanislaus County." (5 RT 1276, 1278.)

The court also observed, however, that Johnsen could renew the motion for a change of venue based on the circumstances arising during the selection of the jury. (5 RT 1277.)

During the proceedings to select a jury, the trial court excused many prospective jurors due to hardships and asked the remaining 140 prospective jurors about their exposure to pretrial publicity. (See 8 RT 1786; 1 CTJQ 11-12.) However, it appears that the court did not initially advise 24 of those 140 prospective jurors about the alleged facts of the case, and that the court excused 7 of those 24 prospective jurors before correcting its oversight. (See 12 RT 2619-2626; 14 RT 2833-2869.) Of the remaining 133 prospective jurors who had been advised of the alleged facts of the case, Johnsen concedes that only 59 indicated that they had been exposed to at least some degree of pretrial publicity. (AOB 103-105.) Of the 59 prospective jurors who had been exposed to pretrial publicity, the court excused 14 of them for various forms of cause. (8 RT 1819; 9 RT 1991, 1998-1999, 2089-2090; 12 RT 2475, 2489-2490, 2531-2543, 2586, 2622, 2684; 14 RT 2849, 2853, 2855-2856, 2934-2935.)

Before Johnsen used any of his 20 peremptory challenges on the remaining jurors, he asked the court for an additional allotment of challenges due to the pretrial publicity. The trial court denied his request and observed that the responses of the prospective jurors had "affirmed [its] position on the change of venue motion" because "there isn't the pretrial publicity that the defendant thought there was going to be." (15 RT 3023.)

> There were very few people, first of all, who had earn [*sic*] heard about the case compared to the number of people that actually came in. Of those people that did read something in the newspaper, most of them had forgotten all about it. Of the ones that did indicate they remembered something about it, there were some of those, but that was several years ago. Almost all jurors that appeared said they wouldn't have any -- hadn't formed any opinions, wouldn't have any problem excluding

> things from their mind. [¶] It indicates to me that the theory that the passage of time lessened the impact of pretrial exposure really applied in this particular case.

(15 RT 3022-3023.) Indeed, "any publicity that anyone had received was so attenuated and so long ago that it didn't have any effect at all." (15 RT 3023-3024.)

Johnsen subsequently used one of his peremptory challenges to remove a prospective juror whom he had unsuccessfully challenged for cause based on the prospective juror's exposure to pretrial publicity. (15 RT 3047.) Johnsen did not use any of his 19 remaining challenges to remove any of the other sworn jurors. (*Ibid.*)

C. Johnsen Fails to Demonstrate a Reasonable Likelihood That He Could Not Have a Fair and Impartial Trial in Stanislaus County at the Time of His Motion for a Change of Venue

Contrary to Johnsen's assertion, the trial court did not err by denying his motion for a change of venue. Indeed, he fails to "establish a reasonable likelihood . . . that a fair trial could not be had at the time of the motion." (*People v. Smith*, *supra*, 61 Cal.4th at p. 39.)

1. The nature and gravity of the offense provided only slight support for a change of venue

Johnsen claims that "the nature and gravity of the offense are factors militating strongly in favor of a change of venue." (AOB 109-113.) The trial court observed there was no dispute that "it's a serious offense. You can't have a more grave offense than murder. In this case there's also an assault of two persons while sleeping. They're elderly people. Obviously these are very serious and grave offenses that are pending against the defendant." (5 RT 1260.) However, no matter where the case was tried, "those factors go with the case. The age of the victims, the fact -- the way they were killed, all those factors run with the case." (5 RT 1266.)

The trial court's determination was entirely correct. As this Court has observed, "'every capital case presents a serious charge. This factor adds weight to a motion for change of venue, but is not dispositive.'" (*Smith, supra*, at p. 40.) And, although the crimes involved gruesome details, there was "nothing approaching the sensational overtones of other cases in which [this Court has] upheld the denial of venue motions. [Citations.] Nor were the circumstances of the crime apt to be particularly prejudicial in [Stanislaus] County, as opposed to an alternate venue." (*Ibid.*)

2. The nature and extent of media coverage did not support a change of venue

Johnsen claims that, although the media coverage was not extensive, the nature of that coverage favored a change of venue for several reasons. (AOB 113-125.) He complains that the media coverage was "inflammatory" because it "portrayed the crime in graphic, sensational terms" and because it suggested that Johnsen himself "(1) was responsible for the large tum-over in counsel which was costing the county thousands of dollars, and (2) was dismissing counsel right and left in order to delay his trial." (AOB 114-119.) He also complains that "the publicity described both actual and non-existent evidence, statements and circumstances strongly pointing to appellant's guilt." (AOB 119-123.) He refers specifically to articles accurately reporting the existence of his confession to fellow inmate Holland and inaccurately reporting that "detectives found a bloody hammer, bloody tennis shoes and several of Sylvia Rudy's possessions in appellant's apartment." (AOB 119-123.) He further complains that "the press informed the public of highly prejudicial inadmissible evidence: appellant's involvement in another homicide [citation] and appellant's invocation of his Fifth Amendment right to refuse to speak to the police." (AOB 123-125.)

His complaints are unavailing. "[T]here is no requirement that jurors be totally ignorant of the facts of a case, as long as they can lay aside their impressions and render an impartial verdict." (*People v. Lewis* (2008) 43 Cal.4th 415, 450.) "'When pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base [the] evaluation on [the judge's] "own perception of the depth and extent of news stories that might influence a juror."'" (*People v. Famalaro* (2011) 52 Cal.4th 1, 24, quoting *Skilling v. United States*, *supra*, 561 U.S. at p. 386.)

Here, the trial court observed that "certainly there was some sensationalism at the time" of the offense, which was "typical of the TV." (5 RT 1269.) However, the coverage was not "continuing or sustained. It was diluted over the passage of time." (5 RT 1269.) Indeed, "most of the heavy publicity in this case occurred . . . in the month of March when the offense occurred and with the arrest of Mr. Johnsen. Since then it's decreased, and the type of language that's been used in the articles has decreased." (5 RT 1269.) The court also observed that, although the news media had "mentioned the confession," the court had "effectively . . . precluded the press from getting that information" because the court had "closed the hearings." (5 RT 1270.)

The trial court also observed that it had "serious doubts about the validity of the defendant's survey. Including the number of people surveyed, the questions asked, the way the questions were asked, how they were asked, the telephone versus face-to-face type of survey, and the statistical information gleaned as a result of the survey." (5 RT 1272.) "The People's expert also testified the defendant's evidence did not show the high numbers of persons that were so affected that they could not be fair and impartial." (5 RT 1272.) Moreover, the court observed that the

defense's expert "did do some editorializing in both his report and in his testimony" which "indicated some bias as towards the defense. He seemed to be . . . angling for a job to help formulate the voir dire whether in this case or some other case." (5 RT 1272.)

When the trial court denied Johnsen's subsequent request for additional peremptory challenges, the court observed that few of the prospective jurors had even "heard about the case compared to the number of people that actually came in. Of those people that did read something in the newspaper, most of them had forgotten all about it." (15 RT 3022-3023.) "Almost all jurors that appeared said they . . . wouldn't have any problem excluding things from their mind." (15 RT 3023.) Accordingly, "any publicity that anyone had received was so attenuated and so long ago that it didn't have any effect at all." (15 RT 3023-3024.)

The trial court's observations were entirely correct. "The passage of time ordinarily blunts the prejudicial impact of pretrial publicity." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1077.) Moreover, "[m]edia coverage is not biased or inflammatory simply because it recounts the inherently disturbing circumstances of the case.'" (*People v. Suff, supra*, 58 Cal.4th at p. 1048, quoting *People v. Harris* (2013) 57 Cal.4th 804, 826.) Although some of the media coverage contained information that was supposedly inaccurate or otherwise inadmissible at trial, the overwhelming majority of the prospective jurors did not indicate any awareness of the information. And, even if they were aware of the information, it was not so pervasive or damaging as to cast doubt on their ability to decide the case based only on the evidence admitted at trial. (See *People v. Smith, supra*, 61 Cal.4th at p. 43.) As a result, the nature and extent of media coverage did not support Johnsen's request for a change of venue.

3. The size of the community did not support a change of venue

Johnsen claims that "the size of community must be viewed as a neutral factor in the present case; it is a factor which neither favors nor disfavors a change of venue here." (AOB 125-126.) The trial court observed that the parties had stipulated "to the size of the community being 405,000 people in Stanislaus County. It's not the largest county in California and it's not the smallest." (5 RT 1261.) "It appears to me that it's a medium sized county in California." (5 RT 1262.) "So while it's a factor, it's certainly not a determinative factor." (5 RT 1261.) Respondent agrees that, "[t]hough not one of the state's major population centers, the county is substantially larger than most of the counties from which this court has ordered venue changes. [Citation.] Thus, the county's size does not weigh in favor of a venue change." (*People v. Coleman* (1989) 48 Cal.3d 112, 134; see *People v. Vieira* (2005) 35 Cal.4th 264, 280.)

4. Johnsen's status in the community did not favor a change of venue

Johnsen claims that his status in the community favored a change of venue. (AOB 127-128.) He relies on newspaper articles published after his crimes that depicted him as being "a weird, drug-dealing stranger who had been involved in another homicide" and "who had 'dropped out' of any type of community life and had few, if any, close friends." (AOB 128, 130.)

However, the trial court was "not sure those articles were offered for that purpose." (5 RT 1263.) Indeed, Johnsen provided the trial court with "very little evidence . . . as to what the defendant's status is or was." (5 RT 1262.) "There's no evidence that the defendant was well-known in this community or a public figure or that he grew up in Modesto and lots of people know him, whether he went to school here or high school or

anything of that nature." (5 RT 1263.) Rather, the hearsay contained in the newspaper articles indicated that "he just had moved to Modesto." (5 RT 1263.)

Indeed, the newspaper articles did not suggest that Johnsen was known to the community prior to the charged offenses. (See *People v. McCurdy*, *supra*, 59 Cal.4th at p. 1079; see *People v. Famalaro*, *supra*, 52 Cal.4th at p. 23.) And, there was no evidence that Johnsen was "associated with any group (such as a disfavored racial minority or juvenile street gang) towards which the community was 'likely to be hostile.'" (*Famalaro*, *supra*, at p. 23.) As a result, Johnsen's status in the community did not favor a change of venue.

5. The status of the victims in the community did not favor a change of venue

Johnsen claims that the status of the victims in the community favored a change of venue. (AOB 127-131.) He relies on newspaper articles describing Rudy as being "an upstanding member of the community" who "worked for a prominent financial institution" that "was offering a reward of $10,000 for information leading to an arrest." (AOB 128-129.) He also argues that "the media created enormous community sympathy" for the victims. (AOB 129-131.)

However, the trial court observed that "there really isn't any evidence in front of the Court on that subject." (5 RT 1264.) "Their daughter does live here or was living here, and that's basically their tie to Modesto. And they were visiting for a vacation. There's no other evidence presented before the Court of relatives, friends, business associates in this community." (5 RT 1264.) "So as far as the status of the victims, it's again negligible in this particular community." (5 RT 1265.)

Indeed, the victims "came to the public's attention only because [Mrs. Bragg] was a murder victim." (*People v. Harris*, *supra*, 57 Cal.4th at p/

829.) "[A]ny features of the case that gave the victim prominence in the wake of the crimes would inevitably have become apparent no matter in which venue defendant was tried." (*Ibid.*) "'Prospective jurors would sympathize with the [victims'] fate' no matter where the trial was held and this sympathy stems from the nature of the crime, 'not the locale of the trial.'" (*People v. Davis* (2009) 46 Cal.4th 539, 578; see *People v. Famalaro*, *supra*, 52 Cal.4th at pp. 23-24.) As a result, the status of the victims in the community did not favor a change of venue.

Johnsen accordingly fails to demonstrate that any one factor was sufficient by itself to warrant a change of venue. Even considering all of the factors together, he fails to satisfy his burden of demonstrating a reasonable likelihood that he could not receive a fair trial in Stanislaus County. (*People v. Smith*, *supra*, 61 Cal.4th at p. 39; see *People v. McCurdy*, *supra*, 59 Cal.4th at p. 1077.)

D. Johnsen Fails to Demonstrate a Reasonable Likelihood That He Did Not Actually Receive a Fair Trial by an Impartial Jury

Even if the trial court erred by denying Johnsen's motion for a change of venue, the error was harmless because Johnsen fails to demonstrate a reasonable likelihood that he "did not actually receive a fair trial." (*People v. Smith* (2015) 61 Cal.4th 18, 39; see *People v. Johnson* (2015) 60 Cal.4th 966, 983.) Johnsen first argues that he did not actually receive a fair trial because "(1) numerous prospective jurors had heard about and were familiar with details of the case through newspaper articles and television coverage; and (2) many were impacted by their exposure to publicity." (AOB 135-142.) However, Johnsen cannot demonstrate prejudice based on the impact that pretrial publicity had on any prospective juror or alternate juror who was not sworn to try the case. (See *People v. Johnson*, *supra*, 60 Cal.4th at p. 983.)

As to the jurors who were actually sworn to try the case, Johnsen observes that five of them had been exposed to pretrial publicity. (AOB 136.) He focuses in particular on the exposure of Juror No. 8. (AOB 141-142.) As previously mentioned, Juror No. 8 said that she was inclined to believe that Johnsen was guilty based in part on "reading the articles and seeing what is on television." (13 RT 2717-2718, 2721.) However, she had not "totally made up [her] mind." (13 RT 2718.) She also said that she did not "feel that the publicity in this case would affect [her] decision in arriving at a penalty." (13 RT 2722.) She said that she understood the admonition that she "would have to rely on the evidence presented during the course of the trial and not from any other source" and that anything she had "read in the newspaper or saw on television has nothing to do with the case." (13 RT 2717, 2722.) The court was "satisfied with her answers here at least as to pretrial publicity. She hasn't been so prejudiced that she couldn't keep an open mind." (13 RT 2722.)

As to four other sworn jurors who had been exposed to pretrial publicity, Juror No. 1 indicated that he had read newspaper headlines about the case and knew that the elderly victims were on vacation and that they were attacked while their daughter was away. (9 CTJQ 2315-2316.) He did not recall anything about the person charged. (9 CTJQ 2316; 13 RT 2732.) He assured the court that he would be able to exclude anything he had read about the case and decide the case based only on the evidence presented during the trial. (13 RT 2732-2733.)

Juror No. 4 had read newspaper accounts of the deaths when they occurred, but she had not read anything else about the case since then. (6 CTJQ 1701.) She recalled that the victims were from out-of-state and were staying in their daughter's house, but she did not remember anything about the person charged. (6 CTJQ 1702; 11 RT 2366.) She had formed no opinions about the case based on what she had read. (11 RT 2366.) She

said that she would be able to keep an open mind, observing that "it was so long ago." (11 RT 2367.)

Juror No. 6 had read newspaper articles but recalled nothing about the case. (5 CTJQ 1285-1286.) He remembered reading in the Modesto Bee that there was a robbery off of Robin Hood Drive. (10 RT 2137.) Two older people were visiting and they were both beaten-up and one was killed. (10 RT 2137.) He saw nothing about the case on television. (10 RT 2137.) He had not formed any opinions about the case based on what he had read. (10 RT 2138.)

Juror No. 10 remembered reading newspaper accounts about the crimes when they happened. (2 CTJQ 375.) She remembered that the person who was charged lived nearby and that the police had picked him up. (2 CTJQ 376.) She remembered that the victims were from out-of-town and were visiting their daughter. (2 CTJQ 376.) During voir dire, she elaborated that she remembered the neighborhood where the crimes had occurred because it was near her daughter's ballet studio. (8 RT 1828-1829.) She remembered nothing else about the case except that someone who had lived in the neighborhood had been "picked up." (8 RT 1829.) She did not remember seeing anything on television or hearing anything on the radio about the case. (8 RT 1829.) She had formed no impressions about the case and noted that she had no idea who had been picked up. (8 RT 1829.) She stated that she would have no problem listening to the evidence and basing her decision on that evidence alone. (8 RT 1830.)

Johnsen now suggests that, even though all of the sworn jurors had assured the court that they would be impartial, there is a reasonable likelihood that they were not actually willing or able to disregard the pretrial publicity. His suggestion is without merit because "juror *impartiality* . . . does not require *ignorance*." (*Skilling v. United States*, *supra*, 561 U.S. 358, 381, original italics.) Jurors "need not enter the box

with empty heads in order to determine the facts impartially." (*Id.* at p. 398.) In addition, the pretrial publicity was not "'so pervasive and damaging' as to cast doubt on the jurors' assurances of impartiality." (*People v. Smith, supra*, 61 Cal.4th at p. 43.) "'The trial court, which observed the jurors' demeanor, expressly found they had demonstrated an ability to set aside any preconceived impressions derived from the media.' [Citation.] This was sufficient." (*People v. Rountree, supra*, 56 Cal.4th at p. 840.)

Moreover, Johnsen did not use any of his 19 remaining peremptory challenges to remove Juror No. 8 or any of the other sworn jurors who had been exposed to pretrial publicity. "'The failure to exhaust peremptories is a strong indication "that the jurors were fair, and that the defense itself so concluded." [Citation.]' [Citation.] This last point can be decisive. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 524; see *People v. McCurdy, supra*, 59 Cal.4th at p. 1080; *People v. Prince* (2007) 40 Cal. 4th 1179, 1215-1216.) As a result, Johnsen fails to satisfy his burden of demonstrating prejudice because he cannot show reasonable likelihood that he did not actually receive a fair trial by an impartial jury.

II. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY DENYING JOHNSEN'S MOTION TO SUPPRESS HIS CONFESSION UNDER *MASSIAH*

Johnsen claims at length that the trial court erred by denying his motion to suppress the statements that he had made to fellow inmate Eric Holland. (AOB 147-264.) Specifically, he argues that the statements were inadmissible because members of the prosecution team had induced Holland to elicit the statements from him in violation of his Sixth Amendment right to counsel under *Massiah v. United States* (1964) 377

U.S. 201.[6] His claim is without merit. Many of the incriminating statements involved offenses for which the right to counsel had not yet attached. And, as to the incriminating statements about offenses for which the right to counsel had attached, there was substantial evidence supporting the trial court's determination that Holland had acted on his own initiative without any inducement from the prosecution team.

A. Summary of Legal Principles

This Court has summarized as follows the well-established principles regarding *Massiah* claims:

> In *Massiah* . . . the high court held that once a judicial proceeding has been initiated against an accused and the Sixth Amendment right to counsel has attached, any statement the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against the defendant. [Citations.] To prevail on a *Massiah* claim, a defendant must show that the police and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. [Citations.] "Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements." [Citation.] The requirement of agency is not satisfied when law enforcement officials "merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance." [Citation.] A preexisting arrangement, however,

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[6] Johnsen does not appear to renew his claim at trial that the prosecution team violated his Fifth Amendment rights under *Miranda v. Arizona* (1966) 384 U.S. 436. Indeed, the Fifth Amendment "does not apply to noncustodial police interrogation or to nonpolice custodial interrogation. When a defendant talks to a fellow inmate, the coercive atmosphere of custodial police interrogation is absent." (*People v. Williams* (1988) 44 Cal.3d 1127, 1142; see *Illinois v. Perkins* (1990) 496 U.S. 292, 296, 300.)

> need not be explicit or formal, but may be inferred from evidence of the parties' behavior indicative of such an agreement. [Citation.] A trial court's ruling on a motion to suppress informant testimony is essentially a factual determination, entitled to deferential review on appeal. [Citation.]

(*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 66-67; see *People v. Dement* (2011) 53 Cal.4th 1, 33-34.)

B. Procedural Background

Johnsen filed a motion in limine to suppress the confession and other statements he made to fellow inmate Holland under *Massiah*. (5 CT 1200-1216.) He attached to his motion, inter alia, transcripts of the recorded meetings between Holland and members of the prosecution team that had occurred on June 26, July 3, September 4, and September 17, 1992. (5 CT 1207-1216, 1218-1243, 1244-1302, 1303-1359, 1360-1373.) The prosecution opposed the motion, arguing that Holland had not been acting as a government agent when he elicited the incriminating statements from Johnsen. (6 CT 1518-1531.)

At the hearing on the suppression motion, Holland testified that he met Johnsen while they were both incarcerated in the Stanislaus County Jail in June 1992. (1 RT 178, 184.) Holland was serving a federal sentence while awaiting trial in state proceedings. (1 RT 178-181.) He had never "given any information to law enforcement officials of any type." (1 RT 183.)

Johnsen was eventually housed in a cell next to Holland's cell. (1 RT 184-185.) Holland "overheard conversations that he was having with other trustees that he was trying to get things done having to do with his case." (1 RT 185.) Johnsen and Holland started passing notes back and forth between their cells. (1RT 201-202, 246.) At some point, Johnsen

"confided in [Holland] some things that he had done." (1 RT 189.) Johnsen "kept contradicting himself at the very beginning then he kept implicating himself more and more . . . ." (1 RT 221.)

Holland eventually told Johnsen that he would be willing to kill certain witnesses and law enforcement officers for him. (1 RT 267.) Johnsen offered Holland collateral in the form of a written confession. (1 RT 216, 266-267.) The confession that Johnsen initially offered was for his role in the murder of Terry Holloway in San Diego. (1 RT 216, 266.) Holland told him that such a confession would be insufficient collateral because Holland would not be able to verify its accuracy. (1 RT 216-217.)

The revelations from Johnsen had an emotional toll on Holland. He testified, "[I]t kept eating on me that this person had done these things and especially when he admitted to me how he ended up being involved in killing his girlfriend and his unborn child." (1 RT 246.) "And then when I heard about what was going on with the things that happened here in Modesto, it really messed with my head." (1 RT 246.)

> [T]here was no reason for it. He did it just because he wanted to see if he could get away with killing somebody. I mean, the way he explained it and the way he said he got dressed to kill, the way he wanted to do it. Because it was the last day to murder, just the way that he said everything. There was no reason for it. It wasn't burglary. It wasn't to gain anything. It was just to kill some people or I should say it was to kill the daughter. Because obviously he didn't know, from what I have gathered from this whole thing, that he even knew that the senior couple were even there. He got the cars mistaken. He thought that the lady was there.

(1 RT 247.) Holland decided to tell his attorney about the revelations that Johnsen had made to him and about the notes that they had exchanged. (1 RT 190.)

After Johnsen had provided Holland with all of the details of the crimes, Holland contacted his own defense counsel, Joe Rozelle. (1 RT

187-190.) Holland showed Rozelle the notes that he and Johnsen had exchanged about Johnsen's crimes. (1 RT 189.) Holland told Rozelle that he wanted to turn over the information to the District Attorney, but that he did not want to testify or have any further involvement in the case. (1 RT 190, 248-249.) Rozelle arranged a meeting between Holland and District Attorney's Investigator Antone. (1 RT 190.)

As revealed in the transcript of the meeting between Holland and Investigator Antone on June 26, 1992, Holland told Antone that he had information regarding "the reason why" Johnsen committed the offenses and "about how it was done, how the victims were slain." (5 CT 1222.) Antone said that, although he was definitely interested in the proffered information, Holland would need "to lay out the cards" and provide "more information . . . as to what he knows." (5 CT 1224, 1230.) Antone also reassured Holland that he could share information without fear of reprisal because the investigation was still ongoing, and the prosecution would withhold the information from the defense until 30 days before the trial. (5 CT 1228-1229.)

Holland told Investigator Antone that Johnsen had revealed that both he and Landrum were involved in the attack on the Braggs. "One did one, one did the other." (5 CT 1233.) Holland elaborated as follows:

> He um the old lady's um wrists were cut. The old man, the reason why he's uh, didn't get stabbed as many times is because the claw hammer uh, was beat almost a inch in his forehead, and uh, he stabbed him in the throat a couple of times both of them, and it took a long time for him to kill them. He was there for almost two hours, couldn't believe that they didn't die, and um, he stabbed them in the chest. She, she came out of it, the reason why he didn't get stabbed as much is because he was (unintelligible). Um, because he got beat so bad in the head, uh he thought he was dead.

(5 CT 1233.) Holland also said that Johnsen had written a list of the addresses, telephone numbers, and vehicles of the people whose murder he was soliciting. (5 CT 1231.)

Holland later asked Investigator Antone whether he was breaking the law by falsely telling Johnsen that he was willing to murder the people on Johnsen's list. (5 CT 1238.) Antone assured Holland that he would not be subject to prosecution for such misrepresentations. (5 CT 1238, 1240.) Antone nonetheless advised Holland, "[I] want you to understand that I'm not asking you to be a police agent and do these things for me." (5 CT 1238.) Holland asked, "Should I continue, should I stop? Do you prefer I not say anything before you advise me on that[?] What, what should I use my own judgment[?]" (5 CT 1239.) He elaborated that Johnsen was going to tell him that night about how he had been involved in a murder in San Diego. (5 CT 1239.) Antone answered, "Well, that's, that's up to you Eric." (5 CT 1239.) Holland's lawyer reiterated, "The only agreement that they're making with you at the moment is not to use any of this against you." (5 CT 1240.) Antone also had Holland sign an "agreement regarding the initial meeting between potential informant an prosecution" form to that same effect. (5 CT 1238, 1240, 1243; see 1 RT 293-294.)

During a subsequent meeting on July 3, 1992, Holland told Investigator Antone that he could arrange for Johnsen's confession to be in writing. (5 CT 1253, 1263, 1297-1298.) However, Holland was unwilling to give Antone anything that was in Johnsen's own handwriting until he had a deal with the prosecution. (5 CT 1254.) Antone admonished Holland, "If you have any idea that you even think you're working for us, stop." (5 CT 1297.) "[D]on't go out of your way to put yourself in Jeopardy. I mean you know you act on your conscience Eric." (5 CT 1298.) "[I] don't want, I don't want you to do anything to try and make my case better." (5 CT 1298.)

A few days later, Holland received a 14-page confession from Johnsen. (1 RT 218, 284.) Holland later testified at the suppression hearing, however, that Johnsen had already told him all of the information contained in the written confession before Holland first met with the prosecution team back on June 26. (1 RT 250-251.)

In the interest of getting "to the heart of the matter," the court asked Holland the following:

> THE COURT: Let me ask you something. As of -- after meeting with Mr. Antone on June 26th, 1992, did anyone from law enforcement tell you to continue to gather information --
>
> [HOLLAND]: Never.
>
> THE COURT: -- from the defendant?
>
> [HOLLAND]: Never.
>
> THE COURT: After the meeting on July 3rd, 1992, did anyone from law enforcement tell you to continue to gather information --
>
> [HOLLAND]: Never.
>
> THE COURT: -- from the defendant?
>
> [HOLLAND]: No one ever asked me to get information on anything. I did this all on my own.

(1 RT 265-266.) Holland also denied that anybody told him that he would not be moved to a different cell until he produced handwritten confessions from Johnsen. (1 RT 280.) Finally, jail records confirmed that no one from the prosecution team had made a special requests that Holland be housed near Johnsen. (2 RT 314.)

The trial court ultimately denied Johnsen's motion. (2 RT 352-356.) The court found, inter alia, that "[a]s of the June 26th, 1992 meeting, Mr. Holland basically had the information against Mr. Johnsen. He had notes, he had been talking with Mr. Johnsen, it wasn't anything that the police had

set up. He contacted them." (2 RT 352.) "At that meeting, Mr. Antone indicated that he was interested, but did not make Holland an agent. He did not instruct him to elicit the information." (2 RT 352.) "As of the second meeting on July 3rd, 1992, he was still not an agent. . . ." (2 RT 352.) "His motives, as he testified to, were moral, ethical . . . ." (2 RT 352.) However, there was "[s]ome self-interest involved in the case. It's a mixture of the two." (2 RT 353.) "But at that point there were no inducements made to him to do this." (2 RT 353.) "There was no conditioning of the move of Mr. Holland by Mr. Antone." (2 RT 354.) Although "Mr. Antone told him that he would be moved when they got the papers and notes," "the police would probably be remiss if they didn't attempt to move him to some location at some point, some different location for his own safety." (2 RT 353.) "Mr. Antone told him he wasn't to consider himself a police agent. Now that can be deemed as self-serving statement by Mr. Antone, but in this case I don't think it was." (2 RT 354.) "We don't have any payment of money in this particular case. And I don't think any deal was made with Mr. Holland before the information was finally received by the People." (2 RT 354.) "Focusing on the state's conduct as a whole in this particular case, I don't think there's agency created." (2 RT 355.)

C. The Trial Court Correctly Determined That Holland Was Not Acting as a Government Agent

Johnsen claims that his Sixth Amendment rights had attached for purposes of *Massiah* once he was charged with the offenses that had occurred inside the Rudy residence. (AOB 123, 181, 188.) He further claims that the supposed violation of *Massiah* warranted the suppression not only of his statements regarding those offenses, but also of his statement regarding the prior murder of Terry Holloway in San Diego. However, the Sixth Amendment right to counsel at issue in a *Massiah*

claim "is offense specific" and "does not attach until a prosecution is commenced, that is, '"at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."'" (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175; see *People v. Thornton* (2007) 41 Cal.4th 391, 434.) "[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." (*Maine v. Moulton* (1985) 474 U.S. 159, 180.) Here, although the Sixth Amendment had attached to the charged offenses that had occurred inside the Rudy residence, Johnsen has not demonstrated that a prosecution had commenced against him as to the murder of Terry Holloway. As a result, his claim that the trial court erred by not suppressing those statements during the penalty phase appears to be a nonstarter.

In any event, the trial court was correct in determining that Holland was not acting as a government agent when he elicited the incriminating information from Johnsen. As previously mentioned, "[t]he requirement of agency is not satisfied when law enforcement officials 'merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance.'" (*People v. Coffman & Marlow*, *supra*, 34 Cal.4th at p. 67.) In addition, "a general policy of encouraging inmates to provide useful information does not transform them into government agents; some specific action 'designed deliberately to elicit incriminating remarks' is required." (*People v. Williams*, *supra*, 44 Cal.3d at p. 1141.)

Johnsen argues that his case is similar to *United States v. Henry* (1980) 447 U.S. 264. However, the informant in *Henry* "was acting under

instructions as a paid informant for the Government." (*Id.* at p. 270.) Indeed, he "had been a paid Government informant for more than a year" and an FBI agent was paying him "on a contingent-fee basis" in which he "was to be paid only if he produced useful information." (*Ibid.*) "Even if the agent's statement that he did not intend that [the informant] would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." (*Id.* at p. 271.)

Here, the trial court correctly found that Johnsen's reliance on *Henry* was unavailing because "[w]e don't have a paid informant here." (2 RT 354-355.) Indeed, Holland had never "given any information to law enforcement officials of any type." (1 RT 183.) Although Investigator Antone told Holland that he was interested in the information that Holland already had about Johnsen, he did not direct Holland to obtain additional information. (1 RT 265-266.) Nor did Antone tell Holland that he would receive additional rewards for obtaining additional information. Rather, Antone specifically and sincerely told Holland not to gather additional information from Johnsen in the hope of sweetening his own deal. (5 CT 1297-1298; 2 RT 354.) As a result, Johnsen's reliance on *Henry* is unavailing because Holland had not been "acting under instructions as a paid informant for the Government." (*United States v. Henry*, *supra*, 447 U.S. at p. 270.)

Johnsen also relies on the rule in *Maine v. Moulton*, *supra*, 474 U.S. 159 that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." (*Id.* at p. 176.) Johnsen's reliance is misplaced because there was no dispute over agency in *Moulton*; the informant was "equipped with a body wire transmitter to record what was said at the meeting." (*Id.* at p.

164.) Here, in contrast, Holland was not a government agent for reasons previously discussed. As a result, Johnsen's reliance on *Moulton* is insufficient to demonstrate a violation of *Massiah* in the present case.

Finally, Johnsen relies on *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, in which the informant named Moore "came to the attention of prosecutors when he gave them a letter asking for leniency and mentioning that he was [the defendant's] cellmate." (*Id.* at p. 1139.) Although "there was no explicit deal under which Moore was promised compensation in exchange for his testimony," it was "clear that Moore hoped to receive leniency." (*Id.* at p. 1144.) Here, however, the trial court found that Holland's motives were mixed. (2 RT 352-353.) Moreover, it was not clear that Holland hoped to receive leniency in exchange for eliciting additional information from Johnsen rather than in exchange for the information that he had already received from Johnsen. As a result, Johnsen fails to demonstrate that the trial court erred by concluding that there was no violation of *Massiah* in the present case because Holland had not been acting as a government agent when he elicited the incrimination information from Johnsen.

D. Any Error Was Harmless

Even if the trial court erred by admitting the statements that Johnsen made to Holland, the error was harmless. As the United States Supreme Court has "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) The Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Ibid.*; see *Chapman v. California* (1967) 386 U.S. 18, 24.) A finding of harmless

error does not require a finding "'that the jury was totally unaware of that feature of the trial later held to have been erroneous.'" (*People v. Harris* (1994) 9 Cal.4th 407, 425-426.) Rather, an error may be harmless if it is "'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*Id.* at p. 426, italics omitted.)

Here, Johnsen does not appear to dispute that there was no error in admitting evidence from Holland regarding statements that Johnsen made to him before Holland ever met with the prosecution team on June 26, 1992. Holland testified that Johnsen had already told him all of the information contained in the written confession before Holland first met with the prosecution team. (1 RT 250-251.) As a result, all of the information was admissible, albeit not in the form of the written confession that Holland received from Johnsen after July 3, 1992. Moreover, the physical evidence, the forensic evidence, and the testimony from eyewitnesses regarding Johnsen's possession of property stolen from the Rudy residence corroborated the fact that Johnsen was involved in the murder. As a result, any error was harmless beyond a reasonable doubt.

III. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY NOT INSTRUCTING THE JURORS ON PRINCIPLES REGARDING ACCOMPLICE TESTIMONY

Johnsen claims that the trial court erred by not instructing the jurors that (1) they should view the testimony of an accomplice with caution and (2) they could not convict him based on accomplice testimony absent corroboration. (AOB 265-286.) He argues that the court was obliged to provide such instructions sua sponte because there was substantial evidence upon which the jury could have concluded that Landrum was an accomplice to all of the offenses occurring in the Rudy residence. His claim is without merit because, although there was substantial evidence upon which the jurors could have concluded that Landrum was an

accessory, there was not substantial evidence that he was an *accomplice*. And, in any event, the alleged error was harmless because there was sufficient corroboration and it is not reasonably probable that instructions on accomplice testimony would have caused the jurors to reach a different verdict.

A. Summary of Legal Principles

Penal Code section 1111 provides that "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (Pen. Code, § 1111.) An accomplice is defined as being anyone "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (*Ibid.*) "'A witness is liable to prosecution within the meaning of section 1111 if he or she is a principal in the crime.' [Citation.] A principal includes those who 'directly commit the act constituting the offense' and those who 'aid and abet in its commission.' [Citation.]" (*People v. Carrasco* (2014) 59 Cal.4th 924, 968.) "A mere accessory, however, is not liable to prosecution for the identical offense, and therefore is not an accomplice." (*People v. Horton* (1995) 11 Cal.4th 1068, 1114; see *People v. Gonzales* (2011) 52 Cal.4th 254, 302.)

A trial court must instruct the jury on "the principles regarding accomplice testimony," including the principles that "an accomplice's testimony implicating the defendant must be viewed with caution and corroborated by other evidence," if there is "substantial evidence that a witness who has implicated the defendant was an accomplice." (*People v. Houston* (2012) 54 Cal.4th 1186, 1223.) "Substantial evidence is 'evidence sufficient to "deserve consideration by the jury . . . ."'" (*People v. Lewis* (2001) 26 Cal.4th 334, 369.)

B. Summary of Evidence Implicating Landrum

1. Landrum possessed and transferred stolen property

Landrum testified that, on the afternoon of February 15, 1992, Johnsen showed him some of the property that he had stolen from the Rudy residence earlier that same day. (15 RT 3261-3262.) Johnsen also asked Landrum to help him steal a television set that remained in the residence, but Landrum refused to do so. (15 RT 3260-3261.) Four days later, Johnsen asked Landrum to remove the stolen property from Johnsen's apartment, lest the police find it while executing a search warrant after arresting him for failing to appear. (15 RT 3265-3266; 20 RT 4396.) Landrum complied and gave the stolen property to Johnsen's mother later that same day. (15 RT 3266-3269.)

Rudy testified that a camera had been among the items stolen on February 15, 1992. (15 RT 3178.) Landrum testified that, on the evening of February 29, 1992, he and Johnsen took a camera to the home of Linda Lee and traded it for drugs. (16 RT 3291.) Lee testified that she never purchased stolen property from Johnsen, but that she did purchase a stolen camera from Landrum sometime around Valentine's Day 1992. (16 RT 3414.) However, she did not explain the basis of her belief that the camera had been stolen. (16 RT 3414.)

Landrum also testified that, during the first week of March 1992, he and Johnsen gave a bag of merchandise to Landrum's mother. (16 RT 3297-3298.) Landrum did not look in the bag and was not aware of its content. (16 RT 3297.)

Landrum further testified that, sometime around March 23, 1992, his mother pleaded with him to remove some telephones, a calculator, and a box of jewelry from her house. (16 RT 3279-3281, 3299-3300.) Landrum had not previously seen the property. (16 RT 3299.) Indeed, Linda Lee

and Johanna Oliver testified that, on the night of March 1, 1992, Johnsen gave Lee a bag containing at least two telephones and a calculator, and asked Lee "to get rid of it where no one would ever see it again." (16 RT 3365-3367, 3403-3404.) Lee did not want the items, so she convinced Landrum's mother to take them. (16 RT 3369, 3405-3406.)

2. Landrum had a bandaged hand

Johnsen's mother testified that, when Landrum came to help her move out of her apartment on the morning of March 1, 1992, he had a bandage on his left hand. (19 RT 4014.) Her coworker, David Johnson, similarly testified that he saw a gauze bandage wrapped around Landrum's hand. (19 RT 3988.) Landrum denied that he had cut his hand or that he wore a bandage. (19 RT 3961.)

3. Landrum disposed of bloody gloves

Landrum testified that, sometime after March 1, 1992, Johnsen said that he wanted to get rid of a particular pair of yellow gloves. (16 RT 3282-3283.) Landrum saw George Romo walking nearby and suggested to Johnsen that they give the gloves to him. (16 RT 3282-3283, 3421.) Johnsen agreed, and Landrum handed the gloves to Romo. (16 RT 3282, 3421.) Forensic testing subsequently revealed that the gloves contained deposits of blood with the same DQ-Alpha type as Mrs. Bragg. (18 RT 3743, 3753.)

C. There Was Not Substantial Evidence That Landrum Was an Accomplice Rather Than an Accessory

The trial court properly declined to instruct the jury on the principles regarding accomplice testimony because there was not sufficient evidence upon which the jury could have reasonably concluded that Landrum was an accomplice. Although there was abundant evidence that Landrum

possessed stolen property in violation of Penal Code section 496, his offense would not make him an accomplice to the "identical offenses charged" for purposes of Penal Code section 1111 because Johnsen was not charged with possessing stolen property. And, although there was substantial evidence that the transfer of stolen and bloody property made Landrum an accessory (see Pen. Code, § 32), an accessory "is not liable to prosecution for the identical offense, and therefore is not an accomplice." (*People v. Horton*, *supra*, 11 Cal.4th at p. 1114.)

Johnsen nonetheless argues that Landrum was an accomplice because his conscious possession of stolen property supported an inference that he had been involved in the burglaries and robberies. However, despite there being substantial evidence that Landrum consciously possessed the property that had been stolen during the first and second burglaries, there was not substantial evidence that he consciously possessed the property stolen during the third burglary. Lee and Oliver testified that they received the property stolen during the third burglary from Johnsen and that they convinced Landrum's mother to take it. (16 RT 3366-3367, 3369, 3403-3406.) Landrum testified without contradiction that he was unaware of the property until three weeks later when his mother asked him to remove the property from her home. (16 RT 3279-3281, 3299.) Landrum left the property with his mother and called the police. (16 RT 3281, 3299-3300.) As a result, there was not substantial evidence upon which the jury could have reasonably concluded that Landrum was in conscious possession of property stolen during the third burglary.

In any event, "evidence of possession of property taken in a burglary, unless augmented by other evidence corroborating the defendant's involvement, is insufficient to support a burglary conviction." (*People v. Mendoza* (2000) 24 Cal.4th 130, 175; see also *People v. McFarland* (1962) 58 Cal.2d 748, 754.) Contrary to Johnsen's suggestion, the trial court did

not err by implicitly concluding that there was not substantial evidence corroborating an inference that Landrum was an accomplice in the burglaries and the robberies. For example, there was not substantial evidence that Landrum gave a false account---much less that he refused to give any account---of his whereabouts during the offenses, of the manner in which he came into the possession of the stolen property after the offenses, or the reasons why he transferred the property after taking possession of it. (See *People v. Lang* (1904) 142 Cal. 482, 485; see also *People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. McFarland, supra*, 58 Cal.2d at p. 754-755; *People v. Citrino* (1956) 46 Cal.2d 284, 288-289.) Although Johnsen suggests that Landrum lied to Lee and to the jury about the origin of the camera, no one asked Landrum about the origin of the camera at trial, and no one asked Lee about the representations that Landrum had made when he transferred the camera to her. (See 16 RT 3291, 3414.) Similarly, Johnsen's argument that Landrum had a motive to commit the offenses in order to feed his drug habit ignores that Landrum was gainfully employed (16 RT 3284, 3298) and that there was no evidence that he tried to fence any of the stolen property aside, possibly, from the camera that he transferred to Lee. As a result, Johnsen's allegation that Landrum was an accomplice to the burglaries and robberies is without merit.

Also without merit is Johnsen's claim that Landrum was an accomplice to the murder and attempted murder. As previously mentioned, there was not substantial evidence that Landrum consciously possessed any of the property that had been stolen during the burglaries and robberies that accompanied the murder and attempted murder. And, even if he did consciously possess the property, possession of stolen property does not raise inference of murder. (See *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173.) Contrary to Johnsen's suggestion, there was nothing suspicious or inconsistent about Landrum's testimony that he slept at home

with his mother during the night and early morning of the murder and attempted murder. (See 19 RT 3960-3961.) Nor did the testimony that Landrum wore a bandage on his hand suggest that he had been an accomplice because there was not substantial evidence that the assailant had suffered an injury. Likewise, the evidence that Landrum, while in the company of Johnsen, handed bloody gloves to Romo did not lead to an inference that Landrum was an accomplice who had participated in or aided and abetted the murder and attempted murder rather than an accessory who was merely helping Johnsen dispose of evidence that would incriminate Johnsen. As a result, Johnsen's claim that the trial court erred by not instructing the jury on the principles regarding accomplice testimony is without merit.

D. Any Instructional Error Was Harmless

Johnsen claims that, if the trial court committed instructional error, the error was of federal constitutional dimension such that reversal is warranted unless the State demonstrates that the error was harmless beyond a reasonable doubt. (AOB 279.) This Court has held, however, that "[e]rror in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error . . . ." (*People v. Williams* (2010) 49 Cal.4th 405, 456; see *People v. Gonzales*, *supra*, 52 Cal.4th at pp. 303-304; *People v. Frye* (1998) 18 Cal.4th 894, 968, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22) Moreover, this Court has explained that the corroboration requirement in Penal Code section 1111 "codifies common law concerns about the reliability of accomplice testimony," and that the existence of "sufficient corroboration" allays those concerns. (*Gonzalez*, *supra*, at p. 303.) "Thus, even in cases where the full complement of accomplice instructions . . . was erroneously omitted, we have found that sufficient

corroborating evidence of the accomplice testimony rendered the omission harmless." (*Id.* at pp. 303-304.) And, even if there is insufficient corroboration of the accomplice's testimony, "'reversal is not required unless it is reasonably probable a result more favorable to the defendant would have been reached.'" (*Id.* at p. 304.) In other words, this Court "will submit the omission of accomplice instructions to the harmless error analysis for state law error" under *People v. Watson* (1956) 46 Cal.2d 818 only "*in the absence of sufficient corroboration.*" (*Gonzalez, supra*, at p. 304, original italics.)

As this Court has explained, the evidence corroborating accomplice testimony "'may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.' [Citation.]" (*People v. Gonzales, supra*, 52 Cal.4th at p. 303.) Indeed, the corroborating evidence is "'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*Id.* at p. 304.) Moreover, a defendant's own statements may provide sufficient corroboration. (*People v. Negra* (1926) 208 Cal. 64, 69.)

Here, there was abundant evidence corroborating Landrum's testimony. Johnsen himself confessed to fellow inmate Holland not only that Johnsen committed all of the charged offenses, but also that Johnsen committed them alone. (6 CT 1382-1394, 1411-1419; 17 RT 3503-3506, 3510.) Johnsen also confirmed to Holland that he had asked Landrum to hide the property that Johnsen had stolen during the first two burglaries (6 CT 1414; 17 RT 3503) and that Johnsen had delivered to Lee the property that Johnsen had taken during the third burglary (6 CT 1421-1422). In addition, Johnsen's mother corroborated Landrum's testimony that he gave her some of the property that had been stolen during the first two burglaries. (16 RT 3308-3312, 3314.) Moreover, the testimony from Lee and Oliver regarding the paper bag that Johnsen gave Lee and that Lee then gave to

Landrum's mother corroborated Landrum's testimony that he was unaware of the property stolen during the third burglary until his mother showed it to him shortly before he called the police. (16 RT 3403-3406, 3366-3369.) As a result, any instructional error was harmless because there was sufficient evidence corroborating Landrum's testimony. (See *People v. Gonzales*, *supra*, 52 Cal.4th at pp. 303-304.)

And, even if the corroborating evidence was somehow insufficient, the alleged instructional error was harmless because it is not reasonably probable that the jury would have reached a different verdict. (See *People v. Gonzales*, *supra*, 52 Cal.4th at p. 304.) In *People v. Lewis*, *supra*, 26 Cal.4th 334, for example, this Court found that the trial court's failure to instruct the jury to view an accomplice's testimony with distrust was harmless because "the other instructions given . . . were sufficient to inform the jury to view [the accomplice's] testimony with care and caution." (*Id.* at p. 371; see *Gonzales*, *supra*, at p. 304.) Those other instructions included an admonition that "'[a] witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others' (CALJIC No. 2.21.2), along with instructions on a witness's credibility (CALJIC No. 2.20) and the character of a witness for honesty or truthfulness or their opposites (CALJIC No. 2.24)." (*Lewis*, *supra*, at p. 371.) In *Gonzales*, this Court found that it was sufficient for the trial court to have instructed the jury with CALJIC Nos. 2.20 and 2.21.2. (*Gonzales*, *supra*, at p. 304.) The trial court gave the same instructions in the present case. (8 CT 2133, 2135.) Moreover, "[t]he jury would have been inclined to view [Landrum's] testimony with caution even in the absence of an instruction that it do so" in light of the undisputed fact that he had received stolen property and was testifying against Johnsen pursuant to a grant of immunity (16 RT 3281). (*People v. Williams*, *supra*, 49 Cal.4th at p. 456; see *Gonzales*, *supra*, at p.

304; *Lewis*, *supra*, at p. 371.) As a result, Johnsen's claim that the alleged instructional error was prejudicial is without merit.

IV. THERE IS NOT A REASONABLE LIKELIHOOD THAT THE JURORS MISCONSTRUED THE TOTALITY OF THE INSTRUCTIONS AS PRECLUDING THEIR CONSIDERATION OF TESTIMONIAL IMMUNITY AND THIRD-PARTY CULPABILITY

Johnsen claims the trial court erred by (1) granting his request to instruct the jurors with CALJIC No. 2.11.5 not to discuss or give any consideration as to why other people were not being prosecuted and (2) by denying his requests for special instructions regarding testimonial immunity and third-party culpability. (AOB 286.) He forfeited his claim regarding CALJIC No. 2.11.5 by asking the court to give the instruction and by not asking the court to limit its application. In any event, his claims are without merit because there is not a reasonable likelihood that the jury applied the totality of the instructions in an unconstitutional or otherwise objectionable manner in light of the totality of the instructions, the evidence, and the parties' arguments. And, any conceivable error was harmless.

A. Summary of Legal Principles

A trial court must instruct the jury "'on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case.'" (*People v. Boyce* (2014) 59 Cal.4th 672, 706.) However, "the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative." (*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

When a defendant challenges a jury instruction on the ground that it violated his or her constitutional rights, the defendant must demonstrate a reasonable likelihood that the jurors applied the instruction in an unconstitutional manner. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72;

Victor v. Nebraska (1994) 511 U.S. 1, 6 [observing that "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it"].) The same "reasonable likelihood" standard applies when a defendant challenges an instruction under state law. (*People v. Clair* (1992) 2 Cal.4th 629, 663; see *People v. Williams* (2013) 56 Cal.4th 630, 688 & fn. 34.) In applying this standard, "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; see *People v. Wilson* (1992) 3 Cal.4th 926, 943.) "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." (*Boyde v. California* (1990) 494 U.S. 370, 380-381.) Indeed, a "commonsense understanding of the instructions in the light of all that has taken place at the trial" is "likely to prevail over technical hairsplitting." (*Id.* at p. 381.)

B. Procedural Background

The trial court instructed the jury with CALJIC No. 2.20 that, in determining the believability of a witness, the jury may consider "anything that has a tendency in reason to prove or disprove the truthfulness of the testimony" including, but not limited to, "[t]he existence or nonexistence of a bias, interest, or other motive." (8 CT 2133; 21 RT 4555-4556.) Johnsen asked the court to pinpoint the effect that a grant of immunity might have on a witness's credibility by instructing the jury with Defendant's Special Instruction No. 14 as follows:

> The testimony of a witness who provides evidence against a defendant for immunity from punishment, or for any other personal advantage, must be examined to determine whether this testimony has been affected by the grant of immunity, by

personal interest, by expectation of reward, or by prejudice against the defendant.

(8 CT 2093.) The court rejected his request because the language of CALJIC No. 2.20 was adequate. (20 RT 4283.)

Johnsen also asked the court to instruct the jury with Defendant's Special Instruction No. 28 as follows:

> You are here to determine the guilt or innocence of the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons also are guilty. But if a reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, including any evidence of the guilt of any other person or persons, it is your duty to find the accused not guilty.

(8 CT 2070; 20 RT 4308-4309.) Johnsen described the instruction as being a modification of CALJIC No. 2.11.5. (8 CT 2070.) At the time of Johnsen's trial, CALJIC No. 2.11.5 provided as follows:

> There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of the defendant[s] on trial.

(CALJIC No. 2.11.5 (1989 rev.) (5th ed. 1988).) The prosecutor repeatedly objected to the court instructing the jury with CALJIC No. 2.11.5 on the ground that there was not substantial evidence that anyone other than Johnsen had been involved in the charged crimes. (20 RT 4309-4311, 4372-4374, 4411.)

The court observed that CALJIC No. 2.11.5 generally favors the prosecution rather than the defense. (20 RT 4410-4111.) However, the court determined that it was obliged to give the instruction over the prosecution's objection because "[t]here are other offenses charged which have to be robbery and burglary. And we have other people in possession of stolen property." (20 RT 4410.) The court also found that it could not limit the application of CALJIC No. 2.11.5 to the theft-related offenses because "there's been some evidence presented from which [defense counsel] could argue that someone else did [the murder]." (20 RT 4410.) Johnsen agreed that "the Court is required to give this instruction." (20 RT 4411.)

During closing arguments, Johnsen argued that there was a reasonable doubt as to his guilt based on, inter alia, the evidence that Landrum possessed some of the stolen property and had a bandaged hand. (20 RT 4462-4463, 4466-4467; 21 RT 4507.) He also argued to the jury without objection that "Mr. Landrum has been given immunity from prosecution for stolen property and drug offenses. This is some evidence of motive or bias to testify in this case." (20 RT 4463.) In addition, Chester Thorne "received a deal to come here and testify in this case, and . . . he received 16 actual months in the Stanislaus County Jail in exchange for his testimony. This makes his testimony suspect." (20 RT 4464.) "The man is testifying to save his own skin, to basically get a deal for all the criminal charges that he's had against him." (20 RT 4464.) Likewise, fellow inmate Holland "was facing five to six years in California state prison for the offenses which were eventually dealt off for him coming in here and testifying for the prosecution." (20 RT 4469-4470.)

After the parties presented their arguments to the jury, Johnsen reiterated as follows his desire for the court to instruct the jury with CALJIC No. 2.11.5 even in its original, unmodified form:

THE COURT: . . . You still want 2.11.5, Mr. Faulkner? Are you sure?

[DEFENSE COUNSEL]: Let's see. What is 2.11.5?

THE COURT: "There has been evidence in this case that a person other than the defendant was or may have been involved in the crime. There may be reasons why such person is not here on trial. Therefore do not discuss or give any consideration."

[DEFENSE COUNSEL]: Yeah, I think I want it.

THE COURT: Do you? Okay. . . .

(21 RT 4542.) The court ultimately instructed the jury with the standard version of the instruction without modification or qualification. (8 CT 2187.)

C. Johnsen Forfeited His Challenge to CALJIC No. 2.11.5

Johnsen forfeited in two different ways his claim that the trial court erred by instructing the jury with CALJIC No. 2.11.5. First, he forfeited the alleged error by inviting it. "Under the invited error doctrine, a defendant cannot complain that the court erred in giving an instruction that he requested. [Citation.] The invited error doctrine applies when the defense has made a 'conscious and deliberate tactical choice' in asking for the instruction in question." (*People v. Merriman* (2014) 60 Cal.4th 1, 104, internal quotation marks omitted; see *People v. Brown* (2003) 31 Cal.4th 518, 560.) Here, the record reveals that the defense made a conscious choice to ask for an unmodified version of CALJIC No. 2.11.5 because the court recited the unmodified version of the instruction when confirming the defense's request. (21 RT 4542.) The record also reveals that the choice was deliberate and tactical because the instruction's assertion that "[t]here has been evidence in this case that a person other than the defendant was or may have been involved in the crime" (8 CT 2187) supported the defense's

theory of third-party culpability (20 RT 4462-4463, 4466-4467; 21 RT 4507). (See *People v. Marshall* (1990) 50 Cal.3d 907, 931.) Johnsen nonetheless observes that he did not affirmatively articulate the tactical basis for his decision on the record. (AOB 303.) However, as this Court has observed, the need for such articulation "is limited to situations in which the court is under an obligation to instruct sua sponte in a manner other than it did." (*Marshall, supra*, at p. 932.) As a result, Johnsen forfeited his claim by inviting the alleged error.

Second, Johnsen forfeited his claim by not asking the trial court to limit CALJIC No. 2.11.5 so that it would not apply to Landrum. This Court has observed that, if the instruction would be proper "as to some unjoined perpetrators but not as to others, a defendant who fails to ask the trial court to give a limiting instruction may not raise the issue on appeal." (*People v. Valdez* (2012) 55 Cal.4th 82, 149.) Here, the trial court found that the instruction was warranted because there were "other people in possession of stolen property." (20 RT 4410.) Those other people included Johnsen's mother Faye, his grandparents Fern and Gene Waitzman and his mother's aunt and uncle Ken and Carol Beucus. Since none of those people testified at trial, it would have been proper for the trial court to instruct the jury with CALJIC No. 2.11.5 not to speculate about their fates. As a result, Johnsen forfeited his claim by not asking the court to limit the application of CALJIC No. 2.11.5.

D. There Is Not a Reasonable Likelihood That the Jury Applied CALJIC No. 2.11.5 in an Unconstitutional or Otherwise Objectionable Manner

Johnsen claims the trial court erred by instructing the jury with CALJIC No. 2.11.5 because "it is reasonably likely that the jurors believed that they could not consider the evidence of Landrum's complicity in the crimes and the benefits he received for testifying against appellant." (AOB

288-291.) Respondent does not quarrel with Johnsen's premise that there was substantial evidence upon which the jury could have found that Landrum "was or may have been involved in the crime" within the meaning of CALJIC No. 2.11.5 even though he was not an accomplice. Indeed, this Court has observed that the issue of whether a person "'was or may have been involved in the crime' for the purposes of CALJIC No. 2.11.5 is a 'separate issue' [citation] from the question whether [the person] was an accomplice." (*People v. Williams* (1997) 16 Cal.4th 153, 226.) Nor does respondent dispute that this Court has repeatedly advised trial courts that CALJIC No. 2.11.5 "should be clarified or not given when a nonprosecuted participant testifies at trial." (*People v. Crew* (2003) 31 Cal.4th 822, 845; see *People v. Williams*, *supra*, 49 Cal.4th at p. 457.)

However, as this Court has held, "the giving of CALJIC No. 2.11.15 is not error when it is given together with other instructions that assist the jury in assessing the credibility of witnesses." (*People v. Crew*, *supra*, 31 Cal.4th at p. 845.) And, contrary to Johnsen's suggestion, accomplice instructions are not a prerequisite to there being no instructional error. In *Crew*, for example, this Court found that there was no error in giving CALJIC No. 2.11.5 despite the evidence that a prosecution witness who was testifying under a grant of immunity may have participated in the crime because "the trial court instructed the jury it could consider any evidence of witness credibility, including the existence or nonexistence of a bias, interest, or other motive (CALJIC No. 2.20), and to consider the instructions as a whole (CALJIC No. 1.01)." (*Crew*, *supra*, at p. 845.) This Court reached the same conclusion in *People v. Williams*, *supra*, 49 Cal.4th 405 and specifically observed that *Williams*, like *Crew*, was "a case in which accomplice instructions were not given." (*Williams*, *supra*, at p. 457; see *People v. Moore* (2011) 51 Cal.4th 1104, 1134.) Here, as in *Crew* and *Williams*, the trial court instructed the jury it could consider any

evidence bearing on a witness's credibility, including the existence or nonexistence of a bias, interest, or other motive (CALJIC No. 2.20), and to consider the instructions as a whole (CALJIC No. 1.01). (8 CT 2129, 2133.) As a result, Johnsen fails to demonstrate a reasonable likelihood that the jury misapplied CALJIC No. 2.11.5 in an unconstitutional or otherwise objectionable manner in light of the totality of the other instructions.

Moreover, Johnsen fails to demonstrate a reasonable likelihood that the jury misapplied CALJIC No. 2.11.5 in light of the evidence and arguments. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) In *Crew*, for example, this Court observed that "in closing argument to the jury, defense counsel expressly mentioned [the witness's] grant of immunity as a ground for impugning [his] testimony." (*People v. Crew*, *supra*, 31 Cal.4th at p. 845.) Likewise, in *Williams*, this Court observed that "in his closing statement defense counsel argued that [the witness's] credibility should be evaluated in light of the immunity from prosecution that had been afforded to her." (*People v. Williams*, *supra*, 49 Cal.4th at p. 458.) Here, defense counsel similarly argued to the jury that there was a reasonable doubt as to Johnsen's guilt based on, *inter alia*, the evidence that Landrum possessed the stolen property and had a bandaged hand. (20 RT 4462-4463, 4466-4467; 21 RT 4507.) Defense counsel also argued to the jury without objection that "Mr. Landrum has been given immunity from prosecution for stolen property and drug offenses. This is some evidence of motive or bias to testify in this case." (20 RT 4463.) In light of defense counsel's arguments and the prosecutor's lack of objection, Johnsen cannot demonstrate a reasonable likelihood that the jury somehow misconstrued CALJIC No. 2.11.5 as precluding it from considering evidence of Landrum's third-party culpability and grant of immunity. As a result, his claim of instructional error regarding CALJIC No. 2.11.5 is without merit.

Moreover, even if there is a reasonable likelihood that the jury applied CALJIC No. 2.11.5 in an objectionable manner, Johnsen fails to demonstrate that the error was of federal constitutional dimension. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 89.) For example, this Court has observed that the instruction does not interfere with a claim of third-party culpability because "the instruction does not tell the jury it cannot consider evidence that someone else *committed* the crime. [Citation.] It merely says the jury is not to speculate on whether someone else might or might not be prosecuted." (*People v. Farmer* (1989) 47 Cal.3d 888, 918, original italics, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

In any event, the alleged instructional error was harmless under either state or federal law. Johnsen's confession corroborated everything Landrum testified to concerning his involvement in the charged offenses. Johnsen admitted that he asked Landrum to help steal Rudy's television set, and that Landrum refused to do so. (6 CT 1412.) Johnsen admitted that he asked Landrum to move the stolen property Johnsen had shown Landrum after Johnsen was arrested on February 18, 1992. (6 CT 1413-1414.) Johnsen admitted he put the bloody yellow gloves in the truck and then participated in giving them to Romo. (6 CT 1416, 1420, 1423.) In addition, the evidence at trial established that Johnsen from the outset intended to try to blame Landrum for the crimes. (6 CT 1438-1439, 1441-1443, 1447, 1449-1450, 1504-1505.) As a result, Johnsen would have been convicted regardless of this instruction.

E. The Trial Court Properly Rejected Johnsen's Proposed Instructions Because They Duplicated Other Instructions

Johnsen complains about the trial court's denial of Defendant's Special Instruction No. 14 regarding the assessment of a witness's

credibility in light of a grant of immunity. (AOB 291.) However, he fails to demonstrate a reasonable likelihood that the jurors would have somehow thought that they could not consider such evidence in the absence of a special instruction. The trial court specifically instructed the jurors pursuant to CALJIC No. 2.02 that they could consider "the existence or nonexistence of bias, interest, or other motive" on the part of a witness in evaluating that witness's credibility. (8 CT 2133; 21 RT 4555-4556.) As a result, the trial court did not err by denying Johnsen's special instruction because it was duplicative. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 659.) And, even if the court erred, the omission was harmless because "a more favorable result was not reasonably probable. [Citations.] In closing statements, defense counsel argued that [the witness's] credibility should be doubted because of his immunity agreement. In light of the instructions given and closing arguments, any error had no effect." (*People v. Lucas* (2014) 60 Cal.4th 153, 289.)

Johnsen further complains about the trial court's denial of Defendant's Special Instruction No. 28 regarding evidence of third-party culpability. (AOB 292.) However, he fails to demonstrate a reasonable likelihood that the jurors would have somehow thought that they could not consider such evidence in the absence of a special instruction. The trial court specifically instructed the jurors pursuant to CALJIC No. 2.90 that Johnsen was presumed innocent, that he was entitled to a verdict of not guilty if the jury had a reasonable doubt regarding his guilt, and that the prosecution bore the burden of proving his guilt beyond a reasonable doubt. (8 CT 2140; 21 RT 4559-4560.) "Because the jury was properly instructed as to these issues, and because the jury could have acquitted defendant had it believed that a third party was responsible for [the victim's] death, no third party culpability instruction was necessary." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 825.) And, even if the court erred, the error was

harmless because it "could not have affected the verdict. It is hardly a difficult concept for the jury to grasp that acquittal is required if there is reasonable doubt as to whether someone else committed the charged crimes." (*People v. Hartsch* (2010) 49 Cal.4th 472, 504; see *Gutierrez, supra*, at p. 825.) As a result, Johnsen's claims of prejudicial instructional error are without merit.

V. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY NOT STRIKING TESTIMONY REGARDING THE RESULTS OF THE DNA ANALYSIS OF THE HAIR THAT JOHNSEN HAD LEFT AT THE SCENE OF THE MURDER

Johnsen claims the trial court erred by not striking testimony from molecular biologist Julie Cooper regarding the results of DNA testing that she had performed on evidence purportedly discovered inside the Rudy residence. (AOB 313-332.) Specifically, he argues that the court abused its discretion by concluding that the prosecution had introduced a sufficient chain of custody. He also claims that defense counsel's forfeiture of the issue violated his right to effective assistance. Howerver, there was no evidentiary error because the trial court did not abuse its discretion by concluding that any supposed faults in the handling and transportation of the evidence went to the weight rather than to the admissibility of Cooper's testimony. Moreover, any error in the court ruling and any deficiency in counsel's performance was harmless because there is not a reasonable probability that the jury would have reached a different verdict in the absence of Cooper's testimony.

A. Summary of Legal Principles

It is well-established that "the party relying on an expert analysis of demonstrative evidence must show that it is in fact the evidence found at the scene of the crime, and that between receipt and analysis there has been

no substitution or tampering." (*People v. Riser* (1956) 47 Cal.2d 566, 580.) However, the proponent is not obliged "to negative all possibility of tampering." (*Ibid.*) Rather, the proponent must "show to the satisfaction of the trial court" that "it is reasonably certain that there was no alteration." (*Ibid.*) In making such a determination, the trial court must take "all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered." (*Ibid.*) If "it is as likely as not that the evidence analyzed was not the evidence originally received," then "the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." (*Id.* at pp. 580-581; see *People v. Williams* (1989) 48 Cal.3d 1112, 1135.)

On appeal, "[t]he trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion." (*People v. Catlin* (2001) 26 Cal.4th 1060C, 134.) The exercise of such discretion "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) The fact that another court might have ruled differently "reveals nothing more than that a reasonable difference of opinion was possible. Certainly, it does not establish that the court here 'exceeded the bounds of reason.'" (*People v. Clair*, *supra*, 2 Cal.4th at p. 655.)

B. Procedural and Factual Background

During the presentation of the prosecution's case in chief, the trial court expressed its desire "to put something on the record on how we're going to handle the chain of custody" regarding a single blond hair that had been subjected to DNA analysis. (18 RT 3662.) Defense counsel affirmed that he wanted "to put it right in front of the jury" rather than to have a

foundational hearing under Evidence Code section 402. (18 RT 3662-3663.) The prosecutor observed there were "certain dangers to that." (18 RT 3662.) For example, if the court determined that there was not a sufficient foundation after the jury had already heard testimony about the existence of the hair, "the jury may conclude that there's some evidentiary value to it and then speculate." (18 RT 3663.) Defense counsel affirmed that, in that event, he would be "satisfied with some kind of limiting instruction to the jury." (18 RT 3663.)

At trial, the jury heard evidence that law enforcement officers found a pair of pantyhose on the back of an armchair in Rudy's living room. (16 RT 3375-3376, 3390-3392.) Dr. Richard Lynd examined the pantyhose at the California Department of Justice's laboratory in Modesto and discovered a single blond hair. (17 RT 3454-3455, 3458-3459.) He concluded that, based on a microscopic analysis of the hair, it could have come from Johnsen and could not have come from Mrs. Bragg, Rudy, or Landrum. (17 RT 3463-3465.) Criminalist John Yoshida later examined the hair at the California Department of Justice's laboratory in Stockton. (18 RT 3755-3758.) After Yoshida finished his examination, he placed the hair in a plastic Petri dish, sealed the dish with tape, and sent it back to the Modesto laboratory. (18 RT 3759-3760.)

On June 3, 1992, Dr. Lynd retrieved the hair from storage in order to take photographs of it before sending it to Cellmark Diagnostics in Maryland for DNA testing. (18 RT 3664-3665, 3763-3764, 3803.) He discovered that the hair "was taped to the plastic container." (17 RT 3470; 18 RT 3763.) While "trying to get it out of the container," he accidently "broke the hair in two pieces." (17 RT 3470; 18 RT 3763-3764.) He mounted the hair on a slide, took photographs of it, removed it from the slide, and put it back into storage. (18 RT 3764-3765, 3801, 3807.) He retrieved the hair again on June 18, 1992, and took another set of

photographs. (18 RT 3769, 3802.) After he finished taking the second set of photographs, he "removed the hair from the slide, rinsed the mounting media off of the hair and packaged it for shipping for the DNA analysis." (18 RT 3803.) He did not usually wear gloves, a mask, or a hairnet when working in the laboratory. (18 RT 3766-3768.)

Detective Bill Grogan delivered the hair in its container to senior molecular biologist Julie Ann Cooper at Cellmark Diagnostics on June 22, 1992. (18 RT 3766, 3773, 3775.) Cooper opened the contained and "observed two very fine blond hairs." (18 RT 3776.) She told the jury, "I only examined it enough to realize there was nothing else in that box except for those two very fine hairs. I did not look at it under a microscope, nor did I remove it from the box." (18 RT 3776.) "I did not examine both ends of both pieces of hair more than just a quick glance and it appeared that at least one of those hairs did have an end which looked thicker and could have been a pulled root." (18 RT 3776-3777.)

Cooper examined the hair more closely three months later. (18 RT 3777.) She told the jury, "[I] examined them just by my eyes, and because they were so very fine and faint, I did not examine them under the microscope." (18 RT 3777; see 18 RT 3778.) "The two pieces of hair, they both looked like they had an end that breathed out a bit which, from my experience, I know that hairs usually with a root, that's the fatter end. The end of your hair usually tapers off somewhat. It's not as thick as that root end." (18 RT 3777.) However, Cooper did not profess any particular expertise in hair analysis. (See 18 RT 3737-3742.) Indeed, she conceded, "We are not a hair analyzing laboratory." (18 RT 3778.)

While defense counsel was cross-examining Cooper regarding the chain of custody, the following exchange occurred:

> Q. What DQ-Alpha type did you get from the pantyhose that you processed?

[PROSECUTOR]: I'm sorry, Your Honor, there was no processing of pantyhose at Cellmark. That's assuming a fact not in evidence.

[¶] . . . [¶]

THE COURT: Let her answer the question.

THE WITNESS: The DQ-Alpha type that was obtained from the hair in the box labeled 'hair from pantyhose' was a 2, 4.[7]

[DEFENSE COUNSEL]: Q. Did you ever process the pantyhose?

A. No. I did no processing of the pantyhose at all.

(18 RT 3780.) Defense counsel did not move to strike Cooper's testimony on any grounds.

The next day, the court observed that there did not appear to be a dispute about the admissibility of any of the physical evidence that had been introduced at trial, except for the hair. (18 RT 3863.) The court also expressed its understanding that "unless it's clearly altered or there's more than just mere speculation that it was altered, it goes to the weight of the evidence, not to its admissibility." (18 RT 3863.) The prosecutor interjected that the issue was no longer timely because "there was no objection" to Cooper's testimony about the results of tests that she had performed on the hair. (18 RT 3863-3864.) The court observed, however, that the prosecution had not yet moved to admit the hair itself. (18 RT 3864.) The prosecutor replied that it was impossible to admit the hair itself because the DNA analysis had already consumed it. (18 RT 3863-3864.)

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[7] The jury had previously heard testimony that Johnsen had the same DQ-Alpha type. (18 RT 3743-3744.) The jury had also heard that approximately nine percent of the general population had that same DQ-Alpha type. (18 RT 3683.) Among Caucasians, the reported frequency varied from 4.6 percent to 8.7 percent. (18 RT 3683.)

The trial court ultimately ruled that, even without regard to prosecutor's complaint regarding untimeliness, Cooper's testimony was admissible because the prosecution had introduced an adequate chain of custody. (18 RT 3866-3868.) Indeed, there was a prima facie "explanation for why there were two hairs" because "Rich Lynd testified that he broke the hair in two pieces." (18 RT 3866-3867.) Although Cooper "testified that when she got it, there were two hairs and they both had roots," she had "never looked at them closely." (18 RT 3865-3867.) And, although the testimony "created some questions about the methods [Lynd] used in transferring that hair from one place to another," there was only "bare speculation that it's not the same hair" or that the hair had been contaminated. (18 RT 3866, 3868.) As a result, the supposed flaws in the chain of custody affected the weight rather than the admissibility of Cooper's testimony. (3867-3868.)

C. Johnsen Forfeited His Challenge to the Admissibility of Cooper's Testimony

Although Johnsen appears to have initially raised the chain-of-custody issue in a timely manner and with sufficient specificity, he forfeited appellate review of the claim by not pressing for a ruling in a timely manner. "An objection to evidence must generally be preserved by specific objection at the time the evidence is introduced . . . ." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) "'When the nature of a question indicates that the evidence sought is inadmissible, there must be an objection to the question; a subsequent motion to strike is not sufficient.'" (*Id.* at p. 21.) And, "a defendant must not only request the court to act, but must press for a ruling. The failure to do so forfeits the claim." (*People v. Ramirez* (2006) 39 Cal.4th 398, 472.) Indeed, "[f]ailure to press for a ruling on a motion to exclude evidence forfeits appellate review of the

claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 481.)

Here, Johnsen did not ask the trial court to rule on his challenge to the chain of custody before Cooper mentioned the results of the DNA analysis. Nor did he ask the court to rule on the issue at any other time during Cooper's testimony. Instead, the trial court raised the issue sua sponte the day after it excused Cooper. Even then, the trial court initially raised the issue only as to the hair itself rather than to Cooper's testimony about the DNA analysis of the hair. (18 RT 3863-3864.) As a result, Johnsen forfeited his claim by not pressing for a ruling in a timely manner.

D. The Trial Court Did Not Abuse Its Discretion

Even if Johnsen had preserved his claim for appellate review, it would fail on the merits. Johnsen argues that the trial court abused its discretion because "the prosecution failed to establish with sufficient certainty that the hair evidence had not been altered by contamination or substitution/ addition." (AOB 328; see AOB 321-325.) First, he argues that Cooper's subjective perception that there were two wholly separate hairs rather than two fragments of the same hair suggested the evidence had been altered "by substitution/addition of one or both of the hair fragments." (AOB 323.) Second, he argues that, "given Dr. Lynd's failure to follow standard lab protocols in handling and working with the hair samples, the hair evidence in this case could easily have been altered by either contamination or substitution/addition." (AOB 323-325.)

Johnsen's argument is without merit because evidence is admissible so long as the proponent makes "at least a prima facie showing that the evidence had not been tampered with." (*People v. Williams*, *supra*, 48 Cal.3d at p. 1135; cf. *People v. Goldsmith* (2014) 59 Cal.4th 258, 267

[foundational requirement of authentication requires only a prima facie showing].) As the trial court correctly concluded, the testimony of Dr. Lynd made such a prima facie showing by explaining that there were not actually two wholly separate hairs in the container that had been sent to Cooper, but rather that there were two fragments of the same hair that Dr. Lynd had accidently broken. (17 RT 3470; 18 RT 3763-3764.) Although Cooper's subjective perception of there being two wholly separate hairs rather than two fragments of the same hair supported a conflicting inference, the existence of such a conflict goes to the weight of the evidence rather than to its admissibility. (See *Williams*, *supra*, at p. 1135; *People v. Riser*, *supra*, 47 Cal.2d at p. 581; cf. *Goldsmith*, *supra*, at p. 267 ["'The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.'"].) And, as the trial court explained, the accuracy of Cooper's subjective perception was suspect because she lacked expertise in hair analysis, had initially given the hair only a quick glance, and had never examined the hair under a microscope. (18 RT 3776-3778.)

Similarly, the testimony regarding the conditions at the Modesto laboratory and the manner in which Dr. Lynd handled the evidence led to only "the barest speculation that there was tampering." (*People v. Riser*, *supra*, 47 Cal.2d at p. 581.) Notably, Johnsen's suggestion that someone might have switched or contaminated the hair from the pantyhose with one of the known hair samples is not credible because the DNA analysis excluded Landrum, Rudy, Mr. Bragg, and Mrs. Bragg as being possible contributors. (18 RT 3743-3744, 3790, 3792-3793.) Moreover, all of the known hair samples were still present and accounted-for when Dr. Lynd produced them at trial. (See 18 RT 3802-3803.) Likewise, the suggestion that one of Dr. Lynd's coworkers might have altered the hair from the pantyhose by touching or sneezing on it, and that there might have been

stray hairs floating around the laboratory, all without Dr. Lynd's knowledge, is fanciful speculation. As a result, Johnsen fails to demonstrate an arbitrary, capricious, or patently absurd abuse of discretion based on the trial court's decision not to strike Cooper's testimony about the results of the DNA testing.

E. Any Evidentiary Error Was Harmless

Johnsen claims that, if the trial court erred by finding that there was a sufficient chain of custody, the error was of federal constitutional dimension such that it would warrant reversal unless it was harmless beyond a reasonable doubt. (AOB 328.) However, the federal Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." (*Perry v. New Hampshire* (2012) __ U.S. __ [132 S.Ct. 716, 723].) As a result, the allegedly erroneous admission of the evidence would be an error of state law and would warrant reversal only if there is a reasonable probability that the jury would have reached a different verdict in its absence. (See *People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Johnsen fails to make such a showing.

For example, if the chain of custody was truly as weak as Johnsen alleges, he fails to demonstrate a reasonable probability that the jury would have accepted it in reaching its verdict. Since he chose not to have a hearing on the chain of custody outside the presence of the jury under Evidence Code section 402, the jury was aware of all the alleged faults in the chain. Johnsen also highlighted those faults during closing arguments. (20 RT 4465-4467; 21 RT 4483-4488.) And, the trial court instructed the jury that "each fact which is essential to complete a set of circumstances

necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (21 RT 4554.) As a result, if the chain was truly broken, the jury would have recognized the defect and would have discounted the DNA results accordingly.

Moreover, even if there is a reasonable probability that the jury would have accepted the DNA evidence despite there being a supposedly inadequate chain of custody, there is still not a reasonable probability that the jury would have doubted Johnsen's guilt in the absence of the DNA evidence. Dr. Lynd had already determined simply from the appearance of the hair that it could not have come from Landrum, Rudy, or Mrs. Bragg. (17 RT 3463-3465.) He also determined it could have come from Johnsen. (17 RT 3465.) His observations corroborated Johnsen's confession to Holland that he had had placed the pantyhose over his head during the murder. (6 CT 1419; 20 RT 4400.) As a result, Johnsen fails to demonstrate a reasonable probability that the jury would have reached a different verdict absent the DNA evidence.

F. The Forfeiture of Johnsen's Claim Did Not Violate His Right to the Effective Assistance of Counsel

Johnsen claims that he did not receive the effective assistance of counsel because defense counsel did not move to strike Cooper's testimony about the results of her DNA analysis of the hair found in the pantyhose. (AOB 325-328.) He argues that counsel should have "moved to strike that testimony as nonresponsive and inadmissible on chain of custody grounds." (AOB 326.) His claim is without merit.

> "To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper

> functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" [Citation.]

(*People v. Thompson* (2010) 49 Cal.4th 79, 122; see *Strickland v. Washington* (1984) 466 U.S. 668, 686.) "Preliminarily, we note that rarely will an appellate record establish ineffective assistance of counsel." (*Thompson, supra*, at p. 122.) Moreover, "[c]ounsel is not ineffective for failing to make frivolous or futile motions." (*Ibid.*)

Here, even though Cooper's testimony about the results of her DNA analysis of the *hair* was not responsive to the question about her analysis of the *pantyhose*, defense counsel could have easily made a tactical decision not to object to the non-responsive nature of her answer lest the prosector elicit the same answer from her on further examination. In addition, Johnsen fails to demonstrate that the chain of custody was so defective that every objectively reasonable defense attorney would have realized the defect and objected to the testimony on that ground. And, since the trial court found that the evidence was admissible after raising the issue sua sponte, it is not reasonably probable that the court would have sustained a chain-of-custody objection from defense counsel. Moreover, as previously discussed, it is not reasonably probable that the jury would have doubted Johnsen's guilt in the absence of Cooper's testimony. As a result, Johnsen's claim that he did not receive the effective assistance of counsel is without merit.

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VI. THE PROSECUTOR DID NOT PREJUDICIALLY ERR, AND DEFENSE COUNSEL DID NOT PERFORM IN A PREJUDICIALLY DEFICIENT MANNER, WHEN DISCUSSING THE BURDEN OF PROOF

Johnsen complains that, while presenting arguments to the jury at the guilt phase of the trial, the prosecutor and defense counsel misstated the law regarding the prosecution's burden of proving guilt beyond a reasonable doubt. (AOB 332-355.) However, Johnsen forfeited his challenge to the prosecutor's comments because he did not object. In any event, his challenge to the prosecutor's comments is without merit because there is not a reasonable likelihood that the jury would have construed and applied the comments in an objectionable manner. Nor is there merit to his claim that the defense counsel's comments violated his right to effective assistance.

A. Summary of Legal Principles

It is well-established that a prosecutor may not "attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Hill*, *supra*, 17 Cal.4th at pp. 829-830.) When a defendant challenges the prosecutor's statements to the jury, he must show that, taking into consideration the entire argument and the jury instructions, there was a "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) The reviewing court does not "lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye*, *supra*, 18 Cal.4th at p. 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

While advocates have "significant leeway" when arguing the facts and law to the jury, "[a] jury may only decide the issue of guilt based on the

evidence presented at trial, with the presumption of innocence as its starting point. Although the jurors may rely on common knowledge and experience in evaluating the evidence." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 669 citing *People v. Leonard* (2007) 40 Cal.4th 1370, 1414.) The prosecutor must still prove the case. The jury must consider both the prosecution and the defense evidence. (*People v. Centeno* (2014) 60 Cal.4th 659, 673.) It is permissible for the prosecutor to argue that the defense's interpretations of evidence is not reasonable or credible. (*Ibid.*) The jury's rejection of defense evidence does not lessen the prosecutor's burden to prove the case. (*Ibid.*) "The prosecution cannot suggest that deficiencies in the defense case can make up for shortcomings in its own." (*Ibid.*)

B. Procedural Background

The prosecutor began his arguments to the jury by reciting the instructions regarding the burden of proving guilt beyond a reasonable doubt. (20 RT 4389-4390.) The prosecutor also recited the instruction defining "reasonable doubt." (20 RT 4390.) The prosecutor then made the following comments without objection:

> [R]easonable doubt doesn't mean a mere possible doubt. It does not mean proof to an absolute certainly [*sic*] and it doesn't mean proof beyond a shadow of a doubt.
>
> I'm going to suggest to you that, based on this definition of reasonable doubt, if any one of you feels that he or she might have a reasonable doubt, he or she should be able to do three things. One, they should be able to put the doubt into words; two, they should be able to point to something in the evidence that makes them have that doubt, and, three, that juror should be able to convince his or her fellow jurors that the doubt is reasonable.
>
> If you can't do all three of these things then I suggest to you, ladies and gentlemen, the doubt that you are contemplating

is the imaginary or mere possible doubt that is referred to in the Court's instruction. And, ladies and gentlemen, when we get through with an examination of the evidence in this case, you will not have any reasonable doubt as to Mr. Johnsen's guilt.

(20 RT 4389-4391.)

At the beginning of the defense's arguments to the jury, defesne counsel responded to the prosecutor's comments as follows:

> [I] agree with the first two steps that he said to take, and that number one step is articulate the doubt. If you have a doubt that you can talk about, if you can put it into words, if you can articulate it, it may be a reasonable doubt. If you can point to a particular piece of evidence to support that doubt and say, "I don't feel good about this evidence and it makes me doubt that which it's offered to prove," those are two steps that you should do.
>
> However, [the prosecutor] is wrong on the third step. You're not required and you don't need to be able to convince your fellow jurors regarding whether or not the doubt is reasonable. Your job is not to convince others. Your job is to deliberate. Your job is to deliberate and decide in your own mind whether each piece of evidence is reasonable, whether it's unreasonable, what it means, what it doesn't mean. And if you have a doubt, you're entitled to retain that doubt and to consider it a reasonable doubt, even though you cannot convince another juror or the rest of your fellow jurors about that particular issue.

(20 RT 4459.) Defense counsel later repeated that he agreed with the prosecutor's first two steps to determining reasonable doubt, but not the third. (21 RT 4506.)

> And, again, I can't articulate for you or I can't say for you what is reasonable and what is unreasonable, but I think if you can state it in your mind, if you can talk about it to someone else and point to a piece of evidence that you think is crucial and critical to the prosecution's case that you have a doubt about, that creates in your mind a doubt which is reasonable, and you can talk about then you have not been convinced beyond a reasonable doubt, to a moral certainty. It's not necessary, as I said before, it's not necessary that you're able to convince

anybody else in this jury. Your duty is to deliberate, which means to discuss, listen with an open mind, state your opinion, listen to other people's opinions. But if you believe something to be such that it creates a doubt in your mind and you can't get rid of that doubt then you don't have to change your mind. You're entitled to maintain that opinion as long as you deliberate fairly.

(21 RT 4506.) The prosecutor later replied without objection as follows to defense counsel's argument:

Reasonable doubt is the burden of proof which the People shoulder. And the operative word is "reasonable." If you don't have any method of assessing whether or not any doubt that you have is reasonable or unreasonable, then the instruction is meaningless. The concept is useless.

And you have to test the reasonableness of any doubt. And one of the ways you do that is to discuss any perceived doubt with your fellow jurors, put it into words, test it, and see if anybody else agrees with you that that is a reasonable doubt. That's how you test it. There's no other way to assess any doubt. There's no way to tell whether a doubt is fanciful, imaginary, or just a mere possible doubt.

(21 RT 4509-4510.)

The trial court subsequently admonished the jury as follows in pertinent part:

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instruction s on the law, you must follow my instructions.

(21 RT 4551; 8 CT 2127.)

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether guilt is satisfactorily shown, the defendant is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving the defendant's guilt beyond a reasonable doubt.

> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(21 RT 4559-4560; 8 CT 2140.)

> The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors or any of them favor such a decision.

(21 RT 4593.)

C. Johnsen Forfeited His Challenge to the Prosecutor's Comments

Johnsen forfeited his challenge to the prosecutor's comments because he did not object to the comments and did not request an admonition to cure the asserted harm. "'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion---and on the same ground---the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) "The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) Johnsen does not identify anything in the record that would "indicate[] that an objection would have

been futile. Nor was the prosecutor's argument so extreme or pervasive that a prompt objection and admonition would not have cured the harm." (*Ibid.*) As a result, Johnsen forfeited his challenge to the prosecutor's comments.

D. There Is Not A Reasonable Likelihood That the Jury Construed or Applied the Prosecutor's Comments in an Unconstitutional or Otherwise Objectionable Manner

Johnsen contends that the prosecutor misstated and diluted the reasonable doubt standard by telling the jurors that a doubt is not reasonable unless they can point to something in the evidence which makes them have that doubt. (AOB 338-339.) He rewords the prosecutor's comment as being that "doubt is not reasonable unless the juror can identify some piece of evidence that causes the juror to have that doubt." (AOB 339.) What the prosecutor actually said, however, was that the jurors should be able to "point to something in the evidence which makes them have that doubt." (20 RT 4390.) "Something in the evidence" would include any ambiguity, vagueness, contradiction or absence in the evidence. The prosecutor's statement does not, as Johnsen maintains, place the burden on the defense to produce evidence that creates a reasonable doubt. When the prosecutor suggested that a juror should be able to "point to something in the evidence that makes them have a doubt" he was referring to all of the evidence, including anything in the evidence that was lacking, contradictory, or unclear. Thus, rather than shifting the burden to the defense to produce evidence of a reasonable doubt, the prosecutor was reinforcing the principle that the jury had to decide the case based on all of the evidence presented, after it had been thoroughly scrutinized by them, including any deficiencies in the evidence.

Johnsen also contends that the prosecutor misstated and diluted the reasonable doubt standard by telling the jurors that they had to convince the

other jurors that the doubt they perceived was reasonable. (AOB 339.) Defense counsel countered this statement in his closing argument by flatly stating the prosecutor was wrong on this point. (20 RT 4459.) This forced the prosecutor on rebuttal to clarify what he meant and he did so. He stated that what he meant was that a juror could test the reasonableness of a doubt by seeing if anyone else agreed with it. (21 RT 4510.) The agreement of another juror was not posited as a requirement for the reasonableness of a doubt. No juror would have understood the prosecutor's remark as requiring him or her to give up on what they thought was a reasonable doubt just because they were not able to convince another juror that it was. Moreover, the jury would have understood the prosecutor's comment to mean just that because the jury instruction informed the jury that both sides were entitled to the individual opinion of each juror. (8 CT 2190 [CALJIC No. 17.40].) "Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors." (*Ibid.*) "[D]o not decide any question in a particular way because a majority of the jurors *or any of them* favor such a decision." (*Ibid.*, italics added.) Indeed, CALJIC No. 17.47 reinforced the concept that the jury could be divided in their beliefs, thus contradicting any prosecutorial notion that a juror who could not convince another juror of the reasonableness of a doubt would not have to simply give up his or her opinion. (8 CT 2197.) As a result, there is not a reasonable likelihood that the jury construed or applied the prosecutor's comments in an objectionable manner, especially in light of the trial court's instructions on the subject.

E. Defense Counsel's Response to the Prosecutor's Argument Was Not Deficient

Johnsen claims that "[b]y failing to object to the misstatements and then agreeing with one of them, counsel deprived appellant of effective

assistance of counsel." (AOB 344-347.) To prove this claim, Johnsen must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice. (*Strickland v. Washington, supra*, 466 U.S. at pp. 688, 694.) Johnsen can do neither.

A defendant must establish that his counsel's performance fell outside the wide range of professional competence, given that the reviewing court will presume that counsel's actions or inactions can be explain as sound trial strategy. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746; see also *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was "'"no conceivable tactical purpose"' for counsel's act or omission. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 675.) "[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one" (*People v. Padilla* (1995) 11 Cal.4th 891, 942, overruled on another ground in *People v. Hill, supra*, 17 Cal.4th at p. 823), and "a mere failure to object to evidence or argument seldom establishes counsel's incompetence" (*People v. Ghent* (1987) 43 Cal.3d 739, 772).

Here Johnsen's counsel made the tactical decision not to object to the prosecutor's suggested third step for assessing reasonable doubt. Instead of objecting, he decided to face the matter head-on in his own closing argument. He stated that the prosecutor was wrong. (20 RT 4459.) That no juror who had a reasonable doubt had to convince any other juror of that reasonable doubt. (*Ibid.*) "Your job is not to convince others," he said. (*Ibid.*) Your job is to deliberate and decide in your own mind whether each piece of evidence is reasonable, whether its unreasonable, what it means, what it doesn't mean. (*Ibid.*) "And if you have a doubt, you're entitled to retain that doubt and to consider it a reasonable doubt, even though you

cannot convince another juror or the rest of your fellow jurors about that particular issue." (*Ibid.*)

Thus, any problem with the prosecutor's third step, defense counsel swiftly dealt with it in a way that might have undercut the prosecutor's credibility and may have had for that a reason a much greater impact than an objection and admonition would have. Here, because of defense counsel's statement that the prosecutor was wrong followed by the prosecutor's clarification of the third step in his rebuttal argument, was a reasonable and effective trial strategy over lodging and objection and request an admonition from the trial court.

F. Any Deficiency Was Harmless

A defendant alleging ineffective assistance of counsel also bears the burden of showing prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) The arguments of counsel are generally thought to carry less weight than the trial court's instructions. (*Boyde v. California*, *supra*, 494 U.S. at p. 384; accord *Mendoza*, *supra*, 42 Cal.4th at p. 703; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.)

Here, the trial court correctly instructed the jury on the presumption of innocence, reasonable doubt, and the prosecutor's burden of proof. The court also explained, "Each of you must decide the case for yourself . . . [¶] . . . [D]o not decide any question in a particular way because a majority of the jurors or any of them favor such a decision." (21 RT 4593.) In light of these instructions, there is not a reasonable probability of prejudice. "When argument runs counter to instructions given a jury, [the reviewing court] will ordinarily conclude that the jury followed the latter and

disregarded the former, for [the reviewing court will] presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

Finally, this was not a close case. Johnsen's written and detailed confession along with Holland's testimony, Landrum's testimony, the hair evidence, the glove evidence, the fact that Johnsen's relatives had most of the stolen property, Johnsen's repeated attempts to find someone to kill the witnesses and detectives on the case, and Holland and Thorne corroborating testimony, made this a very strong case. There was no prejudice from any alleged prosecutorial error in the closing argument nor any prejudice from the claim of ineffective assistance of counsel.

VII. THE TRIAL COURT ADEQUATELY INVESTIGATED THE CLAIM OF JUROR MISCONDUCT, AND THE RESULTING RECORD REBUTS ANY PRESUMPTION OF PREJUDICE

Johnsen claims the trial court erred by conducting an inadequate investigation of juror misconduct after Juror Y.P. admitted that she had solicited and received a priest's views on capital punishment during a two-week recess between the guilt and penalty phases of the trial. Johnsen also claims that, based on the information revealed during the court's supposedly inadequate investigation, the court erred by not removing the juror. (AOB 355-410.) However, Johnsen forfeited his claims because he did not ask the court to conduct a further inquiry, nor did he ask the court to remove the juror. In any event, the court did not abuse its discretion as to either the scope of its investigation or its ultimate decision that the juror's solicitation and receipt of outside information did not warrant her removal. Nor is there a substantial likelihood that the juror had an actual bias on the issue of punishment.

A. Summary of Legal Principles

"It is misconduct for a juror during the course of trial to discuss the case with a nonjuror." (*People v. Danks* (2004) 32 Cal.4th 269, 304.) So too is it misconduct for a juror to receive information outside of the record. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 579.) Such misconduct raises a rebuttable presumption of prejudice. (*Ibid.*; *In re Hamilton* (1999) 20 Cal.4th 1083A, 295.) However, "[a]ny presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton*, *supra*, 20 Cal.4th at p. 296, original italics.)

"Such bias can appear in two different ways." (*In re Carpenter* (1995) 9 Cal.4th 634, 653.)

> "First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror." [Citation.] "Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information." [Citation.]
>
> Second, "even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias under the first test," the nature of the misconduct and the "totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose." [Citation.] "Under this second, or 'circumstantial,' test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record,

> must be considered. 'The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual'" bias.

(*People v. Danks*, *supra*, 32 Cal.4th at p. 303, italics omitted.) "The judgment must be set aside if the court finds prejudice under either test." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.)

If, during the course of a trial, the court has notice of prejudicial juror misconduct "it is the court's duty to make whatever inquiry is reasonably necessary to determine whether the juror should be discharged." (*People v. Martinez* (2010) 47 Cal.4th 911, 941-942, internal quotation marks omitted; *People v. Lomax* (2010) 49 Cal.4th 530, 588.) However, "the hearing should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) "Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Ibid.*)

Once a trial court decides to investigate possible misconduct, "[t]he specific *procedures* to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion."> (*People v. Seaton* (2001) 26 Cal.4th 598, 676, italics added.) Indeed, "there is no statutory procedure for determining the existence of a ground of discharge. In the absence of a stipulation by counsel, 'the judge must act on his own motion, expeditiously.'" (*People v. Dell* (1991) 232 Cal.App.3d 248, 256, fn. omitted.) Accordingly, "[t]he *manner* in which the trial court conduct[s] its inquiry is subject to review for abuse of discretion under the typical standard." (*People v. Fuiava* (2012) 53 Cal.4th 622, 712, original italics.)

B. Procedural Background

After the jury returned its verdicts at the guilt phase of the trial on March 9, 1994, the court planned to recess proceedings for 19 days before beginning the penalty phase. (21 RT 4645, 4658.) On Tuesday, March 15, 1994, the court told the parties that Juror Y.P. had recently called the court, spoken to the bailiff, and confessed that she had talked to a priest about the death penalty. (21 RT 4662-4664.) According the bailiff, the juror "said that the priest told her that the church's position was that it wasn't against the death penalty." (21 RT 4664.) It appears that the priest had also reported the conversation, albeit to a different judge. (21 RT 4662.)

The court observed that the juror had violated her oath not to discuss the case. (21 RT 4663.) The prosecutor suggested that they immediately call her on the telephone. (21 RT 4665.) Defense counsel cautioned, "I just don't want to make her feel that she's done something wrong." (21 RT 4665.)

The court called the juror on the telephone and asked her about the conversation that she had with the priest. (21 RT 4666.) The juror explained that she had been "just curious to know if it was a sin to decide on the death penalty." (21 RT 4666-4667.) She called a priest the day after the jury returned their verdicts at the guilt phase. (21 RT 4667.) The priest did not answer the telephone, so she left a message. (21 RT 4667.) She later called again, and priest revealed that he had reported her first message to the court. (21 RT 4667.) The priest told her that he was willing to answer her question about whether the imposition of the death penalty is a sin, but only on the condition that that she report the conversation to the court. (21 RT 4667.) She asked, "Will I get in trouble?" (21 RT 4668.) The priest speculated that she would not get in trouble because she was not revealing any circumstances about the case itself. (21 RT 4668-4669.) She

agreed to the priest's condition that she report herself to the court, and the priest told her "that they do believe in capital punishment." (21 RT 4668.)

The court reminded her of the admonition "not to discuss the case with anybody." (21 RT 4668.) She replied, "I didn't tell him any information. I just asked him that one question. Even if he were to tell me yes, it is a sin, it doesn't mean that I wouldn't or vice versa. I just wanted to know." (21 RT 4668-4669.) She continued, "I was just curious. It's not going to change the way I feel." (21 RT 4669.)

The parties declined the court's invitation to ask the juror additional questions. (21 RT 4669.) As the court concluded the call, it said, "Don't worry about it. That's fine. Thank you very much. Bye-bye." (21 RT 4669.)

After the call, the court remarked, "[I] don't see any reason to do anything." (21 RT 4671.) "She shouldn't have actually been talking about the death penalty, although we didn't really specifically tell them not to talk about the death penalty. But it does involve the case." (21 RT 4671.) Defense counsel agreed, "I think it's technically a violation but I don't think there's much substance in it." (21 RT 4671.) Neither the defense nor the prosecution accepted the court's invitation "to bring a motion to get her off." (21 RT 4671-4672.)

C. Johnsen Forfeited His Claims

Johnsen forfeited his claims because he did not lodge a contemporaneous objection to the adequacy of the trial court's investigation, and he never asked the court to dismiss Juror Y.P. This Court has repeatedly observed that "failure to raise the issue of juror misconduct and seek relief from the court on that basis results in a forfeiture of the issue on appeal." (*People v. Dykes* (2009) 46 Cal.4th 731, 808, fn. 22.) "Having expressed no desire to have the juror discharged at the time, and indeed no

concern the juror had engaged in prejudicial misconduct, defendant 'is not privileged to make that argument now for the first time on appeal.'" (*People v. Holloway* (2004) 33 Cal.4th 96, 124.)

In *People v. Foster* (2010) 50 Cal.4th 1301, for example, the defendant argued that "third-party contacts with jurors during the trial tainted the jury." (*Id.* at p. 1339.) This Court observed that the trial court had "questioned the jurors, invited counsel to question them, and admonished them. At no time did defense counsel propose additional questions, object to any juror's continued service, or request a mistrial on the ground of juror misconduct. Therefore, defendant has forfeited his claim." (*Id.* at p. 1341.) This Court also noted that, although the defendant had initially requested an inquiry, his request was insufficient to preserve his claim because he "thereafter expressed no dissatisfaction with the inquiry or with the jurors' continued service." (*Id.* at p. 1341, fn. 17.) Here, Johnsen similarly expressed no dissatisfaction with the adequacy of the trial court's inquiry. Specifically, he did not complain that the trial court failed to ask particular questions during the telephonic discussion. Nor did he complain that the trial court failed to examine the juror in person after telephonic discussion. Nor did he ask the court to remove the juror. As a result, Johnsen forfeited his claims.

Johnsen nonetheless argues that his claim is immune from the forfeiture rule pursuant *People v. Cowan* (2010) 50 Cal.4th 401. (AOB 407-408.) In *Cowan*, the defendant argued that "the trial court erred by failing, sua sponte, to conduct an investigation adequate to determine if Juror No. 045829 had been speaking with defendant's family members or had overheard anything connected with the trial." (*Cowan, supra*, at p. 505.) The People replied that the defendant "forfeited his claim by failing to request additional inquiry" after the court heard an account from the reporting juror and told the accused juror that the court did not intend to

take any further action. (*Id.* at pp. 504-506.) This Court found that there was no forfeiture because "[t]he duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry." (*Ibid.*) This Court ultimately concluded, however, that the trial court "acted within its discretion when it declined to inquire further." (*Id.* at p. 507.)

In concluding that there was no forfeiture in *Cowan*, this Court relied primarily on *People v. Burgener* (1986) 41 Cal.3d 505, in which the trial court had erred by not investigating the jury foreman's report that another juror was intoxicated. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 506; *Burgener*, *supra*, at pp. 516-517, 520-521.) However, this Court had refused to entertain the defendant's claim of juror misconduct on direct appeal in *Burgener*, observing that "the record on appeal in this case is insufficient to establish that Juror M. had, in fact, used intoxicants during deliberations," and that "this lack of a record is the result of defense counsel's preference that the court conduct no inquiry." (*Burgener*, *supra*, at pp. 521-522.) "[D]efendant cannot be permitted to prevent an inquiry into the condition of a possibly intoxicated juror . . . and subsequently challenge the verdict of that very jury on grounds that the court's failure to conduct an inquiry prejudiced his interests." (*Id.* at p. 522.) Likewise, Johnsen cannot be permitted to accept not only the adequacy of the trial court's inquiry regarding Juror Y.P. but also her continued membership on the jury and then challenge the verdict of that very juror.

D. There Is Not a Substantial Likelihood That Juror Y.P. Was Biased Against Johnsen or in Favor of the Death Penalty

Even if Johnsen had preserved his claim of juror misconduct, it would fail on the merits because there is not a substantial likelihood that Juror Y.P.

was biased on the issue of punishment. (See *In re Hamilton*, *supra*, 20 Cal.4th at p. 296.) The People do not quarrel with trial court's conclusion at Juror Y.P. should not have solicited or received outside information from a priest regarding the death penalty. (See 21 RT 4671.) However, as this Court has emphasized, "before a unanimous verdict is set aside, the likelihood of bias . . . must be *substantial.*" (*In re Carpenter*, *supra*, 9 Cal.4th at p. 654, original italics; see *People v. Danks*, *supra*, 32 Cal.4th at p. 304.) "[W]e do not reverse unanimous verdicts because there is *some* possibility the juror was improperly influenced." (*Danks*, *supra*, at p. 305, original italics.)

Johnsen offers four reasons why he thinks there was a substantial likelihood of bias. First, he claims the intentional nature of the misconduct supports a finding of bias. (AOB 386-387.) However, as the trial court observed, it did not "specifically tell them not to talk about the death penalty." (21 RT 4671.) Moreover, the trial in the present case occurred before this Court recommended in *Danks* that juries "be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists" lest the jurors "assume such an instruction does not apply to confidential relationships. (*People v. Danks*, *supra*, 32 Cal.4th at p. 306, fn. 11.)

Second, Johnsen claims there was a substantial likelihood of bias because the information Juror Y.P. solicited and received would have been relevant to her decision whether to impose the death penalty. (AOB 387-388.) However, the juror solicited information only regarding the Church's position on capital punishment in general. As in *Danks*, her inquiry "was to determine not whether her vote was correct, but whether it violated a religious proscription." (*People v. Danks*, *supra*, 32 Cal.4th at p. 310.) And, unlike in *Danks*, the priest did not volunteer his opinion about the

imposition of the death penalty on Johnsen in particular. (See *id.* at pp. 306-307, 309.)

Third, Johnsen claims there was a substantial likelihood of bias because the information that the priest gave to Juror Y.P. went to the key issue at the penalty phase of the trial. (AOB 388-396.) However, the Church's position on the death penalty in general was not an issue in the trial, much less the key issue. Moreover, Juror Y.P. told the court that she had merely been curious and that the priest's answer would not affect her decision. (21 RT 4668-4669.) Although Johnsen now accuses her of lying about the impact that the information would have had on her decision, the trial court implicitly found that she was being truthful when it decided not to remove her from the jury.

Fourth, Johnsen claims there was a substantial likelihood that Juror Y.P. was biased because the court did not admonish her to disregard the information that she had received from the priest, nor did the court admonish her not to share the information with other jurors. (AOB 396-397.) He also claims the court compounded the bias by suggesting to Juror Y.P. that she had not done anything wrong. (AOB 397.) However, the court reminded the juror of the admonition "not to discuss the case with anybody." (21 RT 4668.) The court later admonished the jurors, "You must decide all questions of fact in this case from the evidence received in this trial and not from any other source." (26 RT 5832.) The court also admonished the jurors, "You must not discuss this case with any other person except a fellow juror . . . ." (26 RT 5833.) Moreover, Johnsen's suggestion that Juror Y.P. might have shared with the jurors the information that she had received from the priest is pure speculation.

In any event, there is not a substantial likelihood of bias because there was compelling evidence at the penalty phase favoring the imposition of the death penalty. (See *People v. Danks*, *supra*, 32 Cal.4th at pp. 305-306.)

Johnsen had just been convicted by the same jury of the brutal, violent, and senseless murder of an elderly woman in her sleep and the attempted murder of her elderly husband. (8 CT 2223-2231.) Through Holland, the jury heard that Johnsen wanted to kill these two innocent people merely to see if he could and get away with it. (17 RT 3504.) The jury also knew that Johnsen had entered the Rudy residence that night with the intent to rape and murder Rudy. (17 RT 3509.) The jury had also just convicted Johnsen of trying to solicit the murders of two witnesses and two detectives associated with the case, though there was evidence that he had actually solicited the murders of between six and nine people he believed had information that could implicate him. (8 CT 2232-2236; 6 CT 1395-1396, 1425-1426, 1479; 17 RT 3533-3534; People's Exh. 95; 22 RT 4869-4870; People's Exhs. 161-168.) Johnsen solicited these murders while incarcerated, just as he had done when he aided and abetted the murder of his pregnant girlfriend Terry Holloway in San Diego. (17 RT 3484-3487; 22 RT 4869-4870; People's Exhs. 161-168.) As a result, the record rebuts any presumption of prejudice arising from the information that Juror Y.P. solicited and received for a priest.

E. The Trial Court Did Not Abuse Its Discretion Regarding the Manner of Inquiry

Johnsen claims the trial court did not employ adequate procedures in determining whether to remove Juror Y.P. because the court did not examine her in person and did not challenge the truthfulness of her answers. (AOB 402-407.) As previously discussed, Johnsen made no such complaints when the trial court could have easily cured the alleged harm. In any event, the court did not abuse its discretion by determining that, after speaking with the juror on the telephone for the sake of expediency, there were no factual disputes warranting a further examination in person.

First, the court did not abuse its discretion by examining the juror telephonically. "In the absence of a stipulation by counsel, 'the judge must act on his own motion, expeditiously.'" (*People v. Dell*, *supra*, 232 Cal.App.3d at p. 256, fn. omitted.) As the prosecutor observed, it was particularly important for the court to examine Juror Y.P. expeditiously in the present case in order to resolve whether the juror had discussed the case before or after she had returned her verdict at the guilt phase. (21 RT 4665.) As a result, even if a personal examination might have been preferable, the court did not abuse its discretion by starting the inquiry with a telephonic interview. (See *People v. Dell*, *supra*, 232 Cal.App.3d at p. 256, fn. 2.)

Second, the court did not abuse its discretion by deciding that there was no need to conduct a further examination, much less a further examination in person. As previously mentioned, "an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 419.) Here, there was no material conflict in the evidence warranting a further hearing. Indeed, Juror Y.P. admitted that she had solicited and received information from the priest. As a result, Johnsen's claim that the trial court abused its procedural discretion in conducting the investigation of juror misconduct is without merit.

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VIII. THE TRIAL COURT DID NOT PREJUDICIALLY ERR BY ADMITTING EVIDENCE REGARDING THE IMPACT THAT MR. BRAGG'S INJURIES HAD ON HIM AND HIS FAMILY

Johnsen claims the trial court erred by admitting penalty-phase evidence regarding the impact of the physical, non-fatal injuries that he inflicted on Mr. Bragg in the commission of the attempted murder. (AOB 410-434.) He argues that the federal Constitution categorically bars any evidence regarding the impact of a non-capital offense such as attempted murder. (AOB 426-430.) Even if the federal Constitution allows such evidence, he argues that state law categorically bars any evidence regarding the impact of a non-capital offense on anyone other than the victim himself. (AOB 420-425.) And, even if the evidence was not categorically barred, he argues that it was "so over the top as to exceed constitutional limits." (AOB 430-433.) His claims are without merit, and any conceivable error was harmless under any applicable standard.

This Court has repeatedly held that neither state nor federal constitutional law categorically bars the admission of evidence regarding the impact that a defendant's non-capital offenses had on his or her surviving victims. (See, e.g. *People v. Davis*, *supra*, 46 Cal.4th at p. 618; *People v. Benson* (1990) 52 Cal.3d 754, 797.) Johnsen now asks this Court to reconsider its holdings. (AOB 426-430.) However, he offers no compelling reasons for this Court to do so. (See *Davis*, *supra*, at p. 618; *People v. Taylor* (2001) 26 Cal.4th 1155, 1172.)

Johnsen nonetheless suggests that "this Court has never sanctioned the admission of testimony regarding the impact of a surviving victim's injuries on his or her family members" as opposed to on the surviving victim himself. (AOB 425.) However, this Court observed in *People v. Edwards* (1991) 54 Cal.3d 787 that "there is no such prohibition," and that the decision in *People v. Benson*, *supra*, 52 Cal.3d 754 "strongly implies that

such evidence comes within section 190.3, factor (b), 'criminal activity' involving force or violence." (*Edwards*, *supra*, 54 Cal.3d at p. 835.)

In any event, the victim-impact evidence admitted in the present case would not have fallen under the categorical bans that Johnsen now proposes because the evidence related not only to the attempted murder of Mr. Bragg but also to the capital murder of Mrs. Bragg. In *Taylor*, for example, the defendant "burgled, robbed, shot and killed Ryoko Hanano (Ryoko) and attempted to kill her husband Kazumi Hanano (Kazumi), leaving him a quadriplegic." (*People v. Taylor*, *supra*, 26 Cal.4th at p. 1163.) The trial court admitted evidence from Kazumi and his son "describing how their lives had been changed by Ryoko's murder and Kazumi's shooting and resultant paralysis." (*Id.* at p. 1164.) On appeal, the defendant argued that "evidence regarding Kazumi's injuries, including his paralysis, pain, and inability to care for himself, was not true 'victim impact' evidence, as it failed to show the impact of Ryoko's death on Kazumi." (*Id.* at p. 1172.) This Court disagreed, explaining that the evidence showed "that because he suffered severe injuries at defendant's hand, Kazumi will require extensive care that Ryoko might have provided but for her murder, an aggravating circumstance of which the jury was entitled to learn." (*Ibid.*) Likewise, the evidence in the present case showed that, because he suffered severe injuries at Johnsen's hand, Mr. Bragg required extensive care from his family and that Mrs. Bragg might have provided that care but for her murder. As such, the evidence was related to the capital murder and would not have fallen under Johnsen's proposed bans.

Nor was the evidence "so over the top as to exceed constitutional limits." (AOB 430-433.) Johnsen appears to have forfeited the claim by not objecting to the evidence on this ground. (See Evid. Code, § 353.) In any event, the quantum of evidence regarding the effect that Mr. Bragg's physical injuries had on himself and his family was limited. Dr. Brown

testified that Mr. Bragg was not capable of communicating in either written or oral form. (22 RT 4919.) Mr. Bragg's daughter, son, and daughter-in-law testified about the impact that Mr. Bragg's physical injuries had on him and on themselves. (22 RT 4923-4928, 4929-4934 4935-4944.) The evidence regarding Mr. Bragg's physical injuries was not the sort of inflammatory evidence "'that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) Indeed, to the extent the evidence was inflammatory or emotional, it paled in comparison to the evidence regarding the effect that Mrs. Bragg's death had on the same family members.

And, even if the court erred, the error was harmless under any standard. As in *People v. Davis*, *supra*, 46 Cal.4th 539, "there was no reasonable possibility that any error in admitting the evidence affected the jury's decision to impose a penalty of death. Even without the victim impact testimony, the evidence of the [non-capital] crimes themselves left little doubt about the impact of those crimes on defendant's victims." (*Id.* at p. 618.) Likewise, as in *People v. Clark* (1990) 50 Cal.3d 583, "[s]ince the victim impact evidence presented in this case related almost exclusively to the injuries that led to the death of [Mrs. Bragg], and to the horrendous injuries suffered by [Mr. Bragg] and their aftermath, any possible error in admitting evidence that these victims' relatives suffered emotional distress must be deemed harmless beyond a reasonable doubt." (*Id.* at p. 629.) Moreover, it is inconceivable that the jury would have returned a different verdict in the absence of evidence regarding Mr. Bragg's injuries because the jury properly heard compelling evidence regarding the impact of Mrs. Bragg's death on the same family members, and had already determined beyond a reasonable doubt that Johnsen had solicited the murders of several other people. The jury also heard compelling evidence regarding that

Johnsen had previously aided abetted the murder of Holloway. As a result, any conceivable evidentiary error was harmless under any conceivable standard.

IX. THE TRIAL COURT PROPERLY REJECTED JOHNSEN'S PROPOSED JURY INSTRUCTION REGARDING VICTIM-IMPACT EVIDENCE

Johnsen claims the trial court erred by rejecting some of his proposed jury instructions regarding the consideration of victim-impact evidence. (AOB 435-439.) His claim is without merit because this Court has rejected the same claim regarding the same instructions in the same circumstances. Moreover, any conceivable error was harmless.

Johnsen asked the court to instruct the jury with Defendant's Penalty Phase Instruction No. 35, which would have stated the following:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(9 CT 2449.) The trial court rejected the proposed instruction as being "unnecessary." (25 RT 5615.)

Johnsen also asked the court to instruct the jury with Defendant's Penalty Phase Instruction No. 61, which would have stated the following:

> The facts of this case may arouse in you a natural sympathy for the victim or the victim's family. Such sympathy, while natural, is not relevant to the penalty decision in this case.
>
> You are to base your decision on the evidence, the arguments of counsel and the law stated in these instructions.

> You are directed not to consider any feelings of sympathy you may feel for the parties injured or aggrieved in this case.

(9 CT 2477.) The trial court rejected the proposed instruction as being an incorrect statement of the law. (25 RT 5627-5628.)

Contrary to Johnsen's suggestion, the trial court did not commit instructional error. The defendant in *People v. Russell* (2010) 50 Cal.4th 1228 requested an instruction that was identical to the one Johnsen proposed as Defendant's Penalty Phase Instruction No. 35. (*Id.* at p. 1265 & fn. 6.) This Court found that the trial court did not err by denying the request because "the requested instruction was 'unclear as to whose emotional reaction it directed the jurors to consider with caution—that of the victim's family or the jurors' own.'" (*Id.* at p. 1266.) Moreover, the standard instructions were adequate:

> [T]he jury here was given an instruction broadly cautioning it to determine the facts from the evidence presented, to follow the law, and to avoid being swayed by bias or prejudice against defendant. (See CALJIC No. 8.84.1.) We have consistently concluded that neither the trial court's refusal to provide a victim impact evidence instruction worded similarly to defendant's proposed instruction, nor the trial court's refusal to sua sponte provide a similar instruction, constitutes error. Defendant presents us with no reason to reconsider our prior holdings.

(*Ibid.*; see *People v. Foster*, *supra*, 50 Cal.4th at pp. 1361-1362.) Here, the trial court likewise instructed the jury to determine the facts from the evidence presented, to follow the law as stated by the court, and to avoid being swayed by bias or prejudice against Johnsen. (26 RT 5830-5833.) As a result, the trial court did not err by denying Defendant's Penalty Phase Instruction No. 35.

Nor did the court err by denying Johnsen's request to instruct the jurors with Defendant's Penalty Phase Instruction No. 61 that they were forbidden from considering "any feelings of sympathy [they] may feel for

the parties injured or aggrieved in this case." (9 CT 2477.) As this Court has recognized, such an instruction would be an incorrect statement of the law:

> Although a jury must never be influenced by passion or prejudice, a jury at the penalty phase of a capital case may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing the jury may exercise sympathy for the defendant's murder victims and for their bereaved family members.

(*People v. Pollock* (2004) 32 Cal.4th 1153, 1195; see *People v. Zamudio* (2008) 43 Cal.4th 327, 369.) As a result, the trial court did not err by denying Defendant's Penalty Phase Instruction No. 61.

Moreover, even if the trial court somehow committed instructional error regarding the consideration of victim-impact evidence, the error was harmless under any standard because it is beyond a reasonable doubt that a properly instructed jury would have returned the same verdict. As previously discussed, the victim-impact evidence was limited to the three family members and one treating physician. It was not overly emotional or inflammatory. Nothing in the record suggests that this evidence overwrought the jury with emotion such that they abandoned their responsibility to decide the penalty in light of all of the evidence and in accordance with the trial court's instructions. And, as previously discussed, there was compelling evidence favoring the imposition of the death penalty.

X. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY ADMITTING THREE PHOTOGRAPHS OF THE HOLLOWAY AUTOPSY

Johnsen claims the trial court erred during the penalty phase by admitting three photographs that had been taken during the autopsy of Terry Holloway, whose murder he had previously aided and abetted. (AOB

440-457.) He argues that the photograph were irrelevant because he did not personally inflict the fatal injuries. (AOB 445-448.) He also argues that the photographs were unduly prejudicial. (AOB 448-457.) His claim of evidentiary error is without merit, and any error was harmless.

A. Summary of Legal Principles

"'The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion.'" (*People v. Moon* (2005) 37 Cal.4th 1, 34.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) During the penalty phase of a capital trial, a jury may 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 express or implied threat to use force or violence." (Pen. Code, § 190.3, factor (b).) "Evidence that a defendant in a capital punishment case has previously aided and abetted a violent criminal offense is admissible under the language of factor (b) of section 190.3, whether or not the defendant's actions were themselves violent: it is evidence of '*criminal activity* by the defendant which *involved* the use . . . of force or violence . . . .' (Italics added.)" (*People v. Hayes* (1990) 52 Cal.3d 577, 633.)

Even if evidence is relevant, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) This Court has emphasized, however, "that at the penalty phase, the trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is

more circumscribed than at the guilt phase." (*People v. Box* (2000) 23 Cal.4th 1153, 1201.)

> During the guilt phase, there is a legitimate concern that crime scene photographs such as are at issue here can produce a visceral response that unfairly tempts jurors to find the defendant guilty of the charged crimes. Such concerns are greatly diminished at the penalty phase because the defendant has been found guilty of the charged crimes, and the jury's discretion is focused on the circumstances of those crimes solely to determine the defendant's sentence. Indeed, the sentencer is *expected* to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light.

(*Ibid.*, original italics; see *People v. Moon*, *supra*, 37 Cal.4th at p. 35.)

B. Procedural Background

Prior to the start of the penalty phase, the trial court held a hearing under Evidence Code section 402 to determine the admissibility of several photographs that the prosecutor had proffered to prove the circumstances relating to the prior murder of Holloway. At the hearing, Dr. Mark Super testified that the photograph marked as People's Exhibit 185 showed Holloway's injuries to her face and scalp after her body had been cleaned and her head shaved. (22 RT 4752-4753.) The photograph was striking not just because of the abrasions and contusions but because the abrasions had peculiar patterns, a series of parallel short lines consistent with a threaded tool. (22 RT 4753.) At first Dr. Super had noticed these peculiar marks at the scene and thought the instrument used to make them might be a threaded pipe. (22 RT 4753.) After the body was cleaned and during the autopsy, Dr. Super saw that the lines were both parallel and divergent, consistent with a collapsible tool like a scissors jack. (22 RT 4753.)

Dr. Super also testified that the photograph marked as People's Exhibit 186 showed Holloway's body after it was cleaned, but before her

head was shaved. (22 RT 4753.) It showed the parallel abrasions on the left side of her face and front and left side of her neck. (22 RT 4753-4754.) The photograph also showed two parallel slightly curved lines lower on the front of the neck which were initially though to be impact injuries since they were not consistent with fingers, rope or wire marks. (22 RT 4754.) "Some of these marks had little cuts in them as if the object had a narrow edge. We were never really able to identify a particular object. Possibly the same object that struck her face." (22 RT 4754.) They were also possible ligature marks. (22 RT 4755-4756.) Dr. Super explained that both photographs were necessary to explain his analysis because it showed that "she sustained multiple blows on not just one side but both sides of the face." (22 RT 4754-4755.)

Dr. Super further testified that the photograph marked as People's Exhibit 187 showed Holloway's cleaned face and a better image of the "very characteristic converging, parallel abrasions from this instrument and a better picture of these parallel marks on the right side of her chin." (22 RT 4755.) It also showed a screw mark from the scissors jack on the jaw. (22 RT 4756.)

On cross- examination Dr. Super said the cause of injury was blunt force trauma and strangulation and, when asked if he could describe the cause of death adequately without the photographs, he said: "I think the pictures are quite effective in demonstrating the peculiar nature of the injury." (22 RT 4757.) He also said the photographs helped him describe the extensive nature of the injuries. (22 RT 4757.)

The trial court found the photographs relevant and probative of the circumstances of the crime, the prior criminal activity, and how it occurred. Noting that the photographs showed the brutality of the murder and were prejudicial to the defendant, the court found that they were not overly prejudicial and that the prejudice did not outweigh their evidentiary value;

it also noted that the prosecutor and reduced greatly the number of photographs. (22 RT 4759-4760.) The court also noted that the doctor needed the photographs to show the peculiar circumstances of the injuries and the incident. (22 RT 4760.)

At trial, Melisa Andre testified to what one of the accomplices in the murder of Holloway, Anna Humiston had said about how the murder was carried out. (22 RT 4848-4850.) This testimony corroborated Dr. Super's findings. Mia Rodriguez testified to a similar conversation she had with Humiston. (22 RT 4852-4853.) Homicide Detective Ronald Larmour also testified to statements made by Denise Shigemura concerning how and under what circumstances Holloway was killed. (22 RT 4856-4859.) These statements were similarly consistent with the other evidence of the murder.

C. The Photographs Were Relevant and Not Unduly Prejudicial

Contrary to Johnsen's suggestion, the photographs that the trial court admitted at the penalty phase were neither irrelevant nor unduly prejudicial. "There is no unfairness in allowing the People to show the circumstances of the violent 'criminal activity.'" (*People v. Melton* (1988) 44 Cal.3d 713, 755.) "Violent 'criminal activity' presented in aggravation may be shown in context, so that the jury has full opportunity, in deciding the appropriate penalty, to determine its seriousness." (*Id.* at p. 757.) Likewise, there is no error when the defendant "could have been liable as an accomplice for conduct by the codefendant, and evidence of that conduct is necessary to place the defendant's own conduct in context." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 137, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802; see *People v. Thomas* (2011) 51 Cal.4th 449, 505.) Moreover, "a defendant is not entitled to prevent admission of

the '"sordid details"' of criminal conduct under section 190.3, factor (b) '"by stipulating to any resulting conviction or to a sanitized version of the facts surrounding the offense."'" (*People v. Clark* (2011) 52 Cal.4th 856, 1000, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 1017; see *People v. Burgener* (2003) 29 Cal.4th 833, 872.)

Here, the photographs were relevant to show the peculiar injuries inflicted on Holloway. Those injuries corroborated the testimony of other witnesses who testified that they had been told about the murder by actual accomplices to the murder. Those accomplices described the victim being strangled and beaten with a scissors jack. The accomplices involvement tied Johnsen to the murder. The prosecutor was obliged to prove Johnsen's involvement in the murder of Holloway beyond a reasonable doubt, and was not obliged to stipulate to the facts presented by Dr. Super's testimony. As a result, the trial court correctly found that the photographs were relevant and that their probative value was not outweighed by the risk of undue prejudice.

Johnsen's contrary argument is based in part on a mischaracterization of Dr. Super's statement that he could still testify about the cause of death without the photographs. (AOB 442.) In actuality, Dr. Super said that the photographs helped him explain what instrumentality was used to inflict Holloway's fatal injuries. He said he could describe the cause of death without the photographs, but to explain the circumstance of her death the photographs were "quite effective in demonstrating the peculiar nature of the injury." (22 RT 4757.) Indeed, it was Dr. Super himself who went through all of the photographs and narrowed them down to the most important ones. He looked at over 100 photographs and narrowed them down to just these seven. As a result, the photographs were relevant to his testimony and to establishing the circumstance of Holloway's death.

Johnsen also argues that the photographs should have been excluded since he was only an aider and abettor in Holloway's murder. This Court rejected the same type of argument in *People v. Scheid* (1997) 16 Cal.4th 1. In *Scheid*, a photograph of the victim's hands cuffed together and laying in a pool of blood on a bed was admitted at trial even though the defendant was an aider and abettor and charged with responsibility for the deaths under the felony-murder rule, not as an actual perpetrator. (*Id.* at p. 18) This Court also found that the photograph was relevant because it clarified the testimony of witnesses who described the scene of the crime. (*Ibid.*) Here the photographs supported Dr. Super's theory on the instrumentality of the injuries, a scissor jack with possible strangulation. And, not only did the photographs support Dr. Super's theory, they also corroborated the testimonies of Andre and Rodriquez who testified that Humiston, who was an eyewitness to the murder, told them that Holloway was strangled and beaten with a scissors jack.

Moreover, Johnsen's attempt to minimize his role in Holloway's murder by relying on his status as an aider and abettor, is disingenuous. Johnsen was the person who made the decision that Holloway had to be murdered. Johnsen selected the people to do it. He obviously knew the type of people he was dealing with and how they might carry out the task he had given them. The victim was Johnsen's girlfriend who was pregnant with his son. Johnsen wanted her killed because she was going to warn Mynatt that Johnsen was planning to kill him. Moreover, the jury already knew that Johnsen himself was capable of very brutal acts---they saw the photographs of the Braggs who had been beaten with a hammer and stabbed with knives---so the danger that they would be more inflamed by the violent acts he was responsible for in Holloway's murder, even though he was not personal present, was unlikely. As a result, Johnsen's claim that the admission of the photographs was an arbitrary, capricious, or patently

absurd abuse of the trial court's discretion is without merit. His claim of constitutional error without merit for the same reasons. (See *People v. Moon*, *supra*, 37 Cal.4th at p. 35.)

D. Any Evidentiary Error Was Harmless

Even if the trial court erred by admitting the evidence at the penalty phase, the error was harmless under any standard. (See *People v. Jackson* (2014) 58 Cal.4th 724, 761; *Chapman v. California*, *supra*, 386 U.S. at p. 87.) The jury could not have been overwhelmed by the sight of the autopsy photographs of Holloway during the penalty phase because they had already seen 45 autopsy photographs at the guilt phase depicting how Johnsen had bludgeoned Juanita Bragg with a hammer and sliced her multiple times with a knife. (14 RT 2986-3012; 15 RT 3198-3226.) Holland's testimony established Johnsen's role in the murder of Holloway and Johnsen's lack of compassion for his girlfriend and their unborn child. (22 RT 4868-4880; People's Exhs. 161-180.) Nieto's testimony further established Johnsen's propensity for violence by revealing Johnsen's multiple acts of domestic violence toward Holloway. (22 RT 4889, 4892-4893, 4900-4902.) Given this evidence, there is simply no doubt that any error was harmless and would not have had a reasonable possibility of affecting the verdict in the penalty phase.

XI. THERE WAS NO PROSECUTORIAL ERROR DURING THE PENALTY PHASE

Johnsen claims the prosecutor erred in several ways when arguing the case to the jury during the penalty phase of the trial. (AOB 458-496.) He alleges that the prosecutor erred by "making improper appeals to the jurors' passions, fears and prejudices, suggesting that it was their duty to sentence appellant to death, and urging the jury to render a decision based on emotion and vengeance." (AOB 459-477, capitalization omitted.) He also

claims the prosecutor erred by "arguing evidence of the conspiracy to kill Doug Mynatt as aggravating 190.3, factor (b), evidence and basing that argument on a mischaracterization of the evidence." (AOB 477-486, capitalization omitted.)

Johnsen is not entitled to the reversal of his conviction because he forfeited his claim as to most of the prosecutor's comments. In any event, the prosecutor's comments did not infect the penalty phase with such unfairness as to violate the federal Constitution. Nor were they so deceptive or reprehensible as to violate state law. Moreover, any error was harmless in light of the court's instructions and the overwhelming nature of the evidence favoring the imposition of the death penalty.

A. Summary of Legal Principles

"The same standard applicable to prosecutorial misconduct at the guilt phase is applicable at the penalty phase." (*People v. Valdez* (2004) 32 Cal.4th 73, 132; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1153.)

> "'Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such "'unfairness as to make the resulting conviction a denial of due process.'"'" [Citation.] "Under California law, a prosecutor commits reversible misconduct during the penalty phase if he or she makes use of 'deceptive or reprehensible methods' in attempting to persuade either the trial court or the jury, and there is a reasonable possibility that without such misconduct, an outcome more favorable to the defendant would have resulted." [Citation.] "'To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.'" [Citation.]

(*People v. Sattiewhite* (2014) 59 Cal.4th 446, 480.) "'"Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. [Citation.] But emotion need not,

indeed, cannot, be entirely excluded from the jury's moral assessment.'" [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 946.)

B. The Prosecutor's Argument Was Not Unduly Emotional and Did Not Invite the Jury to Base Its Decision on Outside Influences

Johnsen claims the prosecutor erred by "making improper appeals to the jurors' passions, fears and prejudices, suggesting that it was their duty to sentence appellant to death, and urging the jury to render a decision based on emotion and vengeance." (AOB 459-477, capitalization omitted.) He forfeited his claim by not objecting to most of the prosecutor's arguments, by not asking the court to admonish the jury regarding the prosecutor's suggestion that the imposition of an inappropriate punishment would compromise the integrity of the legal system, and by accepting the adequacy of the court's admonition that the each juror must decide the issue of punishment individually. In any event, his claim is without merit because the prosecutor's remarks were not unduly emotional or inflammatory, and there is not a reasonable likelihood that the jurors construed or applied the remarks in an objectionable manner. And, even if the prosecutor somehow erred, the error was harmless.

1. Johnsen forfeited his claim

Johnsen forfeited his claim of prosecutorial error by not objecting to most of the prosecutor's arguments, by not asking the court to admonish the jury regarding the prosecutor's suggestion that the imposition of an inappropriate punishment would compromise the integrity of the system, and by accepting the adequacy of the court's admonition that the each juror must decide the issue of punishment individually. "The same standard applicable to prosecutorial misconduct at the guilt phase is applicable at the penalty phase. [Citation.] A defendant must timely object and request a

curative instruction or admonishment." (*People v. Martinez, supra*, 47 Cal.4th at p. 963; see *People v. Rountree, supra*, 56 Cal.4th at p. 858; *People v. Sanders* (1995) 11 Cal.4th 475, 549; *People v. Miller* (1990) 50 Cal.3d 954, 1001.)

Here, after the parties submitted their arguments to the jury, Johnsen asked the court to instruct the jurors with Defendant's Penalty Phase Instruction No. 60 that they must decide the issue of punishment "individually." (26 RT 5809; 9 CT 2466.) He argued that the instruction was warranted because the prosecutor had "indicated that these people are representatives of 30 million Californians, that they're doing the will of the people by imposing the death sentence." (26 RT 5809.) Johnsen also argued that, "in [the prosecutor's] rebuttal he stated . . . that in order to preserve the integrity of the system that the death penalty was warranted when, in fact, that's really a misstatement because the system's integrity is inviolate, whether life in prison or death." (26 RT 5809.) The prosecutor replied, "The thrust of my argument was that *if* a lesser than appropriate punishment is imposed *then* the integrity of the law is compromised. . . . If he deserves death and he gets a lesser penalty, then the integrity is compromised." (26 RT 5809, italics added.) The court proposed to instruct the jury as follows: "Each of you *individually* must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (26 RT 5810-5811, italics added.) Johnsen replied, "Well, all right. I think that's appropriate." (26 RT 5811.)

Johnsen now suggests that he preserved his claim of prosecutorial error as to the entirety of the prosecutor's argument because, prior to the presentation of arguments, he asked the court to forbid the prosecutor from erring, and the prosecutor responded by promising not to err. (AOB 486-489.) However, Johnsen's motion was not sufficient to preserve his claim

because it was not directed to a particular, identifiable argument at a time when the court could determine the propriety of the argument in its appropriate context. (See *People v. Morris* (1991) 53 Cal.3d 152, 190 [discussing requirements for a motion in limine to satisfy objection requirement of Evidence Code section 353].) Moreover, although the prosecutor promised not to err, Johnsen did not object to any of the prosecutor's comments as violating the promise. Nor did he ask the court to admonish the jury on any issue aside from the need to make a decision individually. As a result, Johnsen's claim that his pre-argument motion and the prosecutor's response thereto preserved his claim of subsequent prosecutorial error is without merit.

Johnsen also suggests that "it would be extremely unfair to penalize the defense for failing to interrupt the prosecutor's argument and object on the spot" in order to avoid antagonizing the jurors. (AOB 489-490.) He also alleges that "given the number and seriousness of the improprieties found in the prosecutor's arguments, it is clear that objections and admonitions would not have cured the harm created by this misconduct." (AOB 491.) However, Johnsen had the opportunity to lodge objections and request admonitions outside of the jury's presence during recesses. (See, e.g., 25 RT 5730; 26 RT 5809.) Johnsen demonstrated that he was aware of those opportunities by actually taking advantage of them. (See 25 RT 5730; 26 RT 5809.) And, as discussed *post*, the alleged errors were not so numerous or inflammatory as to rebut the presumption that the jury would have understood and followed an admonition to disregard the impropriety. As a result, Johnsen's suggestion that it would be unfair to require him to take advantages of the known opportunities to raise his claims during jury recesses is without merit.

2. The prosecutor's arguments were not unduly emotional or inflammatory, and there is not a reasonable likelihood that the jurors construed or applied the arguments in an objectionable manner

Johnsen claims "the prosecutor committed at least six acts of misconduct." (AOB 464.) First, he alleges that the prosecutor told the jurors that they "had a duty, as representatives of 30 million Californians, to impose a sentence of death." (AOB 458, 464.) However, the prosecutor's actual comments were merely as follows:

> Your job as jurors is to base your decision in this phase of the trial on the evidence and the law. . . . I would remind you that you are representatives of 30 million Californians, the great majority of whom are law abiding citizens. You owe them and yourselves a conscientious, courageous and thorough review of the evidence in this phase of the trial. You owe yourselves and your fellow citizens the imposition of a just and appropriate punishment. [¶] I urge you to remain faithful to your oath and to do the right thing. Fellow citizens expect that you will discharge your duty and they are entitled to the discharge of that duty.

(25 RT 5693-5694.) There is no reasonable likelihood that the jurors somehow construed the prosecutor's remark as meaning that they had a duty to ignore the court's instructions and to return a verdict of death regardless of the evidence. Nor is there a reasonable likelihood that the jurors construed the comment as meaning that they had a duty to ignore the court's instructions and to return a verdict of death based on public opinion or sentiment. Nor was it improper for the prosecutor to suggest that "the jury would be acting as the representative of the community or for society as a whole." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 148-149; see *People v. Linton* (2013) 56 Cal.4th 1146, 1209-1210.) As a result, Joshnsen's complaint about this portion of the prosecutor's argument is without merit.

Second, Johnsen complains that the prosecutor told the jurors that "if they did not have the will and courage to 'confront the evil and to eradicate

it,' their decision for a life sentence would be immoral, weak, and criminally negligent" in light of Johnsen's future dangerousness. (AOB 464, 466.) However, the prosecutor's actual comments were merely as follows:

> I wanted to say a few things about the moral underpinnings of capital punishment. . . . Capital punishment . . . protects society from those who kill repeatedly. In that sense, and in those cases, imposition of the death penalty is an act of collective self-defense on the part of society.
>
> [¶] . . . [¶]
>
> There is absolutely no uncertainty in concluding that if allowed to live, Mr. Johnsen will constitute a threat to the lives of others.
>
> A society which lacks the will to protect its citizens from the likes of the Brian Johnsens of the world, is as immoral as it is weak and criminally negligent. Fortunately, we live in a society which has the courage and the will to confront evil and to eradicate it.

(25 RT 5694-5695.) Contrary to Johnsen's suggestion, the prosecutor's comment on the morality of sentencing him to life in prison without the possibility of parole as opposed to death was fair because "the sentencing function is inherently moral and normative." (*People v. Salazar* (2016) 63 Cal.4th 214, 255, internal quotation marks omitted.) So too was it fair for the prosecutor to comment on the need to protect society from Johnsen in light of the future dangerousness evinced by the fact that imprisonment had been insufficient to prevent him from aiding and abetting the murder of his own girlfriend Holloway and from soliciting the murder of several people while awaiting trial for the capital murder of Mrs. Bragg. (See *People v. Lopez* (2013) 56 Cal.4th 1028, 1077; *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 32-33.) And, in light of those offenses and the circumstances thereof, it was fair for the prosecutor to suggest that Johnsen was evil. (See

People v. Garcia (2011) 52 Cal.4th 706, 759-760; *People v. Farnam* (2002) 28 Cal.4th 107, 168.) As a result, Johnsen's complaints about the prosecutor's comments in these regards are without merit.

Third, Johnsen claims that the prosecutor told the jurors that "a life sentence would be interpreted as valuing appellant's life more than Mrs. Bragg's life." (AOB 464.) In actuality, however, the prosecutor merely asked the jurors rhetorically, "Why should Brian Johnsen's life be valued more than *he* valued those of his victims? Why should Brian Johnsen's life be spared when *he* failed to show any compassion or sympathy for his victims at the time he committed his murders?" (25 RT 5695-5696, italics added.) The prosecutor later reiterated:

> Why should you place a higher value on the defendant's life than *he* did on those of Juanita Bragg and Terry Holloway?
>
> Why should you spare the defendant's life when *he* failed to show any compassion or sympathy for Juanita, Leo and Terry?
>
> Why should you spare defendant's life when *he* showed no consideration for his own child developing in Terry Holloway's womb?

(25 RT 5727-5728.) The questions were fair because this Court has "repeatedly approved prosecutors arguing that a defendant is not entitled to mercy, and in particular arguing that whether the defendant was merciful during the crimes should affect the jury's decision." (*People v. Gamache* (2010) 48 Cal.4th 347, 389; see *People v. Rountree*, *supra*, 56 Cal.4th 823, 859; *People v. Ervine* (2009) 47 Cal.4th 745, 802-803.)

Fourth, Johnsen complains that the prosecutor "told the jury not to consider sympathy or mercy for appellant because he did not show any to the victims." (AOB 464.) However, the prosecutor never suggested that the jury that they could not even consider whether to have sympathy or mercy for Johnsen. Rather, the prosecutor argued only that the jury ought

not have sympathy or mercy for Johnsen because the evidence showed that he did not have sympathy or mercy for his victims. (25 RT 5695-5696, 5727-5728.) Such an argument was completely fair. (See *People v. Rountree*, *supra*, 56 Cal.4th at p. 859; *People v. Gamache*, *supra*, 48 Cal.4th at p. 389; *People v. Ervine*, *supra*, 47 Cal.4th at pp. 802-803.)

Fifth, Johnsen complains that the prosecutor referred to "'the remains of his victims decay[ing] in the earth and their survivors [being] condemned to grieve . . . every day of their lives.'" (AOB 464, quoting 25 RT 5695.) However, "[s]ince, as previously discussed, the victim impact evidence was admissible, the prosecutor could recall that evidence and urge the jurors to rely on it in voting to impose the death penalty." (*People v. Brown* (2004) 33 Cal.4th 382, 400.) Moreover, as this Court has observed, an argument comparing a defendant's "life in prison with 'the victim in her grave'" is "not unduly inflammatory or otherwise improper." (*People v. Rountree*, *supra*, 56 Cal.4th at p. 859.) Likewise, the argument juxtaposing Mrs. Bragg's "loss of life and the effect of that loss on her family against the continuing life defendant would have in prison was neither improper nor overly emotional." (*People v. Sattiewhite*, *supra*, 59 Cal.4th at p. 483.) And, the reference to the victims' families grieving "every day of their lives" fairly "addressed the permanence of the loss caused by defendant's crimes and fell within the considerable leeway given for argument at the penalty phase." (*Id.* at p. 482.) As a result, Johnsen's complaints regarding the prosecutor's comments in these regards are without merit.

Sixth, Johnsen complains that the prosecutor argued to the jurors that they should return a verdict of death in order to "maintain the integrity of the law, to insure that it works the way it has been designed to work." (AOB 464; see AOB 466-467.) As the prosecutor subsequently explained to the trial court, "The thrust of my argument was that *if* a lesser than appropriate punishment is imposed then the integrity of the law is

compromised. . . . *If* he deserves death and he gets a lesser penalty, then the integrity is compromised." (26 RT 5809, italics added.) Johnsen does not demonstrate a reasonable likelihood that the jury somehow construed the remark in a different manner, much less in an objectionable manner. Indeed, the prosecutor prefaced his remark by reminding the jurors, "You're not here to apply Biblical wisdom. . . . [¶] . . . [¶] You are here to apply the law of the State of California in a capital murder case and that law requires that you weigh the aggravating and mitigating circumstances in deciding whether to impose the penalty of death." (25 RT 5797.) As a result, his allegations of prosecutorial error are without merit.

3. Any Prosecutorial Error Was Harmless

Even if the prosecutor somehow erred when arguing the case to the jury, the error was harmless. "For prosecutorial misconduct at the penalty phase, we apply the reasonable-possibility standard of prejudice" which "is the 'same in substance and effect' as the beyond-a-reasonable-doubt test for prejudice." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1092.) Here, it is beyond a reasonable doubt that the jury would have returned the same verdict even in the absence of the prosecutor's supposedly improper comments.

First, the trial court's instructions disabused the jurors of any misunderstandings of the law. "[P]rosecutorial commentary should not be given undue weight in analyzing how a reasonable jury understood capital sentencing instructions. Juries are warned in advance that counsel's remarks are mere argument . . . and juries generally understand that counsel's assertions are the 'statements of advocates.'" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1225, fn. 21.) In addition, the jury is presumed to have understood and followed the court's instructions that they "neither be influenced by bias nor prejudice *against* the defendant nor

swayed by public opinion or public feeling," but that they "may consider sympathy, compassion, mercy or pity *for* the defendant." (26 RT 5831, italics added.)

Second, there was overwhelming evidence supporting a judgment of death. As previously discussed, Johnsen had just been convicted by the same jury of the brutal, violent, and senseless murder of an elderly woman in her sleep and the attempted murder of her elderly husband. (8 CT 2223-2231.) Through Holland, the jury heard that Johnsen wanted to kill these two innocent people merely to see if he could and get away with it. (17 RT 3504.) The jury also knew that Johnsen had enter the Rudy residence that night with the intent to rape and murder Rudy. (17 RT 3509.) The jury had also just convicted Johnsen of trying to solicit the murders of two witnesses and two detectives associated with the case, though there was evidence that he had actually solicited the murders of between six and nine people he believed had information that could implicate him. (8 CT 2232-2236; 6 CT 1395-1396, 1425-1426, 1479; 17 RT 3533-3534; People's Exh. 95; 22 RT 4869-4870; People's Exhs. 161-168.) Johnsen solicited these murders while incarcerated, just as he had done when he aided and abetted the murder of his pregnant girlfriend Terry Holloway. (17 RT 3484-3487; 22 RT 4869-4870; People's Exhs. 161-168.) As a result, it is beyond a reasonable doubt that the jury would have returned a verdict of death even if the absence of the prosecutor's supposedly improper arguments.

C. The Prosecutor Did Not Improperly Use or Incorrectly Describe the Evidence Regarding Mynatt

Johnsen claims the prosecutor erred by using evidence regarding the conspiracy to kill Mynatt for an improper purpose and by incorrectly describing that evidence to the jury. (AOB 477-486.) His claims are without merit, and any conceivable error was harmless.

1. Procedural background

Johnsen confessed to fellow inmate Holland that he had previously aided and abetted the murder of his girlfriend Holloway because she was threatening to tell Mynatt that Johnsen and Juardo were plotting to kill him. (8 CT 2257-2258; 21 RT 4677-4678, 4694.) The trial court ruled that the evidence was admissible in order to show Johnsen's motive for aiding and abetting the murder of Holloway, but not to show that Johnsen and Juardo had actually plotted to kill Mynatt. (21 RT 4711-4712.) The court also told the parties, "I'm willing to accept a limiting instruction if you can frame one between yourselves." (21 RT 4711.)

The prosecutor later made the following remarks to the jury about Johnsen aiding and abetting the murder of Holloway:

> Think about the motive. He decided to participate in her murder because she was going to go to the object of a plot he was involved with, a plot to kill another person. So we have a killer here, ladies and gentlemen, who not only premeditates and deliberates his killings, we have a killer that kills so he can continue to kill. That was his motive. He had his girlfriend killed so he could kill Doug Mynatt . . . .

(25 RT 5706-5707.)

Johnsen moved for a mistrial on the ground that the prosecutor had been "talking about the murder of Doug Mynatt not just as a motive but he's using it to aggravate the defendant's -- he's using it as factor in aggravation." (25 RT 5730.) The court denied the motion as follows:

> [I] didn't get from his argument that he was saying the Mynatt case should be considered as a circumstance in aggravation. He may be sensitive to that issue, but I didn't get that from his argument, plus we have an instruction to the jury in our instructions that specifically tells them that they're only to consider it for a limited purpose.

(25 RT 5733.)

After the parties submitted their arguments to the jury, the court admonished the jury as follows:

> Certain evidence was admitted for a limited purpose. [¶] Evidence regarding a plot to kill a Doug Mynatt was admitted only to establish the motive for the murder of Terry Holloway and evidence pertaining to Terry Holloway's pregnancy was admitted only to establish the circumstances of her murder. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

(26 RT 5845-5846; 9 CT 2530.)

1. The prosecutor's arguments were not unduly emotional or inflammatory, and there is not a reasonable likelihood that the jurors construed or applied the arguments in an objectionable manner

Johnsen claims the prosecutor erred by suggesting to the jurors that they could consider his confession as evidence that he had actually plotted to kill Mynatt, and that they could consider such a plot to be yet another act of violence of Penal Code section 190.3, factor (b). (AOB 481-483.) His claim is without merit because there is not a reasonable likelihood that the jurors construed the comment in that manner. The prosecutor never listed the plot to kill Mynatt as being an act of violence separate from the murder of Holloway. Rather, the prosecutor correctly told the jury both before and after the challenged remarks that the evidence was relevant to show Johnsen's role and motive in the murder of Holloway. (25 RT 5702, 5707.) Moreover, the court admonished the jurors that they could consider the "[e]vidence regarding a plot to kill a Doug Mynatt . . . only to establish the motive for the murder of Terry Holloway." (9 CT 2530.) As a result, there is not a reasonable likelihood that the jury construed or applied the totality of prosecutor's remarks in an objectionable manner.

Johnsen also complains that the prosecutor erred by mischaracterizing the reason why he was afraid of Holloway warning Mynatt of the plot to

kill him. (AOB 484-486.) Specifically, Johnsen argues that the evidence did not support the prosecutor's suggestion that he was afraid of no longer being able to carry out the plot. Rather, Johnsen argues that the evidence showed that he was afraid of Mynatt retaliating against him. (AOB 484.) Johnsen relies on the absence of evidence showing that the plot progressed after Holloway was murdered, his self-professed remorse for murdering Holloway, and his statement, "I had no choice. It was her or all of us." (AOB 484-485, citing 6 CT 1470-1471.) However, his claim of prosecutorial misconduct is without merit because a prosecutor is allowed to make a "fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Ward* (2005) 36 Cal.4th 186, 215, internal quotation marks omitted.) It was reasonable to infer that Johnsen's statements expressing remorse and explaining why he aided and abetted the murder of Holloway were insincere because they were self-serving. (See *People v. Silva* (2001) 25 Cal.4th 345, 369.) As a result, it was fair for the prosecutor to suggest that the jury should not accept Johnsen's version of a necessity defense for aiding and abetting the murder of Holloway.

2. Any Prosecutorial Error Was Harmless

Even if the prosecutor erred when discussing the relationship between the plot to kill Mynatt and the motive to kill Holloway, the error was harmless because it is beyond a reasonable doubt that the jury would have returned the same verdict even in the absence of the alleged error. (See *People v. Wallace*, *supra*, 44 Cal.4th at p. 1092.) First, there is not a reasonable possibility that the jury considered the plot to kill Mynatt as being an additional act of violence under Penal Code section 190.3, factor (b). Even if the prosecutor somehow suggested that the jury could consider the evidence for other purposes, the suggestion was fleeting and insufficient

to rebut the presumption that the jurors followed the trial court's contrary admonition to consider the evidence only for the proper purpose of establishing the motive for the murder of Holloway. (See *People v. Clark* (2016) 63 Cal.4th 522, 589.)

Second, even if there is a reasonable possibility that the jury considered the plot to kill Mynatt as an additional act of violence under Penal Code section 190.3, factor (b), his other acts of violence were so numerous that it is beyond a reasonable doubt that the jury would have returned the same verdict. As previously discussed, the jury convicted Johnsen not only of the capital murder of Mrs. Bragg but also of attempting to kill Mr. Bragg and of soliciting the murder of two witnesses and two law enforcement officers while in custody. The jury also heard compelling evidence that Johnsen had committed acts of domestic violence on Holloway and that, regardless of motive, he had aided and abetted her murder while in custody. As a result, it is beyond a reasonable doubt that the jury would have returned the same verdict with or without the prosecutor's supposedly erroneous comments regarding the plot to kill Mynatt.

XII. THE CUMULATIVE IMPACT OF THE SUPPOSED ERRORS DURING THE GUILT AND PENALTY PHASES OF THE TRIAL DID NOT VIOLATE JOHNSEN'S STATE OR FEDERAL CONSTITUTIONAL RIGHTS

Johnsen contends that that there was a cumulative prejudicial impact from the errors he claims the trial court made. (AOB 496-499.) In particular he points to Arguments II, III, IV, V, VII, IX, and X. (AOB 498-499.) Johnsen's contention is without merit since the trial court did not make the errors claimed. Suffice it to say, that because the trial court did not commit any errors, there can be no cumulative prejudice. (*People v. Jackson, supra*, 58 Cal.4th at p. 774.) Where there are no errors there is

"nothing to cumulate." (*People v. Duff* (2014) 58 Cal.4th 527, 568.) And, even if there were multiple errors, none of those errors caused prejudice sufficient to require reversal of the judgment or sentence.

XIII. THE "OTHER ISSUES ARISING FROM THE USE OF THE DEATH PENALTY" DO NOT WARRANT APPELLATE RELIEF

Johnsen raises several challenges to the capital-punishment system in California. (AOB 500-537.) First, he claims that the system is unconstitutional because it is overseen by judicial officers who must stand for popular election. (AOB 500-512.) Second, he claims the system is unconstitutional due to 21 other supposed defects, all of which have been previously addressed in other cases. (AOB 512-537.) His claims do not warrant appellate relief.

A. This Court Has Repeatedly Rejected Johnsen's Claim Regarding Judicial Elections

Johnsen claims that judicial elections make the capital-punishment system unconstitutional in California because "there is an inherent conflict between the obligation to follow the law in a capital case and the desire for career self-preservation." (AOB 512.) However, this Court has repeatedly rejected claims that it is "so influenced by political pressure in its review of capital cases that various constitutional rights associated with meaningful appellate review have been abrogated." (*People v. Gonzales* (2011) 51 Cal.4th 894, 958; People v. Avila (2006) 38 Cal.4th 491, 615 ["This court's review process is not impermissibly influenced by political considerations."].)

> Even if we assume for argument's sake that there is some relationship between affirmance of death sentences and retention in office, defendant fails to demonstrate that a justice of this court must affirm every death sentence or any particular death sentence, much less defendant's own sentence. Thus, defendant

> does not persuade us that members of this court have a disabling conflict of interest in determining this appeal.

(*People v. Kipp* (2001) 26 Cal.4th 1100, 1141.) As a result, Johnsen's claim is without merit.

B. Johnsen's Other Routinely-Rejected Claims Do Not Warrant Reconsideration

Johnsen claims the capital-punishment system is unconstitutional in California due to 21 supposed defects, all of which have been previously addressed in other cases. (AOB 512-537.)

1. The jury's consideration of the circumstances of the crime did not result in an arbitrary or capricious imposition of the death penalty

Johnsen contends that permitting the jury to consider the "circumstances of the crime" within the meaning of Penal Code section 190.3, factor (a) resulted in an unconstitutional, arbitrary, and capricious imposition of the death penalty in his case because this criteria is vague and standardless. (AOB 513.) He also specifically observes, without additional argument, that the jury was not required to be unanimous as to which circumstances of the crime it found aggravating, nor was the jury required to make this finding beyond a reasonable doubt. (AOB 514.) Johnsen cites to the record where the jury instruction on factor (a) was given, but otherwise fails to "identify his claim in context of the facts" of his case as required by *People v. Schmeck* (2013) 37 Cal.4th 240, 304. Nor does he establish that he objected to the instruction on these grounds during the trial or offered a different instruction. Johnsen, consequently, has forfeited this claim. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1140.)

Even if he had not forfeited this claim, the jury's consideration of the circumstances of the crime was appropriate and constitutional in Johnsen's case. Additionally, the jury was not required to be unanimous in its

findings or subject their findings to a standard of existence beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 263-264, 276.)

The circumstances of the crime are a traditional subject for consideration during the penalty phase, thus Penal Code section 190.3, factor (a), which allows the jury to consider the circumstances of the crime is neither vague nor otherwise improper under Eighth Amendment jurisprudence. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1013; *People v. Linton, supra*, 56 Cal.4th at pp. 1214-1215; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976.) In this case, Johnsen murdered the elderly victim while she was asleep in her daughter's home at night while he committed a robbery and callously beat and stabbed her as she tried to defend herself. These were appropriate manner, motive, and location circumstances of the crime which the jury was entitled to and should have considered in deciding whether to impose the death penalty.

Moreover, the admission of evidence showing how a defendant's crimes directly impacted the victim's family, friends, and the community as a whole does not violate the Eighth Amendment unless such evidence is "so unduly prejudicial" that it results in a trial that is "fundamentally unfair." (*People v. Pearson* (2013) 56 Cal.4th 393, 466, quoting *Payne v. Tennessee, supra*, 501 U.S. at p. 825; see *People v. Marks* (2003) 31 Cal.4th 197, 235-236.) Victim impact evidence is likewise admissible as a circumstance of the crime under Penal Code section 190.3, factor (a), so long as it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Taylor* (2010) 48 Cal.4th 574, 645-646, quoting *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; see *People v. Zamudio, supra*, 43 Cal.4th at p. 364.) In the present case the victim impact evidence fell within permissible parameters. (*People v. Pollock, supra*, 32 Cal.4th at p. 1180.)

Johnsen suggests that the jury's determination that the aggravating factors outweighed the mitigating factors and their determination that the aggravating factors were substantial enough to support a death judgment were all "facts" which should have been proven beyond a reasonable doubt under the federal constitution. (AOB 514.) This Court has specifically rejected this argument. (*People v. Harris*, *supra*, 57 Cal.4th at p. 858.) Furthermore, this Court has previously concluded that California's death penalty statute is not lacking in the procedural safeguards necessary to protect against arbitrary and capricious sentencing under the Eighth and Fourteenth Amendments. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) In so holding this Court stated that "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (*Ibid.*) Moreover, this Court held in *People v. Taylor* (1990) 52 Cal.3d 719, 749, and *People v. Prieto*, *supra*, 30 Cal.4th at p. 275, that juror unanimity is not required in the assessment of aggravating factors during the penalty phase of a capital case.

Johnsen offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

2. The jury was not required to be unanimous on factor (b)

Johnsen contends that the jury should have been required to unanimously agree that he was engaged in prior criminal activity under

Penal Code section 190.3, factor (b). (AOB 515-516.)[8] This Court has repeatedly rejected this argument. (*People v. O'Malley, supra*, 62 Cal.4th at p. 1013; *People v. Bunyard* (2009) 45 Cal.4th 836, 860-861; *People v. Ward, supra*, 36 Cal.4th at p. 222; *People v. Anderson* (2001) 25 Cal.4th 543, 590.)

Johnsen also asserts that because the jury had already found him guilty of the crimes charged in the guilt phase, they were not a constitutionally unbiased jury and should not have made these decisions during the penalty phase. (AOB 516.) Both arguments, as Johnsen acknowledges, were rejected by this Court in *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) This Court in *O'Malley* again rejected this argument. (*People v. O'Malley, supra*, 62 Cal.4th at p. 1013.)

Johnsen offers no unique fact or legal argument supporting his request that this Court reverse or reconsider its prior precedents. This Court should, therefore, decline to do so.

3. The jury was not required to be unanimous on factor (c)

Johnsen contends that the jury should have been required to unanimously agree that appellant had been convicted of prior criminal activity under Penal Code section 190.3, factor (c). (AOB 162-163.) Johnsen has failed to establish that he has preserved this claim for appeal, thus it is forfeited. (*People v. Moore, supra*, 51 Cal.4th at p. 1140.) Moreover, this Court has repeatedly rejected this argument. (*People v. O'Malley, supra*, 62 Cal.4th at p.1014; *People v. Bunyard, supra*, 45

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[8] Johnsen contends that he objected to the admission of the evidence that supported the giving of the factor (b) instruction (AOB 525), but his citation to the record reflects that he objected to the wording of the instruction not the evidence admitted at trial. Thus Johnsen has failed to establish that he has preserved this claim for appeal. (*People v. Moore, supra*, 51 Cal.4th at p. 1140.)

Cal.4th at pp. 860-861; *People v. Ward*, *supra*, 36 Cal.4th at p. 222; *People v. Anderson*, *supra*, 25 Cal.4th at p. 590.)

Johnsen offers no unique fact or legal argument supporting his request that this Court reverse or reconsider it prior precedents. This Court should, therefore, decline to do so.

4. The jury was properly instructed on factor (i)

Johnsen contends that the trial court instructed the jury that they could rely on Johnsen's age in deciding whether to recommend the death penalty without giving the jury any guidance on the applicability of this factor. (AOB 517.) As a result of this lack of guidance, Johnsen contends this factor was unconstitutionally vague. (AOB 517.) Johnsen has failed to establish that he has preserved this claim for appeal, thus he has forfeited the claim on appeal. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1140.) Moreover, this Court has repeatedly rejected this argument. (See, e.g., *People v. O'Malley*, *supra*, 62 Cal.4th at p. 1013; *People v. Mills* (2010) 48 Cal.4th 158, 213; *People v. Ray* (1996) 13 Cal.4th 313, 358.)

Johnsen offers no unique fact or legal argument supporting his request that this Court reverse or reconsider it prior precedents. This Court should, therefore, decline to do so.

5. The jury was properly instructed under CALJIC No. 8.85

Johnsen challenges the use of jury instruction CALJIC No. 8.85 on five grounds and alleges that defects in the instruction acted as barriers to the jury's consideration of mitigating factors in violation of his Fifth, Sixth, Eighth and Fourteenth Amendments rights. (AOB 518.) Johnsen has failed to establish that he has preserved this claim for appeal. Moreover, this Court has consistently and recently rejected such claims. (*People v. Thompson* (2010) 49 Cal.4th 79, 143-144; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v.*

Mills, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Ca1.4th at p. 968; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Ca1.4th at pp. 358-359.)

Johnsen offers no unique fact or legal argument supporting his request that this Court reverse or reconsider its prior precedents. This Court should, therefore, decline to do so.

6. The jury was properly instructed on the use of factors (d)-(h) and (j)

Johnsen contends that the trial court should have instructed the jury that certain sentencing factors were only relevant as mitigating factors. (AOB 519-520.) In doing so, he urges this Court to overturn its ruling to the contrary in *People v. Hillhouse* (2002) 27 Cal.4th 469, 509. This Court has recently declined to do so in *People v. Jackson*, *supra*, 58 Cal.4th at p. 773, stating, "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation."

7. The jury was properly instructed on the use of mitigating factors which did not include an instruction on unanimity or burden of proof.

Johnsen contends that the failure of the jury instructions to set forth a burden of proof as to the mitigating factors and the failure of the instruction to advise that mitigating factors need not be unanimously agreed to violated Johnsen's constitutional rights. (AOB 520-521.) Johnsen has not established that he has preserved this issue for appeal, thus he has forfeited the claim on appeal. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1140.) Moreover, this Court has previously ruled that a nonunanimity instruction

on the mitigating factors is not constitutionally required nor is a burden of proof instruction. (*People v. Bryant* (2014) 60 Cal.4th 335, 457-458.)[9]

8. California's death penalty laws are not unconstitutional overbroad

Johnsen contends that California's capital sentencing scheme is unconstitutional because it does not meaningfully narrow the class of murders eligible for the death penalty. (AOB 521-523.) Specifically he contends that the number of special circumstance under which the death penalty can be applied makes it unconstitutional.

This Court has consistently rejected the contention. (See, e.g., *People v. Linton*, *supra*, 56 Cal.4th at p. 1214 [Pen. Code, § 190.2 is not impermissibly overbroad in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution]; *People v. Nelson* (2011) 51 Cal.4th 198, 225 [California homicide law and special circumstances listed in § 190.2 adequately narrow class of murderers eligible for death penalty]; *People v. Williams*, *supra*, 49 Cal.4th at p. 469 [§ 190.2 is not impermissibly overbroad in violation of federal Constitution; number of special circumstances is not so high as to fail to perform constitutionally required narrowing function; special circumstances are not over inclusive, either facially or as interpreted by California Supreme Court].)

Johnsen offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

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[9] Johnsen does not cite any of this Court's precedent on the issue raised.

9. There is no burden of proof standard applicable to the jury's decision making function during the penalty phase in a death penalty case

Johnsen contends that the jury was not instructed that they had to find beyond a reasonable doubt that aggravating circumstances existed or that these aggravating circumstances outweighed the mitigating circumstances before concluding that death was the appropriate sentence. (AOB 523.) Johnsen has not established that he has preserved this issue for appeal, thus he has forfeited the claim on appeal. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1140.) Moreover, this Court has previously concluded that California's death penalty statute is not lacking in the procedural safeguards necessary to protect against arbitrary and capricious sentencing under the Eighth and Fourteenth Amendments. (*People v. Harris*, *supra*, 57 Cal.4th at p. 858; *People v. Blair*, *supra*, 36 Cal.4th at p. 753.) In so holding this Court stated that "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (*Ibid.*)

Johnsen offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

10. There is no constitutional requirement that the jury make written findings during the penalty phase in a death penalty case

Johnsen asserts that the failure of state law to require the jury to make written findings of aggravating and mitigating facts found and relied upon violates his constitutional rights. (AOB 524.) Johnsen acknowledges that this Court has consistently and recently rejected such a requirement. (AOB 524.) Johnsen offers no unique fact or legal reason in support of his request

that this Court revisit its previous holding. Recently this Court again held that there is no such constitutional requirement. (*People v. Contreras* (2013) 58 Cal.4th 123, 172; see also *People v. Cook* (2006) 39 Cal.4th 566, 619.)

Johnsen offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

11. The phrase "so substantial" as used in CALJIC No. 8.88 is not unconstitutionally vague

Johnsen contends that the phrase "so substantial" in the instruction to the jury on the standard to be used in comparing the aggravating factors to the mitigating factors created an unconstitutionally vague and ambiguous standard. (AOB 524-525.) Johnsen has not established that he objected to the instruction on this ground in the trial court and has, consequently, forfeited the claim on appeal. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1140.) Moreover, this Court has consistently and repeatedly held to the contrary, as Johnsen acknowledges. (AOB 525; see also *People v. Contreras*, *supra*, 58 Cal.4th at pp. 160-170.)

Johnsen offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

12. The language of CALJIC No. 8.88 asking the jury to find whether death is warranted is constitutionally sound

Johnsen contends that CALJIC No. 8.88 inadequately states the law by asking jurors to decide whether the circumstances of the case "warrant" death rather than whether death is the "appropriate" punishment. (AOB 525-526.) Johnsen has not established that he objected to the instruction on this ground in the trial court and has, consequently, forfeited the claim on

appeal. (*People v. Moore, supra*, 51 Cal.4th at p. 1140.) Moreover, this Court rejected this same argument in *People v. Manibusan* (2013) 58 Cal.4th 40, 54.

Johnsen offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

13. CALJIC No. 8.88 need not instruct the jury that life without parole must be imposed if the jury finds the death penalty not warranted.

Johnsen contends that CALJIC No. 8.88 is constitutional infirm because it does not instruct the jury that if it finds the death penalty unwarranted then it must impose life without the possibility of parole. (AOB 526-528.) Johnsen has not established that he objected to the instruction on this ground in the trial court and has, consequently, forfeited the claim on appeal. (*People v. Moore, supra*, 51 Cal.4th at p. 1140.) Moreover, this Court has rejected such arguments in the past finding such an admonishment is unnecessary in light of the express instruction that a death verdict could be entered only if aggravating circumstances outweigh mitigation circumstances. (*People v. McKinzie* (2012) 54 Cal.4th at pp. 1302, 1361-1362.)

Johnsen advances no persuasive reason to revisit those decisions.

14. CALJIC Nos. 8.85 and 8.88 adequately covered the principles raised in the defense instructions that were refused

Johnsen contends that these instructions are constitutionally infirm because they failed to inform the jury: (1) that one mitigating factor may be sufficient to undermine a death verdict; (2) that even if the aggravating factors out weighed the mitigating factors life without the possibility of parole could be recommended; and (3) that even in the absence of any

mitigating factors, the jury could still find death was not the appropriate penalty. (AOB 528.)

Johnsen has not established that he objected to the instruction on these grounds in the trial court and has, consequently, forfeited the claim on appeal. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1140.) The instructions offered by Johnsen included these principles, but the trial court rejected them as duplicative, surplusage, or argumentative, not for the reasons cited by Johnsen herein. (9 CT 2398; 25 RT 5597-5598, 5604, 5615-5622, 5626, 5633.)[10]

Johnsen acknowledges that these arguments have been previously and repeatedly rejected by this Court. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1211; *People v. Jones* (2012) 54 Cal.4th 1, 78-80; *People v. McKinnon* (2011) 52 Cal.4th 610, 693-694;.)

Johnsen advances no persuasive reason to revisit those decisions.

15. There is no constitutional violation resulting from the lack of unanimity in the jury's findings on aggravating circumstances.

Johnsen contends once again that his constitutional rights were violated because the jury was not required to be unanimous on its finding "circumstances of the crime" as an aggravating factor.[11] (AOB 531.) Johnsen urges this Court to reconsider its holdings in *People v. Taylor*, *supra*, 52 Cal.3d at p. 749, and *People v. Prieto* (2003) 30 Cal.4th 226, 275. (AOB 533.) This Court has recently declined similar requests and Johnsen has failed to provide a persuasive reason to revisit those decisions. (*People*

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[10] Johnsen's citation to the record relates only to defense offered instruction number 68. (26 RT 5811.)

[11] Johnsen made this argument previously in numbers 1, 2, and 3 above.

v. Thomas (2012) 53 Cal.4th 771, 836; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662.)

Johnsen advances no persuasive reason to revisit those decisions.

16. Intercase proportionality review is not required

Johnsen urges this Court to overrule its prior precedents and find that the Constitution requires a comparison among death penalty cases to ensure that capital defendants receive proportionately consistent sentences. (AOB 533) This Court's precedent is to the contrary and Johnsen offers no unique fact or legal reason justifying this Court's reconsideration of that precedent. (*People v. Jackson*, *supra*, 58 Cal.4th at p. 774.)

17. Disparate sentencing review is not required in capital cases

Johnsen contends that California's death penalty law is unconstitutional because it does not afford capital defendants with the same disparate sentence review afforded in non-capital cases. (AOB 534.) Johnsen acknowledges that the this Court has held to the contrary. Indeed, this Court has said that "The equal protection clause does not require California to include in its capital sentencing scheme the same disparate sentence review previously provided noncapital convicts under the Determinate Sentencing Act." (*People v. Gamache*, *supra*, 48 Cal.4th at p. 407; see *People v. Mendoza* (2016) 62 Cal.4th 865, 916.)

Johnsen offers no unique fact or legal reason justifying this Court's reconsideration of the precedent.

18. The California Death Penalty Scheme does not violate the Equal Protection Clause

Johnsen contends that the California death penalty scheme violates the equal protection clause because it provides "significantly fewer procedural protections to capital defendants than non-capital defendants." (AOB 534-535.) Again Johnsen challenges the lack of unanimity and lack of a

reasonable doubt standard with respect to the aggravating factors and the lack of a written finding. (AOB 535.) He acknowledges that this Court has previously rejected these arguments. (*People v. Williams* (2008) 43 Cal.4th 584, 648; *People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

Johnsen offers no unique fact or legal reason justifying this Court's reconsideration of that precedent.

19. California's Death Penalty scheme does not violate international law

Johnsen contends that by virtue of its procedural deficiencies California's death penalty violates international norms of human decency and law. (AOB 535.) This Court has rejected these arguments. (*People v. Brown, supra*, 33 Cal.4th at pp. 403-404.)

Johnsen offers no unique fact or legal reason justifying this Court's reconsideration of the precedent.

20. The death penalty is not cruel and unusual

Johnsen contends, without elaboration, that the death penalty violates the Eight Amendment proscription against cruel and unusual punishment. (AOB 536.) This Court, as Johnsen concedes, has repeatedly rejected this claim. (*People v. Casares* (2016) 62 Cal.4th 808, 852-853; *People v. Johnson* (2016) 62 Cal.4th 600, 655-656.)

Johnsen offers no unique fact or legal reason justifying this Court's reconsideration of the precedent.

21. There is no cumulating of deficiencies in this case

Johnsen contends that the cumulative effect of the defects he identified under these argument headings has resulted in a violation of the Eight and Fourteenth Amendments. (AOB 536.) Because Johnsen has failed to prove any errors there can be no cumulative prejudice. (*People v.*

Jackson, *supra*, 58 Cal.4th at p. 774.) Where there are no errors there is "nothing to cumulate." (*People v. Duff*, *supra*, 58 Cal.4th at p. 568.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed in full.

Dated: September 13, 2016 Respectfully submitted,

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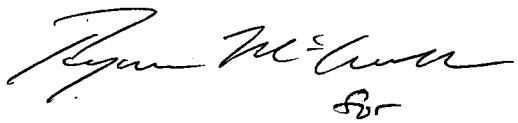
CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 50,534 words.

Dated: September 13, 2016

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Brian David Johnsen**
No.: **S040704**

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.

On September 13, 2016, I served the attached **RESPONDENT'S BRIEF** 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 September 13, 2016, at Sacramento, California.

_____
Signature

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Amended

DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S040704**

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SUPREME COURT
FILED

SEP 15 2016

Frank A. McGuire Clerk

Deputy

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 September 13, 2016, at Sacramento, California.

Blayne Thalken

Signature

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SUPPLEMENTAL
DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Brian David Johnsen**
No.: **S040704**

I declare:

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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 September 14, 2016, at Sacramento, California.

Blayne Thalken
Declarant

Signature

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