In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES FRANKLIN ROUNTREE, Defendant and Appellant.	CAPITAL CASE Case No. S048543

Kern County Superior Court Case No. SC57167A
Honorable Lee P. Felice, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On March 10, 1994, the Kern County District Attorney's Office filed an information charging appellant and his wife, codefendant Mary Elizabeth Stroder, in count 1 with premeditated first-degree murder (Pen. Code, § 187, subd. (a));[1] in count 2 with kidnapping to commit robbery (§ 209, subd. (b)); and in count 3 with robbery (§ 212.5, subd. (b)). Count 1 alleged as special circumstances that the murder was committed while appellant and Stroder were engaged in the commission of kidnapping and robbery within the meaning of section 190.2, subdivisions (a)(17)(1) and (17)(2).[2] (II CT 463-468.)[3]

All counts alleged that appellant personally used a firearm (§ 12022.5(a)) and that Stroder did not, but knew that a principal was armed within the meaning of section 12022, subdivision (d). Counts 2 and 3 also alleged that the alleged offenses were serious felonies within the meaning of section 1192.7, subdivision (c)(19). All counts alleged that appellant had suffered prior convictions within the meaning of section 667.5, subdivision (b). (II CT 463-468.) The trial court struck these prior conviction allegations on January 20, 1995. (IV CT 989-1006.)

On March 16, 1994, appellant pled not guilty, denied all allegations, and demanded a jury trial. (II CT 475-476.)

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Subdivisions (1) and (2) are now subdivisions (A) and (B).

[3] "CT" refers to the Clerk's Transcript On Appeal; "SCT" refers to the Supplemental Clerk's Transcript On Appeal; "2SCT" refers to the Second Supplemental Clerk's Transcript On Appeal; "ECT" refers to the First Supplemental Clerk's Transcript On Appeal containing the Exhibits; "JCT" refers to the Clerk's Transcript On Appeal containing Juror Questionnaires; "RT" refers to the Reporter's Transcript On Appeal; and "AOB" refers to Appellant's Opening Brief. All transcripts are referenced by volume number, unless there is a single volume, and page number.

On May 10, 1995, trial began with hearings on various motions in limine. (V CT 1437.) Jury selection began on May 12, 1995. (V CT 1442.)

On June 16, 1995, the jury found the defendants guilty as charged and all special circumstances and allegations true. (VI CT 1723-1744.)

On June 26, 1995, the penalty phase began. (VI CT 1789-1793.)

On June 30, 1995, the jury returned a verdict of death for appellant and life without the possibility of parole for Stroder. (VII CT 1987-1992.)

On August 11, 1995, the court heard and denied appellant's motion for a new penalty phase and motion to reduce the penalty due to inter-case disproportionality, and imposed a sentence of death. (VII CT 2141-2142.) Stroder was sentenced to life without the possibility of parole. (VII CT 2186.)

Appellant's appeal is automatic under section 1239.

STATEMENT OF FACTS

Guilt Phase

A. The Search for Diana Contreras

On December 9, 1993, 19-year-old Diana Contreras was supposed to arrive at her sister, Annette Perales' house, by 1:30 p.m. to watch Perales' children, and the children of another sister, Valerie Alaniz. (12 RT 2139-2140, 2151.) Diana[4] never made it, and she was not the type of person who would fail to show up for an appointment. (12 RT 2140, 2143, 2151.)

Her sisters tried to locate Diana. They called her apartment and her car phone, to no avail. (12 RT 2140, 2151.) At 10:30 that evening when their brother, Paul Contreras, got off work, they enlisted his help. (12 RT 2140-2141, 2154.) Together, they drove around the Valley Plaza Mall in

[4] Respondent uses the first names of Contreras' family member to avoid confusion and intends no disrespect.

Bakersfield looking for her car, a 1992 red Eagle Talon. (12 RT 2141, 2154.)

A mall security guard saw a newer red car in the Valley Plaza parking lot between 9:00 and 9:40 a.m. (13 RT 2455.) He saw a Hispanic female between the ages of 18 and 20 wearing a white long-sleeved shirt and a pair of jeans exit the vehicle alone. (13 RT 2456.) Diana made several purchases at the mall that morning between 10:15 and 11:15. (13 RT 2466-2467, 2471-2472, 2476-2477.) The security guard returned to the area sometime between 9:40 and 11:00 a.m., although he was unsure of the latter time. The red car was gone. (13 RT 2457-2458.)

Diana's family knew she had planned on shopping at the mall that day. When they failed to locate her car, they filed a missing person's report. (12 RT 2141, 2155.) Alaniz and Paul went to Diana's apartment and broke the kitchen window to enter. Diana's boyfriend, Daniel, joined them. Alaniz stayed at Diana's apartment until 3:00 or 4:00 a.m.; Daniel stayed the night. (12 RT 2141-2142.)

The next morning, Perales went to Diana's apartment. (12 RT 2151.) Alaniz drove to the Wells Fargo Bank on California Avenue where Diana did her banking. Receiving no information, she returned to Diana's apartment. (12 RT 2142.) Paul went to Valley Plaza and showed pictures of Diana and her car to a girl in a jewelry store and a security guard. (12 RT 2154, 2156.) The last time Alaniz saw Diana was the day before her disappearance. (12 RT 2144.)

At approximately 7:20 a.m. on December 10, 1993, Howard Smith, an operator for Texaco, went to a remote area a few miles from Taft to check on an oil well. (12 RT 2157-1258.) En route, he came upon a girl's body. (12 RT 2159, 2168.) The body had not been there the day before when Smith checked the well. (12 RT 2163.) Smith called two colleagues, Tim Watts and Jim Walsh, to come and witness what he had found. (12 RT

2164, 2211.) Watts and Walsh arrived in Walsh's pickup truck and parked a few feet away from the body. (12 RT 2211-2212, 2232, 2234.) Smith's truck was on the other side of Walsh's, and away from the body. (12 RT 2234.)

The men walked up to the body. (12 RT 2164-2165, 2213, 2244.) Smith tapped one toe with the toe of his boot. (12 RT 2174, 2191.) It was apparent to all three men that the girl was not alive. (12 RT 2174, 2213, 2243.) Walsh could see that she had been shot. (12 RT 2236.) He also saw what appeared to him to be .30-30 caliber shell casings in front of the girl's left foot. (12 RT 2217, 2236, 2241.) Watts left in Smith's truck to call law enforcement. (12 RT 2234-2235, 2244.)

B. Investigation of Murder Scene

Kern County Sheriff's Deputy Scott Lopez arrived at the scene at approximately 7:45 a.m. (12 RT 2165, 2191-2192, 2222, 2235, 2244, 2251.) He cordoned off the area, and photographed the oil men's shoes and various tire tracks for later analysis and comparison. (12 RT 2166, 2195, 2199, 2223, 2253-2254, 2261, 2268.)

Kern County Sheriff's Homicide Detective Joseph Giuffre arrived at the oil field at about 8:45 a.m. and took over the investigation. (12 RT 2263-2264; 15 RT 2675-2676.) He worked with Deputy Lopez to eliminate shoe prints and tire tracks already identified as belonging to the oil field workers. (15 RT 2677.) They took tire track and other various measurements at the scene. (15 RT 2678-2679.)

Thomas Fugitt, an evidence technician, and an assistant, photographed the scene which included photographs of tire and shoe tracks located five to 11 feet from the body. (12 RT 2272, 2297-2298, 2309-2310.) He collected and packaged four spent shell casings found at the scene and later booked them into the department's property room. (12 RT 2300-2301, 2309.)

Madelaine Kaiser, an investigator for the coroner's office, examined the body at the scene. (13 RT 2385.) She wrapped the body to prevent contamination and accompanied it to Kern Medical Center. (13 RT 2386-2387.) The body was later identified as that of Diana Contreras. (12 RT 2142-2143, 2152; 15 RT 2681-2682, .)

C. Appellant's Arrest in Kansas and Subsequent Confessions

On December 10, 1993, Diana's sisters provided Detective Giuffre with the license plate number to Diana's red Eagle Talon, which he broadcast to local, state, and Midwestern states' law enforcement agencies. (15 RT 2682-2683.) On December 15, 2009, Kansas State Troopers Terry Stithem and Chuck Wannamaker stopped Diana's red Eagle Talon on Interstate I-70. (15 RT 2563-2564.)

Appellant and Stroder exited the vehicle and were placed into custody. (15 RT 2565.) Stroder consented to a search of her purse. (15 RT 2567.) Inside the purse Officer Stithem found a marriage license and Stroder's birth certificate. (15 RT 2569, 2577.) He also found Diana's social security card under Stroder's photo I.D. Officers seized from inside the vehicle a loaded .30-30 lever action rifle, one motel receipt for the Regency in Denver, Colorado, and two receipts for Harrah's in Las Vegas, Nevada, a box of 16 Remington .30-30 caliber shells, a cloth bag with eight Winchester .30-30 caliber shells, Diana's Wells Fargo checkbook, savings account book, ATM card, and driver's license, and a Siamese kitten in a pet carrier. (15 RT 2587, 2621, 2623-2625-2626, 2631.)

Detective Giuffre learned of the arrest the same day, and that law enforcement was holding the Eagle Talon in Wakeeney, Kansas. He flew out that night and met with local and state law enforcement officers the next day. (15 RT 2684.) Detective Giuffre retrieved the evidence local

authorities had seized and sent the rifle out for fingerprint tests. (15 RT 2784-2686.)

Detective Giuffre conducted taped interviews of appellant on December 16, 1993 in Wakeeney, Kansas, and on December 23, 1993 in Bakersfield. (17 RT 2994, 3011.) Appellant understood and waived his *Miranda*[5] rights on both occasions.[6] (17 RT 2996, 3011-3012.)

Appellant drove from Missouri in a Volkswagen Golf and arrived in California on December 8, 1993. (17 RT 2997.) He brought the .30-30 rifle for protection. (17 RT 2997, 3028.) He was trying to locate his aunt who lived somewhere around Fork Mountain in Northern California. (17 RT 3027.) He ran out of money and spent the night in the parking lot of a Von's store on Wilson road. (17 RT 2997-2998, 3027-3028.)

Appellant first saw Diana at the Valley Plaza mall sitting in her car. He pulled up next to her. (17 RT 3012.) Appellant said that when she got out of her car, "she was just a little girl that wouldn't fight or nothing." Appellant did not follow her into the mall. (17 RT 3013.) He decided to rob Diana because it "just seemed like she wouldn't be as much trouble." (17 RT 2998.) Diana did not get into appellant's car voluntarily. (17 RT 3008.) When she did, she looked down. The .30-30 rifle was sitting across the gear shift, partly in appellant's lap and pointing downward. (17 RT 2998.) Appellant said, "I don't want to hurt you. I just want some money."

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

[6] Appellate counsel draws his Statement of Facts from appellant's unredacted confessions to police. (AOB 6, fn. 3.) Respondent presents this portion of the Statement of Facts from the version redacted to exclude any mention of Stroder, pursuant to court order, and which was presented to the jury through structured questioning of Detective Giuffre. (17 RT 1040-1184; 17 RT 2994-3035; 2 ECT 410-424 [People's Exhibit No. 7].) Exhibit No. 7 is a verbatim replication of the detective's trial testimony about appellant's statements.

(17 RT 3013.) After she got in, appellant set the rifle down low between the seats. (17 RT 2998.)

Appellant claimed that he did not really plan anything, but thought maybe he could get some money from her. (17 RT 3013.) Diana said she had only $7. Appellant asked, "Is this all you got, all you can give me?" Diana offered to withdraw $100 from her bank account. He drove to Wells Fargo Bank. Diana gave him her card and PIN number and told him to take out $100, which he did. (17 RT 2999, 3028.)

Appellant remembered that Diana had a car phone so he did not return her to her car. He wanted to drop her off far enough out of town to give him time to get away. (17 RT 2999-3000.) Diana showed him the easiest way out of town. (17 RT 3030.) During the drive, appellant and Diana had casual conversation about her "going to school and things like that." (17 RT 3029.) He drove to a desolate and remote area with no phones nearby. His plan was to drop her off and drive away. (17 RT 3000.) When Diana seemed nervous about that, appellant told her "he wouldn't leave her off somewhere where it's too far from a call box or a gas station or town." (17 RT 3014.) He did not tie her up because if "no one came up there in a few days she would die of starvation or something." He also did not know what animals were out there. (17 RT 3015.)

Appellant got out of the car to check the engine because they had traveled over a bumpy road. (17 RT 3015.) Appellant explained:

> [I]t's just that when she got out not to leave her and stuff, and I don't know. And she was like walking around the back, I guess, to my side, and I jumped out because I didn't know what was going on, and I just grabbed the gun and I said just go. Because I thought maybe I could scare her, I guess. I don't know. It was just a reaction. It wasn't nothing planned to get out and aim and shoot or nothing, you know. Because if I would have done that, I would have hid the shells and dragged her off somewhere if I was some insane killer just wanting to kill her. I would have

done it a lot differently. I was just like, you know, just go walk, whatever, you know, and it just happened.

(17 RT 3005-3006.)

Diana began crying and pleading with appellant not to leave her there. She said, "just drive me back into town." At this point, appellant had the rifle in his hands, trying to scare her. (17 RT 3000, 3015.) When Diana came around to his side, he told her to "just go, just start walking that way." (17 RT 3000-3001.) Diana was coming close to him. Appellant said, "[J]ust start walking, please. I don't want to shoot you." She was pleading, "[D]on't leave me, don't shoot me." Appellant told her to walk, "you'll find somebody. I don't want to shoot you. I don't want to hurt you." (17 RT 3001.)

Appellant said that when Diana came around the car she came close to him and either she struck the barrel of the rifle or he twitched, he did not remember which, causing the first shot. (17 RT 3017, 3028.) The bullet went through Diana's purse and possibly through the bags she was holding. (17 RT 3009, 3017.) She flew back and "was laying there with her arms up, screaming." (17 RT 3016.) He said when he saw the bullet hole just beneath her heart he was flipping out. Appellant said the first shot was accidental, but that when Diana kept screaming in pain, he did not know what to do so he shot her again. One shot missed because he was nervous, then he shot her again. (17 RT 3002, 3017, 3028.) Appellant claimed that he shot Diana more than once, while she was on the ground, because he did not want her to go through any more pain. (17 RT 3003.) Appellant remembered seeing Diana's face because he had nightmares; her eyes were open. (17 RT 3001-3002.)

Appellant clarified the sequence of shots.

He said he didn't shoot her three times bang, bang, bang. He shot her, she fell. He was freaking out and didn't know what to do. She was sitting with her arms up, screaming, and he shot

again and he saw the gravel hit above, so he [didn't] know if it went through her when she was on the ground or not. So he shot her again and she stopped.

(17 RT 3005.)

Appellant said, "I just stood there for a minute crying, because, man, I didn't know what to do." (17 RT 3016.) Appellant grabbed Diana's bags and threw them into the car and pulled back out the same way he had driven in. (17 RT 3004-3005.) He returned to Valley Plaza and parked. He said he cried and did not know what to do. He withdrew more money from Wells Fargo while in the Golf. (17 RT 3009.) The Golf's engine was rattling because the alternator was broken, so appellant decided to take Diana's car. (17 RT 3006.) He took one license plate from the Golf, but never put it on Diana's car. (17 RT 3030.) He withdrew money again while in Bakersfield, then drove to Las Vegas. (17 RT 3007, 3009.) Appellant used Diana's ATM card three times in Las Vegas and two more times later in Denver. He also signed some receipts at a teller machine in Utah using the name "Robert Contreras" because he knew Diana's father's name began with an "R." (17 RT 3007.)

Appellant took Diana's purse but threw it away; he could not recall in what city. He kept Diana's driver's license, which he said had gun powder residue on it, as a memento, "just to give some respect because he prayed, and it is against his morals and religion and he's never hurt anybody before." He also kept her checkbook. (17 RT 3009-3011.) Appellant claimed that had he intended to kill Diana, he would have dragged and hidden her body and taken and hidden the cartridges from the gun. (17 RT 3030-3031.) Appellant thought about turning himself in, and did not know why he did not. (17 RT 3010.) This completes the testimony recounting appellant's statements.

D. Circumstantial Evidence of Appellant's Guilt

1. ATM Transactions

Diana's bank records for December 9 to December 15, 1993 showed the following ATM transactions for amounts up to Diana's $300 daily limit, including unsuccessful attempts: withdrawals totaling $280 in Bakersfield, and two failed attempts, on December 9, 1993 (14 RT 2524-2528); withdrawals totaling $900 in Las Vegas, and multiple failed attempts, on December 10 through December 12 (14 RT 2529-2531); a withdrawal of $300 on Interstate 70 on December 13; and withdrawals of $600 from Colorado National Bank on December 14 and 15, 1993 (14 RT 2331-2332).

2. Contents of Stroder's Volkswagen Golf

Stroder's father, Daniel Stroder, owned a 1986 Volkswagen Golf that his daughter used while living with him. (13 RT 2483-2484.) He saw his daughter on the morning of December 3, 1993. She was supposed to meet him later that day in Cape Girardeau, Missouri, but she did not show up. (13 RT 2484-2485.) The next time he saw her was when she was under arrest. (13 RT 2485-2486.) Mr. Stroder owned a Winchester .30-30 rifle that he discovered missing from his home the same day his daughter left in his car. He identified the rifle in court. (13 RT 2486.)

Evidence Technician Theodore Grove photographed the Volkswagen Golf and items found inside it. (15 RT 2652-2654.) He seized and catalogued all the evidence taken from the vehicle. (15 RT 2657-2660.) He also took test impressions of the Golf's tires. (15 RT 2656.) He obtained fingerprints from soda cans inside the vehicle. (15 RT 2660.) Some matches were found for Stroder, but none for appellant or Diana. (15 RT 2662-2663, 2670-2671.)

Kern County Criminalist Brenda Smith testified that she examined the interior of the Volkswagen Golf for possible biological and trace evidence, such as fibers and debris. (16 RT 2759-2761.) She also reviewed items seized during Diana's autopsy, such as hair and various fragments and fibers. (16 RT 2763-2764.) A visual comparison using a microscopic led Criminalist Smith to conclude that fibers and other trace materials found on the Golf's front passenger seat were similar to materials and fibers discovered on Diana's clothing and other areas related to her. (16 RT 2765-2783.) Only one piece of trace evidence was found on the driver's side of the Volkswagen Golf, "probable tissue with blood" that matched the same collected from Diana's jeans. (16 RT 2780-2781.)

3. Crime Scene

Gregory Laskowski, Supervising Criminalist at the Kern County Regional Crime Laboratory, testified that the impressions from Stroder's shoes appeared similar to a shoe print discovered near the body. (17 RT 2907-2910.) Even though other evidence showed that only 876 pairs of those same shoes were sold in the western United States in 1993, including California, Criminalist Laskowski was unable to positively identify Stroder's shoes as having made the impression near the body. (16 RT 2740-2741; 17 RT 2910-2911.) He also found a "good correspondence" between a "chunked out" portion of the front tread of Stroder's left shoe and a similar "feathered or weak" track found at the scene. (17 RT 2912-2913.)

Criminalist Laskowski testified about the shell casings found at the scene. He said that in order to fire the Winchester .30-30 rifle, one moves the lever in a downward motion, which cocks the hammer to the ready position. In order to fire, however, one must first depress the safety mechanism located under the rear portion of the stock. These actions must be repeated each time the weapon is to be fired. (17 RT 2879-2880.) It is

possible, he testified, that once the safety lever is depressed, the rifle could be discharged accidentally, but that would still require pulling the trigger. (17 RT 2921, 2943-2944.)

Criminalist Laskowski conducted a trigger pull test on the Winchester to determine the force necessary to release the hammer to fire. The Winchester rifle had a trigger pull of six pounds, placing it in the moderate range, i.e., greater than an easy pull such as a hair trigger, requiring less than one pound of force, but less than a hard pull, requiring more than 12 pounds of force. (17 RT 2880-2881.) Criminalist Laskowski also test-fired the rifle to compare shell casings from the test fire to those found near Diana's body. He concluded that all four shell casings found at the scene were fired from Daniel Stroder's Winchester rifle. (17 RT 2882-2883.) He also concluded from examining the sweater Diana was wearing when shot that the rifle could have been inches away when fired. (17 RT 2928.) Forensic testing revealed Diana's plastic driver's license had been damaged; smudging on it was lead, possibly from a bullet. (17 RT 2900.)

Criminalist Laskowski also compared the test impressions on the tires of the Volkswagen Golf and the Eagle Talon to enlarged photographs of tire tracks found at the scene. He found that two tire tracks at the scene had similar tread designs as the front tires of the Golf. (17 RT 2902-2903.) No similarities were found for the back tires of the Golf, and none for any of the Eagle Talon's tires. (17 RT 2904.) Criminalist Laskowski also compared test impressions of appellant's shoes to shoe prints found at the scene. He concluded that each of appellant's shoes appeared similar to, or were consistent with, two shoe prints found at the scene. (17 RT 2909-2912; see People's Exhibit Nos. 76 and 82.)

4. Autopsy

Sharon Pierce, an evidence technician with the Kern County Sheriff's Department, attended the autopsy on the victim. (13 RT 2393-2394.) She

photographed her and seized her clothing, personal effects, and other objects found on the body, such as bullet fragments and fibers. She also took various physiological samples, such as hair and body swabs. Ms. Pierce packaged everything seized and booked them into the property room. (13 RT 2394-2402.)

Dr. Armand Dollinger, a forensic pathologist, performed the autopsy on Diana and testified as to the cause of death. (13 RT 2407-2409.) Diana had been shot three times, once in the upper left abdomen, once in the upper right abdomen, after the bullet had first passed through her right wrist, and once in the lower abdomen. Diana's liver, right kidney, and left lung were lacerated, and her heart was "destroyed" by the bullets. The path of one bullet suggested Diana was standing when struck. The paths of the other two bullets were consistent with the shots being fired from the direction of her feet toward her head while she was supine, one bullet traveling from right to left and upward and the other following nearly the same path. (13 RT 2434-2435, 2437-2438, 2440-2441.) In Dr. Dollinger's opinion, death occurred instantaneously or within a few seconds. (13 RT 2409-2418.)

Guilt Phase: Defense

Appellant presented no evidence

Penalty Phase

Prosecution Evidence

Perales was Diana's sister. She was ten years older. Diana was a kind and trusting person, attending college possibly to become a pediatrician. Perales and her two children were very close to Diana. (22 RT 3483-3484.) Diana was also very close to their mother, who became disabled in 1986 due to an accident. Diana always cared for her mother. She helped her bathe and took her shopping. (22 RT 3485.) Diana's death

affected their mother – their mother continues to call out for "Luli," Diana's nickname. (22 RT 3485-3486.)

Diana was also close to her other nieces and nephews; she loved children. These children, too, were affected; they were quiet when they learned of Diana's death, and would not speak much. Perales felt, "I was in shock, like somebody broke my heart in two." (22 RT 3486.) Diana had lived her whole life with her family in her parents' home; she moved out a few months before her death. (22 RT 3487.) Perales gave the prosecutor a group of photographs showing her sister at various stages in her life. These photographs were received into evidence. (22 RT 3486-3488.)

Valerie Lovett was 20 years old and was Diana's best friend. (22 RT 3488-3489.) For her, Diana was nice and caring. Even if a person was evil, Diana believed that there was always a nice person inside. Ms. Lovett was hurt badly by Diana's death. (22 RT 3489.) Diana had many friends who cared for her; because she was so small, they protected her. (22 RT 3490.) Everyone liked her; no one had a reason to hate her because she gave no one reason to. (3490-3491.)

Raymond Contreras was Diana's father. (22 RT 3491.) Diana was the sweetest person and had a kind heart, a heart of gold. The entire family loved her and was so proud of her. Diana was trying to accomplish something. She wanted to help people; she wanted to help her father. Diana was attending college, taking psychology to help her father cope with his wife's car accident. Diana and her mother had the closest relationship. Her mother worshipped the ground Diana walked on. Diana took care of her mother – bathed her, combed her hair, did her nails, and took her to dinner and shopping. Diana "was her heart, she was her eyes, she was everything to my wife." (22 RT 3492.) Diana's death hurt everyone, but her mother tried to stay strong for the others. Raymond was "a broken man." (22 RT 3493.) Diana worked with disabled people while she was

going to college. By being the first to go to college, Diana changed the family trend. (22 RT 3493.) Diana's going to college made her father's 14 grandchildren want to go to college, too. (22 RT 3493-3494.)

Defense Evidence

E. Friends & Family

Ruth Evers was appellant's Sunday school teacher when she first met him at eight to ten years old in St. Louis, Missouri. (22 RT 3533-3534.) Appellant participated in Bible class, youth nights, basketball, and various meetings and activities. (22 RT 3536.) Evers was also the Youth Director for a youth group in which appellant was active when he was 16 years old. (22 RT 3534-3535.) Evers also had contact with appellant when he graduated high school. She knew his entire family. (22 RT 3535.)

Evers testified that appellant was polite, warm, and caring. He did not seem to be violent; he was respected and got along with and related well to other children. (22 RT 3535.) He was gentle around girls, not aggressive or mean; he appeared to be protective of them. (22 RT 3536-3537.) Appellant was loving towards his younger sister. (22 RT 3537.)

Evers recounted a church-related outing to Denver. Her group was meeting with other groups in an amphitheater when an extreme thunder storm suddenly dumped a massive amount of rain upon the crowd, causing flooding and panic. Appellant helped people down stairs and tried to keep them warm. When Evers next saw him at 1:30 a.m., he was wet and exhausted. (22 RT 3538-3541.)

Johnny Marcum was appellant's 20-year-old best friend in St. Louis. (22 RT 3543-3544.) They met at a Steak 'n Shake restaurant where they worked and a friendship developed. Marcum said that appellant wanted to go to college and that he wanted to do many things. (22 RT 3545.) Appellant was not a violent person. Rather, he was friendly and

considerate of others. (22 RT 3545-3546.) Around girls, appellant was friendly, caring, and personal [*sic*]. Marcum also found appellant to be protective of girls, of his mother, and even of Marcum. (22 RT 3546.) Appellant did not discuss his family problems, except when he and Marcum went out; then, appellant would be afraid about what his step-father would think. (22 RT 3546-3547.)

Stacy Walker knew appellant from the Steak 'n Shake. She also knew him outside of work. (22 RT 3549.) Walker testified that appellant was a fun guy, caring and nice. He was protective of Walker. She recalled a number of occasions when customers got upset at her. She would go in the back and cry and appellant would come to her and say, "Don't worry about it. Don't let it get to you. It's just a job." (22 RT 3550.) Walker was Marcum's girlfriend. (22 RT 3552.)

Susan Walker first met appellant in 1988, through her aunt. They became friends and she later worked with him at the Steak 'n Shake. (22 RT 3554.) Appellant was friendly, a hard worker, and a good friend who helped her at work, and he was protective of her. Appellant "liked to be everybody's friend and help everybody out." (22 RT 3555.)

Joan Thompson was the production trainer at Steak 'n Shake and had known appellant since 1986. (22 RT 3556.) Thompson and appellant eventually developed a "kind of mother-son" relationship. (22 RT 3557.) She knew him to be a very thoughtful and considerate person who would never deliberately set out to hurt anyone. He was not violent, but polite. And appellant was protective of her. (22 RT 3558.) Appellant was engaged in all the youth programs. Thompson believed that appellant believed in God. (22 RT 3559.)

Jacqualen Messenger worked with appellant at the Steak 'n Shake for about three years and had known him five or six years. They also socialized together. (22 RT 3560.) She testified that appellant was sweet,

never violent, always polite with customers and a good worker. (22 RT 3561.)

Carmen Hobson, appellant's mother, testified that his father passed away when appellant was almost two years old. (23 RT 3581.) Appellant's father had problems sniffing glue, was self-destructive, and attempted suicide on "[q]uite a few occasions." (23 RT 3582.) Appellant's father died when he was hit by a car on the highway; it was not clear whether it was an accident or he had run into traffic. A few days before his death, he had tried to commit suicide. (23 RT 3583.)

Hobson married John Hobson and had three children with him, ages 15, 13 and 10 at the time of trial. (23 RT 3581-3582.) Appellant was six years old when his mother met his step-father. (23 RT 3583.) Hobson admitted that between appellant's father's death and her remarriage, she drank and was an alcoholic. She received treatment and quit drinking. She spent a lot of time with appellant before her remarriage. Hobson testified that appellant was a good boy, went to school everyday, behaved himself and made decent grades. (23 RT 3583-3584.)

Hobson said that appellant loved his siblings and took care of them. They all got along exceptionally well. As they grew up, they played together in the yard and played basketball. Appellant was always clean, and he helped the others clean their rooms. Appellant also helped his mother with chores. As appellant was the oldest sibling, his responsible behavior seemed typical to Hobson. (23 RT 3585.) Appellant was 13 years older than his sister and looked after her. They played together and were very close. (23 RT 3586.)

When appellant reached his late teens, he began dating. His mother told him of his biological father's problems, and urged him to protect women. (23 RT 3586.) She recounted that when she ran away from home at 15 years old and came to California, she was raped by three black men

while appellant's father was present but unable to protect her. She impressed upon appellant that it was his responsibility to protect women. (23 RT 3586-3587.)

Hobson said that appellant was never a violent child, although she recalled that appellant once got into a fight in high school over his family. Hobson had never seen appellant with a weapon, although her husband had guns in the house and was a hunter. (23 RT 3584, 3587-3588.) When appellant was seven years old he went hunting with Mr. Hobson once, but he did not sit still, and did not particularly care for hunting. Appellant never played with the guns or showed any particular interest in them; he never even touched them. (23 RT 3588.)

John Hobson was appellant's stepfather. He testified that appellant was a good child, never disrespectful, played well with others, and took care of his brothers and sisters, all of whom looked up to him. (23 RT 3590-3591.) Mr. Hobson took appellant hunting once, but appellant squirmed, broke sticks, threw rocks, and did not show any interest in hunting, so Mr. Hobson never took him again. Appellant showed no interest in the guns in the home and never touched them. (23 RT 3592.)

Through photographs, Mr. Hobson showed the jury appellant's accomplishments in school sports, i.e., a championship soccer patch from 1989, a jacket and medal he received for soccer, and ribbons for track and field and other events. (23 RT 3593-3595.) Appellant was involved in sports throughout junior high and high school. (23 RT 3595.)

In 1992, appellant was injured in a serious auto accident—he had broken his back, requiring metal rod implants, and he had fractured his knee, requiring a steel plate implant. After the accident, he was unable to participate in sports; attempts at participation would cause muscle spasms. Mr. Hobson said that his family loved appellant very much. (23 RT 3595.)

F. Dr. Michael Byrom

Dr. Michael Byrom was a clinical psychologist who evaluated appellant before trial. He spoke with family members, reviewed mental health records, reviewed appellant's taped statements, interviewed appellant, and administered clinical tests to him. (23 RT 3596, 3598-3600.) Dr. Byrom found no evidence that appellant was psychotic or clinically sociopathic. He found appellant's verbal skills to be in the low average range, and his non-verbal skills to be in the high range. (23 RT 3600.)

Dr. Byrom measured, or attempted to measure, appellant's propensity for recidivist violence. The doctor applied the "Monahan" test, named for its developer, which used 11 factors to screen for inherent violence in people. Appellant fit only three of these 11 factors, which would place him in the low recidivism range for violence. These three factors -- being under 25 years old, male, and peer environment, i.e., whether or not one associated with the criminal element, were not very good at predicting future violence, but they indicated that appellant was not an inherently violent person. (23 RT 3601.)

According to Dr. Byrom, a person's history is the best single indicator of recidivist violence. (23 RT 3602-3603.) He searched appellant's past for anything "damning," but found nothing above and beyond what the Monahan test indicated. Dr. Byrom also found that appellant showed remorse. Four factors were to be considered. (23 RT 3603.) One who admits guilt tends to have more remorse. (23 RT 3603-3604.) Consistency of emotions and feelings when asked about the offense is important. Consistency of one's statements also point to a greater showing of remorse. Finally, a person's understanding of the effect their behavior had on the family is an indication of whether or not the person has an idea of what they have done. (23 RT 3604.) Appellant's report of inability to sleep and

seeing Diana's face in his nightmares were indications of some level of remorse. (23 RT 3604-3605.) Overall, Dr. Byrom concluded, appellant was remorseful. (23 RT 3605.)

Dr. Byrom also concluded that appellant could adapt to the prison environment. (23 RT 3605.) To reach the latter conclusion, Dr. Byrom reviewed reports which detailed appellant's adjustment to a previous incarceration. The doctor used the "Hare Psychopathy Checklist, 'which looks at a defendant's level of sociopathy or level of psychopathic nature.'" He also looked at appellant's violence potential. When appellant's profile was compared to those of other state prisoners, appellant "did not fit the psychopathic insidious predatory profile of more hardened criminals." Appellant's judgment was poor. And, high-stress situations would "exaggerate or exacerbate appellant's already deficient personality." (23 RT 3606.) Appellant's judgment and ability to reason things out would become more impaired with greater stress. (23 RT 3606-3607.)

Dr. Byrom found that appellant was extremely insecure, "especially in the context of his relationships with adult women." He found that appellant would "try to over-compensate for these feelings of inferiority with women by trying to portray himself as a big-shot or as a protector." Dr. Byrom opined that a prison environment, separating appellant from any significant interaction with adult women, would decrease his risk of being violent. (23 RT 3606.) Dr. Byrom did find that appellant's inter-personal relationships were extremely poor due to "open expression of hostility and anger," but that the hostility and anger were not synonymous with propensity for violence. (23 RT 3608.) Similarly, although Dr. Byrom described appellant as angry, belligerent, rebellious, and resentful towards rules and regulations as well as hostile towards authority, appellant would not likely express these characteristics through violence. (23 RT 3609.)

Dr. Byrom testified that appellant's effect was "dull flat and bland in addition to periodic episodes of agitation and rage." The doctor opined that appellant would express these feelings by becoming frustrated with himself and very protective of those he felt were being wronged somehow, especially females. (23 RT 3609.) Appellant might also be expected to run away from authority, or to do the opposite of what an authority figure expected of him. (23 RT 3609-3610.) Finally, Dr. Byrom said that appellant was extremely impulsive, doing things without giving them adequate thought. (23 RT 3610.)

G. Stipulations

The parties made the following stipulations:

(1) When arrested in Kansas, appellant told the officer on the way to jail that what happened went against his religion and everything he believed in.

(2) While in custody in Kansas, appellant wrote several letters that contained the following statements:

> • I took another person's life whether I wanted to or not I still did it. I wish I could reverse time but I can't do it.
>
> • I just pray I don't go to hell, God forgives all sins.
>
> • My mom and I prayed together for forgiveness. I want to go to heaven, I believe in God and that Jesus died on the cross.
>
> • I pray for the girl's parents too, I couldn't imagine how they feel. If someone killed my daughter I would kill them. I wish I could give her life back.
>
> • I failed my family and friends, I failed God. I know God is forgiving but he keeps giving me a chance, I blew it. I should have died last year but I'm still alive. I wish I would have died last year then that little girl would be alive.

(22 RT 3562-3563.)

(3) Carolyn Zieman, a psychiatric nurse at the Lerdo pretrial facility, saw appellant on April 26, 1994. She reported that "[appellant] complained that he has trouble sleeping, he's getting about an hour, one hour of sleep a night. He has nightmares and in the nightmares he keeps seeing her face." He also said that he had "ruined the victim[']s family," "family's lives." (22 RT 3563; 23 RT 3604.)

(4) During the September 16, 1993 interview with Detective Giuffre, appellant told him that he thought about calling Diana's parents, her dad, but he was afraid he would get caught. Appellant also told the detective that after the offense, he could not sleep, he was crying all the time, and he was a nervous wreck. Detective Giuffre asked appellant whether Diana deserved to die and appellant said, "no, she was a sweet little girl." During the September 23, 1993 interview, when Detective Giuffre asked appellant what happened after Diana was shot, appellant answered, "I just stood there for a minute crying. I did not know what to do." In response to another question, appellant said, "I saw Diana lying there, I guess God just wanted me to see her face, I guess. I saw her face, she was looking up so I started crying went to the car and drove off." (22 RT 3566-3567.)

(5) Brenda Rountree is appellant's aunt. She lives in Ford Mountain in Northern California. Before December 1993, she had written letters to the family in St. Louis inviting them to come and stay with her.

ARGUMENT

I. THE TRIAL COURT DID NOT PREJUDICIALLY ERR IN DENYING APPELLANT'S MOTIONS TO CHANGE VENUE

Appellant contends that the trial court prejudicially erred in denying his repeated requests for a change of venue, thereby depriving him "of his rights to due process, a fair trial, equal protection, and reliable determinations on guilt, the special circumstances, and penalty." (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15~17; AOB 23-24.) Respondent disagrees. Moreover, error, if any, did not prejudice appellant.

A. Factual Background

1. Pretrial Motion and Hearing

On December 8, 1994, appellant joined Stroder's motion to change venue, alleging that there was a reasonable likelihood that he could not receive a fair trial in Kern County. (III CT 884-IV CT 948.) Appellant attached three exhibits to his motion: i.e., copies of newspaper reports about the murder (Ex. A, III CT 903-930), a public opinion survey by Dr. Terry Newell, Ph.D. (Ex. B, III CT 931-944), and a flyer for a rally and march on the Kern County Courthouse on May 14, 1994 where the Contreras family was to speak (Ex. C, III CT 945).

On December 16, 1994, the court held a hearing on the motion. (IV CT 981-986OOO.) At the hearing, appellant introduced into evidence newspaper articles from the Bakersfield Californian from December 1993 to December 1994, a video tape entitled "Love For Life March" from May 1994, an advertisement entitled "Love For Life" for a march on July 9, 1994, and photographs of that march. (IV CT 986PP-986UU.) Thirty-seven people, not including media personnel and guest speakers, attended

the July 9th march. (IV CT 986TT.) The march concluded at the courthouse where Joe Klass, Polly Klass' grandfather, state Senator Phil Wyman, and a spokeswoman from the governor's office gave speeches to promote the newly formed Love For Life Foundation. (III CT 930; IV CT 986SS-986TT.)

Dr. Terry Newell, Ph.D., a psychology professor at California State University, Fresno, testified about a public opinion survey he had conducted on appellant's case. (IV CT 986E-986F.)[7] He surveyed 263 adults from an expired jury list by telephone between November 12 and 16, 1994. (IV CT 986F-986H, 986M.) Dr. Newell testified that the survey was accurate to within three percent. (IV CT 986M-986N.)

Of those surveyed, 81.4% "recognized the case" when asked if they had heard or read that 19-year-old Diana Contreras had been kidnapped at the Valley Plaza Shopping Center in December 1993 and shot to death near Taft. (III CT 933; IV CT 986N.) When also asked if they had heard that appellant and Stroder had been accused of murdering Diana after stealing her car and ATM card, their recognition rate rose to 85.2%. (III CT 934; IV CT 986O.) Dr. Newell considered this to be a "very high recognition rate" for a one-year-old case, when compared to other Kern County cases on which he had worked. (IV CT 986S, 986MM.) Of those who recognized the case, if chosen to be on the jury, 22.3% thought appellant was "definitely guilty," and 24.1% thought he was "probably guilty," based on what they had read, seen, or heard, while 52.2% had formed no opinion.

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[7] The survey itself is found at pages 931 through 944 of Volume III of the Clerk's Transcript On Appeal.

(III CT 937; IV CT 986Q.) As for penalty, 54.8% of those who recognized the case would opt for the death penalty.[8] (IV 978, 986V.)

Dr. Newell's survey did not question people's ability to set aside their beliefs as to guilt and punishment based on what they had learned about the case, and to decide the case based on evidence presented in court. The survey also did not ask whether or not people were pro death penalty, nor did it ask how strongly they felt about the death penalty. As a result, Dr. Newell admitted, there was no way of knowing what portion of the 52.7% who would vote for Stroder's death would do so only because this was a murder case, rather than because of what they had learned.[9] (IV CT 986CC-986EE.)

Melvin Khachigian, a local realtor, former educator, and long-time Bakersfield resident, testified that, based on all he had learned about the case from the media, appellant was guilty and the penalty should be death. (IV CT 986VV-986XX.)

On December 27, 1994, the trial court denied the change of venue motion. (4 CT 987.)

2. Renewed Motions During/After Voir Dire

At the start of trial, appellant indicated that he would challenge every potential juror who had formed an opinion about guilt based on pretrial publicity. (4 RT 703-705.). On June 1, 1995, appellant renewed his motion

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[8] This figure is an extrapolation from figures given regarding Stroder, as Dr. Newell did not pose this question in his survey regarding appellant. (IV CT 978, 986V.)

[9] Although the prosecutor did not pose this question in relation to appellant, the gist of it would still apply to him, i.e., Dr. Newell could not know what percentage of the 54.8% who recognized the case and would impose the death penalty for appellant would do so only because this was a murder case.

for change of venue and told the court that he would do so again after the jury was impaneled. (11 RT 2056-2057.) The court stated:

> Although we'll show it being renewed at that time on the basis that I would assume in your mind, Mr. Sprague [appellant's counsel], on behalf of your client . . . that albeit we do have a panel of approximately 81 or 80, maybe it's 81 prospective jurors in this case, that's a substantial number of those are tainted by the pretrial publicity, and that, in fact, the Court denying your motion to basically excuse those, some of those jurors, the record will reflect when you made those motions, it was erroneous, that, in fact, the Court should have granted your challenges, and that if that had been done, we would not be with a sufficient number in the panel, or am I reading too much into it?

(11 RT 2057-2058.)

Appellant agreed with the court's summary of the defense's position and added that "despite *Hovey* voir dire,[10] we're still in the position where publicity has contaminated this panel, and I would be in a better position to argue that when I see who's on the panel." The court then denied the motion as to the general panel and noted that it would hear further argument on the motion and make a final ruling after a jury was impaneled. (11 RT 2058.)

On June 2, 1995, appellant filed an update of the publicity on the case and renewed his motion for change of venue. (11 RT 2066.) He stated that he had reviewed the long questionnaires of the panel of 82 prospective jurors and, based on their responses, he estimated that 30 percent had formed opinions about guilt and punishment based on publicity. (11 RT 2066-2067.) The trial court noted, "There isn't a juror remaining who indicates that they could not set aside whatever it was that he had read or

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[10] *Hovey v. Superior Court of Alameda County* (1980) 28 Cal.3d 1.

heard, whatever opinions they may have formed." (11 RT 2070.) The court again denied the motion. (11 RT 2071.)

Appellant exhausted his peremptory challenges. (11 RT 2084.) The jury and alternate jurors were sworn. (11 RT 2086, 2090.) Appellant renewed his motion for a change of venue, noting that one impaneled juror had heard publicity and felt that appellant was guilty or guilty of something, and that he could not excuse the juror because he had no remaining peremptory challenges. (11 RT 2092.) The court replied:

> There isn't a juror or alternate in this case that was not further questioned [who] without hesitation, indicated they could be fair and impartial to both sides, that they could set aside anything that they've read, as to those that did read something, as to those who did form an opinion, there were none on this panel that indicated they could not set that opinion aside and base their decision solely, exclusively on the evidence presented to them in this courtroom.
>
> There was nothing about anything they read that would prompt them to be anything other than fair, impartial in this case. I think that is the essence of what is necessary in this case in terms of keeping it here. I think that the alternatives would be if in fact the Court were confronted with the situation where we're unable to muster 12 people to hear this case because of the pre-trial publicity, by that I mean we could not find 12 jurors who could set aside whatever it was that he read or heard about the case, independently decide it exclusively on what is presented in this courtroom, I obviously would be in a different position. I think that's the scenario that would require a change of venue; not what we have in this case. So the renewed motion is denied at this point.

(11 RT 2093-2094.)

B. Analysis

A change of venue must be granted when the defendant demonstrates a reasonable likelihood that a fair trial cannot be held in the county. (§ 1033, subd. (a); *People v. Vieira* (2005) 35 Cal.4th 264, 278-279.) In

ruling on the motion, the trial court considers: (1) the nature and gravity of the offense; (2) the nature and extent of the news coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the popularity and prominence of the victim. (*Id.* at p. 279.) On appeal, it is the defendant's burden to show: (1) that denial of the venue motion was error (i.e., a reasonable likelihood that a fair trial could not be had at the time the motion was made); and (2) that the error was prejudicial (i.e., a reasonable likelihood that a fair trial was not in fact had). (*People v. Prince* (2007) 40 Cal.4th 1179, 1213.) Reasonable likelihood means something less than "more probable than not" and something more than merely possible. (*People v. Dennis* (1998) 17 Cal.4th 468, 523.) The reviewing court sustains any factual determinations supported by substantial evidence, and independently reviews the trial court's determination as to the reasonable likelihood of a fair trial. (*People v. Hart* (1999) 20 Cal.4th 546, 598.)

These five factors did not justify a change of venue.

1. Nature and Gravity of the Offense.

Appellant contends that this case "was not a garden variety murder case," also noting that "[m]urders which are cold blooded or committed execution style reflect a high degree of sensationalism." (AOB 35.) Murder is, of course, a crime of the utmost gravity. (*People v. Harris* (1981) 28 Cal.3d 935, 948.) However, the sensationalism inherent in all capital murder cases will not in and of itself necessitate a change of venue. (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 942-943; *People v. Jenkins* (2000) 22 Cal.4th 900, 943.)

> The peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community, define its "nature'; the term "gravity" of a crime refers to it seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict.

(*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582.)

> Although defendant was charged with very serious offenses, every capital case presents a serious charge. This factor adds weight to a motion for change of venue but is not dispositive.

(*People v. Proctor* (1992) 4 Cal.4th 499, 524 [defendant charged with rape, torture, and murder of well-known teacher in Shasta County].) The *Proctor* Court held the nature of defendant's acts tended to support a change of venue, but not to the degree of a case involving serial murders. (*Id.* at p. 523; see also *People v. Jennings* (1991) 53 Cal.3d 334 [defendant raped and bludgeoned one woman, and beat to death or drowned three female prostitutes]; *People v. Hernandez* (1988) 47 Cal.3d 315 [defendant beat, raped, sodomized, murdered, and mutilated a 21-year-old woman and a 16-year-old girl].) Indeed, a change of venue will not result simply because a defendant is charged with capital murder. (See, e.g., *People v. Fauber* (1992) 2 Cal.4th 792, 817-818; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.) While the investigation and details of the offense predictably attracted the media's attention, the same could be said of most murders. (*People v. Dennis, supra,* 17 Cal.4th at p. 523.)

> Simply put,
>
> this case lacked "the sensational overtones of other killings that have been held to require a change of venue, such as an ongoing crime spree, multiple victims often related or acquainted, or sexual motivation."

(*People v. Fauber, supra,* at p. 818.) The nature of the crime – kidnapping, robbing, then shooting someone to death – did not have sensational overtones compared to other murder cases involving change of venue motions. (See, e.g., *People v. Hayes* (1999) 21 Cal.4th at pp. 1211, 1249-1252 [removal of victims' heads and hands].) Thus, the nature of the offenses charged here in and of themselves did not justify a change of venue.

2. The Size of the Community.

The California Supreme Court has reviewed the size of Kern County for purposes of venue motions in a series of cases. In *People v. Balderas* (1985) 41 Cal.3d 144 (*Balderas*), the court held the population of Kern County did not weigh in favor of changing venue in a capital case:

> The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness. [Citation.] Kern County, with a 1981 population of 405,600, ranked 14th among California's 58 counties in that respect. (State of Cal., Cal. Statistical Abstract (1981) table B-3, p. 15.) Cases in which venue changes were granted or ordered on review have usually involved counties with much smaller populations. [Citations.]

(*People v. Balderas, supra,* 41 Cal.3d at pp. 178-179.)

People v. Murtishaw (1989) 48 Cal.3d 1001, 1015 relied on *Balderas* and similarly held the size of Kern County did not weigh in favor of changing venue for defendant's penalty retrial in 1982. In fact, denials of requests for venue changes have been upheld in cases involving counties with significantly smaller populations than Kern County at the time of appellant's trial. [See *People v. Vieira, supra,* 35 Cal.4th at pp. 280-283 [Stanislaus County, population 370,000]; *People v. Hayes, supra,* 21 Cal.4th at p. 1251 [Santa Cruz County, under 200,000 population] *People v. Coleman* (1989) 48 Cal.3d 112, 134 [Sonoma County, 299,681 population].)

In *People v. Weaver* (2001) 26 Cal.4th 876, the court again found the size of Kern County did not favor changing venue for defendant's 1984 trial in a capital case.

> The size of the community is relatively neutral; as defendant asserts, Kern County is "neither large nor small." At the time of trial [1984], the county had a population exceeding 450,000 and Bakersfield, where the trial was held, had a population of 200,000. The key consideration is "whether it can be shown that

> the population is of such a size that it 'neutralizes or dilutes the impact of adverse publicity.'" [Citations.] The adverse publicity in this case was neither relentless nor virulent. The moderate size of Kern County thus does not undermine the trial court's decision to deny the change of venue motion.

(*People v. Weaver, supra,* 26 Cal.4th at p. 905.)

In the instant case, the prosecution stated in their opposition, without contradiction, the population of Kern County was over 500,000 and that of Bakersfield was over 300,000. Given the substantial increase in the community's population, as compared to *Balderas* and *Weaver,* it cannot be said that the size of the community weighed in favor of changing venue.

3. The Status of the Defendant in the Community and;

4. The Popularity or Prominence of the Victim.

Appellant claims that because he and Stroder were from Missouri and the victim was a local resident, his outsider status "weighed in favor of a change in venue." (AOB 42-43.) He selects three survey comments in support of his position. (AOB 43.) He argues that Diana's posthumous celebrity also favored a change in venue. (AOB 44.) Although appellant was an outsider in a geographic sense, he was not an outsider in terms of race. (Cf. *People v. Williams* (1989) 48 Cal.3d 1112 (*Williams*).) Moreover, appellant did not come to Bakersfield with any particular purpose, including committing crimes, but was there only because he ran out of money and gas. (17 RT 2997-2998, 3027-3028.)

Neither defendant nor the victim was prominent or notorious apart from their connection with the present proceedings. As in other cases,

> [a]ny uniquely heightened features of the case that gave the victim and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried.

(*People v. Dennis, supra,* 17 Cal.4th at p. 523.) Moreover, it is the status of appellant and the victim before the crime that is relevant to this particular issue (see *Prince, supra,* 40 Cal.4th at p. 1214; *People v. Ramirez* (2006) 39 Cal.4th 398, 434), and the people submit that post-crime publicity is more appropriately addressed under the category of nature and extent of media coverage.

In any event, the bulk of the post-crime publicity upon which defendant relies was disseminated between December 1993 and February 1994, with a few articles appearing as late as the summer of 1994. (III CT 903-930.) The trial began almost one year later, in May 1995. The passage of time ordinarily blunts the prejudicial impact of widespread publicity. (See *People v. Jenkins, supra,* 22 Cal.4th at p. 944; *People v. Dennis, supra,* 17 Cal.4th at p. 524; see also *People v. Robinson* (2005) 37 Cal.4th 592, 623.) Here, too, a number of survey comments reflected a more reasoned sentiment in the community: "I would have to see the evidence first." "I can't form an opinion without being on the jury or without the facts." "With so much publicity, the media tends to try people before the courts do. This is not fair." (III CT 942.) "I would need to hear all the evidence in court before making a decision about guilt or innocence. They deserve a fair trial." (III CT 944.) Neither appellant's status nor Diana's prominence in the community favored a change in venue.

5. The Nature and Extent of the News Coverage.

Appellant relied heavily on the nature and extent of the news coverage, basing his motion on a series of articles published in The Bakersfield Californian, which described, among other things, appellant's arrest and confession. Appellant appended 22 articles to his motion, the number and month and year of publication as follows: 10 articles in December, 1993; four each in January and February, 1994; one in March, 1994; two in April, 1994, and one in July, 1994. (III CT 903-930.)

The newspaper articles were neither extensive nor inflammatory. Indeed, the articles were fairly factual and addressed the murder investigation, the couple's arrest, and appellant's confession. The number of news articles - 22 - was relatively minimal and the majority of the articles were published one-and-a-half years before jury selection. The last article appeared approximately one year before trial. (Cf. *People v. Cummings* (1993) 4 Cal.4th 1233, 1275, fn. 16 [no need to change venue despite 51 newspaper articles and 24 television reports].) Certainly, the evidence of media coverage was considerably less extensive than in other cases in which this Court has affirmed denials of motions to change venue. (See, e.g., *People v. Prince, supra,* 40 Cal.4th at pp. 1210–1214 [270 newspaper articles and extensive television coverage]; *People v. Ramirez, supra,* 39 Cal.4th at p. 434 [trial court described media coverage as "'saturation, as much as they possibly can give'"]; *People v. Sully* (1991) 53 Cal.3d 1195, 1237 [193 newspaper articles, 300 pages of television transcripts, and eight videotapes].)

The public opinion survey was conducted after the publication of the newspaper articles, and almost one year after the murder. (III CT 903-930; IV CT 986F-986H, 986M.) It showed that just over half of those who recognized the case apparently had not formed an opinion concerning appellant's guilt. (III CT 937.) This high number of unformed opinions is even more striking when one considers that the march to the courthouse had taken place a mere six months earlier. (Ex. C, III CT 945.) In any event, given the size of the community, that left an ample number of prospective jurors from whom to choose. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1395-1396 [change of venue properly denied where 85 percent of those surveyed had heard of case, and 58 percent of those had formed opinion as to guilt]; *People v. Prince, supra,* 40 Cal.4th at p. 1211, p. 1214 [change of venue motion properly denied where survey showed 74 percent

of respondents were aware of case despite little publicity in preceding six months, and of those, 25 percent were predisposed to find defendant guilty]; *People v. Ramirez, supra,* 39 Cal.4th at pp. 432-434 [change of venue not compelled where, following media "'saturation,'" 94.3 percent of survey respondents had heard of case, and 51.7 percent thought defendant was responsible for Night Stalker murders]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 45 [change of venue motion properly denied where survey showed almost 71 percent of participants who resided in judicial district from which jury was drawn recalled case, and over 80 percent of those had formed opinion as to guilt]; *People v. Welch* (1999) 20 Cal.4th 701, 743, 745 [change of venue not compelled where survey results disclosed 65 percent of jury-eligible individuals had heard of case, and 78 percent of those had prejudged defendant to be guilty]; *People v. Proctor, supra,* 4 Cal.4th at pp. 524-525 [change of venue not compelled where survey showed 80 percent of those contacted had heard of case, and 31 percent of those had formed opinion as to guilt]; *People v. Jennings, supra,* 53 Cal.3d at pp. 359, 363 [change of venue motion properly denied where survey showed 72 percent of respondents recalled case, 51 percent thought they might be influenced by the publicity, and 31 percent believed district attorney had very strong case against defendant].) "The key consideration is 'whether it can be shown that the population is of such a size that it "neutralizes or dilutes the impact of adverse publicity."' [Citations.]" (*People v. Weaver, supra,* 26 Cal.4th at p. 905.).) As the California Supreme Court has observed, Kern County's population did not weigh in favor of changing venue in a capital case. (*People v. Balderas, supra,* 41 Cal.3d 144, 178-179.)

And, significantly, the survey did not take into account how many of those would be able to set their opinions aside and base their decision entirely on evidence presented in court. "Pervasive publicity alone does not

establish prejudice. [Citation.]" (*People v. Prince, supra,* 40 Cal.4th at p. 1214.) "'"It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."' [Citations.]" (*People v. Panah* (2005) 35 Cal.4th 395, 448.)

Finally, the jury selection procedures used by the court in this case ensured fairness. The prospective jurors were required to complete a 29-page questionnaire and reveal their prior media exposure to this case. (See 1 JCT 2-30 "Prospective Juror Questionnaire;" see 1 JCT 8-11 for media-related questions.) Prospective jurors were orally questioned privately about their responses. (See, e.g., V CT 1443.) The court and the parties also questioned the prospective jurors about their exposure to this case during general voir dire. (See, e.g., V CT 1513.) The court's careful procedures thus sought to reveal the impact of media coverage and screen out members of the panel who were influenced by such coverage. (See, e.g., *People v. Staten* (2000) 24 Cal.4th 434, 450.) As the trial court noted:

> There isn't a juror or alternate in this case that was not further questioned without hesitation, indicated they could be fair and impartial to both sides, that they could set aside anything that they've read . . .

(11 RT 2093.) Therefore, the typical and minimal news coverage in this case did not justify a change of venue.

Given the circumstances of the murder, i.e, the death of a single victim by gunshot, without more, the nature and gravity of the offense did not weigh in favor of a change of venue. (*People v. Weaver, supra,* 26 Cal.4th at p. 905.) And, as noted above, nor did the remaining factors. Accordingly, the trial court properly denied the motion.

C. Juror Voir Dire and Lack of Prejudice

Even assuming error occurred, appellant cannot show that the error was prejudicial, i.e., he cannot show a reasonable likelihood that a fair trial

was not in fact had. (*People v. Prince, supra,* 40 Cal.4th at p. 1213.) Appellant suffered no prejudice, and the trial court properly denied the renewed motion made after jury selection. "[A]ny inference that an impartial jury could not be impaneled was refuted by the actualities of voir dire." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1003, disapproved on other grounds in *People v. Loyd* (2002) 27 Cal.4th 997, 1008, fn. 12.)

On June 2, 1995, the jury and alternate jurors were sworn. (11 RT 2086, 2090.) Here follows a brief summary of voir dire for the 12 impaneled jurors.

Juror 045973 had heard about a murder in a shopping mall, but recalled nothing more. (2 RT 256-257.)[11] He would have no problem setting aside that information and deciding the case solely on what was presented in court. (2 RT 257.) He had no strong feelings about the death penalty, but rather had mixed feelings. (2 RT 253.) He would not automatically impose it, but would consider both penalties and could impose the death penalty if warranted. (2 RT 253, 256, 258.)

Juror 046113 did not recall anything about the case. (2 RT 300.) He had not thought much about the death penalty, but agreed with it. (2 RT 296.) He would not automatically impose the death penalty but could in the

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[11] The record includes select, unbound pages of redacted jury voir dire of the impaneled jury contained in a sealed envelope. Like appellant, however, respondent cites instead to the unredacted Reporter's Transcript on Appeal which includes the entire voir dire, but also includes juror names. "RR" refers to the 15-page Receipt for Records (Criminal), produced at appellant's behest, which matched juror names with juror numbers for purposes of identification and citation herein. (Also, the RR identifies only 11 jurors, but the omission of Juror 047872 appears irrelevant as he is readily identifiable by matching the redacted unbound page 775 to the unredacted pages 774 and 775 of Volume 4 of the Reporter's Transcript on Appeal.) To respondent's knowledge, no redacted version of the complete voir dire exists.

appropriate case, depending on the facts and circumstances. (2 RT 298.) Although not interested in hearing evidence about the person as a whole besides just crime evidence, he would consider it if so instructed. (2 RT 302.)

Juror 045991 had heard that a girl was abducted from the Valley Plaza and taken to a field and killed, but recalled nothing else about the case. (3 RT 369, 372.) She could not say whether either defendant was guilty of the charges. (3 RT 369-370.) She would not automatically vote for death or life irrespective of the evidence. (3 RT 373.) She would want to hear about the person before deciding the penalty. She could impose the death penalty if she felt it was appropriate. (3 RT 376.)

Juror 047328 had heard nothing about the case, believed in the death penalty, but did not believe that it should be imposed in every murder case. (4 RT 698.) She found both the circumstances of the offense and the background of the accused relevant to her penalty decision. (4 RT 701.) If the murder were shown to be a deliberate, intentional killing, she would lean toward the death penalty, but would not exclude life without the possibility of parole. (4 RT 700-701.)

Juror 048382 had read some newspaper articles about the case when it occurred, but could set that information aside and judge the case solely on what was presented in court. (4 RT 705-706.) The murder upset the juror, who believed appellant was guilty of something, although that would not make him lean towards the death penalty. (4 RT 709, 711.) He believed that appellant would have to be "proven guilty, not proven not guilty." He would not impose the death penalty in all cases, even if someone deliberately kills, but only in appropriate cases, depending on the circumstances. (4 RT 711.)

Juror 047872 only recalled hearing about the location of the corpse, and that was due to his working in the Taft area. He had not formed an

opinion about the case, could presume the defendants innocent, and could decide the case solely on the evidence. (4 RT 775.) He would not automatically vote for the death penalty if the killing were intentional because "it could be a number of things to lead to intentional." (4 RT 780.) He would impose the appropriate sentence based on "all of the facts and the findings" throughout the trial. (4 RT 784.)

Juror 048144 had heard nothing about the case and had no opinion about it. (6 RT 1069-1070.) He could impose the death penalty where the facts and circumstances of the case warranted it, but "would have to listen to all of the evidence to determine that." (6 RT 1070, 1172.)

Juror 048108 heard that the victim was found murdered in Taft, that a rifle had been used to kill her, and that the defendants were captured driving her car somewhere in the Midwest. He could set aside his opinion that the defendants were guilty of something, would fairly listen to both sides and decide the case based on the evidence presented in court, and could impose the death penalty if appropriate. (6 RT 1153-1154, 1159.)

Juror 049934 had heard nothing about the case and had formed no opinion about it. (7 RT 1355-1356.) He would not automatically vote one way or the other, but "would have to look at the whole spectrum of everything going on." (7 RT 1357.) He felt that the death penalty was a strong deterrent but that all avenues should be explored before using it, and, if warranted, would impose it. (7 RT 1358-1360.)

Juror 049200 had heard nothing about the case and had formed no opinions. (7 RT 1456.) She could impose the death penalty depending on the facts and circumstances. (7 RT 1457.) She would weigh all the evidence and would not automatically impose either penalty, even if the killing were shown to have occurred during the course of a robbery. (7 RT 1457-1458.)

Juror 049614 had heard that two people had been caught with the victim's car and credit cards. He had formed no opinion about the case and could set aside pretrial information and judge it solely on the evidence presented in court. (9 RT 1669.) He would wait to hear all the evidence, including evidence of the special circumstances, before deciding the penalty, which could go either way. (9 RT 1671-1672.)

Juror 049933 had heard and read some details about the case. (9 RT 1781-1782.) He could judge the case solely on the evidence presented in court, would not automatically impose penalty, and would impose the death penalty in the appropriate case, depending on the facts and circumstances. (9 RT 1782, 1784-1786.)

At the conclusion of voir dire, appellant renewed his motion for change of venue. (11 RT 2092.) In particular, he stated that had he had any remaining peremptory challenges, he would have exercised one on Juror 048108 because that juror had indicated that the defendants were guilty of something. This ignores the fact that Juror 048108 also stated he could be fair to both sides and base his decision on evidence in court. "The issue is . . . the jurors' ability to lay aside any impressions they may have received and decide the case on the trial evidence." (*People v. Edelbacher, supra,* 47 Cal.3d at p. 1003.) All jurors who had heard about the case and had formed an opinion about it stated that they could put that information and opinion aside and judge the case solely on the evidence presented in court. The trial court properly denied the motion, stating, as noted earlier, that all jurors and alternates "without hesitation, indicated they could be fair and impartial to both sides." (11 RT 2093.)

> Although the jurors' assurances of impartiality are not dispositive (citations), neither are we free to ignore them (citations). We have in the past relied on jurors' assurances that they could be impartial. (Citations.) Absent a showing that the pretrial publicity was so pervasive and damaging that we must

> presume prejudice (citations), we do the same here. Considering all the circumstances, defendant has not established a reasonable likelihood, as opposed to a mere possibility, that he did not in fact receive a fair trial before impartial jurors. (Citation.)

(*People v. Lewis* (2008) 43 Cal.4th 415, 450.)

Appellant compares pretrial publicity in his case with that in *People v. Williams*, *supra*, 48 Cal.3d at page 1112, to show that just as this Court reversed on this issue there, it must here. He notes that in *Williams*, 52% of the prospective jurors had read or heard about the case, including eight of the sworn jurors, and fewer than 9% were excused for cause because they could not disregard their opinions about the case. Here, he continues, 75% of the venire knew about the case, and 38% were excused for cause, both numbers greater than in *Williams*. (AOB 53.) Therefore, he argues, change of venue there mandates the same result here. (AOB 53.)

But appellant ignores the salient differences between the two cases. *Williams* involved two African-American brothers from Sacramento indicted in Placer County for burglary, and the rape, kidnapping, kidnapping for purposes of robbery and murder of Heather Mead, "a virgin or sexually inexperienced" 22-year-old white woman. (*Williams, supra,* at pp. 1117-1118, 1128.) Also, at the time of trial in 1981, Placer County had 117,000 people, only 402 of whom were African-American. (*Id.* at pp. 1126, 1132.) More than 50 newspaper and radio reports, some inflammatory, appeared during the 9-month period between defendant's arrest and motion. (*Id.* at p. 1127.) On the status of the defendant and victim, this Court stated:

> [W]here, as here, the victim is a local woman from a prominent family, the district attorney and the prosecution witnesses are all well known, and the accused -- representing the quintessential "other" in both a geographic and racial sense -- is charged with crimes bearing both sexual and racial overtones, the risk is enormously high that the verdict may be based on a desire for

> revenge, or the fear of social ostracism as the cost of a mitigated verdict.

(*Williams, supra,* at pp. 1130-1131.)

> All of the factors discussed above are exacerbated by the fact that defendant was charged with an exceptionally brutal slaying, and faced the gravest of punishments.

(*Ibid.*)

> In this case the risk was unacceptably high that the jury would treat defendant – "a young black man, a stranger to and friendless in the community" (citation omitted) -- as a dehumanized stranger.

(*Ibid.*)

This Court thus concluded that "all of the relevant analytical factors, viewed not only in isolation but in relation to one another, compelled a change of venue in this matter." (*Williams, supra,* at p. 1126.) A fair comparison of *Williams* to this case, however, compels the conclusion that venue need not have been changed here. Kern County's 1980 population was approximately 403,089, nearly three and one half times that of Placer County. (http://www.census.gov/population/www/censusdata/cencounts/files/ca190090.txt. [as of February 18, 2010]XXX) The victim, although local, was not prominent, and knowledge of the parties in court was not an issue at all. Appellant is not African-American, but is white, and sexual assault was not an issue here. Accordingly, this Court should find that appellant has failed to demonstrate a reasonable likelihood that denial of his motion for change of venue resulted in the denial of a fair trial.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S CHALLENGES FOR CAUSE TO FOURTEEN PROSPECTIVE JURORS

Appellant contends that the trial court prejudicially erred in denying his challenges for cause, depriving him "of his rights to due process and

equal protection, to a trial by an impartial jury, and to receive a fair and reliable penalty determination." (AOB 55.) Respondent disagrees.

A. Relevant Proceedings Below

1. Juror 049614

Juror 049614 had heard about the case from the newspaper and television, but could set aside what he had heard and judge the case solely on the evidence presented in court. (9 RT 1669, 1677.) He had formed no opinion about the case and could presume the defendants innocent. (9 RT 1669-1670.) Assuming a guilty verdict had been rendered and the special circumstances found true, Juror 049614 would wait to hear the penalty phase evidence before imposing penalty one way or the other. (9 RT 1671.) A first-degree murder committed during the course of a robbery or kidnapping would not cause him automatically to vote for death. (9 RT 1672-1673.) He would "weigh all the evidence" and "wouldn't automatically go one way or the other." (9 RT 1673.)

Juror 049614 believed that when the death penalty is imposed, it should be carried out sooner rather than later where there is a guilty verdict and the offender admits culpability, because "the appeal process just takes too long, basically." (9 RT 1678.) Juror 049614 would consider evidence of appellant's past and other evidence not directly related to the crimes to evaluate the appropriate penalty. (9 RT 1680-1681.)

On his questionnaire, Juror 049614 indicated that criminals have too many rights, they should serve at least 75% of their term, and officers should be paid more. (9 RT 1681.) He explained that when criminals appeal their own cases they spend their time in the library; he believed the appeals should be completed within a reasonable time. (9 RT 1682.) Questioning by appellant's counsel produced the following colloquy:

> Q: If it's proved to you beyond a reasonable doubt, just assume it has been for the purposes of this question, that a person

deliberately planned to kidnap, rob someone during that robbery and kidnapping, and they intentionally killed somebody, okay, a willful, deliberate act, would you be leaning toward the death penalty?

A: Yes.

Q: Would you be leaning strongly toward the death penalty under those circumstances?

A: Under those circumstances, yes.

Q: In your mind, would the death penalty, would your gut reaction to that factual situation be pretty much the death penalty?

A: To that situation explained, yes.

Q: So to that extent, if it was proved to you that the person planned the robbery, planned the kidnap and deliberately did that, deliberately killed a person with premeditation, deliberation, planned the whole thing, deliberately did everything, your gut reaction is the death penalty?

A: Yes.

Q: And that would be pretty much automatic, an automatic reaction?

A: Not automatic, I would say I lean towards that.

Q: You would be what, 95 percent there at that point?

A: Oh, percentages. Yeah, about there, I mean if it goes that far, whatever is premeditated, they thought about every single thing, whether someone died or not, it didn't matter to them, then yes.

(9 RT 1683-1684.)

The defense challenged for cause, arguing Juror 049614 "appears to be ADP" (automatic death penalty). The prosecution pointed out that Juror 049614 actually stated that he would lean toward the death penalty under

the very limited circumstances given, but that it was not automatic. (9 RT 1685.)

2. Juror 048108

Juror 048108 had heard about the case from the newspaper and television, but could set aside what he had heard and judge the case solely on the evidence presented in court. (6 RT 1153.) Based on what he knew about the case, he believed that the defendants were guilty of something. (6 RT 1153-1154.) He could set aside this sentiment, too. He would have no problem presuming the defendants innocent. (6 RT 1154.) He also understood that the defendants did not have to prove anything, but that the prosecutor must prove guilt. (6 RT 1154-1155.)

As for penalty, Juror 048108 could impose the death penalty in an appropriate case. (6 RT 1155.) He would not automatically vote for either penalty, but "would be inclined to base [his decision] on all of the evidence presented." Even if he concluded that the murder was planned, deliberate, and premeditated, he would not automatically vote for death but "base [his decision] on the weight of the evidence." (6 RT 1157.)

Appellant's counsel challenged the juror on the publicity issue, Stroder's counsel objected, and the court denied the challenge. (6 RT 1161-1162.) Appellant's counsel later used this juror as an example of one he would have excused had he not exhausted his peremptory challenges. (11 RT 1192-1194.)

3. Juror 047328

Juror 047328 had heard nothing about the case. She believed in the death penalty but did not believe that it should be imposed in every case. (4 RT 698.) It would depend on the facts and circumstances. "It will all depend on what I hear throughout the trial." (4 RT 699.) The following colloquy between appellant's counsel and Juror 047328 occurred:

Q: If it were proved to you that there was deliberate, intentional killing, someone actually shot somebody, intended to do it, killed that person; would you feel under those circumstances the death penalty should be automatic in your mind; person took a life, therefore their life should be taken?

A: I would probably tend to go into that direction but I can't say that I would for sure say they should be put to death. [¶] . . . [¶]

Q: All right. If it were proved to you that that was in fact the circumstances, the person intentionally killed another person, would you automatically exclude life in prison without the possibility of parole?

A: No.

Q: Can you imagine a set of circumstances where there was an intentional killing, maybe killed another person, intended to do it, but you could find life without parole?

A: Yes, I could think of a few things.

(4 RT 700-701.) Juror 047328 also said that the backgrounds of the individuals would be relevant to her sentencing decision. (4 RT 701.) Appellant's counsel challenged Juror 047328 "in that she indicated that she would lean towards the death penalty. I make this in order to protect the record." (4 RT 703.)

4. Juror 048382

Juror 048382 had read about the case in the newspaper and formed the opinion that appellant was guilty of something, although he could set the publicity aside and judge the case based solely on what he heard in the courtroom. He also understood that he had to presume the defendants innocent. (4 RT 706.) As for penalty, Juror 048382 thought the death penalty was the right sentence for certain crimes. (4 RT 707.) When asked by the court whether he would automatically impose the death penalty upon a guilty verdict and true findings as to the special circumstances, Juror 048382 answered,

> I feel you would have to consider all the evidence because you know it would have to be something pretty cold hearted, ruthless, to impose the death penalty in my own feeling.

(4 RT 708.) When asked if he would automatically impose the death penalty if the killing was found to be deliberate, premeditated, cold blooded murder, he answered,

> I think I would have to consider all of the facts. I don't think you could automatically just impose death on somebody without taking everything into consideration.

(4 RT 709-710.)

The following exchange occurred between appellant's counsel and Juror 048382:

> Q: Okay. Now at the time that you heard the publicity, did the fact you heard it tend to make you angry, upset, outraged over the crime?
>
> A: Over the fact that she was murdered, yes.
>
> Q: Did you feel some kind of morally emotional indignation over the fact that that happened or at least you heard what happened?
>
> A: Yes.
>
> Q: As you look at [appellant] now, do you still feel he's guilty of something? . . . [¶]
>
> A: Of something?
>
> Q: Yes?
>
> A: In my opinion, yes. . . [¶]
>
> Q: Do you feel that as you sit there now because you have a feeling that he's guilty of something, this may tend to make you lean towards the prosecution?
>
> A: Not at all.

Q: Do you think in judging any facts in this case you think the fact that you feel he's guilty of something, may make you judge that fact against [appellant]?

A: No, I don't think I would have a problem starting at ground level, just starting you know, like nothing happened. [¶] . . . [¶]

Q: Do you think that the fact you believe that [appellant] is guilty of something, base[d] upon publicity, may affect you in some way in either determining the facts or penalty in this case?

A: No, I don't think so. I think the facts would speak for themselves.

Q: Do you think that [appellant] might have to prove some things to you before say you could find him not guilty in this case, because you feel that he's guilty of something?

A: I think he has to be proven guilty, not proven not guilty.

Q: Do you think that because you feel that he's guilty of something, this may tend to make you lean towards the death penalty in this case?

A: Not at all.

Q: You are not absolutely in favor of the death penalty under all circumstances?

A: No.

Q: Only under circumstances where you feel it's appropriate; is that correct?

A: Right.

Q: Do you feel if someone deliberately kills another person, that's automatically the death penalty?

A: No, it depends on the circumstances.

(4 RT 709-711.) The defense challenged Juror 048382. (4 RT 713.)

5. Alternate Juror 048498[12]

Alternate Juror 048498 had heard extensively about the case from both the newspaper and television. (5 RT 1047, 1051-1052.) He could set that knowledge aside, however, and judge the case solely on what was presented in court. (5 RT 1046.) In his questionnaire, he wrote that he could not answer the questions regarding guilt because he did not have the facts. The following exchange between the court and alternate Juror 048498 occurred.

> A: I haven't heard any facts. I've been reading "The Californian" which is what I feel like I say I haven't heard anything or anything of facts, just reported through "The Californian' and on TV. I thought they were poor questions and I didn't really write in giving an answer. I thought they were innocent or I thought that they were guilty –
>
> Q: So basically as far as you are concerned, the only – the only basis upon which you would form such an opinion would be based upon the evidence presented to you in this courtroom?
>
> A: Definitely, not something secondhand.

(5 RT 1047.)

Alternate Juror 048498 would presume the defendants innocent. (5 RT 1047.) As for penalty, he would impose the death penalty "in the right instance." (5 RT 1048.) He would not automatically vote for death or life without parole. (5 RT 1049.) If convinced that the murder was planned, deliberate, and premeditated, alternate Juror 048498 would lean toward the death penalty, "but [he] would be forced to listen to the rest or the remainder of the information in the second phase." He would not only

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[12] Appellant mistakenly refers to this alternate as Juror 049845, which is actually a different alternate juror. (AOB 63.) Appellant's record citations, however, are to alternate Juror 048498, as this number corresponds to the name given in the record and in the juror questionnaire. (5 RT 1045; RR 116, 288.)

listen, however, but would also weigh and consider it before coming to any final decision. (5 RT 1050.) The defense challenged alternate Juror 048498 on the ground that he stated he would lean toward the death penalty under a certain set of circumstances. (5 RT 1054.)

6. Prospective Juror Judith Burns

Ms. Burns had heard about the case on the radio, and knew that the victim was abducted from the Plaza and that her body was found in the Taft area. (2 RT 310-311.) Ms. Burns would not always vote to impose the death penalty, "depending on what the facts and circumstances surrounding the case were." (2 RT 308.) She would take the facts into consideration. (2 RT 310.)

In her questionnaire, Ms. Burns indicated that the death penalty should be used more, and that it was a waste of taxpayer money to house repeat offenders. (2 RT 311-312.) When asked whether someone should get the death penalty for a first-time murder, Ms. Burns replied, "I would believe that it would depend on the circumstances of how it came about that they killed them." (2 RT 312.) The following colloquy between defense counsel and Ms. Burns occurred:

> Q: If, assuming . . . somebody just killed somebody else, bang, you're dead, done deliberately, could you, in your own mind, consider life without possibility of parole, depending on the circumstances?
>
> A: I don't believe that if it was a deliberate thing, if – you know, premeditated, deliberate, get rid of this person, I – I believe the death penalty. If it was like fooling around with a gun or something and it goes off and somebody gets --
>
> Q: Went off accidentally?
>
> A: Yeah. [¶] . . . [¶]
>
> Q: You're sitting in a case where you have heard the evidence and you're convinced beyond a reasonable doubt that somebody

went out and shot somebody down, killed them deliberately. Would your reaction be that person must die?

A: I think that it would depend on the facts surrounding why and what went on.

Q: All right. So just because it was a deliberate killing does not mean that you would automatically vote for the death penalty?

A: I don't think so.

Q: Under that situation, you could consider life without possibility of parole?

A: Yeah.

Q: Leaning toward death in a situation like that?

A: More so, yes. I don't like the life imprisonment.

Q: You don't like it because?

A: If it was myself, I would rather not be here at all than to be caged up and not be able to enjoy life, you know, see the sun and do what I wanted to do when I wanted to do it.

Q: So just from a personal standpoint, you would feel that the death penalty would be better than sitting around in prison until you die?

A: Right.

Q: That would influence how you would decide penalty in this case?

A: I think that it probably would.

Q: So you would then automatically lean toward death in a case where you have the two choices?

A: Probably.

Q: Because of you feelings about sitting around in prison for the rest of your life?

A: I believe so.

(2 RT 312-314.)

Ms. Burns also thought that, because the police technology prevented them from making many mistakes in tracing people, appellant was probably guilty of something, and just by being there, maybe had one strike against him. (2 RT 315-316.) When questioned by the prosecutor, the following occurred.

> Q: Do you feel as you sit there now that you are not going to make me prove him guilty, that you want to go back there and find him guilty, regardless of how much evidence that I show you?
>
> A: No. I want the information that is going to tell me yes or no.
>
> Q: Okay. And so if I put on witnesses and I show you some physical evidence and I argue to you that he's guilty, and you felt that the evidence that I have given you is not enough to prove to you beyond a reasonable doubt that he's guilty, would you go in the jury room and vote "not guilty?"
>
> A: Yes.
>
> Q: And in spite of the fact that he has been arrested and in spite of the fact that he's sitting here?
>
> A: Yes.

(2 RT 319.)

Under further questioning by defense counsel, Ms. Burns reiterated:

> Well, if the facts are there and they are good facts that prove that he is guilty, then I can judge that way. If the facts are there and there is not enough that don't – that doesn't show that he's guilty, I can -- believe that I can vote "not guilty," also.

(2 RT 320.)

Ms. Burns worked with the Kern County Sheriff's Search and Rescue whose job was to find lost people and to administer first aid. (2 RT 322.) Her job gave her knowledge of the Sheriff's technical equipment used for

tracking. (2 RT 2 RT 322-323.) Ms. Burn did not believe that her involvement with the Sheriff's Department had any bearing on the issue of guilt. And, she agreed that starting out with the presumption of innocence and then going forward was the appropriate way to proceed. (2 RT 323.) Finally, Ms. Burns still believed that the defendants must be guilty of something or they would not be in court. When asked whether there was anything the defense could do to change that, she replied, "Well, you know, I don't know. The facts of the case – I mean, I – like I said, I could vote either direction." (2 RT 324.)

Appellant challenged for cause on two bases. First, he argued that Ms. Burns appeared to be "ADP, automatic death penalty." Second, appellant argued that due to publicity on the case, Ms. Burns had "a fixation about the guilt of the defendants" in that she indicated that appellant was guilty of something despite questioning by all parties. In rejecting appellant's challenge, the court stated:

> All right. You know, I'll be honest with you, I don't think that I should grant it. I think that she has indicated that she would not automatically vote for death, that should be based on the circumstances of the case. [¶]. As far as her feelings regarding the defendants having been guilty of something, she did indicate that she would base her decision in that regard on the evidence presented to her.

(2 RT 325-326.) Appellant exercised a peremptory challenge to excuse Ms. Burns. (11 RT 2079.)

7. Prospective Juror Mary Whitten

Ms. Whitten had read and heard about the case and had formed an opinion about it. (3 RT 386.) When questioned by the court, she thought that she could set aside what she had read and heard and judge the case fairly and impartially.

Q: You think you could, okay. [¶] In order to do that, you would have to set aside any preconceived notions you have about this case.

A: Okay.

Q: You would have to presume the defendants are not guilty at this point. [¶] Can you do that?

A: I think so, yes.

Q: You think so. [¶] Do you have any reservations about that? Anything you want to talk to us about?

A: No.

(3 RT 387-388.)

When the court asked if Ms. Whitten would automatically vote for the death penalty, she replied, "I think I would have to hear and weigh it out." (3 RT 389.) Under questioning by the prosecutor, Ms. Whitten agreed to keep and open mind and consider the death penalty as a possible sentence for either or both of the defendants. (3 RT 390.)

Under questioning by Stroder's counsel, Ms. Whitten admitted that when she first heard about the case, she formed an opinion that the defendants were guilty. (3 RT 392.) The following exchanged then occurred:

Q: And then since that time you have changed that opinion, is that what you're telling me?

A: I formed an opinion of what I read and heard and I think time has gone by and I wasn't there, obviously, and so maybe not completely changed, no.

Q: Okay, so you still have a feeling of probably guilty, right?

A: Right.

Q: And that's probably the way you are going to start this trial out, right?

A: I can't say that I will start that way, no.

Q: Well, at least that's the way you feel right now?

A: Right this minute, no.

Q: Is that a no or a yes?

A: No.

Q: You feel that they're – you feel they're presumed innocent at this present time?

A: Right.

(3 RT 392-393.)

Appellant's counsel expressed his concern that Ms. Whitten had felt appellant was guilty the previous week, and asked, "Do I understand you or your statement now is that you no longer feel he's guilty?" Ms. Whitten replied, "I think I would have to hear the evidence or your side or his side. I think right this minute I could probably say yes he is." (3 RT 394.)

And later, the following exchange took place.

Q: Now, is there anything happening or happened between Thursday of last week and today that would change your mind that he was, in fact, not guilty?

A: I would hope if I were sitting in his position that someone would think I was not guilty and maybe we just need to look at both sides and then form an opinion.

Q: Did you have those thoughts when you filled out the questionnaire, is that something that's come to you since then?

A: I probably did, but I felt that I had to answer it exactly how I felt at that moment.

Q: And your feeling still is that he is guilty?

A: I would think so, yes.

(3 RT 396.)

Ms. Whitten believed that neither what she knew from the publicity about the case nor the fact that she knew a relative of Diana would affect how she viewed the facts. (3 RT 397.) When asked whether the publicity and her feeling that appellant was guilty would affect what penalty she would impose, Ms. Whitten replied, "I still feel I have to hear everything before I can form that or impose that penalty." (3 RT 397-398.) In her questionnaire, Ms. Whitten indicated that life without the possibility of parole should be the sentence. When asked whether appellant should be put to death based on what she knew, Ms. Whitten answered, "Without hearing anything else, I don't think I can make that decision." (3 RT 398.)

Ms. Whitten stated that if the evidence showed that appellant deliberately killed Diana, he should die. (3 RT 398.) She agreed with counsel that, based on what she knew, she was leaning toward the death penalty, which she believed was too seldom imposed. (3 RT 399.) Appellant challenged Ms. Whitten as "a classical ADP." The prosecution objected, noting:

> The fact that she might lean toward the death penalty does not mean she would automatically impose the death penalty. In fact, when she filled out her questionnaire she stated she felt the appropriate penalty was life in prison without the possibility of parole and I think it's obvious that she's somebody who would listen to the evidence, which she indicated a number of times, and she would decide what she feels is the appropriate penalty.

(3 RT 400.)

Stroder's counsel joined in the challenge noting Ms. Whitten's acknowledgment of an extreme amount of publicity and the fact that she knew and worked with the prosecutor's mother. Appellant's counsel also suspected that Ms. Whitten was not being completely candid with her answers. (3 RT 401.) The prosecutor responded to both counsel.

> I think a number of jurors who have come in here have indicated that from what they heard in the newspaper, at that point in time

> they formed an opinion that the defendants were guilty. [¶] The question is, if she sits as a juror, can she set that aside. I disagree with [appellant's counsel] that she's being less candid with us. I think what happened is when she filled out the questionnaire last week she was thinking about what she heard at the time she heard it and she felt that they were guilty. Now she's placing herself in the role of a juror. [¶] You explain to her that she has to set that aside and she's saying, "I can set that aside."

(3 RT 402.) The court denied the challenge and the defense exercised a peremptory challenge to excuse Ms. Whitten. (3 RT 402; 11 RT 2078.)

8. Prospective Juror Edith Sanford

Ms. Sanford had heard about the case from the newspaper and television. (5 RT 1027.) She could base her decision solely on what was presented in court. She did not "really trust the newspaper stuff that much, sometimes they kind of shadow things." (5 RT 1028.) She could presume the defendants innocent, and she would not use what she had heard in the media to fill in evidentiary gaps if the prosecution fails to prove its case. (5 RT 1029-1030.) On her questionnaire, she indicated that, based on media reports, she felt the defendants were guilty as charged and guilty of something. She stated that she could set those opinions aside and presume the defendants not guilty of the charges. (5 RT 1030.)

As for the death penalty, Ms. Sanford believed it was the law and "something we have to do." If the facts and circumstances warranted it, she could impose death in this case. (5 RT 1031.) She would not automatically opt for either penalty because "it's something you would have to determine after all the evidence is in." (5 RT 1032-1033.) This attitude also applied even if the killing were shown to be planned, deliberate, and premeditated. (5 RT 1033.)

Under questioning by appellant's counsel, the following exchange occurred:

Q: As you sit there now, do you have an opinion that the defendant is guilty?

A: No, I don't.

Q: What happened to your prior opinion?

A: Well, it's been a while back and I haven't heard all those things that happened. They could be guilty, maybe they aren't. I don't know.

Q: Now, when you filled out the questionnaire back on, I believe, the 11th of this month, you put down that they are guilty or [appellant] was guilty?

A: From what I had known, yes.

Q: Has something changed in your mind from the time you signed this questionnaire until the time you came to court? [¶] . . . [¶]

A: I was just going on when I was filling that out, I didn't feel like I could actually put no, because I had heard stuff in the paper and their name[s] were in there, too.

Q: Is it your statement now that you have no feeling that [appellant] is guilty or guilt[y] of anything?

A: I would say that I would think that I probably still feel that they probably are, but that's at this point without hearing anything else. So I don't know, I don't really know.

(5 RT 1035.)

Upon further questioning, Ms. Sanford said that the prosecution would still have to prove the case beyond a reasonable doubt, and then the following occurred.

Q: Would they have less of a burden, we know what the burden is, but are they starting out kind of a leg up as far as you're concerned, kind of 50 yards ahead of the race already because of the prior publicity?

A: I would like to be able to say totally no on that, but I just can't guarantee it. I would hope so.

Q: It's possible because of the prior publicity in your opinion, it may affect how you view the facts in this case?

A: That's hard, like I say, I would rather say no, but I really don't know. I would hope that I would put it aside.

(5 RT 1036.) Ms. Sanford said she did not think the publicity would cause her to lean toward the prosecution's version of the facts. (5 RT 1037-1038.)

The defense challenged Ms. Sanford on the ground of publicity on the case. (5 RT 1044.) The court denied the challenge and the defense exercised a peremptory challenge to excuse Ms. Sanford. (5 RT 1044; 11 RT 2077.)

9. Prospective Juror Cleete Baron

Ms. Baron had recently moved to the area and had heard nothing about the case. (4 RT 714.) She believed in the death penalty and would have no difficulty imposing it in the appropriate case. (4 RT 714-715.) She would not automatically impose the death penalty but would "certainly take into consideration the evidence." (4 RT 715-716.) Even if the evidence showed the murder to be deliberate, intentional, cold blooded murder, Ms. Baron would not automatically impose the death penalty, but would "weigh the differences and listen to the evidence." (4 RT 716.)

Under questioning by appellant's counsel, Ms. Baron stated that she would lean toward the death penalty if the murder were a deliberate, premeditated, cold blooded killing, although she could also consider life in prison without the possibility of parole, depending on the evidence. (4 RT 716-717.) If guilt were shown, Ms. Baron would not need to know anything else about the defendant. (4 RT 717.) She stated that she would base her decision on "the evidence given and the crime committed, regardless of how good a person they were 15 years ago." (4 RT 718.) She would have no problem, however, following the court's instruction to

consider evidence about the defendants' lives apart from evidence of the crime. (4 RT 718-719.) She could vote for whichever penalty she considered appropriate. (4 RT 720.)

The defense challenged Ms. Baron based on her statement that she would lean toward the death penalty under certain circumstances, and the court denied the challenge. (4 RT 720-721.) The defense exercised a peremptory challenge to excuse Ms. Baron. (11 RT 2077.)

10. Prospective Juror Leta Russell

Ms. Russell had heard about the case once on a local newscast. (6 RT 1170.) From that, she concluded appellant was guilty as charged, but stated that she would "surely try" to set that opinion aside and judge him based on the evidence presented in court. Ms. Russell understood the presumption of innocence and that only the prosecutor had to prove something. (6 RT 1171-1172.)

Ms. Russell would be able to impose the death penalty in the appropriate case. (6 RT 1172.) She would not automatically vote for either penalty, but would "have to weigh all the evidence" to decide. (6 RT 1174.) The following colloquy between Stroder's counsel and Ms. Russell occurred:

> Q: But you know about yourself and I assume you know how you mentally work. Do you think it's the kind of thin[g] that you're capable of doing or in the interest of being fair to the defendant, are you thinking, "Gee, I wonder if I could be impartial on the right case," or are you –
>
> A: I think I'm very fair, you know, judging – well, not judging, but coming to a conclusion.
>
> Q: All I'm trying to find out is how your mind works and you're the only one that knows that and I assume if you could put aside these feelings, are you positive that you can do that, that you could put aside whatever present opinion you have

formed and decide this case on simply what is presented in this courtroom?

A: I will sure try.

Q: But you don't know until you actually get confronted with the situation, is that what you're telling me?

A: That's correct.

(6 RT 1178-1179.)

The defense challenged Ms. Russell on the publicity issue. The court impliedly denied the challenge by instructing Ms. Russell to return on May 31st. (6 RT 1182.) The defense exercised a peremptory challenge to excuse Ms. Russell. (11 RT 2073.)

11. Prospective Juror Filemon Vigil

Mr. Vigil had heard about the case from the newspaper and television and, based on that publicity, he believed that the defendants were guilty of something, although he could set that belief aside and judge the case solely on the evidence presented in court. (6 RT 1124.) He would presume the defendants innocent, and he could impose the death penalty in the appropriate case. (6 RT 1125.) Mr. Vigil said that he would not automatically vote for a penalty but "would have to hear all of the evidence before" deciding, even if the murder were shown to be planned, deliberate, intentional and premeditated. (6 RT 1127-1128.)

Under questioning by appellant's counsel, the following exchange occurred:

Q: And again, in your eyes, you know, the prosecution is going to be putting on evidence about he's guilty, okay. And there may be testimony and witnesses that would support his innocence. [¶] Do you think that the prosecution is going to have – have an easier time convincing you that he's guilty than the defendant would convincing you that he's innocent?

A: I really can't make a judgment at this time. I really don't know, honestly.

(6 RT 1130.)

The defense challenged Mr. Vigil on the publicity issue and the court denied the challenge. (6 RT 1139.) The defense exercised a peremptory challenge to excuse Mr. Vigil. (11 RT 2074.)

12. Prospective Juror Gene Arbegast

Mr. Arbegast had never heard of the case and, therefore, had no opinion about it. (7 RT 1480.) Assuming appellant was found guilty, he would have to weigh all the evidence and base his opinion as to penalty on that evidence. (7 RT 1481.) He could impose the death penalty in the appropriate case. (7 RT 1482.) Under defense questioning, however, Mr. Arbegast stated that if a person is found guilty and the choice is death or life without possibility of parole, he would choose death. (7 RT 1483-1484.) Under prosecution questioning, however, he indicated that he would not automatically impose the death penalty upon a guilty verdict of first-degree murder during a robbery, but would listen to all the additional evidence before deciding the penalty. (7 RT 1487-1488.)

The defense challenged Mr. Arbegast as ADP. The court noted that the prosecutor's questions rehabilitated Mr. Arbegast and denied the challenge. (7 RT 1488-1489.) The defense exercised a peremptory challenge to excuse Mr. Arbegast. (11 RT 2072.)

13. Prospective Juror Gary McNatt

Mr. McNatt had heard about the case on television, but could set what he had heard aside and decide the case exclusively on the evidence presented in court. (9 RT 1734-1735.) He also indicated that he had no opinion as to guilt or innocence based on what he had heard. (9 RT 1735.)

He understood the presumption of innocence and the prosecution's burden of proof. (9 RT 1736.)

As for penalty, Mr. McNatt did not believe that all murders required the death penalty, but only certain cases. (9 RT 1737.) He would not automatically vote for either penalty, but "would have to weigh the evidence." (9 RT 1738.) If the murder were shown to be premeditated, i.e., if "they set out to commit a murder, [he] would probably have to vote for the death penalty." Upon further questioning by the court, however, Mr. McNatt reiterated that he "would always weigh the evidence." (9 RT 1739.) Under questioning by the defense, Mr. McNatt reiterated both sentiments, i.e., that his gut reaction would be to vote for death and that he would "still have to weigh the evidence." Appellant's counsel presented an analogy wherein actor Randolph Scott asked actor John Wayne, the Marshall in a western, what he was going to do with the horse thieves he had captured. John Wayne replied, "We're going to give them a fair trial and hang the bastards." When asked if he felt that way, Mr. McNatt responded, "No, that is not the way I feel." (9 RT 1741.) Mr. McNatt would be interested in evidence other than crime evidence before deciding the penalty, e.g., a person's history. (9 RT 1742.)

The defense challenged Mr. McNatt on the penalty issue and the court denied the challenge. (9 RT 1744.) Appellant exercised a peremptory challenge to excuse Mr. McNatt. (11 RT 2082.)

14. Prospective Juror Jeffrey Cox

Mr. Cox had heard nothing about the case. (2 RT 207.) He stated that if a person purposefully takes another's life, he would vote for the death penalty. (2 RT 208.) On the other hand, he also stated that he would take the circumstances into consideration. (2 RT 207.) Under defense questioning, Mr. Cox stated that if the prosecution proved beyond a reasonable doubt that someone deliberately shot and killed someone, he

would automatically vote for the death penalty. (2 RT 208.) On the other hand, under prosecution questioning, he confirmed that he could listen to the judge and could weigh mitigating evidence and, if appropriate in this case, he could vote to impose life without the possibility of parole. (2 RT 210-211.) Counsel challenged Mr. Cox, the prosecution objected, and the court denied the challenge. (2 RT 211-212.) The defense exercised a peremptory challenge to excuse Mr. Cox. (11 RT 2078.)

B. Analysis

The state and federal Constitutional standards for determining a capital juror's ability to serve are the same. "The trial court may excuse for cause a prospective juror whose views on the death penalty would prevent or substantially impair the performance of that juror's duties" in accordance with the court's instructions and the juror's oath. (*People v. Smith* (2003) 30 Cal.4th 581, 601; see *Wainwright v. Witt* (1985) 469 U.S. 412, 424.) California statutory law also provides, in relevant part, that a juror may be disqualified based on a challenge for cause where the juror exhibits actual bias, i.e.,

> the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

(Code Civ. Proc., § 225, subd. (b)(1)(C).)

> The standard of review of the court's ruling regarding the prospective juror's views on the death penalty is essentially the same as the standard regarding other claims of bias.

(*People v. Horning* (2004) 34 Cal.4th 871, 896.) In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected.

(*People v. Roldan* (2005) 35 Cal.4th 646, 696.) Excusal is permissible only if the juror makes this position "unmistakably clear." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522.) The trial court's determination of the factual question is binding on appeal if supported by substantial evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 14.) "If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence." (*People v. Horning, supra,* 34 Cal.4th at pp. 896–897.)

> Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.

(*Uttecht v. Brown* (2007) 551 U.S. 1, 9.)

The trial court asked each of the four seated jurors who appellant challenges here whether, assuming guilt as to a first-degree murder committed during the course of a robbery or kidnapping, they would automatically vote for death or would vote for the appropriate penalty after weighing all the evidence. (4 RT 699, 708; 6 RT 1156-1157; 9 RT 1672-73.) Each of these jurors responded that they would not automatically vote for the death penalty. (4 RT 699, 709; 6 RT 1157; 9 RT 1172-1173.) Juror 049614 stated that he would "weigh all the evidence" and "wouldn't automatically go one way or the other." (9 RT 1673.) Juror 048108 stated that he "would be inclined to base [his decision] on all of the evidence presented." Even if he concluded that the murder was planned, deliberate, and premeditated, he would not automatically vote for death but would "base [his decision] on the weight of the evidence." (6 RT 1157.) In her response to counsel's questioning, Juror 047328 stated that she could imagine a set of circumstances where, even though there was an intentional killing, she could vote for life without the possibility of parole. (4 RT 701.) When asked his view if the murder were found to be deliberate, premeditated, cold blooded murder, Juror 048382 stated, "I think I would

have to consider all of the facts. I don't think you could automatically just impose death on somebody without taking everything into consideration." (4 RT 709-710.)

Moreover, the three jurors who were exposed to publicity assured the court that they could set aside what they had learned about the case, and also their feeling that appellant was guilty of something, and judge the case solely on the evidence presented in court. (4 RT 704; 6 RT 1154; 9 RT 1669.) The three jurors asked about the presumption of innocence indicated they could presume the defendants' innocent until the prosecution proved them guilty beyond a reasonable doubt. (4 RT 706-707; 6 RT 1154-1155; 9 RT 1669-1670.) The record adequately supports the court's retention of these four jurors.

By contrast, the court granted challenges to jurors whose views on the death penalty would have prevented or substantially impaired the performance of their duties in accordance with the court's instructions and the juror's oath. (*People v. Smith, supra,* 30 Cal.4th at p. 601; see *Wainwright v. Witt, supra,* 469 U.S. at p. 424.) For example, prospective juror Mr. Easter stated that, based on what he knew or thought he knew, if the defendants were found guilty, he would automatically vote for the death penalty. (2 RT 176.) Appellant challenged for cause, the prosecution did not object, and the court excused him. (2 RT 177.) Similarly, prospective juror Ms. Walden felt "pretty strong" about the death penalty. (2 RT 343-344.) In the case of murder, she believed in an eye for an eye, a tooth for a tooth, and would always vote for the death penalty. (2 RT 344.) Both defense counsels challenged her and the court excused her. (2 RT 345-346.)

In some cases, based on answers given in voir dire, the court assumed a defense challenge and no prosecution objection and released the prospective juror: Ms. Whitely -- based on the publicity and what she knew

about the case, she felt that appellant was guilty and should get the death penalty. When asked whether she would "pretty automatically" vote for it, she replied, "Yes" (2 RT 332-334). Given his military background, Mr. Mosley stated that he would lean towards the prosecution. The court assumed there would be a challenge and excused him. (4 RT 743, 748.)

Still others were excused for cause for various reasons: Mr. Meyer -- because the defendants would have to prove somebody else guilty before he'd believe them innocent (2 RT 307); Ms. Pruett would ignore penalty phase evidence and impose death (4 RT 755); Mr. Terce would always and automatically vote for death on first-degree murder, and probably for death for robbery (3 RT 541); and Mr. Sacksteder – when asked if first-degree murder would result in his automatic vote for the death penalty, he stated, "I don't see why not." (3 RT 439.) When asked whether putting someone to death would act as a deterrent for others, he replied, "Not necessarily for other people, but sure will cure him" (3 RT 439-440).

The court excused some prospective jurors because they answered that they could not set aside the publicity and fairly judge the case on evidence presented in court, e.g., Ms. Okuji (4 RT 731), Ms. Trigueiro (4 RT 750), and Ms. Levan (4 RT 818-822). Some prospective jurors could not impose the death penalty for any reason, e.g., Mr. Munoz (2 RT 237, 240), Ms. Ryan (2 RT 275-277), and Mr. Estrada (3 RT 524-530). The court excused these people, too.

As for the alternate juror and the nine prospective jurors appellant contends should have been dismissed for cause, they could not have possibly affected the jury's fairness because they did not sit on the jury.[13]

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[13] Even if these nine prospective jurors had sat on the jury, however, as noted in Argument I. above, all of them stated that they would listen to all the evidence presented in court before making a decision, and they

(continued...)

(See *People v. Yeoman* (2003) 31 Cal.4th 93, 114.) The harm to appellant, if any, was in being required to use peremptory challenges to cure what he perceived as the trial court's error, thereby reducing the number available to him later in the trial. (See *ibid.*; see also *People v. Boyette* (2002) 29 Cal.4th 381, 418.) But the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury. (See *Ross v. Oklahoma* (1988) 487 U.S. 81, 88; see also *People v. Avila* (2006) 38 Cal.4th 491, 540.) Appellant argues that "the trial court's errors violated [his] federal due process liberty interest in using the full number of challenges available under California law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)" (AOB 69.) This Court has resolved this issue:

> Defendant received and exercised the 20 peremptory challenges allotted to him under state law. (Citation.) State law required him to use those peremptories to cure any erroneous denials of challenges for cause. (Citations.) Defendant received all that was due him under state law.

(*People v. Blair* (2005) 36 Cal.4th 686, 744.)

In sum, the trial court's denial of appellant's 14 challenges for cause did not violate his constitutional rights. Accordingly, this claim should be denied.

III. THE TRIAL COURT'S DISMISSAL OF PROSPECTIVE JUROR JAMES HARMER DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS REQUIRING REVERSAL OF THE DEATH JUDGMENT.

Appellant contends that the trial court erroneously excused prospective juror James Harmer based upon his religious beliefs. (AOB 71.) Respondent disagrees.

(...continued)
would not automatically vote one way or the other. (2 RT 210-211, 320, 323-324, 389-390, 397-398; 4 RT 715-716; 5 RT 1032-1033; 6 RT 1127-1128, 1174; 7 RT 1481, 1487-1488; 9 RT 1738-1739.)

A. Relevant Proceedings Below

Mr. Harmer indicated on his questionnaire, and confirmed under court voir dire, that he had heard about the case from print media and television, he knew the defendants' names, and he recalled they had kidnapped the victim near Taft, murdered her, taken her car and bank card, and left the state. (11 JCT 2984-2985; 6 RT 1086-1087.) On his questionnaire, Mr. Harmer answered that he believed the defendants to be guilty as charged and guilty of something. As for their penalty, he selected "No" as to death for both defendants and left blank the option for life without the possibility of parole. (11 JCT 2985-2986.) As for moral or religious beliefs that would affect his ability to sit in judgment of another, Mr. Harmer wrote, "The Bible tells us not to Judge." The Bible and Christian-authored books were among those he liked to read. (11 JCT 2987-2988.) He also wrote that he had never served on a jury before and "would prefer not to" serve on this jury. (11 JCT 2993.)

Mr. Harmer was an associate pastor of a church and, as such, had mixed emotions about the case. (6 RT 1088-1089.) When asked his feelings about the death penalty on his questionnaire, Mr. Harmer stated, "I think if it's in place then it[']s up to the Court[]s to do as the[y] see fit." (11 JCT 3001.) He also marked on the questionnaire that he did not believe the death penalty was wrong for any reason including religious, moral or ethical beliefs. (11 JCT 3002.) Mr. Harmer also noted that he would have no difficulty imposing the death penalty in an appropriate case. (11 JCT 3002-3003.) He did not belong to any organizations that opposed or favored the death penalty and he would have no trouble imposing it in the appropriate case where the facts and circumstances warranted it. (11 JCT 3002-3003.)

When questioned by the court about his ability to set aside what he had heard and judge the case solely on courtroom evidence, Mr. Harmer

replied, "I am not sure, to tell you the truth, to be honest with you, I'm not sure. You know, I have mixed emotions about it." (6 RT 1088.) Under later defense questioning, he also admitted that he had opinions about the case that "could be wrong" and that he "could probably separate" his opinions and base his decision on the evidence. (6 RT 1094-1095.)

Mr. Harmer admitted that he would have difficulty sitting as a juror because of his religious belief that he was not to judge others. He admitted that it "would be hard" to ignore his religious beliefs and remain on the jury. "As far as I'm concerned, I would have a hard time standing in judgment of somebody, to be honest with you, to tell you the truth." (6 RT 1089.) The court asked, "And in order to do that, would you, in fact, need to or have to ignore religious beliefs that you have?" Mr. Harmer replied, "Yes, sir." The prosecution challenged Mr. Harmer for cause and defense voir dire commenced.

Under questioning by appellant's counsel, Mr. Harmer agreed that he would apply the death penalty, if warranted, with a heavy heart because that was the law of the land. (6 RT 1091.) Upon further defense questioning, however, Mr. Harmer indicated that he was unsure whether he could vote for death, and even intimated that he might be the lone holdout who would say no to death.

> I may be the one that would be off balance to that. I would probably say no and everybody else would say yes, if that was the case. . . . I don't know. I would have to cross that bridge. It is a hard decision. Matthew, quoting it, "Judge not, lest you be judged." That is the whole thing. I don't know if I could say yes, death

(6 RT 1092.) When pressed further, he repeated several times that he would try to pass judgment but that it would be the hardest thing he would ever have to do. (6 RT 1093-1094.)

The following occurred between Stroder's counsel and Mr. Harmer:

> Q: Now, if you determined that the law may be in some conflict with what your feelings are, would you have any trouble following those beliefs and deciding guilt and innocence in this case?
>
> A: That is something that I would have to work through. I can't answer that now because I haven't see the full scale of how, you know. It is like anything else, it takes time, you know, if – if I had to separate it, I believe that I could, because I'm open to it. I'm not going to say, you know, that I couldn't because I am open to pushing it a – pushing it aside if that is the case that – if that is what they want me to do, I will do that.

(6 RT 1096-1097.)

When questioned again by the court, Mr. Harmer admitted that were he selected to serve and forced to render any judgment, he would have to ask God for forgiveness afterwards. The court asked, "In essence, you would, in your heart, feel as though you had violated your religious beliefs?" Mr. Harmer replied, "Yes, sir." The court stated, "I think that is cause, counsel," and excused Mr. Harmer, over defense objection. (6 RT 1098-1100.)

B. Applicable Law and Analysis

As stated in Argument I., the standard for excusing a prospective juror for cause in a capital case is whether the juror's views on the death penalty would prevent or substantially impair the performance of that juror's duties in accordance with the court's instructions and the juror's oath. (*People v. Smith, supra,* 30 Cal.4th at p. 601; see *Wainwright v. Witt, supra,* 469 U.S. at p. 424.) The same standard applies under the California Constitution. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* standard].)

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.]" (*People v. Weaver, supra*, 26 Cal.4th at p. 910.)

> In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. [Citation.]

(*People v. Stewart* (2004) 33 Cal.4th 425, 451.).)

> [T]he manner of the juror while testifying is oftentimes more indicative of the real character of his [or her] opinion than his [or her] words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.

(*Wainwright v. Witt, supra,* 469 U.S. at p. 428, fn. 9.)

Appellant's case is similar to a capital case this Court recently decided. In *People v. Martinez* (2009) 47 Cal.4th 399 (*Martinez*):

> Prospective Juror B.S. stated she was "strongly against" the death penalty, but she also checked a box indicating she did not "hold any religious, moral feelings or philosophical principles that would affect [her] ability to vote for the death penalty in this case". . . At the same time, she added that she could "see some circumstances where society would have to put an end to someone's life."

(*Id.* at p. 427.) When asked about the "bottom line" on her ability to judge, she replied,

> I have some very strong views against the death penalty. And I feel I could listen to the evidence and make a determination based on the evidence. It's not something that I would look forward to doing, but I feel I could do it.

(*Id.* at p. 428.) The following then occurred:

> Trial court: Now bear in mind the decision the jury would be asked to make here is not a decision by society, it's a decision that you personally would have to make. So my question [is] do you . . . realistically and practically feel that you could ever vote

> for the death penalty, you yourself personally vote for the death penalty?"
>
> B.S.: I think I probably could if the evidence warranted it. I would not do so lightly. And I would be more inclined not to.

(*Ibid.*)

In *Martinez*, as here, the defense pointed out that the prospective juror "did assert on several occasions that [s]he could impose a sentence of death." (*Ibid.*)

> When the prosecutor asked whether there was a realistic possibility she could "vote to end [defendant's] life," B.S. responded that "I'd [say] that I could do it if I had to do it." Her explanation introduced some ambiguity into her response, however: "Even though I am philosophically opposed to the death—I'm strongly opposed to the death penalty—I also have thought long and hard about this during these last weeks and I would rather have me on a jury than somebody who has no opinion or somebody who is vociferously for the death penalty."
>
> (*Ibid.*)

When the prosecutor asked B.S. which circumstances might lead her to vote for the death penalty, she gave "particularly heinous" crimes and recidivism as examples. (*Martinez, supra,* at p. 428.)

> The prosecutor continued: "Just knowing yourself ... and the fact that you feel that the death penalty serves no purpose other than making killers out of us all, ... is it realistic that you would vote for the death penalty in this case that we have here?"
>
> B.S. responded: "It is not realistic that I would, but it is realistic that I can, that I could. I'm sorry, I'm a writer."

(*Martinez, supra,* at p. 429.) The prosecutor asked: "[I]s this an appropriate case for you as far as the nature of this case [and] the imposition of the death penalty ... given what you have written in your questionnaire?" B.S. responded:

> I think I can hear the evidence and I think I can make a good decision according to the law. I am not looking to be on this

> jury. I don't especially want to, but if I am chosen for the jury I think I would make a good decision.

(*Ibid.*)

The prosecution in *Martinez* challenged B.S. for cause. (*Martinez, supra,* at p. 429.)

> The court expressed "a definite impression that she would be unable to fulfill and impartially apply the law," and "a definite impression based on her questionnaire and based on what she said here in court that her views are such that [they] would prevent or substantial[ly] impair her performance [of her] duties in accordance with ... instructions [and] ... her oath. ..."

(*Id.* at p. 430.) In upholding the trial court's ruling, this Court reasoned as follows:

> The trial court's impression of the prospective juror's true state of mind is entitled to deference under the circumstances apparent in the present case. This court has considered the extensive transcript documenting the voir dire of B.S. The trial court "supervised a diligent and thoughtful voir dire" (*Uttecht v. Brown, supra,* 555 U.S. at p. 20), taking pains to state and apply the correct standard and to explain the overall impression it received from the entire voir dire of B.S. As required by our decisions, the court "engage[d] in a conscientious attempt to determine [this] prospective juror's views regarding capital punishment . . .." (*People v. Wilson, supra,* 44 Cal.4th at p. 779.) Although the juror declared a theoretical possibility that she could vote for the penalty of death, the court legitimately could infer from the strength of the juror's views, her verbal fencing with the prosecutor, and her equivocal statements, that she was substantially impaired in her ability to perform her duties as a juror.

(*Ibid.*)

Here, the prosecution challenged Mr. Harmer. (6 RT 1090.) The defense objected. "He may be reluctant, but he indicated that he would go ahead and do what he had to do in respect to judging his fellow man and

also in respect to the death penalty." (6 RT 1099-1100.) The trial court responded:

> I don't know that the law would require that someone violate a precept of their religious beliefs, even though this man presumably was willing to do that if I ordered him to do that, but – but I think that it is – I think that it is cause.

(6 RT 1100.)

Given this record, it is easy to see how here, as in *Martinez*, the trial court could form a definite impression of Mr. Harmer, based on his answers on the questionnaire and his contradictory and equivocal responses during voir dire, that he would, in fact, not vote for the death penalty because of his religious convictions. The trial court "supervised a diligent and thoughtful voir dire." (*Uttecht v. Brown, supra,* 555 U.S. at p. 20.) Thus, as in *Martinez*, "[t]he trial court's impression of the prospective juror's true state of mind is entitled to deference under the circumstances apparent in the present case." (*Martinez, supra,* at p. 430.) Accordingly, this Court should reject appellant's claim.

IV. THE TRIAL COURT PROPERLY ADMITTED REDACTED VERSIONS OF APPELLANT'S CONFESSIONS AND DENIED HIS MOTIONS FOR SEVERANCE, SEPARATE JURIES, AND ADMISSION OF THE FULL CONFESSIONS AT PENALTY PHASE. ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Appellant contends that the trial court committed reversible error when it admitted redacted versions of his confessions, and denied his motions for severance, separate juries, and admission of his full confessions

at the penalty phase.[14] (AOB 83.) Respondent disagrees. Any error was harmless.

A. Relevant Record

After his arrest, appellant gave two taped statements implicating himself and Stroder in the crimes charged. (17 RT 2994, 3011.) Stroder made no statements to police.

On March 3, 1995, before trial, the prosecution proffered redacted versions of appellant's confessions in the form of scripted questions to be posed to, and answers to be provided by, Detective Giuffre. (IV CT 1207-1210.) All references to Stroder were redacted. Appellant objected and made several related motions. First, he objected to the prosecutor's redacted versions "basically 'because it ain't what happened.' . . . It is not the facts and circumstances as the crime actually occurred." He argued that under section 190.3, the jury may consider the facts and circumstances of the crimes in deciding life or death.[15] (IV CT 1211.) Appellant argued that by completely excluding any mention of Stroder, the redacted versions made him appear more culpable. (IV CT 1211-1212.) Changing "we" to "I" made it appear as though appellant alone planned the robbery and got Diana into the car, whereas the actual confessions suggests otherwise. (IV CT 1218.)

> So the sum and substance of both these statements is that it creates a different set of circumstances for which the jury can determine the defendant was more culpable than was actually

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[14] Respondent treats the motions to sever penalty and to use separate penalty juries as one in the same issue.

[15] Section 190.3 provides in relevant part:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

> reflected in his statement. And this is an element they can use to determine whether he lives or dies.
>
> And the prosecution can use this statement to argue this man should die because not only is he legally culpable, but he is morally culpable because it appears that he was the one who originated the crime and consummated the crime all by his lonesome. That is not the factual situation.

(IV CT 1219.)

Appellant further argued that the redactions completely eliminated the emotional relationship between appellant and Stroder. (IV CT 1212.) Appellant said that he intended to call Dr. Byrom to the stand to attest to appellant's "savior complex" towards women, and to the fact that appellant is not violent except possibly when emotionally involved with a woman. Eliminating Stroder from the facts and circumstances of the crimes, he argued, would render Dr. Byrom's testimony nonsensical. (IV CT 1213-1214.)

The prosecutor responded:

> But as to how the robbery occurred, how she was killed, where they went, what banks they went to, everything is exactly how it happened, minus Ms. Stroder.

(IV CT 1220.) She urged the court to look at the issue in two separate steps, in terms of guilt and penalty. She argued that the redaction did not prejudice appellant in the guilt phase because he acknowledged his conduct in the robbery, kidnapping, and murder. She reasoned that if the jury found Stroder not guilty, then appellant would proceed to penalty alone and could introduce his entire confessions. On the other hand, if the jury found both defendants guilty, that meant the jury could not have believed appellant acted alone, thus, he would not be prejudiced. (IV CT 1223-1224.) The prosecutor argued that defense concerns could be handled by limiting instructions. Otherwise, if the defense position were correct, separate trials

or separate juries would be required in every case with multiple defendants. (IV CT 1237.)

The court took the matter under submission. On March 9, 1995, the court denied the defense motions to sever and to admit the full confessions without prejudice. (IV CT 1242-1243.)

On June 12, 1995, appellant renewed his objection to the redactions. (17 RT 2858, 2363.) He argued the redactions violated due process by placing "more moral responsibility on the defendant than was reflected in the statement." (17 RT 2863.) He argued that Stroder could keep him from introducing the full confessions at the penalty phase, thereby violating his right to counter aggravating evidence. (17 RT 2964.) He reiterated his point regarding Dr. Byrom's expected testimony. (17 RT 2864-2865.) He also urged the admission of the entire confessions under Evidence Code section 356.[16] In the alternative, appellant asked for a mistrial. (17 RT 2865.) The court denied the motions. (17 RT 2866; V CT 1544.)

On June 23 and 26, 1995, appellant renewed his motions to sever the penalty trials or for mistrial; the court denied them. (VI CT 1785-1786, 1791.) The court instructed the jury generally not to consider evidence admitted against one defendant as evidence against the other, and specifically, not to consider the evidence of appellant's statements against Stroder. (17 RT 2994-2995; 18 RT 3152; VI CT 1575-1576.)

Following trial, appellant moved for a new penalty phase trial based upon his previously argued points, alleging misdirection of the jury on a

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[16] Evidence Code section 356 provides:

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

matter of law, under section 1181, subdivision (5).[17] (VII CT 2048-2058.) The court denied the motion. (VII CT 2142.)

B. Legal Framework

Our Legislature has expressed a preference for joint trials. (*People v. Boyde* (1988) 46 Cal.3d 212, 231.) Section 1098 provides in pertinent part:

> When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.

The court may, in its discretion, order separate trials if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses. (*People v. Avila, supra,* 38 Cal.4th at pp. 574–575; *People v. Massie* (1967) 66 Cal.2d 899, 917.) Additionally, severance may be called for when

> there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.

(*Zafiro v. United States* (1993) 506 U.S. 534, 539 [addressing severance under Fed. Rules Crim.Proc., rule 14, 18 U.S.C.]; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 40.)

A trial court's denial of a severance motion is reviewed for abuse of discretion based on the facts as they appeared when the court ruled on the motion. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) If it is concluded that the trial court abused its discretion, reversal is required only if it is

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[17] Subdivision (5) of section 1181 permits the granting of a new trial:

> When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury.

reasonably probable that the defendant would have obtained a more favorable result at a separate trial. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41; *People v. Keenan* (1988) 46 Cal.3d 478, 503.) If the court's joinder ruling was proper when it was made, however, a judgment may be reversed only on a showing that joinder "'resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

C. Analysis

Here, appellant and Stroder were charged in each count with having committed common crimes involving common events and the same victim. (*People v. Keenan, supra,* 46 Cal.3d at p. 500.) The court accordingly was presented with a """classic case""" for a joint trial. (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 40, quoting *People v. Keenan, supra,* at pp. 499–500; see also *People v. Avila, supra,* 38 Cal.4th at p. 575.) Appellant contends, nonetheless, that the trial court abused its discretion in denying severance because the denial resulted in the introduction of his own statements, edited under *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) to remove references to his codefendant. Specifically, appellant argues that his unredacted statements distorted his role in the crimes, were admissible under Evidence Code section 356, and inaccurately portrayed him as the sole perpetrator of the crimes to which he confessed, violating his rights to due process and a fair trial. He further contends that the court's denials prevented him from bringing out the omitted portions of the statements on cross-examination unless he testified, violating his Fifth Amendment privilege against self-incrimination. Finally, he contends that admission of the redactions denied him the individualized sentencing determination guaranteed by the Eighth Amendment to the United States Constitution. (AOB 83-99.)

Severance may be necessary when a defendant's confession cannot be redacted to protect a codefendant's rights without prejudicing the defendant. (*Aranda, supra,* 63 Cal.2d at p. 530.) A defendant is prejudiced in this context when the editing of his statement distorts his role or makes an exculpatory statement inculpatory. (*People v. Douglas* (1991) 234 Cal.App.3d 273, 285–287.)

Although appellant's edited statements excluded references to his codefendant, it is evident the jury did not believe he had acted alone, for it found Stroder guilty along with him in each crime to which he alone confessed. Moreover, the redactions did not distort appellant's role in the crimes or alter any of his explicit admissions as to his own actions in any material way. To be sure, some of the changes—such as changing "we" to "I"—did change the meaning of appellant's statements and impliedly overstated his role. (See *People v. Tealer* (1975) 48 Cal.App.3d 598, 603–604 & fn. 10 [changing "we" to "I" in defendant's confession was error because "[T]he effect of [the] modification was to throw the entire onus of the planned robbery on defendant ..."]; cf. *People v. Duarte* (2000) 24 Cal.4th 603, 622 (conc. & dis. opn. of Baxter, J.) [statement of accomplice that was redacted to remove references to defendant impliedly overstated accomplice's role].)

Some of the redactions made it appear that defendant acknowledged participating in conduct that he actually had attributed to Stroder, such as telling Diana to get into the car. Such instances were immaterial, however, in light of appellant's consistent admissions in both the unredacted and the redacted versions as to acts he himself performed that constituted the elements of the charged offenses. Moreover, nothing that was omitted was exculpatory. In each of the unredacted statements appellant admitted kidnapping, robbing and personally shooting the victim. That Stroder also

participated in some way could not relieve appellant of liability for his own criminal acts.

Appellant contends that the trial court's ruling preventing him from cross-examining witnesses as to the omitted portions of his statements violated section 356 of the Evidence Code. (AOB 90-92.) This provision permits the introduction of statements that are necessary for the understanding of, or to give context to, statements already introduced. (*People v. Harrison* (2005) 35 Cal.4th 208, 239; *People v. Zapien* (1993) 4 Cal.4th 929, 959.) But limits on the scope of evidence permitted under Evidence Code section 356 may be proper when, as here, inquiring into the "whole on the same subject" would violate a codefendant's rights under *Aranda* or *Bruton*. (See *People v. Ervin* (2000) 22 Cal.4th 48, 87 (*Ervin*.)

Here, the trial court did not prevent appellant from cross-examining the witnesses to bring out his own hearsay statements that exculpated him or lessened his own role in the crimes. For instance, appellant's counsel reiterated on cross-examination of Detective Giuffre that appellant had not planned on killing Diana, that he had not slept for days and was a nervous wreck and cried a lot, and that the victim was a sweet girl who did not deserve to die. (17 RT 3028-3029.) Nor, as in *Ervin*, did the trial court prevent appellant from presenting nonhearsay testimony or evidence that implicated his codefendant. (See *Ervin, supra,* 22 Cal.4th at p. 87.) Rather, the trial court precluded appellant only from bringing out his own hearsay statements that expressly inculpated Stroder. These limits were permissible notwithstanding Evidence Code section 356.

Appellant claims that his case is similar to *People v. Douglas, supra,* 234 Cal.App.3d at page 273 (*Douglas*). (AOB 90-92.) While these cases share the procedural similarities appellant notes, the glaring difference is that in *Douglas*, the trial court failed to "first ascertain 'if all parts of the extrajudicial statements implicating [codefendant] [could] be and [were]

effectively deleted *without prejudice to [appellant]*.'" (*Id.* at p. 282, quoting *Aranda, supra,* 62 Cal.2d at p. 530, italics in original.) "The trial court in this case denied the motion to sever solely on the basis that the prosecuting attorney represented that the confession could and would be successfully edited." (*Id.* at p. 286.) The *Douglas* court reasoned:

> [I]n our case the deletion of references to [codefendant] in appellant's statement clearly, and inaccurately, implied that appellant admitted his involvement in conduct he had explicitly disclaimed. Appellant was then improperly prevented from presenting evidence that his actual statement was exculpatory on major points. The prejudice to him is obvious and serious. If the court had granted the severance motion, deletions of appellant's statement would not have been required to protect [codefendant] under *Aranda/Bruton*. Because the evidence of appellant's involvement in the actual killing of Amey was far from overwhelming, we cannot dismiss this error as harmless.

(*Id.* at p. 287.)

Here, by contrast, both the unredacted and redacted versions of appellant's statements were before the court, thereby allowing it to consider prejudice before ruling. (1 ECT 2-140 [People's Exhibit Nos. 2 & 3; 2 ECT 410-424 .) Indeed, appellant's counsel repeated his concerns of prejudice each of the many times he renewed his motion. Moreover, nothing exculpatory was redacted and evidence of appellant's guilt was overwhelming.

Appellant contends that admission of the redacted statements violated his rights to due process and a fair trial. (AOB 92-95.) Specifically, he argues that the court's ruling prohibited him from cross-examining Detective Giuffre on facts that would have cast him in a more favorable light, especially as they pertained to the penalty phase. (AOB 94.) For instance, he notes that the prosecution used his flight and marriage as evidence of callousness and lack of remorse, and that he could not bring in the true reason for the Las Vegas marriage and their attempt to return to

Missouri. (AOB 93.) Appellant's reliance on a Pennsylvania case (AOB 93), however, ignores the plain fact that none of the excluded information was particularly exculpatory. Also, appellant's own regret and shock over his conduct, his prayers for Diana's parents and empathy for them, and his desire to "reverse time", all expressed in emotions and with religious overtones, were before the jury for mitigation. (22 RT 3562-3563.) Moreover, his claim that they married anticipating arrest and incarceration, or his claim that he wanted to take Stroder safely to Missouri before his own arrest, did not necessarily mean that he, too, did not want to elude capture, his "savior complex" notwithstanding. Whatever his explanation might have been, it is certainly logical for a prosecutor to argue, and a jury to conclude, that the aim of the on-going multi-state thefts was to head home and stay free, especially since the couple was arrested outside California. In sum, the exclusion of non-exculpatory, self-serving statements did not deprive appellant of due process or a fair trial.

Appellant claims that the trial court's ruling restricting him from cross-examining witnesses as to the unredacted parts of his statement unless he testified violated his Fifth Amendment right against self-incrimination. (AOB 95-96; see *United States v. Walker* (1981) 652 F.2d 708, 713, quoting 1 Weinstein, Evidence (1st ed. 1979) § 1106[01], pp. 106–109 ["'[F]orcing the appellant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination.'"].) Restricting cross-examination, however, to protect the rights of a codefendant does not violate the Fifth or Sixth Amendments to the federal Constitution when the restriction does not materially affect the defense or when the probative value of the excluded evidence is slight. (See *U.S. v. Washington* (1991) 952 F.2d 1402, 1404.) As shown above, that was the case here.

Lastly, appellant asserts that the joint penalty trial violated his right under the Eighth Amendment to the United States Constitution to an individualized determination of his sentence based on his own character and background. (AOB 96-98; see *Lockett v. Ohio* (1978) 438 U.S. 586, 605; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) Respondent disagrees. As noted above, the jury heard of appellant's religious guilt, desire to call Diana's father, desire to reverse time, prayer for forgiveness and general remorse. (22 RT 3562-3563.) The jury also heard from eight witnesses in the penalty phase who testified, essentially, that appellant was warm, caring, polite, non-violent, and protective of women. (22 RT 3533-23 RT 3595.) And, Dr. Byrom opined that appellant was not an inherently violent person and was remorseful. (23 RT 3601, 3605.) The redacted passages from appellant's statements would have provided minimal, if any, additional mitigation to the mitigating evidence that was before the jury. Accordingly, their addition to the penalty phase would not have made a difference in the jury's decision.

Furthermore, the trial court instructed the jury: "In this case you must decide separately the question of the penalty as to each of the defendants." (VI CT 1864; 24 RT 3855.) Appellant and Stroder were represented by separate counsel, presented their own evidence, and argued different theories of culpability, or lack thereof. The trial court also told the jury at the guilt phase not to consider against one defendant evidence that had been admitted only against another defendant. (VI CT 1575; 18 RT 3152-3153.) This Court has held that such instructions are adequate to ensure individualized sentencing in joint penalty trials. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1173–1174.) Here, nothing in the record indicates the jury was unable to assess the penalty separately for each defendant. Thus, even had the jury heard appellant's allegedly true explanation for his marriage to Stroder and their flight, it would not have mattered, for it already had

sufficient evidence of mitigation upon which to base its judgment. Appellant argues that had the jury heard the unredacted statements, it might have given him life without the possibility of parole, as they gave Stroder. (AOB 98.) Respondent submits that, in light of the fact that appellant admitted shooting Diana three times and killing her, if the jury had heard that Stroder were more involved in the kidnapping, robbery, and murder, it would have condemned her to death as well. No gross unfairness to defendant resulted from the joint penalty trial.

Finally, assuming the court erred in admitting appellant's redacted statement, it is well established, that *Aranda/Bruton* error is not reversible per se, but rather is scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1128.) In determining whether improperly admitted evidence so prejudiced a defendant that reversal of the judgment of conviction is required, this Court has observed that "if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless." (*Id.* at p. 1129.)

Here, evidence of appellant's guilt was overwhelming—he admitted the crimes, and forensic and documentary evidence corroborated his admission with unfailing consistency and accuracy. Moreover, the redactions notwithstanding, the jury knew that Stroder provided both the car and the rifle to appellant, and that she was with him at the time of their arrest. Therefore, any error was harmless beyond a reasonable doubt. For these very same reasons, admitting only the redacted confessions during the penalty phase was also harmless beyond a reasonable doubt. This is especially so if one considers the additional culpability that would adhere to Stroder had the jury heard about her detailed involvement in the crimes,

none of which could possibly have made appellant appear less culpable given his own admissions. Accordingly, this claim fails.

V. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT AN ACCIDENTAL ACT RESULTING IN DEATH DURING THE COURSE OF A FELONY FAILS TO MEET THE REQUIREMENTS OF THE FELONY-MURDER SPECIAL CIRCUMSTANCES.

Appellant contends that the trial court prejudicially erred by failing in its sua sponte duty to instruct the jury on his defense theory of an accidental shooting. He argues that by instructing with CALJIC No. 8.81.17, the trial court failed to direct the jury to determine whether an accidental shooting met the felony-murder special circumstances. (AOB 100.) In essence, appellant challenges the special circumstance instructions as incorrect in law. Initially, appellant failed to request an instruction on accident and, therefore, has forfeited this claim. Even if reviewed, however, the claim lacks merit.

A. Relevant Record

Appellant told Detective Giuffre that he wanted to drop Diana off far enough out of town to give him time to drive away. (17 RT 2999-3000.) When Diana seemed nervous about that, appellant told her "he wouldn't leave her off somewhere where it's too far from a call box or a gas station or town." (17 RT 3014.) He claimed that he did not tie her up because she might starve if undiscovered, and he worried about animals in the area. (17 RT 3015.) When Diana came around the car she came close to him and either she struck the barrel of the rifle or he twitched, causing the first shot. He did not remember which. (17 RT 3017, 3028.) Appellant said the first shot was accidental, but that when Diana kept screaming in pain, he did not know what to do so he shot her again. One shot missed because he was nervous, so he shot her again. (17 RT 3002, 3017, 3028.) Appellant

claimed that he shot Diana more than once, while she was on the ground, because he did not want her to go through any more pain. (17 RT 3003.)

In closing argument at the guilt phase, appellant argued that the prosecution wanted the jury to believe only those parts of his statement to police that went to guilt, and to ignore those parts that supported an accidental shooting. This, appellant claimed, was "illogical and unreasonable." (18 RT 1230.)

> First of all, the statement, the statement was that it was an accidental shooting to begin with, one, first shot was accidental. Not in felony murder, that has no relevancy but as far as premeditated deliberate murder with intent to kill, it does have an important factor. Again, keep in mind that the first round, [appellant] said, went off because she came around, he doesn't know whether she grabbed the barrel, ran into the barrel or came around, the first round, he says, was accidental.

(18 RT 3231.) The first round, he argued,

> was mortal, it would have killed her. You can't kill a person more than once. So, even if [appellant] deliberately started firing after that, he was firing into a person who was essentially dead.

(18 RT 3231.) Appellant did not request a jury instruction on accidental shooting during the jury instruction conference (17 RT 3115-18 RT 3141) or at any other time.

Appellant also argued that at the time of the shooting, the kidnapping had ceased because Diana was out of the car and not detained as she "was told to leave and go away." (18 RT 3232.) Further, he argued that there was no evidence as to whether or not the victim entered appellant's car involuntarily. This missing information and the fact that appellant did not hide or dispose of the body and shell casings meant that the murder was not planned as the prosecution claimed. (18 RT 3232-3233.)

> If you're going to commit a crime of that magnitude[,] deliberately plan it, would you be so stupid and careless to leave

> a body in plain view, leave the cartridges in plain view and not chuck that rifle? It does not speak of a planned act, it speaks of an accidental act, killing.

(18 RT 3233-3234.) Appellant urged jurors not to believe only the parts of his statement the prosecution wanted them to believe and ignore the rest. "If they're in for a penny, they're in for a pound." (18 RT 3235.)

The trial court instructed the jury on the special circumstances with CALJIC No. 8.81.17, as follows:

> To find the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:
>
> 1A: The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery; or
>
> 1B: The murder was committed during the immediate flight after the commission of a robbery by the defendant to which the defendant was an accomplice; and
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape there from or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder.

(18 RT 3189; VI CT 1654.) Appellant did not object to this instruction or request modification or amplification.

The court further instructed:

> When a person transports a victim from the scene of a robbery for the purpose of avoiding detection for the crime of robbery, that person is engaged in the immediate flight from the robbery.

(18 RT 3190; VI CT 1656.) The court also instructed on the kidnapping special circumstance. (18 RT 3190; VI CT 1655.)

As to mental state for the special circumstances, the court instructed the jury with CALJIC No. 8.83.1, as follows:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only
>
> 1. Consistent with the theory that the defendant had the require[d] specific intent or mental state but
>
> 2. Cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.
>
> If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(18 RT 3192-3193; VI CT 1657-1658.)

In her closing argument, the prosecutor stated that the special circumstances would not apply if the robbery and kidnapping were merely incidental to the murder. (18 RT 3220.) The jury found both special circumstances true. (19 RT 3332-3333; VI CT 1726-1727.)

B. Forfeiture

Generally, a party may not complain on appeal about a given instruction that was correct in law and responsive to the evidence unless the party made an appropriate objection. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.) Moreover,

> [w]here an instruction on a particular point or points as given by the court is correct as far as it goes, and the only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit

> instructions on such point or points, he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instruction.

(*People v. Reed* (1952) 38 Cal.2d 423, 430; *People v. Andrews* (1989) 49 Cal.3d 200, 218.)

Here, appellant failed to request any instruction regarding an accidental shooting. He has, therefore, forfeited this claim on appeal. (*People v. Hudson, supra,* 38 Cal.4th at pp. 1011–1012.) Likewise, although appellant claims CALJIC No. 8.81.17 is ambiguous, he failed to request amplification or a more complete instruction. (AOB 107.) This, too, forfeits the claim on appeal. (*People v. Reed, supra,* 38 Cal.2d at p. 430; *People v. Andrews, supra,* 49 Cal.3d at p. 218.)

Appellant urges this Court nevertheless to review alleged instructional error because it affects his substantial rights. (AOB 101, fn. 15.) It is true that the Court may review any instruction which affects the defendant's "substantial rights," with or without a trial objection. (§ 1259.) If this Court finds no forfeiture, appellant's claim lacks merit.

C. The Trial Court's Jury Instructions Did Not Lessen the Prosecution's Burden of Proof as to the Special Circumstances.

Appellant's claim focuses on the second sentence of the last paragraph of CALJIC No. 8.81.17: "In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder." He argues that because of this language, the instruction does not reflect the "heightened intent" requirement that distinguishes the felony-murder special circumstance from felony-murder itself. (AOB 103, 107-108.) No such "heightened intent" requirement exists. Accordingly, CALJIC No. 8.81.17 properly instructed the jury. Appellant apparently ignores the first portion of the instruction, which requires, in order to find the special

circumstance true, proof that "[t]he murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape there from or to avoid detection." A true finding of the special circumstance does not require that the killing is specifically intended to advance the underlying felony. Rather, the only finding that is necessary is whether the killing, in fact, advanced the underlying felony. In this case, the killing certainly advanced the underlying felony because appellant's intent was to rob Diana, and he was able to get away and avoid detection longer because she was dead. The only intent necessary for the special circumstance is the intent to commit the underlying felony – nothing else is required. (*People v. Anderson, supra*, 43 Cal.3d at pp. 1146-1147; *People v. Huggins* (2006) 38 Cal.4th 175, 215.) Here, the jury found the special circumstances of murder during the commission of a robbery and a kidnapping true. (19 RT 3332-3333; VI CT 1726-1727.) It undoubtedly based its findings on the fact that appellant, admittedly, took Diana's money, drove her to a desolate location against her will, and shot her three times at close range. Under Special Instruction No. 2, the jury also evidently found that since appellant transported the victim from the scene of the robbery for the purpose of avoiding detection for the crime of robbery, he was engaged in the immediate flight from the robbery. (18 RT 3190; VI CT 1656.)

Appellant contends, though, that failing to instruct sua sponte on the defense of accident

> violated his right under the Sixth and Fourteenth Amendments to adequate instructions on his theory of the defense, and the Sixth Amendment right to a jury trial.

(AOB 108-111.) His argument can be summarized as follows: Some jurors could have interpreted the second sentence of the last paragraph of the CALJIC No. 8.81.17 to mean that they did not need to deliberate on

whether the shooting was done to carry out or advance the robbery or kidnapping as long as they found the robbery and kidnapping were not incidental to the murder. (AOB 107-108). In other words, some jurors could have believed that the shooting was accidental, but they would still find the special circumstances true because the robbery and kidnapping were not incidental to the shooting. The court failed to instruct the jury whether an accidental act was sufficient for the special circumstances, so jurors had no way to conclude that an accidental shooting occurred.

> The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

(*Boyde v. California* (1990) 494 U.S. 370, 380.) Appellant makes it sound as if jurors could have concluded that an accidental shooting occurred, but that the second sentence of the last paragraph of CALJIC No. 8.81.17 prevented them from so concluding. And since they had no other direction from the court as to accident, they had to find the special circumstances true, which means the shooting could not have been accidental and appellant must have committed murder as alleged. On the contrary, if some jurors believed the shooting to be accidental, it would not matter whether or not they also believed the robbery and kidnapping to be incidental to the murder. In other words, they would not believe that murder was committed at all, but perhaps involuntary manslaughter. So, the entirety of the special instructions would be excluded as irrelevant. Put differently, since the killing occurred during the [intended] commission of the robbery or kidnapping, the felony-murder special circumstance is proven, regardless of whether or not the shooting was accidental.

The trial court instructed jurors that the instructions were to be considered as a whole. (CALJIC No. 1.01; VI CT 1569). The court also

told jurors that not all instructions were necessarily applicable and that they were to apply those that fit the facts they found and could disregard those that did not. (CALJIC No. 17.31; VI CT 1667.) This Court will presume that the jury followed the court's instruction. (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.) Appellant argues that any error is subject to *Chapman* review. (*Chapman v. California, supra* 386 U.S. at p. 24; AOB 110.) But this might be so only if CALJIC No. 8.81.17 omitted an element of an offense, or raised an improper rebuttable presumption. No rebuttable presumption is at play here, and the second portion of the instruction is a qualifying clause which does not purport to add an additional element to the felony-murder (robbery) special circumstance. (*People v. Stanley* (2006) 39 Cal.4th 913, 956.) Therefore, there is no reasonable likelihood that some jurors believed the shooting to be accidental but nevertheless convicted appellant of murder and the special circumstances. Accordingly, this claim fails.

VI. CALIFORNIA'S FELONY-MURDER SPECIAL CIRCUMSTANCES DO NOT VIOLATE THE FEDERAL CONSTITUTIONAL REQUIREMENT THAT THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY BE NARROW

Appellant contends that, to the extent that CALJIC No. 8.81.17 accurately reflects California's law on felony-murder special circumstances, it violates the Eighth and Fourteenth Amendments to the United States Constitution because

> the special circumstances have become identical to the crime of felony-murder . . . and no longer allow the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not."

(AOB 112.)

> The use of the felony-murder rule as a qualifying special circumstance in California's capital jurisprudence has a

> controverted history. (Compare, e.g., *Carlos v. Superior Court* (1983) 35 Cal. 3d 131 [197 Cal. Rptr. 79, 672 P.2d 862], with *People v. Anderson* (1987) 43 Cal. 3d 1104, 1147 [240 Cal. Rptr. 585, 742 P.2d 1306] [overruling *Carlos*]; see also *People v. Coleman* (1988) 46 Cal. 3d 749 [251 Cal. Rptr. 83, 759 P.2d 1260].) It is enough to point out that in *People v. Marshall* (1990) 50 Cal. 3d 907 [269 Cal. Rptr. 269, 790 P.2d 676] we rejected an argument identical to the one petitioner makes here—"that the felony-murder special circumstance does not provide the 'meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'"--on the ground that "in *People v. Anderson, supra,* 43 Cal. 3d at page 1147, we squarely rejected that very point." (*Id.* at p. 946.) We do so again in this case.

(*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265-1266.) "We have rejected this exact claim numerous times (citation omitted), and defendant does not attempt to explain why our prior decisions were incorrect." (*People v. Gurule* (2002) 28 Cal.4th 557, 663.)

Appellant further contends that California felony-murder special circumstances are unconstitutionally overbroad. (AOB 118.) This Court has repeatedly held that the California death-penalty scheme meets Eighth Amendment requirements. The statute is not overbroad based on the number of special circumstances, or because it permits execution for an unintentional felony-murder. (E.g., *People v. Cornwell* (2005) 37 Cal.4th 50, 102; *People v. Anderson* (2001) 25 Cal.4th 543, *People v. Box* (2000) 23 Cal.4th 1153, 1217; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Frye* (1998) 18 Cal.4th 894, 1029; *People v. Crittenden* (1994) 9 Cal.4th 83, 154-156; *People v. Marshall, supra,* 50 Cal.3d at p. 946.) Accordingly, this claim must again be rejected.

VII. APPELLANT'S SENTENCE IMPOSED FOR FELONY MURDER *SIMPLICITER* IS NOT DISPROPORTIONATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND DOES NOT VIOLATE INTERNATIONAL LAW

Appellant contends that his sentence of death imposed for felony-murder *simpliciter* is disproportionate and also violates international law because no culpable state of mind is required. (AOB 121-122.) This Court has previously and repeatedly rejected both claims.

A. Proportionality

Appellant correctly concedes that California authorizes the imposition of death upon a person who kills during the commission of certain enumerated felonies, such as robbery and kidnapping in this case, without regard to his state of mind. (AOB 123.) This has been the law in California since 1987. (*People v. Anderson, supra,* 43 Cal.3d at p. 1104.) Appellant incorrectly argues, however, that imposition of the death penalty on an actual killer who accidentally kills the victim during the course of a dangerous felony is unconstitutional. (AOB 124-134.) In *People v. Earp* (1999) 20 Cal.4th 826, 905, fn. 15, this Court rejected such an argument, noting,

> defendant is wrong when he asserts that this court has never addressed whether, consistent with the federal Constitution's Eighth Amendment, the death penalty can be an appropriate punishment for someone who kills accidentally during such activity.

In *Anderson*, this Court carefully considered whether United States Supreme Court decisions required that an acutal killer harbor an intent to kill or other heightened mens rea to be eligible for the death penalty. (43 Cal.3d at pp. 1146-1147.) Appellant has not presented a persuasive argument to justify revisiting this settled issue. Indeed, as the United States Supreme Court found, an individual who engages in criminal behavior

"known to carry a grave risk of death," like robbery and kidnapping, has a "highly culpable mental state" justifying imposition of the death penalty. (*Tison v. Arizona* (1987) 481 U.S. 137, 157.) Appellant pulled the trigger himself, three times, killing Diana, during the commission of robbery and kidnapping. As the actual killer of Diana, the federal Constitution required no more mental state than appellant's intent to commit robbery and kidnapping. Appellant has never denied that he harbored the intent to rob and kidnap Diana, which was a "highly culpable mental state" sufficient to support imposition of the death penalty. (*Tison v. Arizona, supra*, 481 U.S. at 157.) Accordingly, death is not a disproportionate sentence.

B. International Law

Appellant contends that imposition of the death penalty on a person without proof that the murder was intentional violates both the International Covenant on Civil and Political Rights (ICCPR) and customary international law. (AOB 136, 139.) Again, this Court has previously rejected these claims.

California's death-penalty law does not violate the ICCPR, which prohibits the "arbitrary" deprivation of life and bars "cruel, inhuman or degrading treatment or punishment." The covenant specifically permits the use of the death penalty "if imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime." (Art. VI, § 2.) When the United States ratified the treaty, it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of the death penalty. (See 138 Cong. Rec. S-4718-01, S4783 (1992); *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)

California's death-penalty law does not violate international norms in contravention of the prohibition on cruel and unusual punishment. (*People v. Perry, supra,* 38 Cal.4th at p. 322.) Nor does it offend international norms of humanity and decency. (*People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Beames* (2007) 40 Cal.4th 907, 935). Moreover, it does not generally violate international law, as international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Hoyos* (2007) 41 Cal.4th 872, 925.)

As appellant brings nothing new to the issue, his claim should be rejected.

VIII. THE TRIAL COURT PROPERLY ADMITTED AUTOPSY AND CRIME SCENE PHOTOGRAPHS. REVERSAL OF NEITHER PHASE IS WARRANTED.

Appellant contends that the trial court's admission of autopsy and crime scene photos was "unduly prejudicial under Evidence Code section 352[[18]] and violated [his] constitutional rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determination on guilt, the special circumstances and penalty," and he asks for reversal of all three. (AOB 140.) No error occurred; thus, reversal is not warranted.

A. Relevant Record

The prosecution moved the trial court to admit autopsy and crime scene photographs. (V CT 1331-1338; 1 RT 42, 46-50, 53.) Appellant and Stroder objected to the use of these photographs and moved the court to

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[18] Evidence Code section 352 provides:

The 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.

exclude all such evidence as highly inflammatory and prejudicial. (V CT 1428-1434; 1 RT 3, 43-46, 50-53.) The defense argue that because appellant had admitted every element of the prosecution's case and other expert witnesses corroborated appellant's description of the shooting and trajectory of the bullets, the photographs were not relevant to any disputed issue. (1 RT 43-46, 50-53.) The prosecution countered that it was not bound by appellant's explanation of what happened but was entitled to present its own evidence of guilt. (1 RT 47.)

The court excluded one photograph as cumulative, but found that the others "may have some probative value." The court did not find the photographs so gruesome as to pose a serious danger of inflaming the jury. (1 RT 53.) The court "weighed the probative value . . . against . . . minimal prejudicial effect" and denied the defense motion to exclude the photographs, without prejudice. (1 RT 54.) During the guilt phase, the defense renewed the motion to exclude and the court again denied it. (13 RT 2381-2383.)

B. Analysis

The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion. (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. (*People v. Roldan* (2005) 35 Cal.4th 646, 713.)

Here, appellant argues that since the photographs portray nothing in dispute, they were irrelevant. Although defendant argues the photographs were cumulative to his explanation of how he shot Diana and expert testimony, this fact does not demonstrate the trial court abused its broad discretion. Photographs of a victim may properly be admitted to corroborate testimony of an expert witness. (*People v. Stanley* (1995) 10

Cal.4th 764, 838; *People v. Kaurish* (1990) 52 Cal.3d 648, 684.) As the prosecution argued, it was entitled to present its own evidence of guilt. (1 RT 47.) Crime-scene and autopsy photos are part of the circumstances of the crime and are not barred by either the Eighth or Fourteenth Amendment. (*People v. Hart* (1999) 20 Cal.4th 546, 648; *People v. Clair* (1992) 2 Cal.4th 629, 682.)

This Court has often rejected the defense contention that photographs of the murder victim must be excluded as cumulative simply because testimony also has been introduced to prove facts that the photographs are intended to establish.

> [P]rosecutors . . . are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case.

(*People v. Gurule, supra,* 28 Cal.4th at p. 625; *People v. Jackson* (1996) 13 Cal.4th 1164, 1216; *People v. Lucas* (1995) 12 Cal.4th 415, 449-450.) "The photographs demonstrated the real life consequences of defendant's crimes and pointedly made clear the circumstances of the offenses . . . ." (*People v. Moon, supra,* 37 Cal.4th at p. 35.)

The trial court properly balanced the probative value of the photographs to the prosecution's case against their "minimal prejudicial effect" and correctly admitted all but one cumulative photograph. (1 RT 54.) No abuse of discretion occurred. Accordingly, reversal is not warranted and this claim fails.

IX. SUBSTANTIAL EVIDENCE SUPPORTED APPELLANT'S KIDNAPPING CONVICTION AND THE TRUE FINDING ON THE KIDNAPPING SPECIAL CIRCUMSTANCE

Appellant contends that the prosecution presented insufficient evidence to support his kidnapping conviction and the true finding on the kidnapping special circumstance. (AOB 154.) Respondent disagrees.

A. Relevant Record

Diana's family knew that she intended to shop at the Valley Plaza Mall on December 9, 1993. (12 RT 2141.) A mall security guard saw Diana exit her car in the Valley Plaza parking lot between 9:00 and 9:40 a.m. (13 RT 2455-2456.) Bank records showed that Diana used a mall ATM at 8:55 a.m. that morning. (14 RT 2524.) She made several purchases at the mall between 10:15 and 11:15 a.m. (13 RT 2466-2467, 2471-2472, 2476-2477.) Later that morning, contrary to arrangements, Diana failed to arrive at her sister's house to watch her sister's children. (12 RT 2139-2140, 2143, 2151.)

Appellant pulled up next to Diana at the mall. (17 RT 3012.) He decided to rob her because she was little and would not be much trouble. (17 RT 2998, 3013.) Diana entered appellant's car against her will. (17 RT 3008.) When she did, she looked down. The .30-30 rifle was sitting across the gear shift, partly in appellant's lap and pointing downward. (17 RT 2998.) Appellant said, "I don't want to hurt you. I just want some money." (17 RT 3013.) After she got in, appellant set the rifle down low between the seats. (17 RT 2998.)

Appellant remembered that Diana had a car phone so he did not return her to her car. He wanted to drop her off far enough out of town to give him time to get away. (17 RT 2999-3000.) Diana showed him the easiest way out of town. (17 RT 3029-3030.) He drove to a desolate and remote area with no phones nearby. His plan was to drop her off and drive away. (17 RT 3000.) Diana seemed nervous about that, so appellant told her "he wouldn't leave her off somewhere where it's too far from a call box or a gas station or town." (17 RT 3014.)

In guilt phase closing argument, appellant argued "there's absolutely no evidence of Diana Contreras, how Diana Contreras got in that car." (18 RT 3232.) The prosecution argued

> it doesn't really matter how she got into the car because there is no innocent explanation . . . for Diana Contreras being in the car with two total strangers.

(18 RT 3288.)

B. Legal Principles

Under the due process clauses of both the Fourteenth Amendment of the federal Constitution and article I, section 15 of the California Constitution, the test of whether evidence is sufficient to support a conviction is

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Rowland* (1992) 4 Cal.4th 238, 269; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) In making this assessment the court looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial in light of other facts. (*People v. Johnson, supra,* 26 Cal.3d 557, 577; *People v. Bassett* (1968) 69 Cal.2d 122, 138.)

> The standard of appellate review is the same when the evidence of guilt is primarily circumstantial. "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (Citations omitted.)

(*People v. Holt* (1997) 15 Cal.4th 619, 668.) When the trier of fact has relied on inferences, those inferences must be reasonable. An inference is not reasonable if it is based only on speculation. (*Id.* at p. 669.)

Appellant contends that "the convictions in this case were based upon nothing more than conjecture and surmise and cannot be affirmed." (AOB 155.) Appellant was convicted in count 2 of kidnapping to commit robbery. (VI CT 1729.) The trial court instructed the jury on simple kidnapping with CALJIC No. 9.50 as follows:

> In order to prove such crime, each of the following elements must be proved:
>
> 1. A person was unlawfully compelled by another person to move because of a reasonable apprehension of harm.
>
> 2. The movement of such other person was without her consent, and
>
> 3. The movement of such other person was for a substantial distance, that is, a distance more than slight or trivial.

(18 RT 3168; VI CT 1610-1611.)

The court also instructed on consent with CALJIC No. 9.56 as follows:

> When one consents to accompany another, there is no kidnapping so long as such condition of consent exists.
>
> To consent to an act or transaction, a person must:
>
> 1. Act freely and voluntarily and not under the influence of threats, force or duress;
>
> 2. Have knowledge of the true nature of the act or transaction involved; and
>
> 3. Possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another person.

> Mere passivity does not amount to consent. Consent requires a free will and positive cooperation in the act or attitude.

(18 3168-3169; VI CT 1612.)

Appellant was convicted of committing murder during the commission of a kidnapping. (VI CT 1727.) The court instructed with CALJIC No. 8.81.17 as noted in Argument V. (18 RT 3190; VI CT 1655.)

Sufficient evidence supports the kidnapping conviction and the kidnapping special circumstance finding, especially when that evidence is contrasted to consent. The evidence shows that Diana voluntarily went to Valley Plaza Mall. Indeed, her family said as much. (14 RT 2141.) The mall guard saw her exit her car alone, and financial transactions also show that she, in fact, shopped at the mall between 10:15 and 11:15 that morning, as intended. (13 RT 2455-2456, 2466-2467, 2471-2472, 2476-2477.) The jury knew that at some point after 11:15, however, Diana got into appellant's car, which was parked next to her own. Appellant admitted that she did so against her will. (17 RT 3008.) When she got in, she looked down and was able to see the rifle, partly in appellant's lap and partly across the gear shift. After she was inside the car, appellant put the rifle low between the seats. (17 RT 2998.) From this, the jury could reasonably infer that Diana did not enter or remain in the vehicle voluntarily, but did so because of a reasonable apprehension of harm. (CALJIC No. 9.56.) There can be no doubt that driving to the Taft area constituted a movement for a substantial distance. The elements of kidnapping were met.

Therefore, the jury did not base its verdicts on speculation, but relied on inferences that were reasonable. (*People v. Holt, supra,* 15 Cal.4th at p. 669.) It was reasonable to infer that Diana would not get into a car with strangers, voluntarily go with them and give them her money, and then drive to the isolated area where her body was left for no apparent reason. Although evidence was circumstantial, the jury could not interpret it as

pointing to innocence. (*Id.* at p. 668.) As the prosecutor pointed out, there simply was no innocent explanation for her conduct.[19] (18 RT 3288.) The guilty explanation was the only one that made sense.

Appellant suggests that Diana may have been moved by pity to enter the car of strangers and offer them money because of their sob story. (AOB 160.) But, the jury knew that Diana was scheduled to babysit her sister's children, and that her failure to appear was uncharacteristic. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Holt, supra,* 15 Cal.4th at p. 668.) Thus, a scenario of "pity" would be incredulous, and, even if it had been considered by the jury, it still would not explain how or why Diana ended up in the Taft area. Viewed in the light most favorable to the prosecution, the encounter establishes kidnapping by fear. A consensual encounter based on pity is speculative at best. Accordingly, this claim fails.

X. THE TRIAL COURT DID NOT INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER BECAUSE THE EVIDENCE DID NOT SUPPORT THAT INSTRUCTION

Appellant contends that the trial court prejudicially erred in failing to instruct the jury on voluntary manslaughter, a lesser-included offense to murder. (AOB 165.) Respondent disagrees.

> It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of

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[19] Appellant states that "the prosecutor acknowledged that there was no evidence of any kidnapping . . . ." (AOB 164.) Actually, the prosecutor pointed out that Diana could not be there to tell the jury how she got into appellant's car because she had been murdered, and said, "You don't have direct evidence . . . circumstantial evidence is just as good as direct evidence." (18 RT 3287.) She then asked the jury to look at the circumstances regarding how Diana entered the car. (18 RT 3287-3288.)

> law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present (citation), but not when there is no evidence that the offense was less than that charged. . . Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense.

(*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*).)

The existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. (*Breverman, supra,* at p. 162.) It is "evidence that a reasonable jury could find persuasive." (*People v. Lewis* (2001) 25 Cal.4th 610, 645 (*Lewis*), quoting *People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative. (*Lewis, supra,* at p. 646.)

> An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense. Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference.

(*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Section 192, subdivision (a) provides that an unlawful killing committed without malice and "upon a sudden quarrel or heat of passion" is voluntary manslaughter. Manslaughter, both voluntary and involuntary, is a lesser included offense of murder. (*Lewis, supra,* at p. 645.)

The heat of passion requirement for manslaughter has both an objective and a subjective component. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.) The defendant must actually, subjectively, kill under the heat of passion. (*Id.* at p. 327.) But the circumstances giving rise to the heat of passion are also viewed objectively. As explained long ago in interpreting the same language of section 192, "this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances," because

> no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.

(*People v. Logan* (1917) 175 Cal. 45, 49.) To satisfy the objective or "reasonable person" element of this form of voluntary manslaughter, the accused's heat of passion must be due to "sufficient provocation." (*People v. Wickersham, supra,* 32 Cal.3d at p. 326.)

Here, there was no evidence that appellant acted under such provocation that would arouse the passions of an ordinarily reasonable person when he killed Diana. Appellant drove to a desolate and remote area to drop her off and drive away. (17 RT 3000.) This made Diana nervous. (17 RT 3014.) Diana began crying and pleading with appellant not to leave her there. She said, "just drive me back into town." At this point, appellant had the rifle in his hands, trying to scare her. (17 RT 3000, 3015.) When Diana came around to his side, he told her to "just go, just start walking that way." (17 RT 3000-3001.) Diana was coming close to

him. Appellant said, "[J]ust start walking, please. I don't want to shoot you." She was pleading, "[D]on't leave me, don't shoot me." Appellant told her to walk, "you'll find somebody. I don't want to shoot you. I don't want to hurt you." (17 RT 3001.) And then he shot her, three times. (17 RT 3005.)

Appellant again cites to information not presented to the jury, i.e., that Stroder started arguing with Diana as she let Diana out of the car. (AOB 170; VI CT 1081.) Appellant then speculates that a reasonable jury could infer that he killed the victim because she was arguing with Stroder and he became overly excited or provoked.[20] (AOB 170.) "Overly excited or provoked" is not the standard. The victim was pleading at gunpoint not to be left alone in such a desolate place.

> No case has ever suggested, however, that such predictable conduct by a[n] [un]resisting victim would constitute the kind of provocation sufficient to reduce a murder charge to voluntary manslaughter.

(*People v. Jackson* (1980) 28 Cal.3d 264, 306.)

Even if the jury had heard about Stroder arguing as Diana got out of the car, that evidence would not have been "substantial enough to merit consideration" on a heat-of-passion theory. (*Breverman, supra,* at p. 162.) This is particularly so with regards to evidence that appellant acted subjectively under a heat of passion because the record contains no evidence of this. To the contrary, appellant's own uncontested testimony established he did not act from strong passion. He claimed the shooting was accidental, not that he was emotional when he fired the first shot. (17 RT 3005-3006, 3017.)

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[20] By appellant's own reckoning, however, Stroder got back into the car before Diana came around to his side, before her pleading with him, and before he told her to start walking. (VI CT 1068.) This information, however, also was not before the jury.

As the trial court noted:

> Given the evidence presented in this case, the Court finds that there is absolutely no way the jury could find heat of passion as defined in Caljic [*sic*] could possibly apply to this case or that there would be a – the emotional state defined in Caljic [*sic*] or required under the law that would make it legally a possible verdict in this case.

(17 RT 3117-3118.) This Court should agree with the trial court's decision not to give a voluntary manslaughter instruction and reject appellant's claim.

XI. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST TO QUESTION THE VICTIM'S FAMILY REGARDING PUNISHMENT

Appellant contends that the trial court erred in denying his request to question the victim's family whether they would be satisfied with a sentence of life without the possibility of parole. (AOB 175.) Appellant acknowledges that this Court has held against him.

> It is clear that the prosecution may not elicit the views of a victim or victim's family as to the proper punishment. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509 [96 L. Ed. 2d 440, 107 S. Ct. 2529].) The high court overruled *Booth* in part, but it left intact its holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2.) That court has never suggested that the defendant must be permitted to do what the prosecution may not do. The views of a crime victim . . . regarding the proper punishment has no bearing on the defendant's character or record or any circumstance of the offense. (*Skipper v. South Carolina, supra,* 476 U.S. at p. 4.) Hence, the Eighth Amendment to the United States Constitution does not compel admission of those views. (*Robison v. Maynard* (10th Cir. 1991) 943 F.2d 1216, 1216-1217 [even after *Payne v. Tennessee, supra,* 501 U.S. 808, "testimony from a victim's relative that she did not want the jury to impose the death penalty was improper mitigating evidence and inadmissible at the penalty phase hearing"].)

(*People v. Smith, supra,* 30 Cal.4th at p. 622.)

Appellant asks this Court to reconsider its holding in *Smith, supra.* (AOB 177.) But, in *Smith*, as here, the victim's family's views on punishment have no bearing on appellant's character or record or any circumstance of the robbery, kidnapping, and murder. (*People v. Lancaster* (2007) 41 Cal.4th 50, 97.) Thus, since appellant brings nothing new to the issue, this claim should be rejected.

XII. THE TRIAL COURT PROPERLY ADMITTED VICTIM-IMPACT EVIDENCE

Appellant contends that the trial court prejudicially erred in admitting substantial victim-impact evidence, "including photos that showed the victim throughout her life and testimony from friends and family that described her life and future plans." (AOB 187.) Respondent disagrees.

A. Relevant Record

The prosecution moved to introduce victim-impact evidence, i.e., live testimony from several of Diana's family members and her best friend, approximately 20 photographs depicting Diana at various stages of her life, and a statement regarding her future plans. The defense objected. The court granted the prosecution's motion. (V CT 1371-1383; VI CT 1745-1746; 20 RT 3350-3354; 22 RT 3469-3474.)

Diana's sister, Perales, testified that she and her two children were very close to Diana. (22 RT 3483-3484.) Diana, who was attending college with the idea of become a pediatrician, was also very close to their disabled mother and always cared for her. (22 RT 3484-3485.) Diana's death affected their mother – their mother continues to call out for "Luli," Diana's nickname. (22 RT 3485-3486.) Diana was also close to her other nieces and nephews, who were also adversely affected. Perales felt, "I was in shock, like somebody broke my heart in two." (22 RT 3486.) Diana had lived her whole life with her family in her parents' home, having moved out

several months before her death. (22 RT 3487.) Perales gave the prosecutor a group of photographs showing her sister at various stages in her life. These photographs were received into evidence. (22 RT 3486-3488.)

To Lovett, Diana's best friend, Diana was a nice and caring person who believed that even if a person was evil, there was always a nice person inside. Lovett was hurt badly by Diana's death. (22 RT 3488-3489.) Diana had many friends who cared for her and protected her. (22 RT 3490.) Everyone liked her; no one had a reason to hate her because she gave no one reason to. (3490-3491.)

To Diana's father, Raymond, Diana was the sweetest person and had a kind heart, a heart of gold. The entire family loved her and was so proud of her. Diana was trying to accomplish something. She wanted to help people; she wanted to help her father. Diana was attending college, taking a psychology course to help her father cope with his wife's car accident. Of all the children, Diana was the closest to her mother. Her mother worshipped the ground Diana walked on. Raymond said that Diana "was her heart, she was her eyes, she was everything to my wife." (22 RT 3491-3492.) Diana's death hurt everyone, but her mother tried to stay strong for the others. Raymond was "a broken man." (22 RT 3493.) Diana worked with disabled people while she was going to college. By being the first to go to college, Diana changed the family trend, making all her father's 14 grandchildren want to go to college, too. (22 RT 3493-3494.)

The court instructed the jury with a special instruction that addressed victim-impact evidence.

> The specific harm caused by the defendant, including the impact on the family of the victim and on the community, is not a separate aggravating fact but may be considered by you as part of the circumstances of the crime for which the defendant was convicted in the present proceeding.

(VI CT 1857-1858; 24 RT 3852.)

In her penalty phase closing argument, the prosecutor spoke of how Diana must have felt during the crimes, the pain she suffered before death, and the devastating impact her murder had on her family, friends, and the community. (24 RT 3860, 3862-3867.)

B. Legal Principles

The Eighth Amendment erects no *per se* bar prohibiting a capital jury from considering victim-impact evidence relating to a victim's personal characteristics and impact of the murder on the family, and does not preclude a prosecutor from arguing such evidence. (*Payne v. Tennessee* (1991) 501 U.S. 808 (*Payne*).) Victim-impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Id.* at pp. 825, 829.)

In California, section 190.3, subdivision (a), permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836; see also *People v. Brown, supra,* 33 Cal.4th at p. 398; *People v. Taylor, supra,* 26 Cal.4th at p. 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster* (1992) 1 Cal.4th 865, 959.) Victim-impact evidence is not limited to the impact on the victim's immediate

family; it extends to the suffering and loss inflicted on close personal friends. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183.) This Court has repeatedly found victim-impact evidence and related "victim character" evidence to be admissible as a "circumstance of the crime" under section 190.3, factor (a). (*People v. Robinson* (2005) 37 Cal.4th 592, 650; *People v. Panah, supra,* 35 Cal.4th at pp. 494-495; *People v. Benavides* (2005) 35 Cal.4th 69, 107; *People v. Brown, supra,* 33 Cal.4th at pp. 396-398; *People v. Pollock, supra,* 32 Cal.4th at p. 1181; *People v. Edwards, supra,* 54 Cal.3d at pp. 832-836.)

There are limits, however, on the permissible "emotional evidence and argument". "'[T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.'" (*People v. Robinson, supra,* 37 Cal.4th at pp. 650-651.) "[J]urors may in considering the impact of the defendant's crimes, 'exercise sympathy for the defendant's murder victims and . . . their bereaved family members.'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 369.) But,

> irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*People v. Harris* (2005) 37 Cal.4th 310, 351, internal citations & quotations omitted.) Moreover, "[t]he federal Constitution bars victim-impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 927, citing *Payne, supra,* 501 U.S. at p. 825.) Thus, victim-impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family or friends. (*People v. Pollock, supra,* 32 Cal.4th at p. 1180.)

Appellant cites to the concurring and dissenting opinions of Justice Kennard in *People v. Fierro* (1991) 1 Cal.4th 173, 264-265 for the

proposition that the testimony and photographs should have been excluded because they did not concern facts of the crime disclosed by evidence received during the guilt phase. (AOB 193.) There, the victim, a store owner, was gunned down outside the store he owned for 40 years after he and his wife of 50 years, also a victim and witness, were robbed. (*Id.* at pp. 234-235.) This Court held that the evidence and argument of store ownership and marriage were proper victim-impact evidence, and that "none of the remarks was so inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*Id.* at p. 235.) Similarly, there was no inflammatory evidence or argument in this case. The victim-impact evidence and argument consisted of expressions of shock, broken hearts, Diana's dreams, and some photographs of her life. Moreover, appellant and Diana conversed casually about her going to school and like matters. (17 RT 3029.) Thus, it is not entirely correct to say that

> the testimony and photographs admitted into evidence here concerned facts that had no direct link to the crime in that they were not known or reasonably apparent to the defendant at the time of the capital crimes.

(AOB 192-193.)

Appellant appears to want to limit the admissibility of victim-impact evidence to testimony of percipient witnesses or, alternatively, to a "quick glimpse" into the victim's life. (AOB 192-193.) But this is not what Justice Rehnquist meant when he stated:

> [W]hile virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering "a quick glimpse of the life" which a defendant "chose to extinguish," *Mills v. Maryland*, 486 U.S. 367, 397, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988) (REHNQUIST, C. J., dissenting), or demonstrating the loss to the victim's family and *to society* which has resulted from the defendant's homicide.

(*Payne, supra,* 501 U.S. at p. 822 [emphasis added].)

> Defendant's arguments fail under *Pollock*. There, consistent with our prior cases, we held that a trial court may admit "victim impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant. [Citation.]" (*Pollock, supra,* 32 Cal.4th at p. 1183.)

(*People v. Zamudio, supra,* 43 Cal.4th at p. 364.)

In sum, *Payne* does not limit victim-impact evidence; it embraces it, subject, of course, to the constitutional limitation of undue prejudice that would defeat due process. The entire segment of the prosecutor's closing argument cited by appellant contains facts deduced directly or inferentially from trial testimony and was in no manner inflammatory and did not, as appellant claims without support, "introduce substantial extraneous emotional matters." (AOB 195-196.) Neither the quality nor quantity of victim-impact evidence, nor the prosecution's argument thereon violated the principles set for under California and federal law. Accordingly, this claim fails.

XIII. THE PROSECUTOR'S PENALTY PHASE ARGUMENT WAS NOT IMPROPER. ANY ERROR WAS HARMLESS

Appellant contends that the prosecutor's penalty phase argument "went beyond the limits of acceptable advocacy by using emotion in order to inflame the jury," violating appellant's "constitutional rights to due process, a fair trial, equal protection, and a reliable jury determination on penalty." (AOB 198.) Respondent disagrees. In any event, any error was harmless.

A. Relevant Record

At the start of her penalty phase closing argument, the prosecutor told jurors, "it's a very important decision that you have to make." (24 RT 3855.)

> What I want to do at this point is to remind you that your duty as jurors is to look at everything. You've heard all of the evidence in this case and consider the law and come to a determination as to what you believe is the appropriate penalty in this case. I ask you – I'm going to ask you to simply render a verdict. I want you to render whatever you do render as a just verdict in this case.
>
> This decision you are about to make is a serious one.

(24 RT 3856.)

The prosecutor warned jurors not to automatically count the number of factors in aggravation and mitigation and then vote accordingly. (24 RT 3856.) She told them their decision was a qualitative one as well. She stated:

> However, to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with mitigating circumstances, that it warrants death instead of life without parole. That's the standard for you to follow.

(24 RT 3857.) The prosecutor then briefly discussed the factors in section 190.3 and told jurors which ones she believed did and did not apply to appellant.[21] (24 RT 3869-3882.) For example, she argued that factor (b),

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[21] The complete list of factors jurors were told to consider are as follows:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(continued...)

the presence or absence of criminal activity involving violence, did not apply to appellant because his prior felony convictions did not involve violence. (24 RT 3858-3859.) Similarly, she argued that factor (j), the accomplice factor, did not apply to appellant because he was not an accomplice but the shooter. (24 RT 3873-3874.) Also, she argued that factor (i), appellant's age, was neither aggravating nor mitigating, but was a neutral factor. (24 RT 3873.) She noted that factor (k) permitted jurors to consider sympathy, mercy, and pity for appellant. (24 RT 3875.)

In arguing for death, the prosecutor stated:

> At some point, society draws a line, society says that when you cross over that line you don't deserve to have the right to live anymore and you have to ask yourself, have these defendants crossed over that line? The evidence in aggravation is

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(...continued)

(b) The 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.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

overwhelming, but you have to also weigh that against the factors in mitigation. You would not be doing your job as jurors if you do not do that.

(24 RT 3868.) Then later, she added:

> When the defense tries to impress upon you how horrible life without parole is, how horrible it's going to be for these two individuals, I want you to keep these things in mind: Diana Contreras will never see another sunrise or sunset, and she will never watch TV. She will never listen to the radio, she will never have another meal, she'll never be able to write letters to her friends and receive letters from her friends and family. She will never be able to talk to her friends and family on the telephone again. She will never be able to see any of her family again. So how horrible is life without parole for these two who will be able to do all these things when Diana is dead and can't do any of those things?
>
> If the defense tries to convince you how horrible life is for these two living in that small cell, you think about Diana who is in a two foot by six foot box because of the actions of these defendants . . . Diana Contreras will never have a chance to get married, she'll never finish college or be a pediatrician because of what these individuals did.
>
> When the defense asks you to show mercy for these two individuals, I ask you to show the same mercy that they showed Diana Contreras which was none at all.

(24 RT 3886-3887.)

The prosecutor also explained the role of punishment, by quoting an English Justice:

> Punishment is the way in which society expresses its denunciation of wrongdoing and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because the

> wrongdoer deserves it, irrespective of whether it is a deterrent or not.[22]

(24 RT 3888-3889.) The prosecutor then made her plea.

> In this case, I'm asking you for a verdict of death because these two deserve it for what they did to Diana Contreras and to her loved ones and to the community.
>
> You are the people who decide if they crossed that line drawn by society, and that's a heavy significant responsibility. You'll be required to be vigilant in your exercise in courage and strength and resolve and maybe tears are involved in this. It's not an easy thing to do, but I submit to you by their actions these two defendants have crossed over that line and by your verdict you will be telling Mary Stroder and Charles Rountree your actions are indeviable [*sic*], immoral, death is the appropriate punishment for your actions.

(24 RT 3889.)

> The prosecutor closed with the following:
>
> I'll leave you with this last comment: When the defense attorneys stand before you and they ask you to exercise mercy, I want you to remember this phrase, and the phrase is, 'Mercy can't rob justice.' Don't let mercy for the defendants rob Diana Contreras of justice.

(24 RT 3889.)

B. Analysis

Following *Payne, supra,* 501 U.S. 808, the question to ask concerning a prosecutor's argument about the victim is whether it called upon irrelevant facts or led the jury to be overcome by emotion in assessing he appropriate penalty. (*People v. Sanders* (1995) 11 Cal.4th 475, 550; *People v. Raley* (1992) 2 Cal.4th 870, 915-916.) Appellant claims that the prosecutor's quote that "it is essential that punishment inflicted for grave

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[22] This argument was upheld in *People v. Vieira, supra*, 35 Cal.4th at p. 298.

crimes should adequately reflect the revulsion felt by the great majority of citizens for them" "prevented the jurors from considering mitigation and reaching an individualized judgment about" him, but he does not explain how so. (24 RT 3889; AOB 200.) Moreover, his citation to *Eddings v. Oklahoma* (1982) 455 U.S. 104, 105, is inapposite because there, the trial court, which was the sentencer, "would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance" or "consider the fact of this young man's violent background" despite substantial evidence on these issues. (*Id.* at p. 109.) That court concluded:

> In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

(*Id.* at pp. 114-115.)

Here, far from preventing the jury from considering factors in mitigation, the prosecutor properly urged jurors to weigh aggravation against mitigation; otherwise, she told them, they would not be doing their job. (24 RT 3868.) Rather than arguing to diminish jurors' sense of personal responsibility, as appellant claims (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 (*Caldwell*); AOB 200), the prosecutor repeatedly emphasized to jurors the significance of their responsibility and the serious nature of their decision. (24 RT 3855-3856, 3889.) No *Caldwell* error occurred.

Appellant also claims the "prosecutor's argument improperly inflamed the jurors' emotions by suggesting that the death penalty was necessary to society's well-being." (AOB 200.) A prosecutor's appeal to the jury to act as a "conscience of the community" is acceptable unless it is "specifically designed to inflame the jury." (*United States v. Williams* (9th

Cir. 1993) 989 F.2d 1061, 1072, quoting *United States v. Lester* (9th Cir. 1984) 749 F.2d 1288, 1301.) Here, the prosecutor urged the jury to impose death because the defendants deserved death, "they ha[d] crossed over that line." (24 RT 3889.) This can hardly be viewed as a plea, designed to inflame the jury. Moreover, unlike in the cases appellant cites, the prosecutor did not "use the community role of jurors to appeal to their passions" (AOB 200), suggest "that others were relying on the jurors for protection," or insinuate "that all murders should be punished with death." (AOB 201.) And, even if

> [t]he prosecutor's appeal . . . was largely aimed at the emotions of the jury, but at the penalty phase ... considerable leeway is given for emotional appeal so long as it relates to relevant considerations.

(*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.) The relevant consideration here was whether appellant's conduct warranted the death penalty.

Appellant argues that telling the jury that a death verdict was necessary because of society's views of serious crime "would have been overwhelming to the jurors." (AOB 201.) First, this is not what the prosecutor said. (24 RT 3888-3889.) Second, even if she had suggested that death was necessary, appellant does not explain how that statement is such improper argument as to overwhelm the jury.

Appellant's final claim here is that the prosecutor improperly contrasted his life in prison with Diana being dead in her grave. (AOB 202.) Appellant points to decisions in other states to support his claim. But in California,

> 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.

(*Pollock, supra,* 32 Cal.4th at p. 1195.) Argument as to what Diana will not experience, what she will not share with her family and friends, versus appellant's continued life, invoked the impact of the murder on the Contreras family, a relevant factor in the penalty determination, and was not an unduly inflammatory appeal to the jury's emotions. (*People v. Riggs* (2008) 44 Cal.4th 248, 324.) Indeed, even in *Payne, supra,* 501 U.S. 808 the prosecutor similarly described what the murdered little girl and her surviving brother would never experience. (*Id.* at p. 816.)

Neither is emphasizing the permanency of the victim's death contrasted to life in prison for appellant erroneous as appellant claims. (AOB 204.) Again, he points to authority not binding on this Court. In California, however,

> [A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn there from. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.

(*People v. Brown, supra,* 33 Cal.4th at pp. 399-400.) The prosecutor stated the obvious – Diana will always be dead. This is proper argument.

In sum, the prosecutor did not use "irrelevant information or inflammatory rhetoric" to "divert the jury's attention from its proper role or invite[] an irrational, purely subjective response." (*People v. Harris, supra,* 37 Cal.4th at p. 351, internal citations & quotations omitted.) Accordingly, this claim fails.

If prosecutorial misconduct occurred, however, there is no cause for reversal. Prosecutorial misconduct during penalty phase argument is subject to the reasonable possibility standard of prejudice (see *People v.*

Brown (1988) 46 Cal.3d 432, 448) which is the same in substance and effect as the beyond a reasonable doubt standard enunciated in *Chapman v. California, supra,* 386 U.S. 18. (*People v. Bennett* (2009) 45 Cal.4th 577, 605, fn. 13; *People v. Wallace* (2008) 44 Cal.4th 1032, 1092.)

The prosecutor's argument is to be viewed in context, not isolation, and with consideration given to the instructions by the trial court and defense counsel's argument. (*People v. Hinton* (2006) 37 Cal.4th 839, 905; *People v. Young* (2005) 34 Cal.4th 1149, 1221; *People v. Jackson, supra,* 13 Cal.4th at p. 1238; see also *People v. Leonard, supra,* 40 Cal.4th at pp. 1416-1418.) The comments at issue were brief when compared to the entirety of the prosecutor's argument. And, as noted above, the prosecutor specifically told jurors that their job required them to weigh aggravating and mitigating factors. Also, defense counsel argued extensively for mitigation and life in prison. (24 RT 3891-3894; 25 RT 3897-3924.) Finally, prosecutorial argument should not be given undue weight, inasmuch as jurors are warned in advance it is not evidence and jurors understand argument to be statements of advocates. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.) Here, the trial court instructed jurors that counsel's arguments were not evidence (CALJIC No. 1.02; VI CT 1830; 24 RT 3837.) Given the paucity of allegedly improper argument, the abundance of proper argument from both sides, and a properly instructed jury, it is not reasonably possible that a result more favorable to the defendant would have occurred absent the comments. Accordingly, this claim fails.

XIV. THE TRIAL COURT DID NOT IMPROPERLY REFUSE APPELLANT'S REQUESTED INSTRUCTION THAT ONE MITIGATING FACTOR MAY BE SUFFICIENT TO SUPPORT A DECISION AGAINST DEATH

Appellant contends that the trial court's refusal to instruct the jury that "a single mitigating factor is sufficient to support a decision against death"

undermined the likelihood that jurors understood the process of weighing aggravating and mitigating evidence, thereby depriving him of due process. (AOB 206; VII CT 1949.) Respondent disagrees, as does this Court.

A trial court may refuse a proffered instruction that is an incorrect statement of law, is argumentative, is duplicative, or might confuse the jury. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.) This Court rejected appellant's claim in *People v. Jones* (1998) 17 Cal.4th 279 (*Jones*). There, as here, appellant claimed that the trial court erred in refusing to give an instruction that one mitigating circumstance may be sufficient to support a decision that death is not the proper penalty. (*Id.* at p. 314.) In rejecting the claim, this Court concluded:

> The second proposed instruction would have been duplicative: the court instructed the jury to return a verdict of life imprisonment without possibility of parole if it found that the aggravating factors did not substantially outweigh the mitigating factors, if it outweighed them at all.

(*Ibid.*)

Appellant's court gave CALJIC No. 8.88 defining aggravating and mitigating factors, and instructing them on how to weigh them, in pertinent part, as follows:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(VI CT 1862, 1864; 24 RT 3854.)

Thus, as in *Jones, supra,* appellant's jury was properly instructed on how to weigh the various factors. Therefore, the court could properly refuse appellant's requested instruction as duplicative. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.) No error occurred.

Appellant attempts to distinguish his case from *Jones* by noting that the emphasis on "'totality' implies a quantitative judgment." (AOB 208.) But this Court has held that "CALJIC No. 8.88 explains to the jury how it should arrive at the penalty determination" (*People v. Perry, supra,* 38 Cal.4th at p. 320), it "accurately describes how jurors are to weigh the aggravating and mitigating factors" (*People v. Elliot* (2005) 37 Cal.4th 453, 488.), and it is the standard penalty-phase concluding instruction describing the sentencing factors for the penalty phase, and does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendments (*People v. Moon, supra,* 37 Cal.4th at pp. 41-42.) Appellant offers no reason for this Court to revisit its precedents. Accordingly, this claim lacks merit.

XV. THE DEATH VERDICT IS NOT DISPROPORTIONATE IN APPELLANT'S CASE

Appellant contends that the imposition of the death penalty in this case is unconstitutional because that penalty is reserved for the worst of the worst and not a 22-year-old offender with a minor criminal record, and with a history of emotional and family problems.[23] (AOB 210.) Respondent disagrees.

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[23] Appellant made a motion for modification of verdict under section 190.4(e) based upon *People* v. *Dillon* (1983) 34 Cal.3d 441 and the mitigating factors discussed herein. (VII CT 2039-2047.) He also moved to reduce the penalty due to intra-case disproportionality. (VII CT 2060-2069.) The court denied both motions. (VII CT 2141-2144.) Appellant also made a motion for modification of verdict under section 190.4(e) based upon *People v. Dillon, supra,* 34 Cal.3d 441 and the mitigating factors discussed herein. (VII CT 2039-2047.) He also moved to reduce the

(continued...)

Upon request, this Court reviews facts of a case to determine whether a death sentence is so disproportionate to a defendant's culpability so as to violate the California Constitution's prohibition against cruel or unusual punishment. (*People v. Howard* (2008) 42 Cal.4th 1000, 1032.)

> To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. (*People v. Dillon, supra,* 34 Cal.3d at p. 479.) If the court concludes that the penalty imposed is "grossly disproportionate to the defendant's individual culpability" (*ibid.*), or, stated another way, that the punishment ""shocks the conscience and offends fundamental notions of human dignity"" [citation], the court must invalidate the sentence as unconstitutional. (*People v. Hines* (1997) 15 Cal.4th 997, 1078 [64 Cal. Rptr. 2d 594, 938 P.2d 388].)

(*People v. Leonard, supra,* 40 Cal.4th at pp. 1426-1427.)

In need of gas money and funds to reach a relative in Northern California, appellant and Stroder kidnapped and robbed Diana. They compelled her to give them information that would allow them to withdraw money from her bank account. Appellant then drove her to an isolated location where he shot her three times at nearly point blank range with a powerful rifle. Afterwards, in possession of Diana's purse, checkbook, savings account book, ATM card, driver's license, and car, the defendants continued stealing from Diana's bank account, paying for several nights at Harrah's and their marriage in Las Vegas. The newlyweds then enjoyed some time at the Regency in Denver, Colorado. They stole again from

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(...continued)
penalty due to intra-case disproportionality. (VII CT 2060-2069.) The court denied both motions. (VII CT 2141-2144.)

Diana's bank account in Utah before ultimately being apprehended by authorities in Kansas. Appellant selected for his victim an admittedly small and vulnerable victim. His motive was money. Appellant stole the money, drove the car, and shot Diana Contreras. The consequences of appellant's conduct took Diana, a young woman unique in her family's educational and emotional history, from that family, her friends, and her community. Appellant's death sentence does not shock the conscience or offend fundamental notions of dignity. (*People v. Leonard, supra,* 40 Cal.4th at p. 1427.)

As noted above, however, the court must consider appellant's personal characteristics, e.g., age, prior criminality and mental capabilities. (*People v. Tafoya* (2007) 42 Cal.4th 147, 198.) In appellant's case, these factors do not militate against death. At 22 years old, appellant was mature.[24] Upon arrest, he fully confessed, took complete and sole responsibility for all the crimes, and directed his attorney not to implicate Stroder in any way. He even recreated the crimes for detectives. These are the actions of a mature and thoughtful man, not the impulsive actions of an immature one. (AOB 215.)

Appellant's criminal history includes felony convictions for burglary of a non-residence, theft of property therein, and witness tampering on September 18, 1992, for which he was facing three years of prison time. (2 JCT 434-435, 456-457, 517-518.) Appellant also received a felony conviction for forgery on October 16, 1992, for which he was also facing three years of prison time. (2 JCT 466-467.) Just over one year later, while on the run from imprisonment, appellant murdered Diana. Respondent fails to see how appellant's felony criminal conviction record aids his case in this Court.

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[24] Appellant was born on November 13, 1971. (I CT 16.)

Lastly, appellant's mental capabilities do not help his claim. According to those who knew him best, appellant was helpful and responsible (22 RT 3538-3541; 23 RT 3585), friendly, caring, and personable around girls (22 RT 3546, 3549), a hard worker and good friend (22 RT 3555, 3561), and an accomplished athlete through high school (23 RT 3593-3595). Dr. Byrom found no evidence that appellant was psychotic or clinically sociopathic. He found appellant's verbal skills to be in the low average range, and his non-verbal skills to be in the high range. (23 RT 3600.) Finally, there was no evidence that appellant was under the influence of alcohol or drugs, or that he was emotionally or mentally impaired, at the time of Diana's murder. For all the above reasons, this Court should find that the penalty in this case is not so disproportionate to appellant's personal culpability as to warrant reversal of his sentence. (*People v. Cox* (2003) 30 Cal.4th 916, 970.)

XVI. APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT BOTH PHASES IS PROPERLY RAISED IN HABEAS CORPUS

Appellant contends that he "was deprived of his fundamental right to effective assistance of counsel" throughout the proceedings below. He concedes, however, and respondent agrees, that this Court has held that claims of ineffectiveness of counsel must generally be raised by petition for writ of habeas corpus. Appellant indicates that is his intention. (AOB 218.) Therefore, respondent will await the opportunity to address this claim in habeas litigation, assuming the habeas petition is timely filed.

XVII. NO COUNT OR SPECIAL CIRCUMSTANCE HAS BEEN REDUCED OR VACATED; THUS, APPELLANT'S CLAIM IS PREMATURE

Appellant argues in the subjunctive, "If this Court reduces or vacates any of the counts or special circumstances, the penalty verdict should be reversed." (AOB 219.) First, to the extent that appellant challenges the

sufficiency of the evidence for the kidnapping conviction and true finding on the kidnapping special circumstance, respondent addressed this in Argument IX. Second, if this Court should satisfy appellant's wish as to any count or special finding, respondent is certain that this Court will then direct the parties to the next step or proper remedy. Therefore, since appellant presents no argument in this claim, respondent does not reply.

XVIII. THERE IS NO CONSTITUTIONAL REQUIREMENT FOR INTER-CASE PROPORTIONALITY REVIEW

Appellant claims a violation of his Eighth Amendment right to be free from arbitrary and capricious imposition of a death sentence by the failure to require inter-case proportionality. (AOB 309.) This issue is well-settled. "Inter-case" proportionality review is not required by the federal Constitution and the California Supreme Court has consistently declined to undertake it. (*Pulley v. Harris* (1984) 465 U.S. 37; *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Cook* (2007) 40 Cal.4th 1334, 1368.) Moreover, California's death penalty scheme is not unconstitutional for not requiring inter-case proportionality review. (*People v. Jackson* (2009) 45 Cal.4th 662, 701.) Accordingly, appellant's claim fails.

XIX. CALIFORNIA'S DEATH PENALTY SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS. VARIOUS CHALLENGES TO MURDER AND GUILT-PHASE INSTRUCTIONS ARE WITHOUT MERIT.

Appellant contends that many features of California's capital punishment scheme violate the United States Constitution. Appellant raises these challenges to preserve them for federal review. (AOB 227.) He correctly states that this Court has repeatedly rejected each of these claims.

(*People v. Jackson, supra,* 45 Cal.4th at pp. 699-702.) As such, his contentions fail.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant claims that section 190.2 is impermissibly broad because, at the time of his trial, it contained 21 special circumstances and, therefore, it does not narrow the class of murderers eligible for the death penalty. (AOB 228.) This Court has rejected this claim, holding that

> California's death penalty statute "does not fail to perform constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed."

(*People v. Beames, supra,* 40 Cal.4th at p. 933.) Also, as noted in Argument VI above, this Court also held that the California death-penalty scheme meets Eighth Amendment requirements and is not overbroad based on the number of special circumstances. (*People v. Cornwell, supra,* 37 Cal.4th at p. 102.) Thus, this Court should reject this claim.

B. Application of Section 190.3(a) Did Not Violate Appellant's Constitutional Rights.

Appellant contends that section 190.3, factor (a) is too broadly applied such that the concept of "aggravating factors" has been applied to almost all features of every murder, violating the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 229-230.) Appellant acknowledges, however, that this Court has rejected this claim.

> Allowing the jury to consider the circumstances of the crime (§ 190.3, factor (a)) does not lead to the imposition of the death penalty in an arbitrary or capricious manner.

(*People v. Kennedy* (2005) 36 Cal. 4th 595, 641; *People v. Brown, supra,* 33 Cal.4th at p. 401; AOB 230.) This case presents no compelling reason to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Do Not Fail to Set Forth the Appropriate Burden of Proof.

Appellant contends that California's death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof in eight ways. (AOB 230.)

1. Constitutionality of Death Penalty

Appellant argues that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. This Court has held otherwise.

> The death penalty law is not unconstitutional for failing to impose a burden of proof — whether beyond a reasonable doubt or by a preponderance of the evidence — as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.

(*People v. Hoyos, supra,* 41 Cal.4th at p. 926; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1066.) Because the California death-penalty law requires a beyond-a-reasonable-doubt standard for proving special circumstances, and then requires the jury to consider and take into account all mitigating and aggravating circumstances in determining whether to impose the death penalty, it is constitutional. (*People v. Leonard, supra,* 40 Cal.4th at p. 1429; *People v. Frierson* (1979) 25 Cal.3d 142, 180 [interpreting 1977 death-penalty law].)

> Under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense . . . ¶ Because any finding of aggravating factors during the penalty phase does not "increase[] the penalty for a crime beyond the prescribed statutory maximum" (*Apprendi,*

> *supra,* 530 U.S. at p. 490), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings.

(*People v. Prieto* (2003) 30 Cal 4th 226, 263, italics in original.)

Appellant acknowledges the holding in *Prieto* but urges this Court to reconsider it in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 961, and *Cunningham v. California* (2007) 549 U.S. 270. (AOB 233-234.) But this Court has already done so, and has concluded,

> [t]he recent decisions of the United States Supreme Court interpreting the Sixth Amendment's jury trial guarantee do not compel a different result.

(*People v. Bramit* (2009) 46 Cal.4th 1221, 1250, footnote omitted.) In like fashion, this Court should reject appellant's request to reconsider its holding in *People v. Blair*, *supra*, 36 Cal.4th at 753, 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.

This claim should be rejected.

2. Burden of Proof

Appellant contends that his jury should have been instructed that the State had the burden of persuasion regarding the existence and weighing of aggravating and mitigating factors, the appropriateness of the death penalty, and a presumption of life without parole was an appropriate sentence. (AOB 235.) As he acknowledges, however, this Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (AOB 235; *People v. Jackson, supra,* 45 Cal.4th at p. 694; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Thus, there is no requirement that the

court instruct the jury that it had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors and that death was the appropriate penalty. (*People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Berryman* (1993) 6 Cal.4th at 1048, 1101; *People v. Diaz* (1992) 3 Cal.4th 495, 569.) Similarly, there is no requirement that the jury be instructed on a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*People v. Jackson, supra,* 45 Cal.4th at p. 701; *People v. Perry, supra,* 38 Cal.4th at p. 321; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.)

Appellant also argues that the trial court should have instructed the jury that the prosecution had no burden of proof. This Court has also settled this issue. Since California does not specify any burden of proof, except for other-crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt, supra,* 15 Cal.4th at pp. 682-684; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Thus, the trial court need not instruct that "no party bears the burden of proof on the matter of punishment." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1319.) This claim, too, should fail.

3. Unanimity and Unadjudicated Criminal Activity

Appellant contends that because his death verdict was not premised on unanimous jury findings regarding aggravating factors and unadjudicated criminal activity, the verdict violates the Sixth, Eighth, and Fourteenth Amendments. (AOB 236-238.) There is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since aggravating circumstances are not elements of an offense. (*People v. Jackson, supra,* 45 Cal.4th at p. 701; *People v. Hoyos, supra,* 41 Cal.4th at p. 926; *People v. Stanley, supra,* 39 Cal.4th at p. 963; *People v. Medina, supra,* 11 Cal.4th at p. 782.) Appellant acknowledges that this Court reaffirmed this holding after the decision in *Ring v. Arizona,*

supra, 536 U.S. at page 584. (See *People v. Prieto, supra,* 30 Cal.4th at p. 275; AOB 236.) He presents no compelling reason to revisit the decision.

Moreover, it is not necessary to instruct the jury that it must unanimously agree beyond a reasonable doubt that defendant committed each unadjudicated offense. (*People v. Anderson, supra,* 25 Cal.4th at p. 590; *People v. Sims* (1993) 5 Cal.4th 405, 462.) Appellant also acknowledges that this Court specifically ruled on this issue in *People v. Ward* (2005) 36 Cal.4th 186, 221-222; AOB 238-239.) As such, his claim should be rejected here, too.

4. The Standard for the Penalty Determination was not Impermissibly Vague and Ambiguous

Appellant contends that the death penalty determination hinged on whether the jurors were

> persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(AOB 239; CALJIC No. 8.88; VI CT 1862, 1864; 24 RT 3854.) He argues that the phrase "so substantial" is impermissibly broad and does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. He acknowledges, however, that this Court has held that the requirement that the jury find the aggravating circumstances "so substantial" in comparison with the mitigating circumstances that it "warrants death" is not vague or directionless. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Arias* (1996) 13 Cal.4th 92, 170.) As such, this claim fails.

5. The Instructions Properly Instructed the Jury to Determine Whether Death was Warranted

Appellant contends that CALJIC No. 8.88 failed to instruct jurors that the ultimate question in the penalty phase of a capital case is whether death

is the appropriate penalty. (AOB 239.) He acknowledges that this Court has held that CALJIC No. 8.88 is not defective in requiring the jury to determine whether death is "warranted" as opposed to "appropriate." (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Watson* (2008) 43 Cal.4th 652, 702.) Accordingly, this claim fails.

6. CALJIC No. 8.88 Properly Instructed the Jury on How to Weigh Aggravating and Mitigating Factors

Appellant contends that CALJIC No. 8.88 does not direct the jury to impose a sentence of life in prison without parole when the mitigating circumstances outweigh the aggravating circumstances. (AOB 240-241.) He acknowledges that this Court has held the contrary, i.e., that CALJIC No. 8.88 is

> not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without possibility of parole.

(*People v. Rogers, supra,* 46 Cal.4th at p. 1179; *People v. Moon, supra,* 37 Cal.4th at p. 42, citing *People v. Dennis, supra,* 17 Cal.4th at p. 552.) Accordingly, this claim should be rejected.

7. The Instructions Did Not Violate the Sixth, Eighth, and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

Appellant contends that the jury instructions violated the Sixth, Eighth, and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances. (AOB 241.) This Court has held, however, that CALJIC No. 8.88 does not reduce the prosecution's burden of proof generally, and it is not unconstitutional for failing to assign and allocate a burden of proof

of beyond a reasonable doubt or to inform the jury who bears the burden of proof. (*People v. Moon, supra,* 37 Cal.4th at p. 43.) Similarly, as for instructing regarding unanimity, this Court has ruled that the phrasing of standard penalty-phase instructions did not support a conclusion that the jury would misconstrue those instructions to require unanimity before finding a mitigation circumstance. Thus, the trial court was not required to instruct the jury that unanimity not required for finding of mitigation circumstance. (*People v. Phillips* (2000) 22 Cal.4th 226, 239.) Again, this claim should fail.

8. There is no Requirement that the Trial Court Instruct the Penalty Jury on the Presumption of Life

The trial court told jurors during voir dire that there was no presumption for either death or life imprisonment without possibility of parole. (2 RT 153-154, 280.) Appellant claims the court erred by not giving his requested instruction on this issue during the penalty phase. (AOB 243.) But, CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon, supra,* 37 Cal.4th at p. 43, citing *People v. Maury* (2003) 30 Cal.4th 342, 440.) Accordingly, this claim should be rejected.

D. Failing to Require the Jury to Make Written Findings Does Not Violate Appellant's Right to Meaningful Appellate Review

Appellant contends that the failure to require written or other specific findings by the jury deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review. (AOB 245.) As acknowledged, this Court has rejected this claim, holding that CALJIC No. 8.88 is not unconstitutional for failing to require written findings so as to facilitate "meaningful appellate review." (*People v. Moon, supra,* 37 Cal.4th at p.

43, citing *People v. Williams* (1997) 16 Cal.4th 153, 276.) Therefore, this claim should be rejected.

E. The Instructions on Mitigating and Aggravating Factors Did Not Violate Appellant's Constitutional Rights

Appellant contends that the instructions on mitigating and aggravating factors violated his constitutional rights because the use of restrictive adjectives in the list of potential mitigating factors prevented the jury from giving full effect to his mitigating evidence, they failed to delete inapplicable sentencing factors, and they did not specify that certain factors were relevant only as mitigating factors. This Court has settled these issues.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" in CALJIC No. 8.85 (VI CT 1852-1853) did not prevent the jury from considering mitigating factors in violation of appellant's constitutional rights. As appellant acknowledges, this Court rejected this argument in *People v. Avila, supra,* 38 Cal.4th at page 614. (AOB 246; *People v. Jackson, supra,* 45 Cal.4th at p. 700.) Appellant presents no compelling reason to reconsider the decision.

The failure to omit from CALJIC No. 8.85 factors that were inapplicable to appellant's case did not confuse jurors or prevent them from making a reliable penalty determination, as this Court concluded in *People v. Cook* (2006) 39 Cal.4th 566, 618. (*People v. Rogers, supra,* 46 Cal.4th at p. 1179.) Reconsideration of that holding is not warranted.

This Court has held that the trial court need not instruct jurors that certain sentencing factors in CALJIC No. 8.85, i.e., (d)-(h), and (j), were relevant only as possible mitigating factors. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 509; VI CT 1852-1853.) Again, reconsideration is not warranted in this case.

F. California's Death Penalty Scheme Does Not Violate Equal Protection by Failing to Allow Depositions of Prosecution Witnesses

Appellant contends that California's death penalty scheme fails to allow depositions of the prosecution's witnesses, thereby treating him less favorably than a defendant in civil proceedings, violating his procedural rights under the equal protection clause. (AOB 248-252.) He acknowledges that this Court has rejected this claim. (AOB 252; *People v. Manriquez (*2005) 37 Cal.4th 547, 590.) Reconsideration is not warranted in this case.

G. The Trial Court Properly Denied Appellant's Motion to Suppress His Confessions Under *Miranda v. Arizona, supra,* 384 U.S. 436

Appellant twice waived his constitutional rights under *Miranda v. Arizona, supra,* 384 U.S. 436. (17 RT 2996, 3011-3012.) Neither appellant's age nor a failure to advise him that he faced the death penalty invalidated those waivers, thereby necessitating the suppression of his confession. Appellant acknowledges that this Court has rejected this claim. (AOB 253; *People v. Sanders* (1990) 51 Cal.3d 471, 512-513.) That should end the matter.

H. The Jury was Properly Instructed on First-Degree Murder.

Appellant was charged with willful, unlawful, deliberate, premeditated murder, in violation of section 187, subdivision (a), which did not specify the degree of murder. (II CT 463.) The jury convicted him of first-degree murder, "as charged in the first count of the Information." (VI CT 1723.) Appellant contends that convicting him of the "uncharged" first-degree murder violated his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty. (AOB 254.) Appellant acknowledges that this

Court has held that a defendant may be convicted of first-degree murder even though the Indictment or Information charged only malice-murder in violation of section 187. (AOB 255; *People v. Hughes* (2002) 27 Cal.4th 287, 368-370.) Reconsideration is not warranted.

I. Failure to Instruct Jurors That They Were Required to Agree Unanimously on a Theory of First-Degree Murder Was Not Unconstitutional.

Appellant claims that the trial court failed to instruct jurors that they must agree on a theory of first-degree murder in order to find him guilty thereof, thereby violating his constitutional rights. (AOB 255-256.) He acknowledges that this Court has rejected this claim in *People v. Carey* (2007) 41 Cal.4th 109, 132-133. (AOB 256; *People v. Geier* (2007) 41 Cal.4th 555, 592.) Reconsideration is not warranted.

J. The Jury Was Properly Instructed That It Could Not Return a Verdict of Second-Degree Murder Unless It Unanimously Acquitted Appellant of First-Degree Murder.

The trial court instructed the jury with CALJIC No. 8.75, in pertinent part, as follows"

> The court cannot accept a verdict of guilty of second degree murder [as to Count[s] One] unless the jury unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree.

(VI CT 1633.) Appellant claims that this "acquittal first instruction" precludes full jury consideration of lesser-included offenses, and thereby violates his constitutional rights. (AOB 257.) He acknowledges that this Court has rejected this claim. (AOB 257; *People v. Nakahara* (2003) 30 Cal.4th 705, 715.) Reconsideration is not warranted.

K. A Series of Standard Guilt-Phase Instructions Did Not Undermine the Requirement of Proof Beyond a Reasonable Doubt in Violation of Appellant's Constitutional Rights

The trial court instructed the jury with CALJIC Nos. 2.01 [circumstantial evidence], 2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state, 2.21.1 [discrepancies in witness testimony], 2.22 [weighing conflicting testimony], 2.27 [testimony by one witness], 2.51 [motive], 8.83 [circumstantial evidence for special circumstances], and 8.83.1 [special circumstances – sufficient of circumstantial evidence to prove required mental state]. (VI CT 1573-1574, 1582-1586, 1646, 1657-1660.) Appellant contends that these pattern instructions violated the requirement of proof beyond a reasonable doubt. (AOB 258.)

Appellant acknowledges that this Court has rejected each of these claims. (AOB 259; *People v. Howard, supra,* 42 Cal.4th at p. 1006; *People v. Friend* (2009) 47 Cal.4th 1, 53.) Reconsideration is not warranted.

XX. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW.

Appellant contends that his death sentence violates "international law, covenants, treaties and norms that bind the United States as the highest law of our land." (AOB 260-275.) As respondent argued in Argument VII. B., this Court has repeatedly rejected this and related claims.

Appellant also argues, however, that this Court should apply a standard adopted by the United Nations Economic and Social Council that allows a death verdict only if there is clear and convincing evidence "leaving no room for alternative explanation of the facts." (AOB 269.) But appellant fails to explain how doing so would change the analysis or result

in this case, especially where the jury had the opportunity to consider, and reject, an accidental shooting via counsel's argument and CALJIC No. 8.83.1 on the mental state for the special circumstances, as argued above in Argument V. Moreover, the jury considered accident under a reasonable doubt standard, not a clear and convincing standard. It was instructed to convict only if there was a reasonable way to interpret the circumstantial evidence. The jury found there was.

Appellant also argues that the jury selection procedures rendered his trial fundamentally unfair and violated his right to an impartial jury under international standards. (AOB 270-271.) Respondent addressed this issue in Arguments II and III. Appellant further argues that use of the redacted confessions denied him a right to a fair hearing. (AOB 272-274.) Respondent addressed this issue in Argument IV. Respondent also addressed, in Arguments V through VII and XIX, appellant's claims that the trial court gave numerous instructions that diminished the reasonable doubt standard, lowered the prosecution's burden of proof, and denied him the defense of accident at the guilt phase. (AOB 274.)

Finally, respondent addressed, in Arguments XI, XII, and XV, appellant's claims that the admission of victim impact evidence while excluding evidence that some of Diana's family members thought life in prison was appropriate resulted in death sentence that was disproportionate to his character, mental state, and personal responsibility. (AOB 274-275.) Accordingly, this claim fails.

XXI. NO CUMULATIVE ERROR OCCURRED

Appellant contends that even if none of the errors he identified was prejudicial standing alone, the cumulative effect of the errors undermines confidence in the integrity of both phases of trial. (AOB 276.) But, where the claims of error are defective, the defendant has presented nothing to cumulate. (*People v. Staten, supra,* 24 Cal.4th at p. 464.) Here, appellant's

claims of errors have failed, and he cannot prevail on his argument that the cumulative effect of errors made during trial deprived him of his right to a fair trial. Accordingly, this claim fails and reversal is not warranted.

CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to affirm appellant's convictions and judgment of death.

Dated: February 18, 2010

Respectfully submitted,

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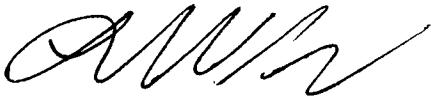

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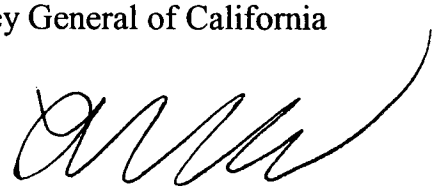
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 41,973 words.

Dated: February 18, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rountree - CAPITAL CASE**
No.: **S048543**

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 that same day in the ordinary course of business.

On February 19, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 19, 2010, at Fresno, California.

Lynda Gonzales
Declarant

Lynda Gonzales
Signature