IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

IVAN JOE GONZALES,

Defendant and Appellant.

S067353

CAPITAL CASE

San Diego County Superior Court No. SCD114421
The Honorable Michael D. Wellington, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In the few months four and a half-year-old Genny Rojas lived with her aunt and uncle, Ivan and Veronica Gonzales, she was tortured, culminating in a final act of torture by placing her in a hot bathtub that scalded her to death. The torture leading up to Genny's death included the Gonzaleses burning Genny's head with hot water, burning her face and body with a blow dryer and curling iron, tying her hands together with rope, handcuffing her, pulling her hair out, hanging her from a hook in a closet, strangling her and putting her in a small wooden box in the closet. Genny had injuries all over her small body, including second degree burns to her head that caused hair loss and infection, black eyes, injuries to her ears so deep the cartilage was exposed, and ligature marks from being tied and bound.

The fatal burn injury was caused by the Gonzaleses immersing Genny in a scalding hot bathtub. The outer layers of her skin burned off from her waist to her toes. Genny was conscious during this heinous act. Even though she was severely burned, Genny had a 70 to 90 percent chance of survival had she been given medical treatment. Instead, the Gonzaleses allowed Genny to go into shock and die, which occurred within a few hours.

In addition to the myriad of standard claims that the death penalty is unconstitutional, Gonzales raises numerous other issues, none of which have any merit. Gonzales claims numerous evidentiary and instructional errors occurred in both the guilt and penalty phase. He also argues the trial court erred by denying his motion for a new trial based on his claim the jury did not deliberate on whether he intended to kill Genny.

Gonzales claims the trial court erred in the penalty phase by erroneously removing a prospective juror, and excluding evidence of the impact his execution would have on his son, Ivan Jr. because his son's testimony was used during the guilt phase.

Gonzales also claims there was insufficient evidence to support his murder conviction and the special circumstance finding, the prosecutor committed misconduct during the guilt and penalty phase, and the trial court violated his right to a public trial by excluding his youngest children from attending the penalty phase.

In spite of Gonzales's waiver of his presence when the court and counsel meet the prospective jurors in the jurors' lounge to screen out those jurors requesting a hardship and to disseminate questionnaires, Gonzales claims his constitutional and statutory rights were violated because his waiver was invalid. None of Gonzales's claims have merit. Gonzales received a fair trial. Therefore, his conviction, special circumstance finding and death sentence should be affirmed.

STATEMENT OF THE CASE

On December 11, 1995, the San Diego County District Attorney filed an information charging Gonzales and his wife, Veronica Gonzales, with the murder of Genny Rojas. (Pen. Code, § 187, subd. (a).) The information alleged the special circumstance that the murder was intentional and involved

the infliction of torture, within the meaning of Penal Code section 190.2, subdivision (a)(18). (1 CT 39-40.)

Prior to trial, the court granted the Gonzaleses' request to sever their trials. (13 CT 2905; 30 RT 3311.)[1/] On May 16, 1997, a jury found Gonzales guilty of the first degree murder of Genny Rojas. It further found that the murder was intentional and involved the infliction of torture within the meaning of Penal Code section 190.2, subdivision (a)(18). (9 CT 2120-2121; 13 CT 3009.) The same jury was unable to reach a verdict on the appropriate penalty. (13 CT 3037.) Another jury was empaneled to determine the penalty, and at the conclusion of that trial, found death to be the appropriate penalty. (12 CT 2677; 13 RT 3102.) On January 13, 1998, the trial court denied Gonzales's motion for a new trial and for modification of the verdict under Penal Code sections 190.4, subdivision (7) and 1385. (13 RT 3110.) The court sentenced Gonzales to death. (13 RT 3111-3112.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

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1. Veronica Gonzales, in her separate trial, was also sentenced to death, and is the subject of a separate automatic appeal in Case No. S072316.

STATEMENT OF FACTS

Guilt Phase

Genny Rojas, along with her five siblings, was removed from her mother's care in April 1994 because her mother, Mary Rojas, was neglecting them, the home was filthy, and Genny's father was in prison. (50 RT 5976-5977; 51 RT 6143-6144, 6151.) The children were placed with Mary's mother, Utilia Ortiz, in Corona. (51 RT 6143-6144; 8 CT 1758.) When Genny lived with her grandmother, she was well cared for and well dressed. She had a full head of hair and no injuries, scars, physical marks or bruises. (51 RT 6145; 9 CT 1975-1976.) Genny was thriving in her environment. (51 RT 6146.)

Without the consent or knowledge of the assigned social worker (51 RT 6148), Ortiz asked her other daughter, Veronica Gonzales, to take care of Genny. (50 RT 5977; 8 CT 1758.) In approximately February 1995, Genny came to live with Gonzales, Veronica and their six children in Chula Vista. (50 RT 5899; 8 CT 1757-1759.) The Gonzaleses lived in a small, two-bedroom, one-bath apartment. (52 RT 6303.) The Gonzales children all slept in one bedroom with blankets on the floor. (8 CT 1773, 1850.) Gonzales and Veronica slept in the other bedroom. (8 CT 1850.) Genny slept in the Gonzaleses' room in their closet or in the bathtub. (9 CT 1932, 1964, 1979.)

July 21, 1995: Genny's Murder

While it is not known exactly what happened on the day of Genny's murder, July 21, 1995, what is known is that Gonzales filled up a bathtub of scalding hot water, and he and Veronica forcefully immersed Genny inside it. A few hours later she went into shock, and then died. The evidence showed the events of that day were as follows:

Between 3:00 and 3:30 p.m., Gonzales went to Hilltop Liquor and bought food on store credit. (52 RT 6241-6243.) During the same time frame, sometime between 3:00 and 4:00 p.m., Juan Banuelos, who worked at a different store, Hilltop Calimex Market on Hilltop Drive, went to the Gonzaleses' apartment to collect $800 Gonzales owed the market for groceries. (51 RT 6129-6130, 6135.) Gonzales shopped at the market about twice a day on credit. (51 RT 6139.) At the beginning of the following month, Gonzales would pay the bill with his welfare check. (51 RT 6139.) Gonzales did not make his payment for June 1995. (51 RT 6140.)

About three to four minutes after Banuelos knocked on the door, Gonzales opened the door, snuck out and quickly closed the door behind him. (51 RT 6131.) The apartment was quiet. (51 RT 6135.) Gonzales said he had just woken up. (51 RT 6135.) Gonzales was outside with Banuelos for five to ten minutes. (51 RT 6135.)

About 6:00 or 7:00 p.m., Gonzales's son, Ivan Jr., went to a neighbor's house and had a "weird" expression on his face, further described as a "blank stare." (51 RT 6195-6196.) Ivan Jr. borrowed rubbing alcohol from the neighbor. (51 RT 6196.)

That evening, around dusk,[2/] Marisa Lozano and Christina Robles were in front of the Gonzaleses' apartment and heard some commotion coming from the apartment. (52 RT 6261-6262, 6265; 53 RT 6529, 6532, 6534.) They heard a loud bang or thud as if someone hit a wall. (52 RT 6265; 53 RT 6534.) Seconds later, they heard a baby crying very loud as if the baby was hurt. (52 RT 6266, 6269; 53 RT 6534.) Within a minute, Gonzales looked out his window and slammed the window closed. (52 RT 6267, 6269; 53 RT 6535.) Gonzales then left the complex. (52 RT 6270; 53 RT 6536.) When he left the complex, he appeared to be in a hurry. (53 RT 6536.) Gonzales looked very

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2. The sunset that evening was at 7:55 p.m. (54 RT 6701.)

upset and angry. (52 RT 6284.) Gonzales returned to Hilltop Liquor at 8:45 p.m. and was there about 15 minutes. (52 RT 6242, 6260, 6353.)

Patty Espinoza lived right across the patio from the Gonzaleses. (51 RT 6204.) At about 9:00 p.m., Patty heard Veronica yelling and screaming to come and help her because her niece had burned in the bathtub. (51 RT 6190, 6205-6206.) Patty asked Veronica how someone could get burned in the bathtub. Veronica told her not to call the police. Patty followed Veronica into the Gonzaleses' apartment and saw Genny lying on the floor in the bedroom. (51 RT 6206.) Gonzales was next to Genny. (51 RT 6207.) Patty did not know how to perform CPR, but her sister Naomi, who lived upstairs did. (51 RT 6193, 6207.)

Naomi Espinoza was in her upstairs apartment when she heard the commotion coming from the patio area downstairs. (51 RT 6190-6191.) Naomi heard loud noises and a woman screaming. (51 RT 6191.) Someone came upstairs and asked Naomi, who was a nurses assistant, to go downstairs because there was a child who was not breathing. (51 RT 6191; 53 RT 6537.) Naomi went downstairs to the steps across from the Gonzaleses' apartment. (51 RT 6192.) Gonzales carried Genny to Patty's apartment. (51 RT 6192.) Genny was not moving. (52 RT 6270.) Gonzales acted as if nothing was wrong. (52 RT 6271-6272.)

Veronica followed Gonzales to Patty's apartment. (52 RT 6272.) Veronica said, "Don't call the cops. They're going to blame us." (52 RT 6273.) Naomi asked what happened, and Gonzales said Genny had burned herself in the bathtub. (51 RT 6192-6193.) Naomi asked Gonzales what he meant, and he replied that Genny did not know how to regulate the water. (51 RT 6193.) Naomi checked to see whether Genny had a pulse but knew Genny was already dead by the way she looked. (51 RT 6193.)

Genny's skin felt cold. (51 RT 6194.) Her body and the t-shirt she was wearing were dry. (51 RT 6194.) Her lips were white. (51 RT 6194.) Naomi noticed a bald spot on the right side of Genny's head, a mark on her neck, another mark on her right arm and that her leg was red. (51 RT 6194.) Nonetheless, Naomi attempted CPR. (51 RT 6194.)

The 911 call reported there was a nonbreathing baby at 1428 Hilltop Drive, No. 1, in Chula Vista. (50 RT 5889-5890, 5931-5932.) It was placed at 9:21 p.m. (50 RT 5889.) Chula Vista Police Officers Barry Bennett and William Moe responded at 9:22 p.m. (50 RT 5889, 5931-5932.) The officers ran to the apartment and were flagged down by Veronica, who was standing about five feet from the apartment door. (50 RT 5890-5891, 5895.) Veronica calmly said she found Genny in the bathtub and she was not breathing. (50 RT 5895, 5933, 5935.)

Genny was lying on her back in the middle of the living room floor, wearing only a shirt. (50 RT 5891, 5893, 5933.) She appeared lifeless. (50 RT 5893.) The officers checked for signs of life but Genny was not breathing and did not have a pulse. (50 RT 5894, 5934.) Genny's body, hair, and shirt were completely dry. (50 RT 5896.) Her skin was very cold and felt rigid. (50 RT 5895, 5934.) The officers did not attempt to perform CPR because it was apparent Genny had been dead for some time. (50 RT 5894-5895, 5934-5935.)

As Officer Bennett was kneeling next to Genny, Veronica said she put Genny in the bathtub, ran the water and went to the kitchen to make dinner. After about 20 minutes, she went back to the bathroom and found Genny under the water. She did not have a phone, so she picked up the child and ran to apartment No. 1 to call the police. (50 RT 5895.)

At 9:25 p.m., Chula Vista firefighters arrived. (50 RT 5990.) Chula Vista Firefighter John Miller immediately went to Genny's side to assess her. Genny was cold and had no pulse. Miller attempted to assess an airway to

begin CPR, but her lower jaw was clenched and hard to lower. (50 RT 5991.) Genny's jaw had rigor mortis, indicating she had been pulseless and had not been breathing for a while. (50 RT 5992, 5994.) Rigor mortis is a change that occurs after death whereby the muscle stiffens in the position in which it is held. (51 RT 6035.) It usually occurs an hour or two after death, then continues to develop for several hours. (51 RT 6035.)

Chula Vista Police Officer Philip Collum arrived at the scene after Officers Bennett and Moe. (50 RT 5955.) Veronica told Officer Collum, in Gonzales's presence, that she had drawn a lukewarm bath for Genny, then went to mash potatoes. About ten minutes later, she checked on Genny and Genny was lying still on her side, submerged in the water. The water had cooled. (50 RT 5965.)

Veronica was calm. (50 RT 5896.) Gonzales was calmly sitting at a table in the kitchen, observing everything and acting nonchalant and indifferent. (50 RT 5897-5898, 5936, 5938, 5957, 5959, 5996-5997.) Veronica's demeanor then changed from calm to visibly upset, and she was crying and rambling. (50 RT 5966, 5997.) Gonzales's demeanor also changed, and he appeared a little anxious or disturbed. (50 RT 5965-5966.)

Genny's injuries on her body were inconsistent with a child that had slipped into a bathtub. (50 RT 5989-5899.) There was a clear line in the middle of Genny's stomach area. Below that line all the way down to her feet it was red and appeared to be burned. (50 RT 5899.) Genny also had numerous other injuries on her body, including bruises, scrapes, abrasions and an open wound on her head. (50 RT 5899.) There were separate burns to Genny's head and face. (53 RT 6482.)

The Murder Investigation

Approximately 10 to 15 minutes after Officers Bennett and Moe arrived at the scene, they went to the Gonzaleses' apartment, No. 7. (50 RT 5902.) The bathtub appeared dry and did not have any water in it. There was no water on the bathroom floor. (50 RT 5904, 5941.) There was a plunger in the bathtub. (53 RT 6554.) There was an opaque paperlike material in the tub, that was believed to be Genny's skin and toenails; it contained DNA consistent with that of Genny's. (53 RT 6554-6555, 6565; 56 RT 7008; 95 RT 11871.)

Genny had a third degree burn from her waist down to her feet. (51 RT 6032; 53 RT 6479-6480; 91 RT 11330.) It was roughly half of her body. (53 RT 6491.) It appeared to be an immersion injury in hot liquid, such as bath water. (53 RT 6480-6481.) There was a very sharp distinction between burned skin and unburned skin at Genny's trunk. The burn progressed all the way down to her feet in uniform, smooth, homogenous distribution, with the exception of areas such as behind her knees, in her groin, and on her buttocks that had been spared. (53 RT 6479.) Sparing is where there are unburned portions within an overall burned area. (53 RT 6471.) It can occur where the body is folded up in a way where that part of the body is out of the water, for example, if the knees were bent and sticking up out of the water it may be spared while the rest of the leg is burned. (53 RT 6471-6472.) Another example is where the leg is tightly bent, there will be skin-to-skin contact behind the knee that prevents water from entering there. Those skin-to-skin contacts usually imply that the child is restrained in that position. (53 RT 6472.)

There were areas that were not as severely burned, such as the inguinal creases, where the leg joins the body. (51 RT 6070-6071.) Behind Genny's knees were diamond-shaped patches of relatively intact skin, which were still burned but not as deeply. This type of sparing occurs when someone is

immersed in a liquid and pulls their knees up because the skin meets behind the knees and the liquid is not able to get in that spot. (51 RT 6069, 6071-6072; 53 RT 6480.) This burning pattern indicated Genny's knees were drawn up while she was being burned. (51 RT 6070.) She was also a little less burned across her buttocks, which is consistent with being firmly held down on the surface of the bathtub because it is a little cooler than the water. (51 RT 6070; 53 RT 6472.) There was also slight sparing in her lower abdomen where there was a skin crease. (51 RT 6072.)

The total depth of the water when Genny was immersed was between seven and eight inches. (53 RT 6483.) Based on the sparing on Genny's buttocks, it was determined that she was pressed firmly against the bottom of the tub. The burn rose a little further on her breastbone, indicating she was probably arched backward, forcibly, and tipped forward. (53 RT 6483, 6486.) The sparing on the creases of her groin and behind her knee indicated her legs were flexed on her body. (53 RT 6483-6484.)

A first degree burn is a very superficial burn where the skin is reddened. (51 RT 6033.) A first degree burn causes reversible injury to the skin, such as a sunburn. (53 RT 6467.) A second degree burn is where there is irreversible injury to the skin, and some of the skin dies off. (53 RT 6467.) A third degree burn occurs when there is damage to the tissue beneath the skin. (51 RT 6033.) A burn below the hair follicles is a third degree burn. If it is a large area, it cannot heal in from the edges, so skin grafting is necessary for the burn to heal. (53 RT 6468.) If exposed to hot water, a first degree burn initially occurs, then a second or third degree burn. (53 RT 6469.) It is extremely painful from the onset of the burn until it actually becomes a third degree burn. Then the areas with third degree burns lose their pain sensation because the nerve endings are damaged. (53 RT 6491.) Treatment of the pain from a burn usually requires high doses of intravenous or intramuscular narcotics. (53 RT 6491.)

When a child feels pain from hot water, the reflex response is withdrawal. (53 RT 6475.) The straight line between where Genny was burned and not burned indicated she was immersed in a liquid and held motionless because the level of liquid stayed the same. Had she been able to thrash around, she would have had more irregular marks and splash marks. (51 RT 6070-6071; 53 RT 6476, 6481.) In an immersion burn, if unrestrained, a child would struggle and attempt to get out. (53 RT 6476.) Unless the water was so hot the burning was very rapid, the child would be able to get out before serious injury occurred. (53 RT 6477.) The lines would be less clear and there would be more tapering. (53 RT 6476.) Genny did not have immersion burns to her arms.[3/] (51 RT 6071.)

The Gonzales children were locked inside their bedroom while Genny took her final, fatal bath. (8 CT 1877; 9 CT 1939, 1966, 1971, 1973, 2004-2005.) Gonzales had put a lock on the outside of the children's bedroom door. (52 RT 6321; 8 CT 1865; 9 CT 1953, 1966, 2001.) Gonzales had removed the doorknob and put a piece of cloth in its place. (52 RT 6321; 9 CT 1965, 2000.) The door faced the hallway and was almost directly across from the bathroom. (52 RT 6321.) The hallway was four feet wide. (52 RT 6321.) From the children's bedroom, the entire bathroom was visible by looking through the doorknob hole with the rag in it. One could see the toilet, the tub and the sink. (54 RT 6698-6699; 9 CT 1964-1966.) Ivan Jr. testified at the preliminary hearing that he could see both his parents in the bathroom with Genny through

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3. The prosecutor theorized Genny's arms were not burned because her arms were tied together and/or handcuffed. (63 RT 8051.)

the hole in the doorknob.[4] (9 CT 1972.) Genny screamed "Ow," four or five times. (8 CT 1866; 9 CT 1902, 1904, 1974.)

A test showed it took approximately 15 minutes to fill up the bathtub. (53 RT 6562.) It took 10 minutes to drain the water out of the bathtub when it was filled to 11 inches (54 RT 6697-6697) and 15 minutes to drain when it was filled 13 to 14 inches (52 RT 6387). The water coming out of the tap was 148 degrees, and the water in the middle of the tub was 140 degrees. (53 RT 6562-6564.) A two ounce medicine cup was used to stop the water.[5] (53 RT 6561.) It was too hot to use ones hands to pull the medicine cup out of the water, so the plunger was used to suction the medicine cup out. (53 RT 6564.) During the test, the mirrors steamed up, and the heat inside the bathroom was uncomfortable. (92 RT 11559.)

At 150 degrees, it takes 2-to-3 seconds to cause a deep second degree burn injury; at 140 degrees it takes 6-to-8 seconds; at 130 degrees, it takes 30 seconds. (53 RT 6473.) At 120 degrees, it takes 10 minutes to cause the same injury. (53 RT 6473.) At lower temperatures, children and adults burn at the same rate. At higher temperatures, insulation becomes a factor. Adults have thicker skin than children, so children will burn faster. Thus for a child, it would take about one and a half to two seconds for second degree burns to

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4. Ivan Jr. also said in a previous statement that he saw both of his parents put Genny in the hot water. (9 CT 1939.) On cross-examination during the preliminary hearing and during previous interviews Ivan Jr. testified that the night she died, he saw only Genny in the bathtub. (8 CT 1865; 9 CT 2021.) Ivan Jr. explained, however, that on other nights he had looked through the hole in the door and saw both parents putting hot water on Genny in the bathtub. (9 CT 2021.) He said that he believed his parents both put Genny in the tub on the night of the murder because "they always did it." (9 CT 1941.)

5. The Gonzaleses used a similar cup to keep the water from draining. (9 CT 2027-2028.)

occur at 140 degrees. It would become painful for either an adult or a child if exposed to a liquid between 108 to 113 degrees. (53 RT 6474.)

Genny had a splash burn on her right chest just above the immersion burn area. (53 RT 6481.) This indicated that the water was hot enough that with some splashing of the water it could still cause burn injury. (53 RT 6481.) Therefore, the water was probably 140 to 150 degrees. (53 RT 6481, 6486.) At that temperature, it would take one and a half to two seconds to cause a deep second degree injury. (53 RT 6486.) Genny's injuries were deeper than second degree injuries. (53 RT 6486.) Genny's injuries could have been caused within 10 seconds or less. (53 RT 6486.)

On a serious burn such as Genny's, there initially is traumatic shock from the pain, and the vessels dilate and cause fluid loss. When the outer layer of skin is lost, fluids can weep from that injury, and there may be a significant amount of fluids lost. (51 RT 6034.) It is usually survivable with hospital treatment. The problem of infection then arises. (51 RT 6034-6035.) The area is easily infected because the skin is gone and the tissue is damaged and denuded, so if bacteria lands on the area, it will grow. (51 RT 6035.)

Genny had a 70 to 90 percent chance of survival had she received medical treatment. (53 RT 6492.) To survive, Genny would have required fluid resuscitation. She went into shock two to four hours after the burn due to fluid loss. (53 RT 6492-6494.) There were also chemical changes in her body due to the burn injury. (53 RT 6492.) Once she went into shock, her blood pressure and blood flow dropped below the level needed to sustain her brain. (53 RT 6494.) Over time, survival would have required removal of the burned tissue, and grafting of healthy skin. (53 RT 6492.) A child with a burn like Genny's would remain pretty conscious and cogent as long as they are maintaining blood pressure, which is usually until the bitter end. (53 RT 6495.) A burn takes about 15 minutes to cause unconsciousness. (51 RT 6085.) The

forensic pathologist opined that Genny was still conscious when she was taken out of the bathtub. (51 RT 6085.)

Genny's skin from her waist to her toes was denuded–the outer layers of her skin was gone. (51 RT 6068-6069.) The surface layer of her skin peeled off, and she was left with exposed, oozing blood vessels and tissue. (53 RT 6489.) The layer underneath the skin is fibrous tissue, blood vessels and nerve endings. When one loses the outer layer of skin, the nerve endings are exposed which is why burns are so painful. (51 RT 6069.) The areas of second degree burns would be extremely painful. (53 RT 6490.)

The forensic pathologist opined that Genny died as a result of thermal burns of approximately 50 percent of her body surface area, i.e., the immersion burn from her rib cage to her feet. (51 RT 6084.) Genny's injuries were not caused in the normal course of life: Genny was chronically and repeatedly abused. (51 RT 6085.) Genny's injuries were not consistent with accident or self-infliction. (51 RT 6085.) It was not plausible that Genny turned on the bathtub and let it rise as she sat placidly in a rigid position. (53 RT 6487-6488.)

It probably took two to three hours from when Genny was burned until she died. (51 RT 6121-6122.) In someone Genny's size, rigor would probably become detectable within one to two hours. (51 RT 6123-6124.) Therefore, it probably took three to six hours from when Genny was burned until her body became rigid. (51 RT 6124.)

There was no evidence that Genny drowned. Her lungs were lighter than normal, and there was no water in her airway. (51 RT 6085-6086.) There was no burning in her mouth or nose. (53 RT 6489.) Debris was recovered from the bottom of the bathtub, however, there was no debris in Genny's lungs. (52 RT 6318; 53 RT 6489.)

There was a small amount of rubbing alcohol in Genny's blood. (51 RT 6087.) There was rubbing alcohol found in the Gonzaleses' bedroom in the triangular area created by the door, the wall and the bureau. (53 RT 6587.)

The Torture Of Genny

When Genny died on July 21, 1995, in addition to her fatal burn injury, Genny had scrapes or abrasions on her head, patches where her hair was missing, open wounds on her scalp, a ligature mark across her throat, bruises, and parallel scrape marks on both sides of her face. (50 RT 5899.) Ivan Jr. explained during one of the interviews that his parents were beating Genny to death and trying to kill her by "torturing her." (9 CT 1939-1940.) Genny had a number of burn injuries of varying ages on her face, arms and torso. (51 RT 6032.) On her face, there was a lot of scarring, intermixed with multiple injuries. (53 RT 6514.)

Four year olds tend to fall and end up with bruised hands and knees. Genny did not have such injuries. (51 RT 6078.) Genny's injuries were not consistent with injuries she would receive in normal growth. (53 RT 6516.) It would be very unusual to self-inflict injuries on ones face. Genny's injuries were definitive for intentionally inflicted injuries. (53 RT 6516.)

Although it was unknown how many of the injuries were inflicted on Genny while under Gonzales and Veronica's care, some of Genny's injuries

were explained by Ivan Jr.'s testimony,[6] which was corroborated by the physical evidence. Other injuries were explained by the forensic evidence.

Genny's Second And Third Degree Burns From The Blow Dryer

Genny had burns to both cheeks, her shoulders and biceps caused by a blow dryer within hours of her death. (51 RT 6047, 6059-6060; 53 RT 6509; 55 RT 6833-6835, 6837-6838, 6848.) The burns on her face were probably deep second degree burns, and could have been third degree burns. (53 RT 6512.) Second and third degree burns are painful. (53 RT 6512.) The other blow dryer injuries were shallow second degree burns and would also be painful. (53 RT 6512.)

The burns were a branding-type injury from Genny's skin coming in contact with a hot, solid object. (53 RT 6509.) The burns on Genny's cheeks were symmetrical, which showed it was not a single, brushing, accidental contact. (53 RT 6511.) It indicated someone had repetitively imprinted the blow dryer on Genny's face. On the right side of Genny's face, there were separate, overlapping imprints. (53 RT 6511.) There were two burn marks on Genny's left arm. (55 RT 6839.)

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6. The oldest of the Gonzaleses' children was eight-year-old Ivan Jr. (8 CT 1846, 1848; 9 CT 1962.). Ivan Gonzales Jr. was interviewed four times and testified at the preliminary hearing. (55 RT 6855.) All those taped interviews were admitted in evidence at trial, in addition to the videotaped preliminary hearing testimony. (Exhs. 84 & 85 [7/22/95 interview videotape and transcript]; Exhs. 86 & 87 [7/23/95 interview audiotape and transcript]; Exhs. 88 & 89 [7/26/95 interview videotape and transcript]; Exhs. 90 & 91 [10/15/95 interview videotape and transcript]; Exhs. 93, 94 & 95 [11/8/95 preliminary hearing testimony videotapes and transcript].) Ivan Jr. did not testify at the trial because the court made a finding he and his siblings were unavailable under Evidence Code section 240 based on expert testimony they would suffer substantial trauma to testify against their parents in a capital case. (25 RT 2586-2587; 2591-2592; 55 RT 6877.)

A blow dryer was found on a table in the Gonzaleses living room area. (52 RT 6403.) It was set to high. (52 RT 6404.) It had an extension cord attached to its base to make the cord longer. (52 RT 6404.) There was a reddish/brown material on the blow dryer that contained DNA consistent with Genny's. (52 RT 6405; 56 RT 7008.) There was also a foreign material stuck on the surface of the blow dryer. (52 RT 6406.)

An expert witness made impressions of Genny's cheeks, shoulder and biceps with die stone. (55 RT 6811.) Her skin was indented. (55 RT 6814.) There were dark marks where the tissue had been charred "like the grill marks when a steak has been placed on a hot grill." (55 RT 6814.) The expert witness compared the casting on Genny's cheeks with the head of the blow dryer that was seized from the Gonzaleses' apartment. (55 RT 6826, 6829-6830.) There was almost an exact tracing of the marks on Genny's face, shoulder and biceps to the grill on the blow dryer. (55 RT 6832-6833, 6834-6835, 6835-6837.) The expert witness opined that the blow dryer caused the marks. (55 RT 6833-6835, 6837-6838, 6848.)

Tests done on the blow dryer revealed it took 45 seconds to reach a constant temperature. (52 RT 6407-6408.) When placed 12 inches away, it reached a temperature of 124 degrees; at 10 inches it reached 131 degrees; at 8 inches it reached 136 degrees; at 6 inches it reached 149 degrees; at 4 inches it reached 152 degrees; at 2 inches it reached 162 degrees and at contact it reached 181 degrees. (52 RT 6408.) Genny's injuries would have taken one minute to inflict at 127 degrees, and a few seconds to inflict at 140 degrees. (53 RT 6510.)

Genny's Ligature Injuries From Being Hanged In The Closet

Gonzales and Veronica tied Genny's hands with rope and hung her so she was suspended in their closet to the point where her hands bled. (9 CT 1946-1948, 1985-1987, 2028.)

Genny's neck had a continuous band of healing injuries, where her skin was ulcerated. It was consistent with a ligature mark. (51 RT 6052-6053.) It appeared to have had chronic pressure on her neck that eroded away her skin. (91 RT 11350.) The injury came to a point or an apex on the back left part of her neck. (51 RT 6052.) This injury was at least a week or two old. (51 RT 6052.) It appeared that Genny had been hanged or suspended by her neck; pulled up behind her left ear. The ligature was very tight and on Genny for some time, maybe several days. (51 RT 6053.) This type of injury would have been painful. (91 RT 11352.) The forensic pathologist opined the marks were consistent with Genny being hanged in a closet by her neck. (51 RT 6054.)

The Gonzaleses' closet doors were inside the closet but off their tracks. (52 RT 6324.) They had a brownish/red material on them that was consistent with blood. (54 RT 6689.) The inside of the closet door was heavily stained with dirt or other fluids, in addition to the bloodstains. (93 RT 11682.) There was a hole that went through the closet door that was approximately five feet from the floor. (52 RT 6326.) When you looked through the hole in the door you could see a hook in the closet. (52 RT 6327.)

There were reddish/brown (blood) stains swiped on the wall in the back of the closet that contained DNA consistent with Genny's. (52 RT 6333; 54 RT 6669-6670; 56 RT 7007-7008.) It appeared there were feces in the closet. (52 RT 6565.) The blood drops had cascaded down onto the interior side of the closet door. It appeared blood was thrown onto the door from above the stains near the vicinity of the hole in the door. (54 RT 6689-6690.) The closet wall had blood in a castoff and/or spatter and transfer pattern. (52 RT 6333; 54 RT

6680.) The blood appeared to be diluted and was running down the wall. (54 RT 6680.) There were also lumps of dry blood that struck the wall. (54 RT 6680.) Blood stains containing DNA consistent with Genny's were found on the closet doors. (53 RT 6547; 56 RT 7007-7008.)

No clothes were hanging in the closet. Only a hook hung in the closet. (53 RT 6604.) There were clothes located outside the closet area on the floor. (53 RT 6610.) A wooden box in the closet was placed directly underneath the metal hook that was mounted on the closet clothes bar. The hook was mounted securely and tied with cloth to a mounting bracket. (52 RT 6325.) The rod was 60 inches above the ground. (52 RT 6334.)

The hook had a substance on it that was consistent with blood. (54 RT 6678.) Expert testimony revealed the blood was cast off from below the rod. (54 RT 6681-6682.) There was blood on the bar and the wall at the same height as the hook and droplets of blood below and to the left of the hook. (52 RT 6334; 54 RT 6677, 6683.) There was blood on both sides of the cloth that was used to thread the hook. (54 RT 6678.) To the right of the cloth area there were transfer patterns consistent with transfer of blood by hair. (54 RT 6678.) There were reddish/brown stains in the shape of a foot about 35 inches below the hook. (52 RT 6334-6335; 54 RT 6684.) The pattern of the footprint showed it was pointed down and pushing off the wall. (93 RT 11670.) The shelf above the closet rod and hook had a substance that contained DNA consistent with Genny's. (53 RT 6548; 56 RT 7008.)

The evidence was consistent with a 38-inch child hanging, suspended, on a hook. (54 RT 6685.) It showed Genny rubbed her hair on the hanging rod. The movement of swinging back and forth cast off blood and caused it to spatter onto the wall. It showed Genny pushed off with her foot. (54 RT

6685.) There was no evidence Genny's hands touched the wall.[7] (54 RT 6686.)

Genny's Injuries From Being Handcuffed

On both of Genny's arms, starting at her elbow, there were ulcerations of her skin in the form of two parallel marks, in a pattern one would see with handcuffs. (51 RT 6057, 6064-6065; 55 RT 6845-6846.) The injuries appeared to be at least one, and more likely, two to three-weeks old. (51 RT 6065.) There was enough pressure to wear through the skin and erode it. It would have been a painful injury. (91 RT 11358.)

Two pairs of handcuffs were recovered from the Gonzaleses' apartment. (52 RT 6312.) There was blood inside and on the face of one set of the handcuffs. (52 RT 6421.) The blood contained DNA consistent with Genny's. (56 RT 7008.) The same brand of handcuffs was sold at Hilltop Liquor, where Gonzales shopped, for $1.98. (52 RT 6245-6246.)

An expert witness did an overlay of the handcuffs to Genny's injuries to her arms. (55 RT 6842.) The marks were almost the exact size as the handcuffs. (55 RT 6844.) The expert opined that there was no question in his mind that the injuries to Genny's arms were caused by handcuffs. (92 RT 11434-11435.) It appeared the solid portion of the handcuffs caused the mark on Genny's arm above her elbow. (55 RT 6843.)

Genny's Scalp Injuries

Ivan Jr. explained that Genny lost her hair when his mom and dad burned her with hot water in the bathtub. (9 CT 1976, 2019, 2038.) Ivan Jr.

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7. The prosecutor argued there were no handprints because Genny's hands were bound. (63 RT 8078-8079.)

explained that his dad would hold down Genny's head while his mom put hot water on her. (9 CT 2021-2023.) Genny cried and screamed. (9 CT 2022.) Additionally, both his parents pulled Genny's hair out. (9 CT 1937-1938, 1948, 1976, 2020, 2038-2039.)

Genny's head injuries appeared to be caused by liquid burns from more than one incident. (51 RT 6041-6042.) There were red marks on the back of Genny's head that were either splash marks from the same burn or a separate area that was burned. (51 RT 6043.)

On the top part of Genny's head, on the left side, was a large, third degree burn that was at least a week old. (51 RT 6039-6040; 53 RT 6497.) It covered pretty much the entire back part of her head. (91 RT 11332.) It was infected, reddened and raw. (51 RT 6040; 91 RT 11332.) There was a residual of intact hair up front and at the nape of her neck. (53 RT 6498-6499.) It appeared there was a flow pattern with a hot liquid off the back of her head down to her shoulder. The water thinned and lessened as it ran downhill. (53 RT 6498.) This burn pattern indicated Genny's head was tilted back and the water just drained off the skin and the back of her neck was protected or spared. (51 RT 6042; 53 RT 6499.)

These burns were not consistent with Genny pulling hot water or liquid off a stove because the burns were not on the front of her body. (53 RT 6501-6502.) Furthermore, according to a medical burn expert, the burn to Genny's head was not accidental. (53 RT 6502-6503.)

Expert testimony confirmed there was damage to Genny's hair follicles from the burn to her head, where there was no hair. (51 RT 6041.) There was also hair loss that was not from the burn that the expert opined may have been from being pulled out. (51 RT 6041.)

Genny's Brain Injuries

Genny's brain appeared swollen from injury. (53 RT 6503.) She had a subdural hematoma on her brain that was caused by a blow to her head or a violent shaking. (51 RT 6076-6077; 53 RT 6505.) There would have to be a significant amount of force to cause a subdural hematoma, such as a traffic collision, a fall from a great height, or a child being abused. (51 RT 6078; 53 RT 6506.) This type of injury would require substantial velocity. (53 RT 6507.) Genny had bruises on her face that were consistent with her being hit with enough force to snap her head back, and could also have caused the subdural hematoma. (51 RT 6078; 53 RT 6505-6506.) Genny's subdural hematoma was less than a day old. (51 RT 6079.) This type of injury can be life threatening. (53 RT 6507.) The injury was consistent with inflicted or non-accidental trauma. (51 RT 6079; 53 RT 6507.)

There was also evidence of older brain injuries. (51 RT 6079.) The older brain injuries were at least several weeks old, and would have been caused by a significant blow to Genny's head, causing subarchnoid hemorrhage. (51 RT 6080-6081.) The blow could have been severe enough to cause unconsciousness.

Genny's Black Eyes

Both of Genny's eyes were bruised. These injuries were from blunt force that occurred within a day or two of Genny's death. (51 RT 6040, 6045-6046.) The bruising on her right eye extended beyond her eye and onto her eyelids. (51 RT 6045.) There was also a symmetrical laceration on both of her eyebrows. (51 RT 6045-6046.)

Genny's Internal Eye Injuries

Genny's right eye had a small pinpoint hemorrhage or petechiae, which is a small capillary hemorrhage typically seen when ones neck is squeezed. It is typically a sign of strangulation. (51 RT 6082.)

Genny's Other Facial Injuries

On the left side of Genny's face her skin was eroded. She had an abrasion where the superficial layer of her skin had been rubbed away. (51 RT 6044-6045.) This injury occurred within hours or a day before her death. (51 RT 6045.)

Genny also had an abrasion on the bridge of her nose that occurred within a day or two of her death. (51 RT 6046.) It appeared to be a burn injury or a pressure injury. (53 RT 6515.) It was consistent with something being wrapped around Genny's head, causing injury to her ear and the bridge of her nose.[8/] (53 RT 6515.)

There was bruising over Genny's cheekbone that appeared to have been inflicted within a few days. (51 RT 6047-6048.) Genny's face and nose had red marks consisting of small abrasions or scrapes across her upper cheek and lower nose that were too numerous to count. This injury was probably a few days old, and could have been from being hit by a hairbrush. (51 RT 6050.) The skin under Genny's chin was eroded from her jawbone down to the middle of her chin. This injury was probably several days old. (51 RT 6054.)

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8. There was a "hood-like object" that was recovered that was consistent with the size of Genny's head and her injuries. The prosecutor argued that the Gonzaleses put it over Genny's face and covered her eyes. (63 RT 8079-8080.)

Genny's Ear Injuries

Genny's ears were "intensely" injured. (53 RT 6515.) The depth of the injury was so great, the cartilage was exposed on the top part and inside of her left ear. (51 RT 6042-6043, 6089; 53 RT 6515.) This injury was at least several days to a week or two old. (51 RT 6043.) It was likely caused by having severe pressure over the cartilage, or by a very hot, flat metal object like the surface of an iron. (53 RT 6414-6515.) If it was caused by pressure, it would have to be prolonged enough pressure of a great enough severity to rob that tissue of blood supply. (53 RT 6515.)

Genny's Mouth Injuries

There were two separate injuries on Genny's lip. (91 RT 11346.) The inside of her lip was lacerated, and there was a tear between her lip and gum. (91 RT 11346.) One of the injuries was from cutting and one was from tearing. (51 RT 6049.) The tissue was sheared away where the lip attached to the gum. (53 RT 6512.) There would have been a lot of pressure to incur such injury. (51 RT 6049.) It appeared to be from an impact directed downward. (53 RT 6512-6513.) These injuries were probably a few days old. (51 RT 6048.) There is a lot of nerves in this area so it would be very sensitive to pain. (91 RT 11347.)

Genny's Shoulder Injuries

Genny's left shoulder had an abrasion that could have been a pressure mark or a scrape. It appeared to be caused by a triangular shaped object. (51 RT 6055-6056.) There was also a bruise on the top of Genny's left shoulder caused by a blunt injury from a blow. (51 RT 6059.)

Genny's right shoulder had parallel burn marks, scratches and linear marks. (51 RT 6063.) The burn injury appeared to be from a curling iron coming into contact with Genny's skin. (53 RT 6513.) The burn marks looked as if they were incurred within a day or two. (51 RT 6064.)

A curling iron was found in the dining room area on top of a hutch. (52 RT 6414.) The curling iron was set to high. (52 RT 6415.) On high, the curling iron reached 134 degrees, but if the probe was placed inside the alligator clip it reached 216 degrees. (52 RT 6415.)

Genny's Neck Injuries

There was a bruise on the base of Genny's neck caused by an external blow. (51 RT 6059.) There was also some scarring on the base of Genny's neck that appeared to be from a weeks old liquid burn. (51 RT 6064.)

Genny's Arm Injuries

Ivan Jr. explained that his parents tied Genny's wrists together with rope many times. (9 CT 1936, 1979.) There was a circumferential mark on Genny's forearm. It appeared to be caused by an object that went around the arm that wore the skin away. It had scarred, indicating it was probably weeks old. (51 RT 6061.)

On Genny's right wrist, her skin was eroded in what appeared to be three separate injuries. (51 RT 6065-6066.) These injuries did not have a distinct pattern, and were consistent with a ligature type injury, such as a chord type tying. (51 RT 6066.) This injury was not consistent with handcuffs. (51 RT 6066.)

Genny also had a mark on the side of her right thumb, and a scar on her left wrist that was from an injury that was almost healed. The wrist injuries were probably older than the handcuff injuries. (51 RT 6067.)

Genny's Heel Injuries

Genny had injuries across the top of both of her heels on her achilles tendons. (51 RT 6070, 6072.) Her skin was ulcerated on the back and front of her ankles. (91 RT 11368.) These injuries were caused from some type of pressure or band that was there for some time that caused the skin to erode and ulcerate. (51 RT 6070, 6072; 91 RT 11368.) This injury was probably several days old. (91 RT 11368.)

Genny's Thigh Injuries

Both of Genny's thighs were bruised. There was a series of four small bruises on each leg in a line that looked like finger marks. (51 RT 6073-6074.) They were one-fourth to one-half an inch in diameter, and were red, blue or purple. (51 RT 6074.) These injuries appeared to be fairly recent. (51 RT 6074.) It appeared someone grabbed Genny's thighs from the back and pressed firmly with their fingers. (51 RT 6074-6075.)

Genny's Thymus Gland

Genny's thymus gland was much too small for her age. (51 RT 6083.) The thymus gland is behind the breastbone and extends slightly into the neck. (51 RT 6082.) It is important in the body's immune system and in the formation of cells that respond to infection. (51 RT 6082-6083.) The thymus gland is reduced in size when a child is chronically ill. (51 RT 6084.) It is very sensitive to stress. (51 RT 6083.) Genny's thymus gland was probably reduced because she was chronically stressed in response to the multiple injuries she had over a period of weeks. (51 RT 6083.)

Genny Was Forced To Sleep In A Two Foot Box

Genny was forced to sleep in a wooden box in the Gonzaleses' closet with her hands tied together. (8 CT 1782, 1804, 1839; 9 CT 1985.) Inside the Gonzaleses' closet was a wooden box that was 25 inches high, 24 inches wide and 24 inches deep. (52 RT 6325.) There were blood stains inside and on the edge of the wooden box that contained DNA consistent with Genny's. (52 RT 6328-6329; 53 RT 6546; 54 RT 6688; 56 RT 7008.) There was a considerable amount of blood in a swiping-type pattern, indicating there was a lot of movement or rubbing. One of the stains was consistent with a hair swiping or a cloth. (54 RT 6688.) There was feces in the box. (52 RT 6359.)

Other Abuse Of Genny

Genny did not eat with the Gonzales children at the kitchen table. (9 CT 1977-1978.) Rather, Genny would eat in Gonzales and Veronica's room. (9 CT 1977-1978.) Genny would ask for food and Ivan Jr. would give it to her without his parents knowledge. (9 CT 1954, 1978.) When his parents found out, they would hit Ivan Jr. (9 CT 1955, 1978.) Genny was 38 inches tall and weighed 28 ½ pounds. She was thin but adequately nourished. She was small for her size; less than the fifth percentile in both height and weight. (51 RT 6037.)

In the Gonzaleses' bedroom, the entry door had a cord or string tied from the inside doorknob to a door of a nightstand that was mounted against the wall.[9/] (52 RT 6336.) In that area, there was a hole in the drywall, 36 inches high, that had reddish/brown stains consistent with Genny's DNA. (52 RT 6337-6338; 53 RT 6542; 56 RT 7005, 7008.) Expert testimony revealed the

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9. This created a small triangular area. The prosecutor argued that this small area is where Genny lived. (63 RT 8076-8077.)

blood was applied either before or at the time the wall was broken.[10] (54 RT 6670-6671.) There were also reddish/brown stains on the wall on the other side of the hole and stains between 24 and 36 inches off the ground from the bottom of the wall consistent with Genny's DNA. (52 RT 6338-6339, 6364, 6366; 56 RT 7005, 7008.) There was a blanket behind the door that was soiled with what appeared to be blood stains and fecal material on it that contained DNA consistent with Genny's. (52 RT 6340; 56 RT 7008; 93 RT 11574.) There was an open bottle of rubbing alcohol in the same area. (92 RT 11524.)

Ivan Jr. explained that when Genny scratched her head and rubbed it against the wall, his parents would hit her "everywhere" with a belt. (9 CT 1977.) Gonzales and Veronica told their children to be mean to Genny. (9 CT 1953.) They told them to throw her to the ground and hit her. (9 CT 1953.) Gonzales and Veronica told their children to throw a hard ball at Genny. (9 CT 1949-1950, 1980-1981, 2013-2014, 2017.) Ivan Jr. threw it but intentionally missed Genny because he did not want to hurt her. (9 CT 1981, 2014.) If the children refused to throw the balls at Genny, Gonzales and Veronica hit them. (9 CT 1981-1982, 2015.) The Gonzaleses punished their children by hitting them with their hands, a belt, a metal bar and a plastic bat. (9 CT 1953, 1966-1967, 2002-2003.)

Oftentimes, Gonzales and Veronica put Genny in the bathtub to sleep. (9 CT 1982-1984.) At times it had water in it and at times it was empty. (9 CT 1982-1983.) Genny's hands and feet were bound when she slept in the bathtub. (9 CT 1983-1984.) Gonzales and Veronica forced Genny to eat her feces if she had an accident. (9 CT 1932-1933.)

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10. The prosecutor's theory was that Genny was thrown so hard into the wall that it broke the wall and left her bloodstain on it. (63 RT 8045, 8076.)

Gonzales's Statement

Gonzales was interviewed the day following Genny's murder at 9:45 a.m. (54 RT 6746.) Gonzales repeatedly and consistently said he and Veronica both put Genny in the bathtub and that he turned on the water. (8 CT 1760, 1762, 1774, 1796, 1803, 1812, 1823.) Gonzales said he checked the water, and it was a comfortable temperature. (8 CT 1761, 1800.) Gonzales then turned off the water. (8 CT 1775.) Gonzales went to the store to get milk, bread and beer while Veronica was making dinner. (8 CT 1761, 1763.) Veronica was never alone with Genny in the bathtub. (8 CT 1841.) When Gonzales returned five to ten minutes later, Veronica asked him to check on Genny but he forgot to do so. (8 CT 1761, 1764-1765.)

About 10 minutes later, Veronica checked on Genny and screamed, "Ivan." (8 CT 1764, 1766.) Veronica took Genny from the bathtub. (8 CT 1764.) Genny was red and looked like she was asleep. (8 CT 1776.) Gonzales claimed he tried to administer CPR to Genny, but that it did not work. (8 CT 1764-1765.) Veronica ran next door to Patty's apartment and asked Patty to call an ambulance. (8 CT 1764-1764.)

Gonzales surmised that Genny turned the water on after he had turned it off. (8 CT 1775, 1777.) He said that Genny did not know which way to turn the faucet so maybe she turned the dial to hot. (8 CT 1761, 1797.) Gonzales denied he or Veronica held Genny in the water. (8 CT 1801, 1813-1814.)

Gonzales claimed that the marks on Genny were from her peeling her skin and picking at herself. (8 CT 1767.) He also claimed sometimes his or the neighborhood children ganged up on her. (8 CT 1768, 1773.) He claimed his son threw a toy truck at her. (8 CT 1772, 1818.) Gonzales said the marks on Genny's neck were from the neighbor children pulling her by a candy necklace a few weeks earlier. (8 CT 1773-1774, 1806.)

Gonzales said he did not see the marks or bruises on Genny's face. (8 CT 1790.) The other injuries on her face, Gonzales claimed, happened when Genny fell on a mop. (8 CT 1772, 1818.) Gonzales said the injury to Genny's back and hair occurred about two weeks earlier when Genny knocked over a pot of boiling water. (8 CT 1770-1771.) It did not heal because Genny always picked at it. (8 CT 1771.) According to Gonzales, they had not taken her to the doctor because they had not yet received her Medi-Cal card. (8 CT 1771.)

Gonzales said that Genny had head lice when she lived with them. (8 CT 1780.) Genny rubbed and scratched her head on the walls. (8 CT 1780.) Gonzales said the blood behind the door in his bedroom was from Genny rubbing her head against the wall when it itched. (8 CT 1783.) Gonzales and Veronica scolded Genny and slapped her on her hand. (8 CT 1780.)

Gonzales said he bought the handcuffs to get "a little kinky." (8 CT 1783.) Gonzales denied using the handcuffs or otherwise restraining Genny. (8 CT 1784, 1789, 1819, 1822.) Gonzales said Veronica restrained Genny's hands one time with a cloth for a couple of hours in their room so she would not pick at her sores. (8 CT 1787, 1819, 1822, 1839, 1878.) Gonzales said Genny did not cry. (8 CT 1787.) Gonzales admitted spanking Genny to punish her for getting blood on the wall and for having accidents on the rug. (8 CT 1786.) Gonzales initially denied disciplining Genny by putting her in the bathtub, then admitted they put Genny in the bath a couple of times to scare her after she had an accident. (8 CT 1787, 1788.)

Gonzales claimed the hole in the closet was to put a stick through to hang up clothes. (8 CT 1781.) His brother-in-law made the wooden box and gave it to him. When asked what it was for, Gonzales claimed, "nothing." (8 CT 1781.) He then claimed they used it as a clothes hamper. (8 CT 1782.) When the detective told Gonzales that Veronica admitted that they sometimes used the box to put Genny in to discipline her for rubbing her head up against

the wall, Gonzales admitted that they made Genny sleep in the box overnight three or four times. (8 CT 1782, 1804, 1839.)

Gonzales claimed the closet hook did not hook onto anything, and was just there to scare Genny. (8 CT 1807.) He said they used it to hang up clothes. (8 CT 1809.) Gonzales denied hanging Genny from the hook. (8 CT 1808.)

Gonzales put the lock on his children's room. (8 CT 1826.) He denied locking it the night Genny was murdered. (8 CT 1826.)

Defense

Juan Lozano, Patty and Naomi Espinoza's nephew, testified that he was watching television at Naomi's house when he heard Veronica screaming. (56 RT 7017-7019.) He went down the stairs and saw Gonzales carrying Genny. (56 RT 7019-7020.) Patty told Lozano to call 911 and get Naomi because Naomi knew CPR. (56 RT 7020.) Lozano went into the apartment, and checked for a pulse on Genny. (56 RT 7021.) He attempted to perform CPR on Genny from what he had learned in a high school class. (56 RT 7021.) Lozano testified he did not feel Genny breathing. When he attempted CPR, he did not have any problem opening Genny's jaw. (56 RT 7022.) On cross-examination, however, Lozano testified that Genny was cold and dry when he attempted CPR. (56 RT 7027.)

Alicia Montes, who lived directly upstairs from the Gonzaleses' apartment, testified that she heard the water running for an hour, either between 8:00 and 9:00 p.m. or 8:30 and 9:30 p.m. (57 RT 7086-7088, 7098.)

Rose Mary Banuelos, co-owner of the Calimex grocery store on Hilltop Drive, testified that Gonzales came to her store at least two times a day. (56 RT 7048, 7050.) Gonzales was quiet and submissive, and always looked down at the ground. (56 RT 7051.) Veronica looked like a strong woman. Veronica initiated conversations and was not shy or quiet. (56 RT 7052.) Veronica did

not appear submissive. (56 RT 7053.) Gonzales stood behind Veronica and held the children while Veronica did the talking. (56 RT 7055.)

Eugene Luna, a previous supervisor of Gonzales's, testified he had a father-son type of relationship with Gonzales. (57 RT 7103, 7107.) Luna also knew Veronica because she was his wife's cousin. (57 RT 7104.) The Lunas and Gonzaleses lived in the same apartment complex at one point and socialized together. (57 RT 7104-7105, 7132.) Luna testified that Veronica was the "boss" of the household. (57 RT 7106.) Veronica told Gonzales what he could and could not do. (57 RT 7107.)

Gonzales came to Luna for advice on how to handle situations at home. (57 RT 7108.) At one point, Gonzales told Luna that Ivan Jr. had seen Veronica kissing Luna's son, 15 or 16-year-old Eugene Luna, Jr. (57 RT 7110-7111.) Gonzales and Luna confronted Luna, Jr. about whether he was having an affair with Veronica, but Luna, Jr. denied it. (57 RT 7111, 7136.)

Eugene Luna, Jr. testified that on another occasion when Gonzales asked him whether he was having an affair with Veronica, Gonzales pushed Luna, Jr. and Luna, Jr. pushed Gonzales back. Gonzales then took a swing at Luna, Jr. and nicked him. Luna, Jr. reacted by hitting Gonzales back, knocking him down. Luna, Jr. then helped Gonzales get back up. (57 RT 7136.) Luna, Jr. later admitted he was having an affair with Veronica. Gonzales was embarrassed and hurt. (57 RT 7111-7112.)

Luna, Jr. testified that he had a sexual affair with Veronica that lasted a few months when he was 16 or 17 years old. (57 RT 7133.) Veronica became pregnant and told Luna, Jr. that the child was his. (57 RT 7150.) Gonzales believed the child was as a result of the affair. (57 RT 7112, 7128, 7139, 7219, 7244.)

Anthony was six years old, and was supposedly the child fathered by Luna, Jr. (57 RT 7112, 7190-7191, 7268.) Guadalupe Baltazar, Gonzales's

sister, testified that Gonzales treated Anthony the same as his other children, and had a close relationship with Anthony. (56 RT 7076.) Gonzales's other sister, Patricia Andrade, testified that Gonzales was even more affectionate with Anthony than he was with his other children because Anthony had a seizure when he was a baby. (57 RT 7268.)

Luna testified he never saw Gonzales be physically aggressive towards Veronica. (57 RT 7105.) He did, however, witness an incident where Veronica hit Gonzales with a closed fist in the mouth. (57 RT 7105.) Veronica said, "fuck you," and "mother," to Gonzales. (57 RT 7106.) Gonzales just stood there and did not say anything. (57 RT 7106.)

Luna, Jr. testified he once saw Veronica get mad and throw a plate at Gonzales, hitting Gonzales in the mouth. (57 RT 7135.) During a second incident, Gonzales, Veronica and Luna, Jr. had been drinking shots of tequila. (57 RT 7156.) Gonzales was driving them home and pulled over at McDonald's to help Veronica roll up her window. (57 RT 7157-7158.) Veronica got upset when Gonzales leaned over her to help with the window and Veronica kicked the radio, dashboard and steering wheel. (57 RT 7158, 7170.) The police came and Veronica charged at the officer. (57 RT 7158, 7161.) Veronica was taken to detox, and Luna, Jr. and Gonzales returned to Gonzaleses' relatives' house and continued drinking while they waited for Veronica. (57 RT 7162.)

Baltazar testified that in 1987 she observed an incident where Gonzales was working on his car and Veronica pulled the wires out. Gonzales took the wires back and started to put them back in the car. Veronica was upset and yelled obscenities. Veronica pulled the hood of the car down on Gonzales's head and hit him on his back. Gonzales told Veronica to "knock it off" and did not strike Veronica in response. (56 RT 7079.)

Andrade testified that Gonzales and Veronica lived with her for about six months in 1986. (57 RT 7261.) Veronica often called Gonzales a "mother fucker," "lazy" and a "coward." (57 RT 7262.) Gonzales merely put his head down and did not respond. (57 RT 7262.) Veronica would call Gonzales into their room and Andrade would hear muffled sounds and things being tossed around. (57 RT 7265.) Gonzales would come out of the room with scratches and bruises on his face and arms. (57 RT 7266.)

Lorena and Frank Peevler, who had previously been married, both testified. (57 RT 7210, 7235.) Frank and Gonzales were best friends. (57 RT 7210, 7236.) Frank often stayed the night with Gonzales and his family when they were growing up. (57 RT 7236-7237.) Gonzales's father was kind and gentle. (57 RT 7239.) Gonzales was shy and timid around "girls." (57 RT 7240.) Gonzales met Veronica when they were teenagers. (57 RT 7240.)

Lorena testified that Gonzales was quiet and shy. (57 RT 7210.) Lorena and Veronica became good friends. (57 RT 7212.) The Gonzaleses lived with the Peevlers for a few months. (57 RT 7212, 7242.) Lorena testified that the Gonzaleses fought a lot. (57 RT 7213.) Veronica yelled at Gonzales and tried to provoke him. (57 RT 7213.) Veronica threatened to leave with the children. (57 RT 7214.) Gonzales would tell Veronica to be quiet and calm down, and Gonzales just walked away. (57 RT 7214-7215.)

Lorena witnessed two or three physical fights where Veronica punched or scratched Gonzales and pulled his hair. (57 RT 7215-7216.) Gonzales tried to protect himself by holding his hands up and pushing Veronica away. (57 RT 7215.) Gonzales did not strike Veronica back. (57 RT 7216.) The Peevlers both testified that Veronica was the "boss" in the relationship. (57 RT 7217, 7242-7243.) Veronica always told Gonzales what to do. (57 RT 7218.)

On cross-examination, Lorena testified about an incident where Gonzales left the house after a fight he had with Veronica. (57 RT 7223-7224.)

Gonzales climbed up onto a utility pole, and the police and paramedics had to talk him down from the pole. (57 RT 7224-7225.) Gonzales told the police officers who responded to shut up and said, "fuck you guys." (95 RT 12001.)

Luna, Jr. testified that there were times when Veronica and Gonzales got along well, were publicly affectionate, and appeared to be in love. (57 RT 7168.) Baltizar testified that she had seen Gonzales and Veronica affectionate and loving towards each other. (57 RT 7203.) Andrade testified that when they were not fighting, Gonzales and Veronica hugged, held hands and acted like "honeymooners." (57 RT 7272.)

Baltazar testified that she saw Genny one day after the 4th of July. Genny had a towel on her head. (56 RT 7066-7068.) Gonzales told his sister that Genny had been burned. (56 RT 7069.) Genny had a scab on the back of her head and shoulder. (56 RT 7072-7073.) Baltazar testified she did not see any scars or cuts on Genny's arms, legs, stomach or face. (56 RT 7075.)

Karen Oetkin, the social worker for the Gonzales children, testified that the Gonzales children initially went to Polinsky Center, then were placed in foster homes. (58 RT 7305-7306, 7308.) Initially, the oldest four children were placed together, then Ivan, Jr. and Michael went to a second foster home. (58 RT 7309-7310, 7401.) Oetkin spoke to Ivan, Jr. numerous times, and on July 24, 1995, Ivan Jr. told her that he did not think his parents hurt Genny. (58 RT 7402-7404.) Ivan Jr. told her that he was not afraid of his mother but was afraid of his father because he thought his father was going to hit him in his butt even though he had never done so before. (58 RT 7404.)

The parties stipulated that Gonzales is 5 feet 2 and ½ inches tall. (58 RT 7416-7417.)

Rebuttal

Karen Oetken testified that Gonzales told her there was no domestic violence in his family. Martha Halog lived next door to the Gonzaleses on

Hilltop Drive. (60 RT 7607-7608.) One time, in 1994, Halog heard an argument coming from the Gonzaleses' apartment. (60 RT 7608.) Gonzales called Veronica a "fuckin' bitch," and angrily said, "why don't you lose weight, you fat pig." Veronica yelled back, "why don't you get off your fuckin' ass-lazy ass and go to work?" (60 RT 7609.)

Halog then saw Veronica as they both left their apartments. Veronica was upset and hysterical. (60 RT 7610.) Veronica told Halog that Gonzales pulled the telephone out of the wall and left her. (60 RT 7614.) Halog went to the store and saw Gonzales, who was acting normally and did not appear upset. (60 RT 7614-7615.) Halog told Gonzales that Veronica was crying and hysterical, and to go back home because there were children involved. Gonzales said he would go back later. (60 RT 7616.)

Angela Dominguez, Veronica's first cousin, testified that Gonzales and Veronica stayed at her apartment in Corona with her and her husband for a few weeks in 1988. (60 RT 7640-7641.) Gonzales disciplined the children by spanking them. (60 RT 7643.) She never saw Veronica physically discipline the children. (60 RT 7643-7644.) One time when Dominguez came home, there was a hole in the wall of the apartment. (60 RT 7645-7646.) Veronica was scared and looked like she had been crying. (60 RT 7644-7645.)

Veronica's brother-in-law, Victor Negrette, testified. (60 RT 7709.) Negrette was married to Veronica's oldest sister, Anita. (60 RT 7734.) Gonzales and Veronica lived with Negrette in Corona in 1990 or 1991 for three or four months. (60 RT 7707.) Negrette testified that Gonzales was overprotective of Veronica and was jealous. (60 RT 7708.) One time when Veronica and Anita went to the store, Gonzales got upset. Gonzales paced and looked out the window. (60 RT 7727-7728.)

On three separate occasions, Veronica called Negrette sobbing when she and Gonzales lived in Chula Vista. (60 RT 7711.) Veronica wanted Negrette

to pick her up because she and Gonzales were arguing and fighting, and she said Gonzales had hit her. (60 RT 7717-7718.) Negrette drove an hour and a half to two hours to Chula Vista to pick up Veronica. (60 RT 7713, 7758.) Veronica, still crying, told Negrette that she wanted to leave with her children. (60 RT 7713.) Negrette took Veronica and her children with him back to Corona. (60 RT 7715.) A week or two later, Gonzales came to Negrette's house to talk to Veronica. (60 RT 7720-7721.) Veronica left Negrette's house with Gonzales. (60 RT 7722.)

Negrette heard Gonzales yell at Veronica numerous times. (60 RT 7722.) Gonzales called Veronica a "fucking bitch," and said, "what's wrong with you." (60 RT 7723.)

Negrette saw Gonzales act violently towards the children. (60 RT 7724.) Gonzales grabbed and pulled Michael by his upper arm. (60 RT 7724.) Gonzales also hit Michael with a hard plastic bat. (60 RT 7725.) Gonzales hit Ivan Jr. and kicked him on his buttocks. (60 RT 7726.) When Negrette asked Gonzales why he did it, Gonzales just stared at Negrette. (60 RT 7726.)

One time Negrette saw Gonzales act violently by punching and breaking the windows of a car with his fist. (60 RT 7731-7732.) Gonzales was growling and acting "insane." (60 RT 7732-7733.) Veronica never acted violent in Negrette's presence. (60 RT 7733.)

On cross-examination, Negrette testified that he and Anita took care of Genny for four months prior to Genny coming to live with the Gonzaleses. (60 RT 7735-7736, 7739.) Genny was a very troubled child and always appeared terrified. (60 RT 7736.) Genny flinched when they spoke loudly. (60 RT 7736.) Genny was difficult to handle and broke into screaming and crying fits. (60 RT 7737.) Genny cried constantly and was always unhappy. (60 RT 7738.) Genny needed help, but they did not have the money to get her help.

(60 RT 7738.) The Negrettes could not handle Genny anymore, so they sent her back to her grandmother. (60 RT 7739.)

Negrette also testified on cross-examination that Veronica grew up in a troubled household. (60 RT 7740.) Negrette was very close to Veronica and loved her very much. (60 RT 7741.)

Lastly, the prosecutor presented Veronica to the jury for the jury to view her. (60 RT 7578-7579; 98 RT 12602-12604.)

Penalty Phase

The prosecution relied on the circumstances of the crime as its aggravating evidence and did not put on additional aggravation evidence. Because the first jury hung on the penalty, the second jury heard evidence of the crime, similar to that put on in the guilt phase.[11/]

In addition to the defense evidence presented during the guilt phase trial, Gonzales put on other mitigating evidence. James Park, a prison classification consultant testified that if Gonzales were given life without the possibility of parole, he would be in a level four prison. (95 RT 11874, 11877, 11889.) Park described the setting of level four prisons. (95 RT 11879, 11885.) Park testified Gonzales had not had any bad behavior while in jail, and was a mild, conforming individual. (95 RT 11890, 11898.) Park opined that Gonzales would not be likely to be assaultive in prison and would more likely be the victim of an assault. (95 RT 11901.)

Gonzales attended a weekly Bible Study group with other inmates. (96 RT 12255.) He was a quiet inmate, and had never received a rule violation. (97 RT 12343, 12349.)

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11. There were some differences in evidence that was presented during the penalty re-trial. Where relevant, it will be discussed during discussion of the issues.

Gonzales presented testimony from childhood friends, relatives and others, such as his grammar school teacher, regarding his character growing up, including his interest in playing the guitar. (96 RT 12226, 12228, 12238, 12240; 97 RT 12359; 98 RT 12516-12531.) He presented testimony that he was quiet, shy and respectful. (95 RT 11993, 12018, 12020, 12043; 96 RT 12123, 12179, 12232-12233, 12238, 12243, 12239-12250, 12276-12277, 12279, 12288-12289; 97 RT 12360, 12365, 12409, 12414, 12416, 12472-12473, 12480.)

The family spoke about Gonzales's Catholic upbringing. (96 RT 12297-12298; 97 RT 12406-12407; 98 RT 12531-12533.) Gonzales's sister, Baltazar, described each of Gonzales's children and went through various cards Gonzales's children had given him for Father's Day. (97 RT 12432-12436, 12440-12444, 12456-12458.) A few witnesses described the children and testified that the children loved Gonzales. (97 RT 12458-12461, 12484-12487; 12494-12495, 12496; 98 RT 12579-12582.) An attorney representing the Gonzales children in juvenile court testified that it would be devastating for the children if their father were executed. (97 RT 12495-12496.) Gonzales's family members testified how they would feel if Gonzales were executed. (96 RT 12290, 12305; 97 RT 12390, 12464, 12477; 98 RT 12584.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING EVIDENCE OF VERONICA'S MOTHER'S ABUSE TO SUGGEST THAT VERONICA IS MORE LIKELY TO HAVE COMMITTED THE CRIME

In a lengthy argument, Gonzales claims the trial court prejudicially erred by excluding evidence that Veronica's mother, Utilia Ortiz, abused Veronica's sisters and Veronica to show that Veronica was more likely to have been responsible for abusing Genny. (AOB 42.) The evidence was improper evidence of Veronica's character, therefore, the trial court properly ruled it was not admissible.

Prior to trial, Gonzales moved to admit evidence that Veronica's mother, Utilia Ortiz, excessively disciplined her children. (6 CT 1325-1331; 21 RT 1830.) Specifically, Ortiz tied up her children and burned her daughter Mary's feet, in front of Veronica. (21 RT 1831.) According to an expert, styles of disciplining children are passed down from one generation to the next. Therefore, Veronica must have used the "discipline" techniques to abuse Genny. (6 CT 1327.) Gonzales also wanted to present expert testimony that in Mexican-American families, the mother is traditionally tasked with disciplining the children, and in Gonzales's family, which was a Mexican-American family, Veronica disciplined the children. (21 RT 1837-1838.) Gonzales argued that it showed Veronica's motive to commit the crime. (6 CT 1329; 21 RT 1844.)

The court ruled the evidence was inadmissible because it was irrelevant. (21 RT 1845.) The court explained it was third party culpability evidence, and because Veronica and Gonzales were both charged in the murder, it would have to show that Veronica acted alone to be relevant. (21 RT 1845.) In other words, even if the court admitted evidence that an abused Hispanic woman was

more likely to be an abuser, it did not show that Veronica acted alone. (21 RT 1846.) The evidence was third party culpability evidence that did not raise a reasonable doubt whether Gonzales was involved in Genny's murder. (21 RT 1845, 1847.) Even if there was marginal relevance, it was so attenuated, it was excluded under Evidence Code section 352 because its marginal relevance was outweighed by the risk of confusion and the undue consumption of time. (21 RT 1847.)

After Gonzales filed a motion for reconsideration (6 CT 1409-1422), the court addressed the issue again. Gonzales detailed his offer of proof regarding what evidence he proposed to admit. (7 CT 1526-1536.) The court indicated that it believed Gonzales met the threshold for admissibility as third party culpability evidence, but it had other impediments to admissibility, such as whether it was impermissible character evidence to prove Veronica's predisposition to commit the crimes. (28 RT 3096-3097, 3101.) The court held an Evidence Code section 402 hearing to determine the admissibility of the evidence. (47 RT 5517-5616.)

At the hearing, Gonzales presented testimony from Patricia Perez-Arce, a neuropsychologist and professor, that individuals learn parental behaviors through observation of their parental figures. (47 RT 5518, 5520.) Mexican-American families are very family-oriented. The father is typically the breadwinner and the mother is a homemaker who handles the discipline. (47 RT 5524-5525.) Perez-Arce opined that Gonzales's family fit within the traditional Mexican-American framework. (47 RT 5526-5527.) Perez-Arce would not expect Gonzales to abuse his or other children. (47 RT 5532.)

Perez-Arce opined that, based on her review of documents pertaining to Veronica's family, it did not fit within the traditional Mexican-American framework because her mother had a problem with alcohol, was dominant in the family, was disrespectful towards her husband and brought shame to the

family. (47 RT 5533, 5535.) Perez-Arce testified that Ortiz was impulsive and became violent and threatening. (47 RT 5536.) Ortiz hit her daughter Mary with sticks, pulled Mary and Veronica's hair, and tied their hands together while burning their feet. (47 RT 5537.) Perez-Arce would expect Veronica would have difficulty dealing with her frustration, and become offensive, threatening, and possibly hurtful. (47 RT 5538.) Based on the additional stress in the household when Genny came to live with them, she would expect Veronica to exhibit some of the parenting practices that had been modeled to her as a child. (47 RT 5540-5544.) On cross-examination, Perez-Arce testified that less than half of children who are physically abused become child abusers. (47 RT 5551.)

Gonzales argued that the evidence was admissible to show identity and motive. (49 RT 5781.) He further argued that even if it was inadmissible under Evidence Code section 1101, it was admissible under his constitutional right to present a defense. (49 RT 5792.)

The trial court ruled the expert could testify how children learn values and behavior, including disciplinary patterns. (47 RT 5584, 5592-5593, 5612; 48 RT 5762.) The expert could also testify as to Gonzales's character, under Evidence Code section 1102. (47 RT 5589, 5612; 48 RT 5762.) The court, citing *People v. Walkey* (1986) 177 Cal.App.3d 268, ruled the expert could not testify as to Veronica's character. The testimony was excluded because the testimony is prohibited by Evidence Code section 1101 as inadmissible character evidence. (47 RT 5585, 5590-5591, 5601; 48 RT 5763; 49 RT 5809.) The court further ruled that exclusion of the evidence did not infringe Gonzales's constitutional right to present a defense. (49 RT 5810-5811.) The court noted the proffered evidence was speculative and far weaker than what would be required to override state evidentiary rules. (49 RT 5811-5813.)

At various points throughout the trial and penalty phase, Gonzales renewed his request to present the evidence. (56 RT 6940-6945; 60 RT 7660, 7677; 65 RT 8233, 8264, 8269-8283.) The court's ruling remained the same, except it ruled that Gonzales could ask Anita Negrette, Veronica's sister, whether Veronica grew up in a troubled home to show Anita's bias against Gonzales (and in favor of Veronica to rebut Gonzales's position that Veronica was abusive towards Gonzales). (60 RT 7684.) The court did not allow the defense to present testimony of specific acts committed by Ortiz on her daughters. (60 RT 7684-7686.)

A. The Trial Court Properly Ruled Evidence Of Veronica's Upbringing To Show She Was More Likely The Perpetrator Of Genny's Abuse Was Inadmissible Character Evidence

The trial court properly exercised its discretion in ruling that Veronica's childhood background was not admissible because it was improper character evidence. A trial court's rulings on the admissibility of character evidence under Evidence Code sections 1101 and 352 are reviewed for abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230.)

Gonzales claims the trial court's ruling was a per se abuse of discretion. (AOB 50.) Gonzales's apparent reasoning is the trial court's ruling is not entitled to deference because it erroneously concluded the proffered evidence was character evidence. (AOB 50.) The nature of the proffered evidence was character evidence, regardless of how Gonzales now attempts to characterize it. The proffered evidence was only relevant if it tended to show that because of her background, Veronica had the disposition to commit the crime. The trial court did not apply the wrong statute in excluding the evidence. The correct statute governing the proffered evidence is Evidence Code section 1101. Accordingly, the ruling by the trial court is not error unless the trial court abused its discretion. (*People v. Harrison, supra*, 35 Cal.4th at p. 230.)

Evidence Code section 1101, subdivision (a) generally prohibits the "evidence of a person's character or a trait of his or her character . . . when offered to prove his or her conduct on a specified occasion." Subdivision (b) provides an exception "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such act." Moreover, to be admissible, the evidence "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." (*People v. Harrison, supra*, 35 Cal.4th at p. 229.)

Here, Gonzales's proffered evidence was that, because Veronica had witnessed abuse in her home, it should be inferred that she, not Gonzales, was the one who tortured and murdered Genny. In other words, that because of her childhood, Veronica was predisposed to abuse Genny. This is prohibited character evidence. It is explicitly prohibited by Evidence Code section 1101 because it is evidence of a trait of Veronica's character (growing up in an abusive home) to prove her conduct on a specific occasion (that she tortured and murdered Genny).

In *People v. Walkey, supra*, the prosecution elicited evidence in a child murder case from an expert witness that the single most important factor in whether one is a child abuser is whether they were themselves abused in infancy or childhood. (*People v. Walkey, supra*, 177 Cal.App.3d at p. 277.) On cross-examination, the defendant admitted that he had been abused as a child, and the prosecutor argued that the defendant fit the profile of a battering parent. (*Ibid.*) The Court of Appeal held the trial court erred by admitting the "battering parent syndrome" evidence. (*Id.* at pp. 278-279.) The court relied in part on other courts that have addressed the issue and found that "character evidence in criminal cases may not be used to prove a defendant acted in conformity with such character." (*Id.* at p. 278.) "Such evidence invites a jury to conclude that

because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child . . . abuse, it is more likely the defendant committed the crime." (*People v. Walkey, supra*, 177 Cal.App.3d at p. 278.)

Here, the same reasoning applies. The forbidden inference is that Veronica is more likely to have committed the crime because she grew up in an abusive home. Gonzales contends that the propensity rule was inapplicable because he did not attempt to elicit evidence that Veronica previously abused children. (AOB 52.) In *Walkey*, the prohibited inference was that because the defendant was abused as a child, he was more likely to be a child abuser. (*People v. Walkey, supra*, 177 Cal.App.3d at pp. 278-279.) In *Walkey*, the prosecutor did not elicit evidence that the defendant previously abused children. It was his character as being abused as a child, coupled with expert opinion that such character trait makes him more likely to be a child abuser, that was prohibited. The prohibition is not limited to using prior crimes to prove a person acted in conformity with a character trait. (Evid. Code, § 1101, subd. (a); *People v. Walkey, supra*, 177 Cal.App.3d at pp. 278-279.) Thus, Gonzales's request to infer Veronica abused Genny based on her witnessing abuse in her home is prohibited.

Gonzales claims that he never attempted to make the forbidden inference that Veronica had the propensity to abuse children. (AOB 52.) The relevance of the evidence was that based on her background, Veronica, and not Gonzales abused Genny. Gonzales claims it was to show Veronica applied the disciplinary techniques she learned at home "and applied those techniques against Genny." (AOB 52.) Regardless of how Gonzales phrases it, the inference he is seeking is that Veronica abused Genny because she was predisposed to do so, based on her background.

Gonzales claims the court's reliance on *People v. Walkey* was erroneous because the evidence was not "profile evidence." (AOB 54.) The trial court did not rule the evidence was inadmissible because it was "profile evidence." Nor did the court in *People v. Walkey* rule that the evidence was inadmissible because it was "profile evidence." The court in *People v. Walkey* ruled the evidence was inadmissible because it was improper character evidence. (*People v. Walkey, supra*, 177 Cal.App.3d at p. 276.)

Gonzales attempts to distinguish *People v. Walkey* on the grounds that (1) he did not seek to elicit evidence of a battering-parent profile and (2) he did not attempt to present evidence that Veronica fit the battering-parent profile. (AOB 56-57.) Gonzales sought to elicit evidence from Dr. Perez-Arce that individuals learn parental behaviors through observations of their parental figures, and that she would expect Veronica to exhibit some of the parenting practices that had been modeled to her as a child. (47 RT 5520, 5540-5544.) Thus, although Gonzales words it differently in his brief, he sought to admit evidence of a battering parent profile (those that come from abused homes). He sought to admit evidence that Veronica fit that profile--that she would be expected to be a batterer because that had been modeled to her as a child. The evidence Gonzales attempted to elicit here is indistinguishable from that in *Walkey*: Veronica came from an abused home, therefore, she was more likely to be the abuser.

Likewise, even without the expert testimony, the evidence that Veronica came from an abused house is still indistinguishable from *Walkey* because the purpose for which its admission was sought was to make the forbidden inference that Veronica was predisposed to commit the crime because she came from an abusive home. Gonzales claims that without evidence of a battering-parent profile, the evidence did not imply that Veronica fit the profile and the jury would have no basis to conclude that she was a child abuser. (AOB 57.)

If there were no basis to conclude Veronica was a child abuser, and Gonzales did not attempt to infer that Veronica was a child abuser based on her background, then there was no relevance to the evidence. Gonzales claimed, and still claims, the relevance of the evidence was to show Veronica was the abuser. (6 CT 1327; AOB 42.) Showing Veronica's background of growing up in an abusive home by itself was not relevant. It is only relevant when coupled with the inference that because of that background, she was the one that inflicted the abuse on Genny.

Relying on *People v. Griffin* (2004) 33 Cal.4th 536, Gonzales argues disposition is not part of the inferential chain at issue in this case. (AOB 55-56.) The evidence in *Griffin* that Gonzales argues is comparable was admitted for an entirely different purpose than the evidence in this case. In *Griffin*, the defendant admitted he killed his 12-year-old step-daughter, but denied he sexually assaulted her. (*Id.* at p. 547.) The prosecutor sought to admit evidence in the penalty phase that the defendant had worked in a slaughterhouse to show he slaughtered the victim like an animal as evidence of the circumstance of the crime. (*Id.* at p. 581.) The defendant's former employer testified that defendant had worked in the slaughter house. Defendant did not himself slaughter sheep, but had the opportunity to watch the process. The sheep were killed by rendering each animal unconscious with an electrical stun, stabbing them in the neck with a knife and slashing their throats to sever the jugular veins and causing exsanguination. After the animals died, their bodies were slashed from the hips through the belly, and the brisket toward the neck, opening their body cavity. The pathologist testified that the defendant rendered the victim unconscious by strangulation, stabbed her neck with a very sharp knife, then severed her carotid artery and caused exsanguination by slashing her throat. After the victim died, the defendant slashed her body in four strokes from her

chest to her belly and pubic area toward her buttocks, opening her body cavity. (*People v. Griffin, supra*, 33 Cal.4th at p. 582.)

In *Griffin*, the defendant claimed the evidence was not relevant, and was unduly prejudicial. (*Id.* at p. 583.) This Court held the evidence was relevant to show the defendant treated his step-daughter more like an animal than a human being, so he was more blameworthy, and that the evidence was not unduly prejudicial. (*Ibid.*) It was not offered to show the defendant, because of what he had witnessed, was more likely to be the killer. Therefore, it is not comparable to the facts in this case. Gonzales sought to admit the evidence to show that because of what Veronica witnessed as a child, she was the one who committed the acts. This is classic character evidence. In *Griffin*, the prosecutor did not use the evidence to claim the defendant was disposed to commit the crime, and on appeal he did not claim the evidence was improper character evidence.

Citing cases which state the purpose for the propensity rule and profile evidence, Gonzales claims that the rationale for the rules further demonstrate their inapplicability. (AOB 52-53, 57.) In *People v. Falsetta* (1999) 21 Cal.4th 903, 915-916, this Court stated there were three reasons for the rule prohibiting propensity evidence.

> The rule of exclusion (1) relieves the defendant of the often unfair burden of defending against both the charged offense and the other uncharged offenses, (2) promotes judicial efficiency by avoiding protracted 'mini-trials' to determine the truth or falsity of the prior charge, and (3) guards against undue prejudice arising from the admission of the defendant's other offenses.

Gonzales also cites from *People v. Walkey* that the "nature and extent of the potential prejudice to a defendant generated by character evidence renders it inadmissible." (AOB 57.) Gonzales concludes that since there would be no prejudice to Veronica, the propensity rule should not be applied. (AOB 53, 57-58.) Given Gonzales's logic that the propensity rule should only apply when

it meets one of the outlined purposes, the propensity rule would only apply to evidence of other offenses admitted against *a defendant*. The statute is not limited to just offenses or prior crimes, nor is it limited to character evidence of a defendant. The propensity rule applies equally to admission of other acts or crimes of a third party or co-defendant.

In *People v. Davis* (1995) 10 Cal.4th 463, 510, this Court rejected an argument that Evidence Code section 1101 applied only to defendants. In *Davis*, the defendant claimed it was error for the court to exclude evidence of a third party's prior violent acts to show the third party was the perpetrator of the crime. (*Id.* at p. 500.) This Court held the trial court properly excluded the evidence because it was "essentially an attempt to show that [the third party] was more likely to have been the killer because he had a history of violence." (*Id.* at p. 501.)

Recently, in *People v. Abilez* (2007) 41 Cal.4th 472, 498-502, this Court upheld the trial court's determination under Evidence Code section 1101 that the defendant could not offer evidence of a co-defendant's prior offenses to prove the co-defendant was the one who sodomized and killed the victim. Gonzales's argument that the evidence should have been admitted because it did not prejudice Veronica is unavailing–lack of prejudice is not a requirement to admission of the evidence. Thus, Gonzales's argument that the rationale for the propensity rule demonstrates its inapplicability is without merit.

Citing *People v. Smith* (2005) 35 Cal.4th 344, 356, Gonzales claims that the court erred by excluding the evidence because even if it is profile evidence, it should be barred "only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (AOB 58.) Gonzales misses the poin.. The evidence is barred by Evidence Code section 1101 because it is improper character evidence. This Court in *People v. Smith* held that "profile evidence" is not a separate ground for excluding evidence. It did not hold that other

sections of the Evidence Code are to be disregarded when profile evidence is proffered.

Gonzales claims that the only way the jury would have concluded from the evidence that Veronica had a predisposition to commit the crimes was if they used knowledge learned outside the courtroom that child abuse tends to be intergenerational. (AOB 58-59.) Without the inference that because Veronica's home was abusive she was the one who abused, tortured and murdered Genny, the evidence is irrelevant. Gonzales sought to use the evidence for that purpose: to show Veronica was the abuser. Gonzales repeatedly states the relevance of the evidence is to show that Veronica is likely to have been the one to abuse Genny. He cannot escape the purpose for which he sought its admission with semantics. It is improper character evidence.

Gonzales next claims the evidence was admissible to show Veronica's motive and identity. (AOB 59-60.) While other acts are admissible for purposes other than to show a persons disposition to commit such acts, the evidence did not show Veronica's motive and identity: it showed her disposition to commit the crimes.

Gonzales does not explain how the proffered evidence is relevant to prove motive or identity. As he does throughout his argument, he claims that Veronica learned the "excessive disciplinary techniques" from her mother, and concludes she therefore disciplined Genny excessively and abusively. (AOB 60.) The evidence does not show a motive. "[E]vidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable." (*People v. Roldan* (2005) 35 Cal.4th 646, 707.) Growing up in an abusive house does not show why Veronica would single Genny out for abuse or torture her. It would show motive, if for example, the abuse was perpetrated on her mother because a reasonable inference is she was angry at her mother for inflicting abuse, so she had a motive to retaliate. Having learned

how to abuse a child in her home does not show she had a motive to abuse, torture, and murder Genny.

Likewise, the proffered evidence does not prove Veronica's identity.

> For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.

(*People v. Roldan, supra*, 35 Cal.4th at p. 706, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) As Veronica did not commit the prior acts, but was either a victim or a witness to them, Gonzales's argument that the evidence showed her identity fails. Gonzales concludes that the evidence showed she was the sole, or alternatively the primary perpetrator of the abuse. (AOB 60.) If Gonzales' argument is that the evidence showed Veronica as the perpetrator of the abuse not by showing she committed a signature-type crime, but because of her background, it is impermissible character evidence because it is using her character to show her identity.

Lastly, Gonzales argues the evidence should not have been excluded because it was relevant evidence of third party culpability. (AOB 61.) While Gonzales had a right to present evidence that a third party committed the crime, it must be otherwise admissible. (*People v. Abilez, supra*, 41 Cal.4th at p. 502.) As this evidence was impermissible character evidence, it was not admissible as third party culpability evidence. (*Ibid.*)

B. Exclusion Of The Character Evidence Did Not Infringe Gonzales's Constitutional Rights

Gonzales claims exclusion of the evidence of Veronica's childhood violated his constitutional rights to present witnesses and a complete defense, to present relevant mitigating evidence and rebut aggravating evidence, and to a fair and reliable capital sentencing determination. (AOB 61-83.)

As this Court recently explained,

> Defendant's argument fails to account for the general rule that the application of the ordinary rules of evidence under state law do not violate a criminal defendant's federal constitutional right to present a defense, because trial courts retain the intrinsic power under state law to exercise discretion to control the admission of evidence at trial. (*People v. Lawley* (2002) 27 Cal.4th 102, 155.) . . . . This general rule will give way in extraordinary and unusual circumstances, but such was not the case here.

(*People v. Abilez, supra*, 41 Cal.4th at p. 503.)

Moreover, as this Court has stated:

> The United States Supreme Court has held that the constitutional right to present and confront material witnesses may be infringed by general rules of evidence or procedure which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness. However, the high court has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible.

(*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

Gonzales claims the exclusion of third-party culpability evidence "is the paradigmatic evidentiary ruling that violates a defendant's rights to a defense." (AOB 62.) This Court has consistently ruled that excluding evidence of third party culpability evidence does not violate a defendant's constitutional rights. (*People v. Cudjo, supra*, 6 Cal.4th at p. 604 [trial court excluded evidence that a third party confessed to the crime]; *People v. Yeoman* (2003) 31 Cal.4th 93, 140-141 [trial court excluded third party culpability evidence]; *People v. Farmer* (1989) 47 Cal.4th 888, 921, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690 [trial court excluded evidence of accomplice's violent history to show he was more likely to have murdered victim]; *People v. Davis, supra*, 10 Cal.4th at p. 500 [trial court excluded evidence of third party's prior sex crimes to show third party committed crimes]; *People v. Abilez, supra*, 41 Cal.4th at p. 503 [trial court excluded evidence of co-defendant's prior sex

crimes].) Gonzales has not made a compelling argument for this Court to depart from its longstanding precedent.

Gonzales also claims that his constitutional rights were violated because the evidence was favorable and crucial to his defense, and its exclusion failed to advance legitimate state interests. (AOB 63-69.) In *People v. Abilez*, this Court held the trial court's exclusion of similar evidence, that of a co-defendant's background to show he was more likely the perpetrator of the crimes, did not violate the defendant's constitutional rights. (*People v. Abilez, supra*, 41 Cal.4th at p. 503.) This Court explained:

> We cannot say the excluded evidence was 'so vital to the defense that due process principles required its admission. [Citations.] Although the high court in *Chambers* determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of the case before it, it did not question 'the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.'

(*Ibid.*, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [93 S.Ct. 1038, 35 L.Ed.2d 297] and *People v. Cornwell* (2005) 37 Cal.4th 50, 82.) As in *Abilez*, the trial court's evidentiary ruling on Evidence Code section 1101 was a "garden-variety evidentiary issue" and did not violate Gonzales's right to present a defense. (*People v. Abilez, supra*, 41 Cal.4th at p. 503.)

Gonzales claims the trial court erred in concluding that exclusion of the evidence did not violate Gonzales's constitutional rights because it lacked sufficient probity. (AOB 69.) The court did not exclude the evidence because it lacked sufficient probity, and stated that it believed there was some probative value to the evidence. (49 RT 5812.) The trial court held it was inadmissible character evidence. (49 RT 5809.) The court further analyzed whether exclusion of the evidence violated Gonzales's constitutional rights, and concluded that the evidence was far weaker and far more speculative than evidence in cases such as *Chambers* and *Green*. (49 RT 5811, discussing

Chambers v. Mississippi, supra, 410 U.S. at 284 [state evidentiary rule that party cannot impeach its own witness prevented defendant from presenting third party culpability defense that someone else confessed to the crime because witness recanted his confession and defense could not cross-examine him on prior confessions]; and *Green v. Georgia* (1979) 442 U.S. 95 [99 S.Ct. 2150, 60 L.Ed.2d 738] [trial court excluded evidence as hearsay that a co-perpetrator had admitted to a friend that it was he who shot and killed the victim].) The court also concluded that it would infringe the People's right to a fair trial to admit the evidence. (49 RT 5812.)

Gonzales claims the trial court's analysis was flawed in relying on the People's right to a fair trial. The court did not exclude the evidence because it would "decrease the likelihood of a conviction." (AOB 70-71.) Nor did the court exclude the evidence, as Gonzales contends, because it was not admissible in Veronica's trial. (AOB 71.) The court, in its analysis, was pointing out the nature of the evidence: inadmissible character evidence. It is particularly evident when analyzed in the context of whether the same evidence would be admissible in Veronica's trial to show what Gonzales attempted to show–that Veronica committed the crime.

Gonzales requests this Court to reject its pronouncement in *People v. Cudjo* that the right to present a defense can be infringed only by general rules of evidence, and not a trial court's misapplication of the evidentiary rules. (AOB 72-74.) In *People v. Cudjo*, the trial court excluded evidence that the defendant's brother confessed to the crime because the person he confessed to was unreliable and untrustworthy. (*People v. Cudjo, supra*, 6 Cal.4th at pp. 604-606.) This Court held the trial court abused its discretion because doubts about the hearsay declarant's credibility were for the jury, not the court to make. (*Id.* at p. 610.) This Court found the proper standard of prejudice was that of *People v. Watson* (1956) 46 Cal.2d 818, 836, that holds the error is harmless

unless it is reasonably probable the verdict was affected by the error, and not that of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], that requires reversal unless the error is harmless beyond a reasonable doubt. (*People v. Cudjo, supra*, 6 Cal.4th at p. 611.)

This Court has explained that because the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense, the mere erroneous exercise of discretion under such "normal" rules does not implicate the federal Constitution. (*People v. Cujo, supra*, 6 Cal.4th at p. 611.) This Court noted,

> [t]he United States Supreme Court has held that the constitutional right to present and confront material witnesses may be infringed by general rules of evidence or procedure which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness. However, the high court has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible.

(*Ibid.*)

Gonzales argues this premise is "fundamentally flawed," and that it is not supported in United States Supreme Court precedent, principles of constitutional law, or logic. (AOB 72-74.) As this Court has explained, it will "not lightly assume that a trial court invites federal constitutional scrutiny each and every time it decides, on the basis of the particular circumstances, to exclude a defense witness as unworthy of credit." (*People v. Cudjo, supra*, 6 Cal.4th at p. 612.) Moreover, the trial court did not exclude the testimony because it found the witnesses were not credible. Rather, it excluded testimony based on its nature as inadmissible character evidence.

Gonzales fails to provide a persuasive reason for this Court to reject its pronouncement in *Cudjo*. Moreover, Gonzales's argument is particularly unavailing since the trial court properly applied the rules of evidence.

Gonzales argues that even if the trial court properly excluded the evidence under Evidence Code section 1101, his constitutional rights were violated because the evidence was exculpatory, central to his defense, and the state lacked an interest in maintaining the integrity of the adversarial process that outweighed his interest in presenting a defense. (AOB 75.) Gonzales also claims the rule was applied arbitrarily because he did not seek to use the evidence to prove Veronica's propensity or disposition to commit the crime. (AOB 76.) As previously stated, the proffered evidence was only relevant if Gonzales used the evidence to show Veronica's character to commit the crime. Thus, Gonzales's argument fails.

Gonzales argues excluding the evidence did not serve the purposes the propensity rule was designed to serve, i.e. to protect criminal defendants from prejudicial other-acts evidence, thus its enforcement is disproportionate to its purposes. (AOB 76-77.) Gonzales also notes there has been scholarly criticism of the exclusion of character evidence to show third party culpability. (AOB 78.) If Gonzales's argument were accepted, Evidence Code section 1101 would only apply to evidence of a defendant's character. However, this is not what the statute says. The propensity rule is not so limited.

As this Court has already stated:

> neither due process nor *Chambers v. Mississippi* has led the high court to 'question[] the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability–even if the defendant would prefer to see that evidence admitted.'

(*People v. Yeoman, supra*, 31 Cal.4th at pp. 142-143, quoting *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636].)

Nor did exclusion of the evidence at the penalty phase infringe Gonzales's rights to present relevant mitigating evidence, to rebut aggravating evidence or to have a fair and reliable capital sentencing hearing, as Gonzales claims. (AOB 79-83.) At the penalty phase, a defendant must be permitted to

offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record. (Pen. Code, § 190.3; *People v. Marlow* (2004) 34 Cal.4th 131, 152; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8 [106 S.Ct. 1669, 94 L.Ed.2d 1].) However, the rule allowing all relevant mitigating evidence has not "abrogated the California Evidence Code." (*People v. Phillips* (2000) 22 Cal.4th 226, 238; *People v. Edwards* (1991) 54 Cal.3d 787, 837.) Additionally, the trial court retains discretion to exclude evidence that is irrelevant. (*People v. Marlow, supra*, 34 Cal.4th at p. 152.) Moreover, "'[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Phillips, supra*, 22 Cal.4th at p. 238, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.)

As this Court noted in *People v. Frye* (1998) 18 Cal.4th 894, 1015-1016, the Eighth and Fourteenth Amendments contemplate

> the introduction of a broad range of evidence mitigating imposition of the death penalty. [Citations.] The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." (*Jurek v. Texas* (1976) 428 U.S. 262, 271 [96 S.Ct. 2950, 2956, 49 L.Ed.2d 929].)
>
> At the same time, however, the United States Supreme Court has made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record or the circumstances of the offense. . . . Thus, in a proper exercise of its discretion, the trial court determines the relevancy of mitigation evidence in the first instance. [Citations.]

Here, the evidence was impermissible evidence of Veronica's character. For the same reasons the evidence was inadmissible at the guilt phase, it was inadmissible at the penalty phase. (*People v. Farmer, supra*, 47 Cal.3d at p. 921, fn.5.) The court properly applied an evidentiary rule. Thus, Gonzales's rights to present relevant mitigating evidence, to rebut aggravating evidence and

to have a fair and reliable capital sentencing hearing were not violated. (*People v. Yeoman, supra*, 31 Cal.4th at pp. 141-142.)

C. Exclusion Of The Evidence Of Veronica's Childhood Did Not Prejudice Gonzales

Even if the trial court erred by excluding evidence of Veronica's childhood, there was no prejudice to Gonzales. Had the evidence been admitted, it is not reasonably probable that the jury would have reached a more favorable verdict. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 [standard for excluding defense evidence is governed by *People v. Watson, supra,* 46 Cal.2d at p. 836].) Contrary to Gonzales's view, the evidence against him was compelling. The torture was brutal. It was particularly egregious because it was inflicted on a helpless, four-year-old child by those who were entrusted to take care of her. Genny had injuries all over her body, including ligature marks where she had been bound and hung. Her murder was particularly cruel and brutal.

Gonzales admitted, repeatedly, that he and Veronica put Genny in the bathtub, and he was the one who turned on the water. (8 CT 1760, 1762, 1774, 1796, 1803, 1812, 1823.) Gonzales said Veronica was never in the bathroom alone with Genny. (8 CT 1841.) Ivan Jr. said that both of his parents were in the bathroom with Genny. (9 CT 1972.) Genny was forcefully held in the scalding hot water, causing her skin and toenails to peel off her body and her eventual, extremely painful, death. (51 RT 6068-6071, 6084; 53 RT 6476, 6481, 6554-6555, 6565; 56 RT 7008; 95 RT 11871.) In spite of Gonzales's statement that "I won't lie," (8 CT 1831), Gonzales said that neither he nor Veronica held or forced Genny in the water. (8 CT 1813-1814, 1816.)

The evidence showed Genny died between 3:00 and 6:00 p.m. Expert testimony revealed Genny would have gone into shock two to three hours after being burned. (51 RT 6121-6122; 53 RT 6493.) It took another two to three

hours for rigor to set in (51 RT 6123-6124), therefore, the burn occurred three to six hours prior to when the police responded to the scene (51 RT 6124). Even assuming the best scenario for the defense–that shock occurred very quickly, and rigor mortis had not set in, it still would have taken at least an hour for Genny to go into shock and die. (53 RT 6493.) Had Genny received medical intervention, she had a 70 to 90 percent chance of survival. (53 RT 6492.) Instead of seeking medical assistance, Gonzales went to the store and bought bread and beer. (52 RT 6242, 6260, 6353; 8 CT 1761.)

The evidence was also strong that Gonzales tortured Genny leading up to the murder. Gonzales stated that he was the main disciplinarian, and that he disciplined his children by hitting them with a belt. (8 CT 1768-1770.) Ivan Jr. said that Gonzales and Veronica hit Genny with a belt. (9 CT 1977.) Both Gonzales and Veronica told their children to throw balls at Genny. (9 CT 1949-1950, 1980-1981, 2013-2014, 2017.) They also forced Genny to eat her feces if she had an accident. (9 CT 1932-1933.)

Gonzales said that both he and Veronica hit the children with a brush. (8 CT 1840-1841.) Gonzales said that Veronica was a good mother and took good care of the children, and that he had never seen Veronica hit Genny. (8 CT 1781.) Gonzales said that Veronica would not "torture" Genny. (8 CT 1801.) Gonzales admitted he spanked Genny "a few times." (8 CT 1786.)

Ivan Jr. said his parents tied Gennys wrists together with rope. (9 CT 1936, 1979.) Gonzales said that Veronica would not tie Genny up. (8 CT 1806.) Gonzales initially said Veronica never restrained Genny's hands in any way (8 CT 1784), then said that Veronica tied her hands (8 CT 1787, 1819, 1839). Genny had scars on her arms caused by an object that went around her arm and wore the skin away, and ligature injuries. (51 RT 6061, 6066.)

Gonzales lied to the detectives and told them Genny's head injury was from pulling a hot pot off the stove. (8 CT 1770; 53 RT 6502-6503.) Genny's

burn on her head was not accidental. (53 RT 6501-6503.) Ivan Jr. said that Gonzales and Veronica burned Genny's head with hot water in the bathtub. (9 CT 1976, 2019, 2038.) Gonzales held Genny's head down while Veronica poured hot water on her. (9 CT 2021-2023.) Genny had a large, third degree burn on her head that was infected, reddened and raw. (51 RT 6039-6040; 53 RT 6497; 91 RT 11332.)

Hours prior to her death, Genny was burned by a blow dryer on her face, shoulders and biceps. (51 RT 6047, 6059-6060; 53 RT 6509; 55 RT 6833-6835, 6937-6838, 6848.) Genny's skin was indented and tissue had been charred. (55 RT 6814.) Nevertheless, Gonzales said he never saw the blow dryer marks on Genny's cheeks. (8 CT 1790, 1817-1818.) Gonzales lied to the detectives by telling them Genny's facial injuries were from falling on a mop, and from his children throwing toys at her. (8 CT 1772, 1818.)

Gonzales admitted he put the hook up in the closet "to scare [Genny]." (8 CT 1807, 1809.) Ivan Jr. said both Gonzales and Veronica tied Genny's hands with rope and hung her in the closet. (9 CT 1946-1948, 1985-1987, 2028.) Genny had a ligature mark on her neck, to the point where her skin was ulcerated, consistent with her being hanged in a closet. (51 RT 6052-6054.) Genny's blood drops were inside the closet door and on the hook. (52 RT 6333; 53 RT 6547; 54 RT 6678, 6680, 6689-6690, 6669-6670; 56 RT 7007-7008; 93 RT 11682.) Genny's bloody footprint was inside the closet where she had pushed off the wall while she was hung in the closet. (52 RT 6334-6335; 54 RT 6684; 93 RT 11670.) The evidence showed Genny was hung, suspended from the hook. (54 RT 6685.) Genny rubbed her hair on the hanging rod, and her movement back and forth cast blood off and it spattered on the wall. (54 RT 6685.) Gonzales lied by saying Genny's ligature marks on her neck were from the neighbor children pulling candy necklaces around her neck. (8 CT 1773.)

Gonzales admitted he put Genny inside the two foot wooden box for a few hours "to scare her." (8 CT 1804-1805; 52 RT 6325.) Genny's blood and feces were inside the box in a swiping-type pattern, indicated she was moving around a lot. (52 RT 6328-6329, 6359; 53 RT 6546; 54 RT 6688; 56 RT 7008.)

Gonzales admitted he bought the handcuffs that were used on Genny, which caused ulcerations of her skin on her arms starting at her elbow. (8 CT 1783; 51 RT 6064-6065; 91 RT 11434-11435.) He denied ever putting them on Genny. (8 CT 1822.)

In addition to these acts of abuse, Genny had a brain injury from being violently shaken or dealt a severe blow (51 RT 6076-6077; 53 RT 6503, 6505), bruises on her face (51 RT 6078; 53 RT 6505-6506), black eyes caused by blunt force (51 RT 6040, 6045-6046), eye injuries consistent with being strangled (51 RT 6082), an abrasion on the bridge of her nose (51 RT 6046), abrasions and bruises on her cheekbone (51 RT 6047-6048), abrasions on her upper cheek consistent with being hit by a hairbrush (51 RT 6050), ear injuries so severe the cartilage was exposed (51 RT 6042-6043, 6089; 53 RT 6515), an abrasion and a bruise on her left shoulder (51 RT 6055-6056, 6059), burn marks on her right shoulder (51 RT 6063), bruising on her neck caused by an external blow (51 RT 6059), injuries on her heels and ankles where the skin was ulcerated (51 RT 6070, 6072; 91 RT 11368), bruises on her thighs that looked like finger marks (51 RT 6073-6074), a laceration on the inside of her lip, a tear between her lip and gum (91 RT 11346), erosion of her skin on the left side of her face (51 RT 6044-6045), and a reduced thymus gland from being abused (51 RT 6083).

In contrast to the strength of the evidence Gonzales abused, tortured, and eventually murdered Genny, the excluded evidence was speculative and weak. Gonzales did not propose to admit any direct evidence that Veronica solely

perpetuated the abuse. It would require speculation that just because Veronica grew up in an abusive household, she was the one who perpetrated the abuse against Genny.

In Gonzales's detailed offer of proof, he anticipated the evidence would come from four sources, none of which provided many details or remembered the abuse. The first witness was J. Alexandra Krahelski, a social service worker who was assigned to investigate the abuse in the Ortiz household. (7 CT 1528.) The report by Krahelski was written in 1980, seventeen years prior to the trial. (7 CT 1528.) Krahelski did not have any independent recall of the report or the abuse. (7 CT 1530.)

The second witness was Beverly Ward, Veronica's cousin. (7 CT 1530-1531.) Ward recalled spending time in the Ortiz home in 1979, and that Ortiz was a heavy drinker and when drunk was "scary." (7 CT 1531.) Ward recalled Mary being mistreated, such as being punished by washing the dishes, but not Veronica. (8 CT 1531.) Ward could not recall the specifics of her conversation with the social worker or an incident she told the social worker about where Ortiz was abusive to her daughters. (8 CT 1531-1532.) Ward did not remember any details of abuse, but when questioned about her previous statement, she said it sounded right. (8 CT 1532.) Ward only remembered Ortiz being a violent drunk and pulling her daughter's hair. (8 CT 1533.)

The third witness was Paul Becerra, Veronica's uncle. (8 CT 1533.) Becerra's proposed testimony was that Veronica was her step-father's favorite, and Veronica was treated better than her sisters. (8 CT 1533.) Ortiz had a drinking problem and got into fights when she was drunk. (8 CT 1533-1534.) Ortiz hit Mary, and once Mary showed him burns on her body. (8 CT 1533.) Ortiz yelled and cursed at her daughters. (8 CT 1533.)

The fourth witness was Shirley Leon, a family friend. (8 CT 1534.) She did not witness any abuse, but remembered Mary and Veronica telling her Ortiz

abused and burned them. (8 CT 1534-1535.) Thus, none of the witnesses Gonzales proposed to present actually witnessed much of the alleged abuse in the Ortiz household. What they did witness was mostly Ortiz being an out of control drunk. Although Veronica apparently later confirmed some of the abuse in the household (49 RT 5815), she was unavailable as a witness (52 RT 6230). Additionally, there was no allegation that any of the abuse was perpetrated on Veronica.

Even if Gonzales could present persuasive evidence that Ortiz was abusive to her daughters, it would still require the jurors to infer that because Veronica witnessed the abuse, she perpetrated the abuse on Genny. This inference is speculative. Even the expert witness testified that less than half of children who are physically abused become child abusers. (47 RT 5551.) A further weakness in Gonzales's evidence was that there was no allegation Veronica tortured or abused her other children in the same manner. The inference Gonzales wanted the jury to draw was that Veronica learned the abusive techniques from her childhood, and used the techniques on Genny. The inference would be supported if there was evidence Veronica abused all her children in the same manner. Thus, the inference that Gonzales sought to put before the jury is not particularly logical. Moreover, Gonzales's argument is not persuasive because it does not take any specialized knowledge to learn how to beat and torture a helpless child.

Even under the stricter *Chapman* standard of review urged by Gonzales (AOB 87), there was no prejudice. Under the harmless error standard of *Chapman v. California, supra,* 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], reversal is required unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict.

Given the strength of the evidence against Gonzales as detailed above, and the weak evidence Gonzales sought to admit, any error in exclusion of the evidence was harmless under either standard.

Gonzales argues that evidence of his guilt was thin. (AOB 85.) Gonzales's argument assumes Veronica and Gonzales told the truth to the police, and the jury believed the defense argument. For example, Gonzales says his admissions that he put up the hook to scare Genny did not constitute an admission that he abused her. (AOB 85.) Given what the forensic evidence showed was done with the hook, i.e., hanging Genny by it, Gonzales's statement that he put up the hook and used it to scare Genny supports a reasonable inference that the abuse was done with his own hands. Gonzales also disregards Ivan Jr.'s statement that both his parents tied Genny's wrists together and hung her in the closet. (9 CT 1946-1948, 1985-1987, 2028.) Gonzales argues that his statement that he put Genny in the bathtub was not an admission of his guilt because he said the water was "appropriately warm." (AOB 85.) Gonzales disregards the evidence that the water was scalding hot, and that she was forcibly held down.

Gonzales argues the prosecutor's evidence against Gonzales was undercut because Veronica said she drew the bath and put Genny in the water. (AOB 85.) Veronica's statement was not true, as it was coupled with her statement that Genny drowned, which is known to be a lie. Gonzales also relies on the testimony he presented by Alicia Montes, who heard water running in the bathroom after Gonzales left the apartment to infer Genny was murdered after he left the apartment. (AOB 85-86.) The physical evidence showed Genny had died between 3:00 and 6:00 p.m. (51 RT 6124), therefore, the water that the neighbor heard running was not the scalding hot water that burned Genny's outer layers of skin and killed her. Gonzales relies on Ivan Jr.,'s testimony from the preliminary hearing that he did not see Gonzales put Genny

in the bathtub on the night she died. (AOB 86.) Gonzales disregards other statements made by Ivan Jr., however, that he saw both parents put Genny in the hot water (9 CT 1939), and that he believed both parents put Genny in the bathtub the night of her murder because "they always did it." (9 CT 1941.) Gonzales's arguments that the evidence against him was thin is belied by the record.

Gonzales surmises the jury must have had difficulty determining whether he was guilty of murder because they deliberated for seven days, and concludes it was therefore a close case. (AOB 86.) The trial was long (12 court days over more than 3 weeks) and there were over 100 exhibits. (13 CT 2953-2999; 56 RT 7015.) The jurors went scrupulously through the evidence, in a detailed fashion as indicated from their notes. The first day of deliberations, the jurors sent a request to the court for a flipchart, masking tape, a microwave, a television, a VCR, three steno pads, and twelve highlighter pens and post-it note pads. (9 CT 2111-2113; 13 CT 2999.) The next day, they requested green, red and blue markers and a small table to hold their coffee and condiments. (9 CT 2114; 13 CT 3001.) A few days later, they requested sugar packets, spoons, and cups for hot beverages. (9 CT 2118; 13 CT 3005.) Thus, it cannot be concluded that the length of deliberations was because the jurors were having difficulty. It appears more likely it was because they went through each piece of evidence and analyzed it.[12/] This was a lengthy, complex, capital case, thus the length of deliberations "demonstrates nothing more than that the jury was conscientious in its performance of high civic duty." (*People v. Cooper* (1991) 53 Cal.3d 771, 837.)

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12. Indeed, the jurors in later declarations explained that the foreperson re-read the instructions to the jury, and copied all the instructions onto a large flip chart. (11 CT 2472, 2474-2476, 2478-2479, 2481-2482.)

Gonzales argues that even if his murder conviction is upheld, the torture-murder special circumstance should be reversed because the torture-murder special circumstance required a specific intent to kill, and the proffered evidence would have negated the intent-to-kill. (AOB 88-90.) Gonzales's argument is premised on his theory that "the excluded evidence suggested that Veronica was the mastermind and the primary, if not sole, perpetrator of the acts against Genny." (AOB 89.) As discussed above, the excluded evidence was weak, and would not have shown the jury that Veronica was the primary perpetrator of the abuse, particularly when coupled with the strength of the evidence against Gonzales. For the same reasons any error was harmless with regard to Gonzales's murder conviction, it was also harmless with regards to the special circumstance finding.

Gonzales also claims that even if this Court affirms his murder conviction and special circumstance finding, it should vacate the death sentence because excluding the evidence undermined his ability to establish he was a minor participant or to present mitigating circumstances of the offense. (AOB 90.) For the penalty phase, the rulings are harmless if there is no reasonable possibility that the jury would have returned a different sentence in their absence. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) Stated another way, reversal is unnecessary if any error was harmless beyond a reasonable doubt. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479 [stating that state harmless-error analysis in the penalty phase is the equivalent of the test under *Chapman v. California, supra,* 386 U.S. at p. 24]; accord, *People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11.)

The analysis is the same: the evidence against Gonzales was strong and the excluded evidence was weak. The proffered evidence did not show that Gonzales was a minor participant. Thus, even had the evidence been admitted

at the penalty phase, there is no reasonable possibility that the jury would have returned a different sentence.

Gonzales claims excluding the evidence inaccurately inflated his degree of participation. (AOB 92.) Due to the weakness of the evidence, as explained above, it would not have shown Gonzales was a lesser participant in the crime. The evidence would not have "weakened the strength of the aggravating evidence" as Gonzales claims. (AOB 93.)

Citing law review articles, Gonzales argues it is more difficult to show harmlessness during the penalty phase than the guilt phase, and that using an overwhelming-evidence test is not appropriate in a penalty phase. (AOB 95-99.) Gonzales concludes that excluding relevant mitigating evidence should rarely be held harmless. (AOB 96.) Gonzales's arguments to change the standard this Court uses to evaluate harmlessness in the penalty phase are unpersuasive. There is no reasonable possibility admitting the evidence would have changed the death sentence. Thus, even if there was any error, there was no prejudice to Gonzales.

II.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING EVIDENCE THAT VERONICA HAD ANTIPATHY TOWARDS HER SISTER, GENNY'S MOTHER

Gonzales claims the trial court erred by excluding Veronica's statements to the police indicating she did not like Genny's mother. He claims the error violated the Evidence Code and his constitutional rights to present a defense, present mitigating evidence, rebut aggravating evidence, and have a fair and reliable capital sentencing determination. (AOB 100.) Veronica's feelings toward her sister (Genny's mother) did not show her motive to abuse, torture, and murder Genny. Therefore, the trial court did not abuse its discretion by finding the evidence irrelevant.

Prior to trial, Gonzales requested to admit two statements Veronica made when she was interviewed by the detectives. (6 CT 1316-1319.) The first statement was in response to a question of where her sister, Mary, lived. Veronica responded, "She's in, in I don't know if you call it rehabilit (sic) one of those kind of homes." The detective asked Veronica why Mary was there and Veronica responded, "Cause she's a little bitch. I mean–." (6 CT 1316.) The second statement by Veronica was made in response to a question about why Genny never screamed. Veronica said, "She does not talk. Her damn mother. I'm not saying (unintelligible) no I'm not saying. I'm saying her damn mother gets her so goddamn freaked out (unintelligible)." (6 CT 1317.) Gonzales argued these statements showed that Veronica disliked her sister, Mary, and acted on those feelings by singling out Genny, Mary's daughter, as the object of her hostility. (6 CT 1317.) In other words, it showed Veronica's motive to abuse, torture and murder Genny. (21 RT 1855.)

The trial court held that the statements showing "Veronica's anger or upset toward her sister" were not relevant. (21 RT 1860.) The inference that Veronica's feelings toward Mary would cause her to abuse Genny was "far too speculative to be relevant." (28 RT 3091.) It stated that if there was more of a link showing antipathy towards Genny, it would rule differently. (28 RT 3091; 49 RT 5818.) Prior to the penalty phase, Gonzales again requested to admit the evidence. (65 RT 8283-8291.) Based on the same reasoning, the trial court ruled the evidence was inadmissible. (65 RT 8291.)

A. The Trial Court Properly Exercised Its Discretion In Ruling The Evidence Was Speculative, Thus Not Relevant

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance

is whether the evidence tends "logically, naturally, and by reasonable inference" to establish disputed material facts such as identity, intent, or motive. (*People v. Scheid* (1997) 16 Cal.4th 1, 13.)

The trial court has wide discretion to determine the relevancy of evidence, subject to the requirements of Evidence Code section 352. (*People v. Marshall* (1996) 13 Cal.4th 799, 832-833.) Section 352 provides the trial court with broad discretion in assessing whether the probative value of particular evidence is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) A reviewing court will not disturb a trial court's ruling under Evidence Code section 352 unless the trial court exercised its discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*Ibid.*) The reviewing court thus reviews the trial court's ruling for an abuse of discretion, while giving the trial court's determination deference. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The trial court properly determined that Veronica's feelings towards her sister did not show a motive to abuse Genny. For it to show Veronica's motive, there would have to be an inference that the feelings towards Mary were transferred to Genny. That inference is not a reasonable one, and is speculative. "Evidence leading only to speculative inferences is irrelevant." (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

In explaining why the testimony was relevant, Gonzales claims that "because she had to care for Genny, Veronica resented Mary." (AOB 103.) There was no such evidence. The court repeatedly told Gonzales that if he could show some link showing Veronica's dislike for Mary resulted in antipathy towards Genny, it would allow admission of the evidence. (28 RT 3091; 49 RT 5818.) Veronica's dislike towards her sister, Mary, did not lead

to a reasonable inference that Veronica would abuse, murder and torture her niece because she was Mary's daughter.

Gonzales also claims the trial court erred in excluding the statements because it was evidence of a third party's culpability. (AOB 104-105.) While Gonzales had a right to present evidence that a third party committed the crime, it must be otherwise admissible. (*People v. Abilez, supra*, 41 Cal.4th at p. 502.) As stated above, a speculative inference is not relevant, thus it was not admissible. In addition, to be admissible, third party culpability evidence must raise a reasonable doubt as to a defendant's guilt, and "must consist of direct or circumstantial evidence that links the third party to the crime. It is not enough that another person has the motive or opportunity to commit it." (*Id.* at p. 517.)

Gonzales argues there was other evidence of third party culpability, such as Veronica's comments that she alone perpetrated the acts that caused Genny's death, evidence that Veronica did not leave the apartment the day Genny was murdered, that items belonging to Veronica were used to abuse Genny, and the excluded evidence that Veronica came from an abusive home. (AOB 65-66, 104-105.) Veronica did not state that she alone perpetrated the acts that caused Genny's death–she gave a self-serving statement that she put Genny in the bath and when she returned Genny had drowned. (See Argument III.) While there was no evidence Veronica left the apartment that day, there was no evidence Gonzales left the apartment that day either, except for short trips to the store. The evidence that some of the items of clothing used to bind and gag Genny were Veronica's did not show that Veronica alone abused Genny, particularly when Gonzales admitted that he put the hook up that was used to hang Genny, and admitted that he stuffed Genny into the two foot box. As discussed in Argument I, the evidence of Veronica's childhood abuse was inadmissible character evidence. Thus, while these acts may show Veronica also abused, tortured and murdered Genny, they do not show that Gonzales did not abuse,

torture and murder Genny. The excluded evidence, therefore, did not raise a reasonable doubt as to Gonzales's guilt.

Gonzales also claims that Perez-Arce's testimony explained that Veronica's resentment toward Mary had symbolic meaning for Veronica. (AOB 101-103.) Gonzales did not request that Perez-Arce's testimony on this issue be admitted. Perez-Arce was explaining her theory about how Veronica modeled her behavior after her mother. Gonzales sought to admit Perez-Arce's testimony to show Veronica's abusive childhood home made her more likely to perpetrate the abuse on Genny (see Argument I). (28 RT 3097-3104.) Gonzales did not propose to admit Perez-Arce's testimony regarding why Veronica's feelings towards Mary would result in abuse of Genny, and the court did not rule that such evidence was excluded on that basis. Thus, any claim that it was error to exclude Perez-Arce's testimony to explain why Veronica's feelings towards her sister showed that she was the one who abused, tortured and murdered Genny were forfeited. (*People v. Price* (1991) 1 Cal.4th 324, 430 ["Defendant may not challenge on appeal the admission of evidence on grounds not urged in the trial court"]; *People v. Ashmus* (1991) 54 Cal.3d 932, 972 [the general rule is that "questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal"].)[13/]

Exclusion of the evidence of Veronica's antipathy towards her sister did not violate Gonzales's constitutional rights, as he claims. (AOB 105-108.) As stated previously, the general rule is that

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13. Gonzales also mentions Perez-Arce's statement that Veronica believed that Gonzales and Mary had a relationship and that Genny was a result of the relationship. (AOB 101.) Upon inquiry, counsel said there was no evidence Gonzales intended to present that Veronica believed that Genny was the product of an extramarital affair between Gonzales and Mary. (65 RT 8290.) In addition, Gonzales did not seek to admit any such testimony.

> the application of the ordinary rules of evidence under state law do not violate a criminal defendant's federal constitutional right to present a defense, because trial courts retain the intrinsic power under state law to exercise discretion to control the admission of evidence at trial.

(*People v. Lawley* (2002) 27 Cal.4th 102, 155.) While this "general rule will give way in extraordinary and unusual circumstances," no such circumstances are presented in this case. (*People v. Abilez, supra*, 41 Cal.4th at p. 503.)

Gonzales's argument that the exclusion of the evidence violated his constitutional rights is premised on his belief the evidence showed Veronica's motive to harm Genny. (AOB 106-108.) The evidence did not show such motive. It showed Veronica did not like her sister, but did not show that Veronica did not like Genny, or that Veronica's dislike for her sister would cause her to abuse, torture and murder Genny. Thus, exclusion of the evidence did not violate Gonzales's constitutional rights.

B. Excluding The Evidence Did Not Prejudice Gonzales

Even if the trial court erred by excluding the evidence, any error was harmless. It is not reasonably probable that the jury would have reached a more favorable verdict with respect to either the murder conviction or the special circumstance finding had the evidence been admitted. (*People v. Fudge, supra,* 7 Cal.4th at pp. 1102-1103 [standard for excluding defense evidence is governed by *People v. Watson, supra,* 46 Cal.2d at p. 836].) As discussed in detail in Argument I, the evidence against Gonzales was compelling.

The excluded evidence was weak, and did not show, as Gonzales claims, that Veronica had a motive to abuse, torture and murder Genny. It merely showed, at most, that Veronica did not like her sister. The excluded evidence consisted of Veronica's statement that her sister was "a little bitch," and that she referred to her as Genny's "damn mother." (AOB 100-101.) These statements in no way detract from the evidence that Gonzales abused, tortured and murdered Genny. The statements do not show that Veronica disliked Genny,

or that because she had antipathy towards Mary, that she would abuse Genny. Looking at the statements in context further demonstrates there was no link to show that Veronica disliked Genny or would abuse her. Veronica explained, after she said her sister was a "little bitch" that her sister did not care about anything and her children were taken away from her. (2 CT 383.) The implication is the reason Veronica thought her sister was a "little bitch" was because she did not properly care for her children. Given the basis for her statements to police about her sister, the reasonable inference would be that the antipathy being expressed was consistent with protecting Genny, as opposed to abusing her. This would also be consistent with Veronica's later statement to police that it was not Genny's fault "that the mother never give [sic] attention to her." (2 CT 385.) The record only demonstrates Veronica did not hold Genny responsible for Mary's faults.

Gonzales claims the excluded evidence suggested that he, unlike Veronica, lacked the intent to torture required for the special circumstance finding. (AOB 110.) The excluded evidence does not show that Gonzales did not have the intent to torture. Even if it showed Veronica had the intent to torture Genny, it does not follow that Gonzales did not also have an intent to torture her.

Even under the stricter *Chapman* standard of review urged by Gonzales (AOB 109-110), there was no prejudice. Under the harmless error standard of *Chapman v. California, supra,* 386 U.S. at p. 24, reversal is required unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict. Given the strength of the evidence against Gonzales and the weakness of the excluded testimony, any error did not affect the jury's verdict.

Also, even if the testimony of Perez-Arce had been admitted, it was also weak and would not have affected the verdict. Perez-Arce's testimony was

based on a review of documents and discussions with Gonzales's family. (47 RT 5546-5549.) She did not interview Veronica, so she was theorizing that Veronica resented Mary and that Genny had symbolic meaning for Veronica. Thus, it was speculative, and would not have shown Veronica solely abused, tortured, and murdered Genny.

Likewise, had the evidence been admitted at the penalty phase, there is no reasonable possibility that the jury would have returned a different sentence. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11 [standard for evaluating penalty phase errors].) The statements did not show Gonzales was a minor participant, as Gonzales claims. (AOB 111.) The statements lacked relevance and did not show Veronica was the primary perpetrator of the abuse, torture and murder. Thus, even had the statements been admitted below, there is no reasonable possibility Gonzales would have enjoyed a more favorable outcome.

III.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING VERONICA'S UNRELIABLE, SELF-SERVING HEARSAY STATEMENTS TO OFFICERS AT THE SCENE THAT SHE PUT GENNY IN THE BATHTUB AND GENNY DROWNED

Gonzales contends the trial court abused its discretion in the penalty phase retrial by excluding Veronica's statements to the responding officers that she put Genny in the bathtub and when she returned Genny had drowned. (AOB 113.) While Gonzales acknowledges Veronica's statements were hearsay, he contends they were admissible as spontaneous statements, statements against penal interests, or under the catch-all hearsay exception. (AOB 114.) The trial court correctly exercised its discretion in excluding Veronica's statements because they were self-serving statements and were

unreliable. Therefore they were not admissible under any of the hearsay exceptions.

Prior to the first trial, the prosecutor indicated that he intended to admit into evidence Veronica's statements to the police that Veronica found Genny in the bathtub and that Genny had drowned. (33 RT 3488-3490.) Defense counsel stated he did not object, but wanted to look at it again. (33 RT 3489.) When the issue arose again, Gonzales's other defense counsel stated she was not objecting to most of Veronica's statements, just one statement made to Officer Webb at the police station. (36 RT 3866, 3869.) The court overruled Gonzales's objection. It said,

> I think it's not hearsay. I think it's relevant to show a consciousness of guilt on Veronica's part and, to the extent that her statements are consistent with Ivan's, to show a consciousness of guilt on his part based on a showing, based on a conclusion that they couldn't have come up with this story independently and that they had to have talked in advance about what to say about all this.

(36 RT 3873-3874.)

During the guilt phase, Sergeant Barry Bennett testified he and Officer Moe arrived at the scene at the same time and Veronica flagged them down. (50 RT 5899-5890, 5895.) As they walked in the door, Veronica told Sgt. Bennett that she found the baby in the bathtub. (50 RT 5895.) When they were inside the apartment, Veronica elaborated. She said she had put Genny in a bathtub, run the water, then went to the kitchen to cook dinner. After about 20 minutes, she went back to the bathroom and found Genny underwater. Veronica did not have a phone so she picked up Genny and ran to apartment No. 1 to call the police. (50 RT 5895.) Veronica was calm. (50 RT 5896.)

Officer William Moe testified that Veronica was calm when they arrived. (50 RT 5933, 5935.) Veronica told him that she put Genny in the bathtub and that Genny stopped breathing. (50 RT 5933, 5945.)

Officer Philip Collum testified that Veronica told him that she had drawn a bath for Genny and went downstairs to mash potatoes. (50 RT 5965.) The water was lukewarm. About 10 minutes later, she checked on Genny and Genny was lying submerged in the water on her side. (50 RT 5965.) Officer Collum testified that Veronica was rambling and was visibly upset and crying. (50 RT 5966.)

Prior to retrial of the penalty phase, the prosecutor indicated he did not intend to put on those police officers, and moved to exclude Veronica's statements. (90 RT 11164-11165.) Gonzales sought to admit the statements, arguing that they were spontaneous statements, therefore, an exception to the hearsay rule. (90 RT 11168.) Gonzales argued the statements were relevant because Veronica used the pronoun "I," not "we," therefore, it showed Veronica was the one who put Genny in the bathtub. (90 RT 11172-11173.)

Based on Gonzales's offer of proof, the court determined he was intending to offer the statements for their truth, therefore, they were hearsay. (90 RT 11179.) The court found it was not a spontaneous statement. It explained:

> As I hear the offer, it is that Veronica would testify to putting the child in the bathtub, going away and coming back and finding the child floating in the bathtub. ¶ She wasn't excited, it seems to me, by the putting of the child in the bathtub. . . . What excited her was coming back and finding the child floating in the bathtub. That's the part of her story that would be exciting. ¶ That's not the part that the defense wants to use. What the defense wants to use is the part where Veronica admits putting her in the bathtub. ¶ It doesn't seem to me that that is a, an event, if you believe it to be true, that was exciting enough to cause the perception. So all the underpinnings of that exception just logically fail. . . . And frankly, the whole statement appears demonstrably and, I think, undeniably to be fabricated to begin with.

(90 RT 11180-11181.)

The court explained that the statements were not offered in the guilt phase for their truth. (90 RT 11181.) In response, defense counsel argued that

the statements should be admitted in spite of being hearsay. (90 RT 11182-11185.) The court stated that if this were a confession, state evidentiary rules would give way to protect Gonzales's constitutional rights. (90 RT 11185-11186.) But, "[i]n this case, we're talking about a denial by someone else. If this was an acceptance of responsibility by Veronica, for all the reasons that you articulate, it would come in; it would be a declaration against interest and it would come in." (90 RT 11186.) Thus, the court excluded Veronica's statements as inadmissible hearsay.

A. The Hearsay Statements Were Inadmissible

Gonzales concedes the statements Veronica made to the police officers were offered for their truth, and were therefore hearsay. (AOB 114.) Gonzales argues that the statements were admissible as spontaneous statements, declarations against interest, or under the catch-all hearsay exception. The statements were not admissible under any of these exceptions.

A trial court's ruling on the admissibility of a hearsay statement is reviewed for an abuse of discretion. (*People v. Williams* (2006) 40 Cal.4th 287, 317; *People v. Phillips, supra,* 22 Cal.4th at p. 236 [spontaneous statement exception]; *People v. Brown* (2003) 31 Cal.4th 518, 536 [declaration against interest exception].) The trial court's resolution of questions of fact underlying its determination are reviewed for substantial evidence. (*People v. Phillips, supra,* 22 Cal.4th at p. 236.) Here, the trial court properly exercised its discretion. There was substantial evidence to support its determination that Veronica's statements were self-serving and not reliable.

1. The Statements Were Not Spontaneous

Evidence Code section 1240 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Whether a hearsay declarant spoke "under the stress of excitement" is a factual determination reviewed for substantial evidence. (*People v. Brown, supra,* 31 Cal.4th at pp. 518, 540-541.) A spontaneous statement is one made without deliberation or reflection. (*People v. Raley* (1992) 2 Cal.4th 870, 892.) Lapse of time and whether the statement was made in response to a question are factors to consider in determining spontaneity. (*People v. Brown, supra,* 31 Cal.4th at p. 541.)

> Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*

(*Ibid.*, quoting *People v. Poggi* (1988) 45 Cal.3d 306, 319, emphasis original.)

Here, the trial court did not abuse its discretion by finding Veronica's statement was not spontaneous. The court found that Veronica was not under the stress of the excitement, and that she had fabricated the statement. It said, "[a]ll the scientific evidence and . . . common sense suggests that [the statements are] a flat lie." (90 RT 11181.) In allowing its admission in the guilt phase, the trial court relied on its falsity, i.e., that Veronica and Gonzales concocted the story about Genny drowning, so the statements were admissible to show Gonzales's consciousness of guilt. (36 RT 3873-3874.)

The uncontested evidence supports the court's findings. Expert testimony revealed Genny went into shock two to three hours after being burned. (51 RT 6121-6122; 53 RT 6493.) It took another two to three hours for rigor to set in (51 RT 6123-6124), therefore, the burn occurred three to six hours prior to the police responding to the scene (51 RT 6124). Even assuming

the best scenario for the defense–that shock occurred very quickly, and rigor mortis had not set in, it still would have taken at least an hour for Genny to go into shock and die. (53 RT 6493.)

The evidence at the scene showed that the Gonzales's did not suddenly find Genny in distress and call the police. Genny's body, hair and clothes were dry. (50 RT 5896; 51 RT 6194.) She was cold. (50 RT 5895, 5934; 51 RT 6194.) The statement was not made while Veronica's reflective powers were still in abeyance, rather, the statement was made with the benefit of reflection occasioned by the substantial delay in summoning help for Genny. Veronica's statements were self-serving, and she was in a position to fabricate her story. (See *People v. Raley, supra*, 2 Cal.4th at p. 894 [holding statements were spontaneous in part because the declarant was in no condition to fabricate and her statements were not self-serving].)

A statement must be "sufficiently reliable" to be admissible as a spontaneous statement. (*People v. Raley, supra*, 2 Cal.4th at p. 892.) Veronica's statements were not reliable. The statements were that she put Genny in the bath and Genny drowned. The evidence conclusively and definitively showed Genny did not drown. (51 RT 6085-6086; 52 RT 6318; 53 RT 6489.) Gonzales never claimed that Genny drowned. The uncontested evidence showed Genny was scalded to death. Gonzales concedes part of Veronica's statements were untrue. (AOB 118.) Therefore, Veronica's statements that she put Genny in the bathtub and Genny drowned were not "sufficiently reliable" to be admissible as spontaneous statements.

Furthermore, although Collum testified that Veronica was rambling and was visibly upset and crying (50 RT 5966), Bennett and Moe both testified that Veronica was calm when she made the statements (50 RT 5896, 5933, 5935). Thus, Veronica's demeanor showed Veronica was not under the stress of an exciting event.

Therefore, there was substantial evidence to support the court's finding that Veronica was not under the stress of the excitement when she made the statements to the police. The evidence supports the court's finding that Veronica (and Gonzales) told the police the story to try to absolve themselves of responsibility, and thus, the statements were not made under the stress of the excitement.

Gonzales argues, without citing any authority, that the trial court considered improper factors in its determination to exclude the statements because it was irrelevant that Veronica's story suggested that she got excited from finding Genny submerged under water in the bathtub, rather than from drawing the bath and placing Genny in the tub. (AOB 116.) The court's analysis was proper. Gonzales sought to admit the statement that Veronica said she put Genny in the bathtub, which was not the exciting event. The exciting event was finding Genny submerged in the bathtub. The court explained the purpose of the spontaneous statement exception is

> if you get so excited about something and you start talking about it when you're still all cranked up about it, you're not going to have time to step back and think through a fabrication. And there is nothing about her event of putting the child in the bathtub that suggests that kind of excitement.

(90 RT 11180.) Furthermore, the court based its analysis on its determination, supported by substantial evidence, that the statement was "undeniably [] fabricated to begin with." (90 RT 11180-11181.)

Gonzales next argues that the court inappropriately relied on analysis of extrinsic evidence to conclude that Veronica's statements were unreliable. (AOB 117.) The cases Gonzales cites do not support his proposition, and in fact show it is proper to rely on evidence admitted at trial to evaluate the reliability of a statement. In *People v. Arias* (1996) 13 Cal.4th 92, 150, this Court rejected the defendant's argument that a spontaneous statement was not

reliable because the declarant had never told anyone about the spontaneous statement. This Court held the statement did not

> become inadmissible because the declarant failed to mention, recall, or confirm it on later or calmer occasions. A spontaneous declaration is admissible, despite its character as hearsay, because of its particular reliability as the immediate product of direct perception, before fading memory or the opportunity for fabrication has intervened.

(*People v. Arias, supra,* 13 Cal.4th at pp. 92, 150.) Thus, *People v. Arias* is not on point, as there is no argument that Veronica's statement was not reliable because she failed to confirm it at a later time. It supports the trial court's determination, in that the trial court found Veronica had the opportunity, and did, fabricate the statement and it was not the immediate product of direct perception.

Gonzales's reliance on *People v. Sully* (1991) 53 Cal.3d 1195, 1229, is also misplaced. Gonzales claims that in *Sully,* this Court "conclud[ed] that [an] apparently unreliable statement by [an] accomplice-declarant is admissible if standards for admission of spontaneous statements are otherwise met." (AOB 117.) Contrary to Gonzales's argument, this Court rejected the defendant's argument that a witnesses's spontaneous statement was not reliable. It listed numerous factors that showed the statement was reliable, and concluded, "[t]hese factors supply a sound basis to regard [the] utterance as reliable evidence." (*Id.* at p. 1229.) Likewise, in *People v. Farmer, supra,* 47 Cal.3d at 906, also cited by Gonzales, this Court rejected the defendant's claim a spontaneous statement was unreliable and explained the factors that showed the statement was reliable. Here, the statements were not reliable, therefore, the cases cited by Gonzales are inapposite. The trial court did not abuse its discretion in excluding Veronica's statements.

2. The Statements Were Not Against Penal Interest

Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

In order for a statement to be admissible as a declaration against penal interest, the proponent of "the evidence 'must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Elliot* (2005) 37 Cal.4th 453, 483, quoting *People v. Lawley, supra,* 27 Cal.4th at p. 153.) The court may take into account the circumstances under which the statement was made, the declarant's motivation, and the declarant's relationship to the defendant. (*People v. Brown, supra*, 31 Cal.4th at p. 536.)

Here, Veronica was unavailable to testify because she indicated she would invoke her Fifth Amendment right not to incriminate herself. (52 RT 6230; *People v. Duarte* (2000) 24 Cal.4th 603, 609-610.) The statements were not admissible, however, because they were not against Veronica's penal interests, and were not sufficiently reliable.

Veronica's statements were made to absolve her of culpability by stating Genny drowned, instead of saying she forcibly held her in scalding hot water, therefore it was not against her penal interest. If believed, the statement was exculpatory, rather than inculpatory. (See *People v. Elliot, supra*, 37 Cal.4th at p. 483.) As the trial court aptly noted, Veronica's statement was "as though she

said, 'I did the appropriately motherly thing and put her in a proper bathtub and left to do some cooking; and then when something terrible happened, and I don't know what it was. [sic] When I came back, she was floating,' which we know is not true." (90 RT 11187.) The trial court properly found Veronica's statement was not against her penal interest, as it was a false statement, that was self-serving, made in an attempt to absolve her and Gonzales of responsibility.

Gonzales claims that the portion of Veronica's statement that she put Genny in the bath was incriminating, and that the trial court should have redacted the exculpatory portions of her statement. (AOB 118-119.) That type of distortion of Veronica's statement would be improper.

The statement must be viewed as a whole. Whether a statement is against the declarant's interest must be determined by viewing it in context. (*People v. Duarte, supra,* 24 Cal.4th at p. 612.) A declaration that contains self-serving and unreliable information is not rendered credible merely because it is coupled with an admission of criminal culpability. (*Id.* at p. 611.) "'A self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not.' [citation]" (*Ibid.*) Thus, it would not have been appropriate to allow Gonzales to parse Veronica's statement and admit that which was favorable to him, while excluding the remainder of the statement that put the statement in context. "[R]edaction cannot enhance the underlying or general trustworthiness of a declaration as a whole." (*Id.* at p. 614.)

Citing *People v. Gordon* (1990) 50 Cal.3d 1223, 1251-1253, Gonzales argues Veronica's statements were more incriminating than hearsay statements that were made by a declarant who provided medical care to perpetrators of a robbery-murder that this Court found to be admissible. (AOB 119.) In *Gordon*, the declarant "all but confessed" to being an accessory to the crimes by assisting the perpetrators in their medical care until the wounds sustained in the crime were healed sufficiently to go to a hospital without suspicion.

(*People v. Gordon, supra*, 50 Cal.3d at pp. 1249, 1252.) Here, Veronica's statement was self-serving and exculpatory, not one that would be believed to subject her to the risk of criminal liability, or that she would not have made if it were not true. The statement in *Gordon* was incriminatory; Veronica's was not.

Furthermore, as detailed above, the statements were not reliable or trustworthy. The evidence conclusively showed Genny did not drown. The statement was not truthful, therefore it was not reliable. (See *People v. Geier* (2007) 41 Cal.4th 555, 585.)

Gonzales claims that the inconsistencies between Veronica's statements and the physical evidence do not render her statements untrustworthy. (AOB 120.) In this case, the statements were untrustworthy because they were untrue. Gonzales acknowledges as much. (AOB 120 [Gonzales refers to the untruthful portions of Veronica's statements].) In *People v. Geier, supra*, this Court upheld the exclusion of a statement by someone who confessed to the murder for which the defendant was on trial, because on two other occasions the declarant gave contradictory statements. Because two out of three of the declarant's statements were absolutely untruthful, all the statements were unreliable. Thus, this Court held the trial court properly excluded the statement as untrustworthy. (*People v. Geier, supra*, 41 Cal.4th at pp. 583-585.) Here, the trial court, based on substantial evidence, determined the statements were patently false and a fabrication, therefore they were not trustworthy. Therefore, the statements were not admissible as declarations against interest.

3. The Statements Were Not Admissible Under The Nonstatutory Catch-All Exception

This Court has observed that "'exceptions to the hearsay rule are not limited to those enumerated in the Evidence Code; they may also be found in . . . decisional law'" [citation] . . . ." (*People v. Ayala* (2000) 23 Cal.4th 225, 268.) This Court has warned courts, however, in doing so, to "proceed with caution." (*Ibid.*) Thus, a defendant "does not have a constitutional right to the admission of unreliable hearsay statements." (*Id.* at p. 269.) Thus, for the same reasons the statements were inadmissible as spontaneous statements or statements against interest, i.e., that they were unreliable, they were not admissible under the nonstatutory catch-all exception.[14/]

B. Gonzales's Constitutional Rights Were Not Violated By Exclusion Of The Unreliable, Self-Serving Statements

Gonzales claims the exclusion of Veronica's statements infringed his constitutional rights. (AOB 121.) The exclusion of Veronica's unreliable, self-serving statements did not violate Gonzales's constitutional rights.

> The general rule remains that "'the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'"

(*People v. Lawley, supra,* 27 Cal.4th at p. 155, citations and footnote omitted.)

Gonzales claims the evidence was relevant, mitigating evidence because it showed Veronica was the primary perpetrator, and thus that he was a minor participant in the crime. (AOB 121.) While due process may require admission

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14. Gonzales also argues that the untruthful portions of the statements were admissible for a nonhearsay purpose–to show Veronica's consciousness of guilt. (AOB 120.) Gonzales did not seek to admit the statements as nonhearsay, therefore, any claim the statements were admissible on these grounds is waived. (*People v. Waidla, supra,* 22 Cal.4th at p. 717.)

of evidence that is otherwise statutorily inadmissible, the evidence must be "highly relevant to a critical issue in the punishment phase of the trial" and there must be "substantial reasons to assume the reliability of the evidence." (*People v. Morrison* (2004) 34 Cal.4th 698, 725.) "A defendant does not have a constitutional right to the admission of unreliable hearsay statements." (*People v. Ayala, supra*, 23 Cal.4th at p. 269.) Here, as discussed above, Veronica's statements were not reliable.

Without citing any direct authority, Gonzales next argues that even if Veronica's statements were unreliable, they should nevertheless have been admitted to advance the integrity of the adversarial process because there was an imbalance in that Gonzales's statement was admitted but not Veronica's. (AOB 122-123.) Gonzales's argument is illogical. Each statement must be analyzed on its own. Admission of a statement harmful to Gonzales does not then require the court to admit a statement beneficial to Gonzales ostensibly to create a level playing field. Gonzales's statement was admissible under Evidence Code section 1220 as an admission of a party, an established exception to the hearsay rule. (*People v. Ray* (1996) 13 Cal.4th 313, 379.)

Gonzales also claims it was unfair, amounting to a due process violation, to admit Veronica's statements in the first trial which determined his guilt, but to exclude the statements in the second penalty trial. (AOB 123.) During the first trial, the statements were not offered for their truth; they were offered to show Veronica and Gonzales fabricated their story, and thus they both had consciousness of guilt. (36 RT 3873-3874.) During the second trial, Gonzales sought to elicit the statements for their truth (90 RT 11179), a different purpose. The court engaged in a different analysis for the penalty phase because the statements, offered for their truth, were hearsay. (90 RT 11179-11181.) The court did what it is required to do: analyze each piece of evidence separately

and determine the purpose for which its admission is sought. There is no unfairness in the courts analytical, logical approach.

Gonzales also argues his due process rights were violated because the prosecutor used the statements in the first trial, then opposed them at the second trial, which was inconsistent and impermissible. (AOB 123.) While the prosecutor used the statements during the first trial to argue Veronica and Gonzales's consciousness of guilt, he was not required to elicit or present the same evidence in the penalty phase retrial.

The only authority cited in support of Gonzales's position is *In re Sakarias* (2005) 35 Cal.4th 140, 164 (AOB 123), which held the prosecutor cannot use inconsistent and irreconcilable factual theories to convict two people of a crime only one could have committed, or to obtain harsher sentences for both on the basis of an act only one could have committed. Gonzales is not arguing the prosecutor used inconsistent or irreconcilable factual theories to convict Gonzales. Gonzales has cited no authority that a prosecutor must rely on and present the same evidence in a retrial.

Lastly, because Veronica's statements were self-serving and unreliable, Gonzales was not denied his right to a fair, accurate, and reliable capital-sentencing hearing, nor did it infringe his right to rebut aggravating evidence. (AOB 124.)

C. The Exclusion Of Veronica's Statements Was Not Prejudicial

If this Court were to hold the statements were improperly excluded, even under the stricter *Chapman* standard of review urged by Gonzales (AOB 125), there was no prejudice. Under the harmless error standard of *Chapman v. California, supra,* 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], reversal is required unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict.

The jury would have known, based on the evidence, that Veronica's statements were not true. The evidence conclusively showed Genny did not drown. (51 RT 6085-6086; 52 RT 6318; 53 RT 6489.) No reasonable jury would have believed that Veronica was being truthful to the police when saying she put Genny in the bathtub, but she then lied in the next breath when she explained that Genny had drown. A reasonable jury would have disregarded Veronica's statements as self-serving lies.

Moreover, Veronica's statements were damaging, not helpful, to Gonzales. As argued in the first trial, the statements showed Gonzales and Veronica came up with a false story to tell the police, therefore, it showed they both had consciousness of guilt. Additionally, in his statement, Gonzales repeatedly said he and Veronica both put Genny in the bathtub and that he turned on the water. (8 CT 1760, 1762, 1774, 1796, 1803, 1812, 1823.) Gonzales's admissions to the police showed he put Genny in the bathtub. Veronica's self-serving statement would not have shown otherwise because it was coupled with a lie.

Gonzales's theory that Veronica's statements could have led the jurors to conclude that Genny was placed in the bathtub twice–once by both Gonzales and Veronica and later by Veronica when Gonzales left the apartment (AOB 125), is not supported by the evidence. The fatal burns occurred three to six hours before the police arrived. (51 RT 6124.) Gonzales's theory is not reasonable. Likewise, Gonzales's theory that the jury could have concluded that his admissions were untrue and were made to protect Veronica (AOB 125) is speculative and not supported by the evidence.

Given the strength of the evidence, the weak nature of Veronica's statements, the obvious falsity of her statements and that Gonzales admitted turning on the bathtub, assuming there was any error, it was harmless beyond a reasonable doubt.

IV.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY NOT ALLOWING GONZALES'S CHILDREN TO BE PRODUCED AS EXHIBITS FOR THE JURY AND PROHIBITING THEM FROM ATTENDING THEIR FATHER'S CAPITAL TRIAL

Gonzales contends the trial court violated his constitutional rights to present relevant, mitigating evidence because it prohibited him from parading his children in front of the jury as exhibits during the penalty phase. (AOB 127.) Gonzales also claims that by prohibiting his four youngest children from attending certain portions of the penalty trial, the court violated his constitutional rights to a public trial. (AOB 127.)

The court properly exercised its discretion by prohibiting Gonzales from parading his children as exhibits to the jury because exhibiting the children in that fashion was not a form of proper, relevant evidence. The trial court did not violate Gonzales's constitutional right to a public trial by prohibiting his children from attending because his trial was otherwise open to the public.

During the penalty phase, Gonzales requested his four younger children be brought in so the jury could see them. Gonzales did not want the children to testify. (67 RT 8548.) Gonzales argued it was mitigating to show the effect the execution would have on the children, and that they were alive, breathing, adorable children. (67 RT 8549, 8551.)

The court stated it did not feel the children's presence added anything of relevance to the issues. (67 RT 8550, 8555, 8557.) It stated the relevant question was whether they loved their dad and whether it would hurt them to lose him to an execution. (67 RT 8551.) Having the children physically in the courtroom would not materially add to that issue. (67 RT 8551.) The court also expressed concern about the children being involved in such a case. (67 RT 8555.) As a fallback position, Gonzales requested the court instruct the jury

that the children were not present because the court found them to be unavailable. (67 RT 8556.)

The following morning, Gonzales's children were in the courtroom. (68 RT 8621-A.) The court asked to see counsel because it felt counsel was trying to be manipulative in that for the first time in the trial, the children came to court, right after the court ruled the children could not be paraded in front of the jury. (68 RT 8621-B-8621-C.) The court felt the defense was circumventing the court's order, and attempting to get the benefit of parading the children in front of the jury by bringing the children to court. (68 RT 8621-G-H.)

The court expressed its concern "as a human being" about the children being in court watching their father being tried for his life. (68 RT 8621-G.) Counsel expressed the same concern, but argued it was different if the children's presence was limited to when their grandfather, uncle, or teacher testified about family background. (68 RT 8621-G-H.) After argument whereby counsel wanted to relitigate whether the children would be paraded in front of the jury (68 RT 8621L-N), the court ordered they be prohibited from attending the trial. (68 RT 8621-0.)

The court relied on its power as a Superior Court Judge, who was designated as a juvenile court judge. The Gonzales children were dependents of the court. The court found it was in the best interest of the children that they not be present. (68 RT 8621-0.) The court expressed its concern that if Gonzales were given a death sentence, the children would feel some sense of responsibility if they were involved in the trial. (68 8621-I.) The court explained the children could go to the children's waiting room in the courthouse. (68 RT 8622.) The court also arranged a time where Gonzales could see his children in court when the jury was not present. (68 RT 8622-8623.)

During the retrial of the penalty phase, the prosecutor brought to the court's attention that a juror from the first trial told him that the children were in the elevators with the jurors, and one of the children said to Gonzales's father, "are these the people that are going to kill daddy?" (81 RT 9598-9599.) The court said it did not want the children to be present again, and that it found the children's presence in court was "cynical and manipulative." (81 RT 9600.) The court addressed Gonzales's family members, who were present in court, and told them that it needed to control the proceedings. It ordered the family members not to bring the children to court during the trial. (81 RT 9602.) It stated, for the childrens' sake, it did not want them to come into contact with jurors. (81 RT 9604.)

A. The Trial Court Properly Exercised Its Discretion By Prohibiting Gonzales From Parading His Children In Front Of The Jury

The trial court properly exercised its discretion in prohibiting Gonzales from parading his children in front of the jury as an exhibit. The trial court found by doing so, it would not add anything of relevance to the issues.

At the penalty phase, a defendant must be permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record. (Pen. Code, § 190.3; *People v. Marlow, supra,* 34 Cal.4th at p. 152; *Skipper v. South Carolina, supra,* 476 U.S. at pp. 1, 4-8 [106 S.Ct. 1669, 94 L.Ed.2d 1].) However, the rule allowing all relevant mitigating evidence has not "abrogated the California Evidence Code." (*People v. Phillips, supra,* 22 Cal.4th at p. 238; *People v. Edwards, supra,* 54 Cal.3d at p. 837.) Additionally, the trial court retains discretion to exclude evidence that is irrelevant. (*People v. Marlow, supra*, 34 Cal.4th at p. 152.) Moreover, "'[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a

defense.'" (*People v. Phillips, supra*, 22 Cal.4th at p. 238, quoting *People v. Hall, supra,* 41 Cal.3d at p. 834.)

As this Court has noted, while the Eighth and Fourteenth Amendments contemplate the introduction of a broad range of evidence mitigating imposition of the death penalty, "the United States Supreme Court has made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record or the circumstances of the offense." (*People v. Frye, supra,* 18 Cal.4th at pp. 1015-1016.)

Having the children paraded in front of the jury was not a proper form of relevant evidence. Gonzales bases his relevancy argument on the premise that the effect of his execution on his children was relevant mitigating evidence. (AOB 129.) Gonzales's argument is based on a faulty premise. This Court has consistently held that the impact an execution has on a defendant's family members is not admissible. (*People v. Vieira* (2005) 35 Cal.4th 264, 295; *People v. Smith, supra,* 35 Cal.4th at pp. 366-367; *People v. Smithey* (1999) 20 Cal.4th 936, 1000; *People v. Ochoa, supra,* 19 Cal.4th at pp. 455-456.)[15/] A defendant's background and character are relevant and admissible, but not the distress of his or her family. (*People v. Ochoa, supra*, 19 Cal.4th at p. 456.) Thus, a defendant may offer evidence that he or she is loved by family members, and that family members want him or her to live because it is indirect evidence of character. (*Ibid.*) "The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed." (*Ibid.*) Gonzales's argument is based on the faulty premise that execution impact evidence is admissible, thus, his argument that the children being paraded in front of the jury was proper

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15. The trial court ruled that it would allow evidence of the impact an execution would have on Gonzales's children. (65 RT 8325-8327.) The trial was in 1997, prior to this Court's decisions ruling that execution impact evidence is not admissible.

evidence of the impact that his execution would have on his children, is legally unsupportable.

Even if it were of marginal relevance because it showed Gonzales's character, the trial court properly exercised its discretion in prohibiting the children from being paraded in the courtroom under Evidence Code section 352. Even though execution impact evidence is not admissible, Gonzales's background, including his family, was relevant to show his character. (*People v. Ochoa, supra*, 19 Cal.4th at p. 456.) Gonzales was not precluded from, and did, present substantial evidence about his children and his background. Gonzales's sister, Baltazar, described each of Gonzales's children and went through various cards Gonzales's children had given him for Father's Day. (97 RT 12432-12436, 12440-12444, 12456-12458.) A few witnesses described the children and testified that the children loved Gonzales. (97 RT 12458-12461, 12484-12487; 12494-12495, 12496; 98 RT 12579-12582.) An attorney representing the Gonzales children in juvenile court testified that it would be devastating on the children if their father were executed. (97 RT 12495-12496.) There were photographs admitted that showed the children. (68 RT 8630-8635, 8679-8680; 94 RT 11867; 95 RT 12081; 97 RT 12380, 12382, 12438-12439; 98 RT 12579.)

The court allowed Gonzales to present evidence that he had six children, that his children loved him, and it admitted numerous cards the children had written to Gonzales. Witnesses described in detail each child's personality. (97 RT 12462-12436, 12440-12444, 12456-12461; 12484-12487, 12494-12495, 12496; 98 RT 12579-12582.) The court was not required to admit each type of evidence Gonzales sought to be admitted. The court has discretion in limiting the form in which evidence is presented, particularly if it is inaccurate or cumulative. (*People v. Carpenter* (1997) 15 Cal.4th 312, 400; *People v.*

Freeman (1994) 8 Cal.4th 450, 512.) Here, the evidence would have been cumulative.

Gonzales argues that the parties need not offer only the most antiseptic evidence to establish certain facts. (AOB 130.) As support for his position, Gonzales cites *People v. McClellan* (1969) 71 Cal.2d 793, 802, which held that parties are not required to enter into a stipulation to prove the facts of their case. (AOB 130.) That is not what happened in this case. Here, the court merely limited the form of the evidence to be presented.

Gonzales claims this Court has "long permitted the use of people as demonstrative evidence despite the capacity of other evidence to prove the same points." (AOB 132.) In the only California, published case cited by Gonzales, *People v. Richardson* (1911) 161 Cal. 552, 561-562, this Court allowed a baby to be shown to the jury to show the baby's resemblance to the defendant to determine whether he was the father. This is not the purpose for which Gonzales sought to exhibit his children. Gonzales also cites *State v. Barden* (N.C. 2002) 572 S.E.2d 108, 131, which held it was not error for a witness to point out the victim's wife and daughter, both of whom were in the audience. This out of state case is also not on point, as it was not similar to what Gonzales requested be done.[16/]

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16. In a footnote, Gonzales notes other cases, for which automatic appeals are pending, in which he represents a child was exhibited to the jury. (AOB 131-132.) Gonzales cannot properly cite to these other cases as support for anything since there has been no decision issued by this Court in either case. (See, Cal. Rules of Ct., rules 8.1105(a), 81115(d).) Moreover, in both cases, according to Gonzales, it was the child of the **victim, not the defendant,** that was exhibited. Victim impact evidence is relevant, and admissible; execution impact evidence is not relevant. (*People v. Smithey, supra,* 20 Cal.4th at p. 1000 [this Court rejected defendant's contention that execution impact evidence was admissible merely because victim impact evidence is admissible].) Accordingly, even if the other cases could be properly cited by Gonzales, they do not support his argument that the trial court erred in denying him an opportunity to parade his children before the jury.

Gonzales argues that courts routinely admit demonstrative evidence at trial, including mannequins, photographs, and people. (AOB 131-132.) Because demonstrative evidence was admitted in other trials, or in this trial, does not have any bearing on whether the trial court abused its discretion on this issue. Gonzales does not cite any case that held it was an abuse of discretion for a trial court to refuse to allow a capital defendant's children to be paraded in front of the jury.

Gonzales also argues that Veronica was exhibited to the jury to show that people can be used as exhibits. (AOB 133.) Exhibiting Veronica to the jury was for a relevant purpose: to show her stature because there was a question of her physical and emotional domination of Gonzales that was raised by the evidence. (67 RT 8550.) There was no such issue that required the children to be displayed to the jury.

Gonzales contends exhibiting the children had a narrative relevance, which would have "transformed them from apparent abstractions to actual children." (AOB 134-135.) He concludes that by doing so, "the evidence that appellant's execution would devastate the children would have been more powerful." (AOB 135.) Again, Gonzales's argument rests on the faulty premise that the impact of execution on the children is relevant. However, it is not relevant. (*People v. Smith, supra,* 35 Cal.4th at pp. 366-367.) Therefore, Gonzales's argument is without merit.

Citing articles on how to effectively represent a capital defendant, Gonzales argues that the court hamstrung his ability to present a compelling narrative. (AOB 136.) The issue is not the effectiveness of counsel's presentation. Counsel is only allowed to present relevant evidence, therefore, Gonzales's argument is misplaced.

Gonzales's constitutional rights were not violated, as he claims. (AOB 137-138.) The trial court properly prohibited the children from being presented

as exhibits. As execution impact evidence is not relevant, Gonzales's constitutional rights were not violated by its exclusion. (*People v. Frye, supra*, 18 Cal.4th at pp. 1015-1016.)

B. Any Error Was Harmless

Even if exhibiting his children in front of the jury were a proper, relevant, form of evidence, its exclusion was harmless. Evidentiary rulings are harmless if there is no reasonable possibility that the jury would have returned a different sentence in their absence. (*People v. Jones, supra,* 29 Cal.4th at p. 1264, fn. 11; *People v. Jackson, supra,* 13 Cal.4th at p. 1232.) Stated another way, reversal is unnecessary if any error was harmless beyond a reasonable doubt. (*People v. Ochoa, supra,* 19 Cal.4th at p. 479 [stating that state harmless-error analysis in the penalty phase is the equivalent of the test under *Chapman v. California, supra,* 386 U.S. at p. 24]; accord, *People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11.)

Here, the jury knew Gonzales had six children. The trial court did not prohibit Gonzales from presenting testimony from the younger four children. (82 RT 9688-9690; 84 RT 9970-9971.) Gonzales chose not to do so. (84 RT 9972.) Gonzales presented substantial evidence about his children and his background. Gonzales's sister, Baltazar, described each of Gonzales's children and went through various cards Gonzales's children had given him for Father's Day. (97 RT 12432-12436, 12440-12444, 12456-12458.) Witnesses described the children and testified that the children loved Gonzales. (97 RT 12458-12461, 12484-12487; 12494-12495, 12496; 98 RT 12579-12582.) An attorney representing the Gonzales children in juvenile court testified that it would be devastating for the children if their father is executed. (97 RT 12495-12496.) Photographs were admitted depicting the children. (68 RT 8630-8635, 8679-8680; 94 RT 11867; 95 RT 12081; 97 RT 12380, 12382, 12438-12439; 98 RT

12579.) Thus, seeing the children in person would add little, if anything, to the jury's determination.

Moreover, Gonzales was convicted of murdering and torturing a child. The facts of the case were horrific. Seeing Gonzales's children in person, instead of their photographs, would not have made a difference.

In support of his argument that any error was prejudicial, Gonzales cites a Georgia case he claims is similar. (AOB 146.) In *Barnes v. State* (Ga. 1998) 496 S.E.2d 674, 687, the trial court excluded a poem written by the defendant to his wife and photographs of the defendant and his family when he was growing up, his infant, his step-children and his handicapped nephew. The Georgia Supreme Court held the evidence was admissible mitigating evidence and overturned the defendant's death sentence. (*Id.* at p. 689.) The court found the error was prejudicial due to the "complete elimination of the photographs and Barnes' poem from the jury's consideration." (*Ibid.*) The facts of *Barnes v. State* are not similar. Gonzales was not barred from presenting photographs of his children. Thus, it is not persuasive authority for Gonzales's position. Given the facts of this case, and that the jurors were told about and saw photographs of Gonzales's six children, there is no reasonable possibility the jurors would have reached a different result had Gonzales's six children been paraded as exhibits in front of the jury.

C. Gonzales's Right To A Public Trial Was Not Violated By Prohibiting His Children From Attending The Trial

Gonzales claims the trial court did not have the authority to exclude his children from the courtroom, and that the court erred in finding it was in the children's best interest that they not observe portions of the trial testimony. (AOB 138-141.) The trial court had the authority to prohibit the children from attending the trial.

"Trial courts possess broad power to control their courtrooms and maintain order and security." (*People v. Panah* (2005) 35 Cal.4th 395, 452, quoting *People v. Woodward* (1992) 4 Cal.4th 376, 385; Code of Civ. Proc. § 128, subd. (a)(1)-(5).) A trial should generally be open to the public

> with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and *youth of tender years*, and to do other things which may facilitate the proper conduct of the trial.

(*People v. Woodward, supra*, 4 Cal.4th at p. 385, quoting *People v. Hartman* (1894) 103 Cal. 242, 245, emphasis added.) Thus, the trial court had the authority to exclude Gonzales's children from his capital trial.

Moreover, there was no requirement the trial court hold a hearing on whether it would be in the children's best interests to be present for the proceedings, as Gonzales claims. (AOB 139-140.) Gonzales has not cited any direct authority for his proposition. As the trial court was not required to make such findings, it did not err in its determination that it was not in their best interests to attend the proceedings. Nor was Gonzales's constitutional right to a public trial violated by excluding his young children from the courtroom.

A criminal defendant has a state and federal constitutional right to a public trial. (*People v. Prince* (2007) 40 Cal.4th 1179, 1276.)

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .[Citations][Fn][P] In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

(*People v. Woodward, supra,* 4 Cal.4th at p. 385, quoting *Waller v. Georgia* (1984) 467 U.S. 39, 46 [104 S.Ct. 2210, 81 L.Ed.2d 31].)

The right to a public trial is not absolute, however. (*Waller v. Georgia, supra*, 467 U.S. at p. 45.)

> The Sixth Amendment public trial guarantee creates a 'presumption of openness' that can be rebutted only by a showing that exclusion of the public was necessary to protect some 'higher value' such as the defendant's right to a fair trial, or the government's interest in preserving the confidentiality of the proceedings.

(*People v. Prince, supra*, 40 Cal.4th at p. 1279.)

In *People v. Woodward, supra*, the trial court had its bailiff lock the courtroom doors during the prosecutor's closing argument. Those spectators who were present were allowed to stay, and additional spectators could enter at designated recesses. (*People v. Woodward, supra*, 4 Cal.4th at p. 379.) In finding the defendant's right to a public trial was not violated, this Court distinguished situations where the general public was entirely or substantially excluded from trial or pretrial proceedings. (*Id.* at p. 383.) In *Woodward*, this Court found the temporary closure of the courtroom did not implicate any of the factors for having public trials, i.e., to see the accused is fairly dealt with and not unjustly condemned, to ensure the judge and prosecutor carry out their duties responsibly, encourage witnesses to come forward and to discourage perjury. (*Id.* at p. 385.)

Likewise, by excluding Gonzales's four youngest children from the trial, the trial court did not implicate any of the important policy reasons for having public trials. The trial was otherwise open to the public, and to any of Gonzales's family members except his young children.

This Court has also upheld the exclusion of particular spectators from trials. In *People v. Holloway* (2004) 33 Cal.4th 96, 147, the trial court excluded a defense investigator from the courtroom for the day because she was crying (although she claimed she was wiping mascara out of her eye). This Court held the defendant's constitutional rights to a public trial were not violated. "The temporary exclusion of a single spectator, intended to prevent potentially disruptive displays, did not constitute a cognizable deprivation of the public trial right." (*Id.* at p. 148.)

Although there is no California case addressing the exclusion during trial of a defendant's children, other courts that have addressed this issue have ruled it was not a constitutional violation. In *Sobin v. United States* (D.C. App. 1992) 606 A.2d 1029, 1032-1033, the trial judge excluded the defendant's four and six-year-old children from his sentencing proceeding. The D.C. Court of Appeals held that the exclusion of the defendant's children "in no way undermined the public policy goals . . . which are advanced by the requirement that criminal proceedings be open." (*Id.* at pp. 1033-1034.) The court also noted the trial judge was correctly concerned about shielding the children from "unpleasant discussion of a parent's criminal activity" and seeing their father be taken into custody. (*Id.* at p. 1033.) Other courts have also upheld exclusion of a defendant's children. (*McConnaughey v. United States* (D.C. App 2002) 804 A.2d 334, 341 [upheld exclusion by trial court of children once the jury was present]; *United States v. Garland* (2nd Cir. 1966) 364 F.2d 487, 489 [not a violation of the defendant's right to a public trial where the judge ordered the defendant's infant excluded, which resulted in his wife's exclusion to care for the infant]; *Reed v. United States* (8th Cir. 1972) 461 F.2d 1106 [not a violation of constitutional right to a public trial because trial judge excluded the defendant's six daughters from courtroom; "the decisive factor is whether the public was excluded"].)

Gonzales claims that the trial court's ruling conflicted with rulings from other jurisdictions. The cases cited by Gonzales are not similar, therefore they are not persuasive. Most of the cases cited by Gonzales involved a trial court's order excluding all witnesses, including a defendant's family, during the testimony of an undercover officer. In New York, trials are routinely closed to the public in undercover drug cases. (Jonakait, *Secret Testimony and Public Trials in New York* (1998) 42 N.Y.L. Sch.L.Rev. 407, 407-408.) New York Courts require a special hearing before an accused's family can be excluded,

called a *Hinton* hearing, based on *People v. Hinton* (1972) 31 N.Y. 2d 71 [334 N.Y.S.2d 885, 286 N.E. 2d 265]. (Jonakait, *Secret Testimony and Public Trials in New York, supra*, at p. 408; Annot., Exclusion of Public From State Criminal Trial to Preserve Safety or Confidentiality of Undercover Police Officer (2007) 100 A.L.R. 5th 171.) In *Rodriguez v. Miller* (2nd Cir. 2006) 439 F.3d 68, 70, the New York trial court excluded the defendant's mother and brother during the testimony of an undercover officer.[17/] In *Vidal v. Williams* (2nd Cir. 1994) 31 F.3d 67, 69, the New York trial court excluded the defendant's parents during the testimony of an undercover informant. In *People v. Garcia* (2000) 94 N.Y.2d 946 [727 N.Y.S.2d 1, 750 N.E.2d 1049], the trial court excluded the defendant's uncle and girlfriend during the testimony of undercover officers. None of these cases involved children.

The only cases cited by Gonzales that involved children were not based on their status as children, but were based on the trial court excluding the public, including the defendant's family members and children to protect the identity of a undercover police officer. In *People v. Nieves* (1977) 90 N.Y.2d 427 [660 N.Y.S.2d 558, 683 N.E.2d 764, 765], the trial court excluded the public, including the defendant's wife and children, from the courtroom during an undercover officer's testimony in a drug case. The trial court determined the children should be excluded because they would not understand the concept of confidentiality as to the undercover police officer. (*Id.* at p. 766.) The court held the exclusion violated the defendant's right to a public trial. As regards the children, the court stated the trial court did not determine whether the children were able to preserve the witness's identity, and noted that the record did not show whether they were toddlers or teenagers. (*Id.* at p. 767.) Likewise,

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17. After Gonzales filed his brief the United States Supreme Court granted a writ of certiorari, and vacated and remanded this case. (*Rodriguez v. Miller, supra,* 439 F.3d at p. 68, cert. granted January 16, 2007, No. 05-1472, ___U.S.___ [127 S.Ct. 1119, 166 L.Ed.2d 888].)

People v. Gutierez (1995) 86 N.Y.2d 817 [633 N.Y.S. 470, 657 N.E.2d 491], involved the exclusion of the defendant's wife and children during an undercover officer's testimony. There is no indication of the ages of the children, and they were not excluded because of their youth. Thus, both *People v. Nieves* and *People v. Gutierez* concerned closing the courtroom to protect an undercover police officer. The exclusion of the defendant's children here was for an entirely different purpose than the exclusion orders in those cases. Therefore, those cases are not persuasive authority.

The only case outside of New York cited by Gonzales was also not on point. In *Walker v. State* (Md.App.1999) 723 A.2d 922, 927, 931-936, the trial court excluded the defendant's mother, sister and girlfriend after their reaction to a scuffle the defendant got into with a witness. None of these excluded spectators were children. Thus, consistent with the cases that have addressed this issue, and in keeping with the policy reasons for having public trials, Gonzales's constitutional rights were not violated by excluding his children from his capital trial.

Gonzales argues that the state did not have an overriding interest in excluding the children from the courtroom because it is unlikely his children would have been harmed from attending portions of the trial where his relatives testified about his background and character. (AOB 142.) The four youngest children ranged from four to eight years old at the time of trial. (8 CT 1755 [ages at time of crime]; 66 RT 8388 [ages at time of trial].) Common sense reveals it would be harmful for children of that young age to attend their father's capital trial. As the prosecutor pointed out, he intended to ask the defense witnesses whether they think Gonzales should die, to ask them questions about what crimes were deserving of the death penalty, and to discuss the horrific facts of the case. (68 RT 8621-L.) These are hardly appropriate subjects to be witnessed by young children.

Gonzales next argues the exclusion of his children from the courtroom was overbroad, because they could have just been present for certain portions of testimony. (AOB 143.) He also contends the court should have considered other alternatives, such as having them present for certain portions of certain witnesses testimony. (AOB 143-144.) The court's order was narrow in that it did not close the courtroom to the public. It was narrowly tailored to prohibit the children from being present in a very serious trial. Gonzales cites no authority for the proposition that the court or parties were required to manage the testimony based on the children's presence.

Citing another New York case (*People v. Garcia* (App. 2000) 710 N.Y.S.2d 345, 348), Gonzales claims the trial court's findings were not sufficient to support closing the courtroom. (AOB 144.) In *People v. Garcia*, the court said it was interpreting New York law, not the constitutional right to a public trial. (*Id.* at p. 348.) Gonzales also relies on *Rodriguez v. Miller, supra,* 439 F.3d at 68, 74-76, for his proposition that the court cannot rely on speculation to exclude the children from the courthouse. (AOB 144.) The case cited by Gonzales is no longer valid authority (see fn. 17). Nevertheless, the trial court did not speculate; it relied on common sense that a capital trial is not an appropriate place for children.

Gonzales relies on *Carson v. Fischer* (2nd Cir. 2005) 421 F.3d. 83, 91-92, for his proposition that the trial court failed to conduct a particularized inquiry that excluding the children was necessary to advance an overriding state interest. (AOB 144.) The court did conduct a particularized inquiry. It did not close the courtroom to other spectators, other family members, or the press. It merely excluded the young children from attending. Moreover, like in *Carson v. Fischer*, the exclusion of only a few specified people, for particular reasons, was "trivial" because it did not "undermine[] the values the [Sixth] Amendment is aimed to protect." (*Id.* at pp. 92-93.)

Gonzales claims that his death sentence should be automatically reversed because excluding his children was a structural error. (AOB 148.) Because Gonzales's constitutional rights were not violated, reversal is not required even if the trial court erred in excluding the children from being paraded before the jury.[18/]

V.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING EXECUTION IMPACT EVIDENCE AND IRRELEVANT EVIDENCE OF GONZALES'S PARENTS HISTORY AND OTHER TANGENTIAL MATTERS

Gonzales claims the trial court erred by excluding evidence in the penalty retrial of the effect of Gonzales's execution on his son, Ivan Gonzales, Jr., because his son testified at the preliminary hearing, and that testimony was used in the guilt phase to convict Gonzales. (AOB 149.) Gonzales also claims the trial court erred by excluding evidence pertaining to his father and uncle's backgrounds, his parents dating relationship, his mother's feelings upon bringing Gonzales home from the hospital when he was born, and his mother's feelings about his relationship with Veronica. (AOB 149-150.) He also claims the trial court erred by ruling it would allow evidence of his support for Anthony, who was conceived as a result of an affair of Veronica's, but that the prosecutor would be allowed to present evidence in rebuttal of the dirty condition of the Gonzales home and that Gonzales used drugs. Gonzales claims these rulings denied him his constitutional rights to present mitigating evidence,

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18. In *People v. Woodward, supra*, this Court did not reach the question of whether a reversible per se standard should apply to temporary denials of the public trial right. (*People v. Woodward, supra*, 4 Cal.4th at p. 387.) In this case, the closure was not of the public, and was only for a limited number of people. Gonzales did not request his children watch the whole trial, thus, it was only a partial, temporary closure.

rebut aggravating evidence, and to a fair and reliable capital-sentencing scheme. (AOB 149.)

Execution impact evidence is not admissible, therefore, the trial court properly excluded the impact that Gonzales's execution would have on Ivan Jr., since the child's preliminary hearing testimony was used against Gonzales in securing his conviction. The trial court allowed evidence of Gonzales's family backgrounds and his mother's feelings toward his birth. The trial court properly excluded evidence of his mother's disapproval of his relationship with Veronica because the evidence was irrelevant–it did not relate to the circumstances of the offense or to Gonzales's character. The trial court also properly ruled that if the defense presented evidence that Gonzales was a good father to Anthony, the prosecution could rebut that evidence by showing the filthy conditions in which the children lived and that Gonzales used drugs.

At the penalty phase, a defendant must be permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record. (Pen. Code, § 190.3; *People v. Marlow, supra,* 34 Cal.4th at p. 152; *Skipper v. South Carolina, supra,* 476 U.S. at pp. 1, 4-8 [106 S.Ct. 1669, 94 L.Ed.2d 1].) However, the rule allowing all relevant mitigating evidence has not "abrogated the California Evidence Code." (*People v. Phillips, supra,* 22 Cal.4th at p. 238; *People v. Edwards, supra,* 54 Cal.3d at p. 837.) Additionally, the trial court retains discretion to exclude evidence that is irrelevant. (*People v. Marlow, supra*, 34 Cal.4th at p. 152.) Moreover, "'[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Phillips, supra*, 22 Cal.4th at p. 238, quoting *People v. Hall, supra,* 41 Cal.3d at p. 834.)

During the first penalty phase trial, Roland Simoncini, the lawyer representing the Gonzales children in dependency court, testified. (68 RT

8386; 68 RT 8718.) Simoncini testified that the six children love Gonzales and that his execution would be devastating to them. (68 RT 8723-8724.) During the discussion prior to the testimony in which the parties discussed the limitations of Simoncini's testimony, Gonzales sought to admit evidence regarding what the impact will be on Ivan Jr. because his testimony from the preliminary examination was used by the prosecutor to "take the life of his father." (66 RT 8419.) The trial court ruled Simoncini could not be asked that particular question. (66 RT 8419.) In spite of that ruling, counsel asked the question, but the court sustained the prosecutors objection prior to the answer. (68 RT 8724.)

Ivan Jr.'s testimony was not offered by either side during the penalty retrial. Gonzales sought to offer evidence, however, that Ivan Jr.'s testimony was used during the guilt phase, and the impact that would have on him if his father were executed. (82 RT 9668, 9670-9671.) Gonzales requested the court take judicial notice that Ivan Jr.'s testimony was previously used or to allow Simoncini to testify to it. (82 RT 9671-9672.)

The court ruled it would not take judicial notice that Ivan Jr.'s testimony was used during the guilt phase because just the fact that Ivan Jr. testified was not, by itself, relevant without addressing the content of his testimony. (82 RT 9698-9699.) Additionally, the court ruled admission of the evidence would be confusing, misleading and prejudicial under Evidence Code section 352. (82 RT 9699.) The court ruled that Simoncini was not an appropriate witness to address the emotional damage that Ivan Jr. may suffer. (82 RT 9700.) The court suggested perhaps a psychologist would be an appropriate witness. (82 RT 9700.) Gonzales never requested to have a psychologist testify as to the impact his execution would have on Ivan Jr. The trial court allowed Gonzales to present evidence generally on the impact of his execution on his children. (82 RT 9688-9689; 97 RT 12495-12496.)

Gonzales argues the trial court erred in excluding the evidence because it was probative on the impact that his execution would have on Ivan Jr., thus it was relevant mitigating evidence. (AOB 151.) Without addressing the issue the trial court decided–whether it should take judicial notice of Ivan Jr.'s testimony and whether Simoncini would have the proper foundation or expertise to give such opinion, the evidence was inadmissible for a more fundamental reason: this Court has consistently held the impact of an execution on a defendant's family members is inadmissible. (*People v. Vieira, supra*, 35 Cal.4th at p. 295; *People v. Smith, supra*, 35 Cal.4th at pp. 366-367; *People v. Smithey, supra,* 20 Cal.4th at p. 1000; *People v. Ochoa, supra,* 19 Cal.4th at pp. 455-456.) "The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed." (*People v. Ochoa, supra*, 19 Cal.4th at p. 456.) Thus, the trial court did not err in excluding the evidence regarding the additional impact Gonzales's execution would have on Ivan Jr. because his testimony had been used in the guilt trial as evidence against his father.

Gonzales argues the trial court erred in finding the evidence would be confusing, misleading, and prejudicial under Evidence Code section 352. (AOB 151.) The evidence would have been confusing and misleading because it would only be relevant if Ivan Jr.'s testimony contributed to or was responsible for Gonzales's death verdict. It assumes that Ivan Jr. was responsible for his father's execution, or would hold himself responsible. Gonzales is the only person that is responsible for his conduct. Moreover, the jury that heard Ivan Jr.'s testimony convicted Gonzales of first degree murder and found the special circumstance to be true. To assign Ivan Jr. "responsibility" for that conviction would necessitate admitting all the evidence that was admitted in that trial to show the jury what other evidence contributed to the jury's guilty verdict. In any case, because the evidence was not

admissible, there was no need for the court to engage in an Evidence Code section 352 analysis.

Gonzales next complains that the trial court erred in excluding evidence of his uncle and father's backgrounds, his parent's dating relationship, his mother's feelings when she brought Gonzales home from the hospital after his birth and his mother's disapproval of his relationship with Veronica. (AOB 149-150.) Gonzales sought to admit evidence of his father's upbringing, in that he and his brother were poor Mexican-Americans, and that they both joined the Air Force and worked for Rohr Industries. (67 RT 8611; 68 RT 8624-8625, 8760-8761, 8764, 8766; 96 RT 12286.) The court ruled that because it was his family's background and it did not relate to Gonzales's background, it was not relevant. (68 RT 8628.) In the penalty retrial, when counsel questioned Gonzales's uncle about whether he joined the Air Force, the prosecutor objected, and the court stated "I need this to move relatively quickly to the defendant's life." (96 RT 12286.) Gonzales's father testified about the training he received in the Air Force. (96 RT 12293.) When he was asked further about the type of work he did when he got out of the Air Force, the court again, after an objection, told counsel that it needed the examination to quickly move to the defendant. (96 RT 12294.) Gonzales's father then testified that he was an aircraft engine mechanic at North Island when Gonzales was born, and that he continued in that job for 30 or 31 years. (96 RT 12295.)

Gonzales's father testified about when he met his wife, how he fell in love with her "at first sight," and about the children they had together. (68 RT 8768-8769; 96 RT 12294.) Gonzales's mother testified about where and when she was born, when she met her husband, that she obtained citizenship, and that she had four children. (98 RT 12512-12514.) She testified where and when Gonzales was born, and that she was happy when she delivered a boy. (98 RT 12514.) She testified that she stayed home and took care of the children while

her husband worked. (98 RT 12514.) Gonzales's sister testified about her excitement when Gonzales was brought home from the hospital. (97 RT 12403.) Gonzales's aunt testified about Gonzales's reception after his birth. (97 RT 12471.) She described the family's excitement, including that of his brothers and sisters. (97 RT 12471.) When she was asked how Gonzales's mother felt when she brought Gonzales home from the hospital, the court sustained an objection, and stated, "let's focus on the defendant, his relationship to his family." (97 RT 12471-12472.)

The trial court did not err in its rulings that Gonzales could present evidence relating to his character, but not present testimony about his father and uncle's employment before Gonzales was even born. In *People v. Holloway, supra,* 33 Cal.4th at 148-149, the defendant claimed the trial court erred by excluding evidence that his mother's parents disapproved of her relationship with her husband, and disowned her, leaving her to raise four children without any help while defendant's father was out "floundering." This Court held the court did not abuse its discretion in excluding the evidence because, while the father's deficiency as a father and role model were relevant subjects in mitigation, his father's character itself was not at issue. (*Id.* at p. 149.) Similarly, here, Gonzales was allowed to present evidence that he grew up in a nice family, but his father and uncle's upbringing, prior to Gonzales's birth was not at issue.

Gonzales correctly claims that evidence regarding a capital defendant's background constitutes relevant mitigating evidence. (AOB 152.) The cases relied upon by Gonzales that discuss the relevance of family history are referring to the defendant's upbringing. (*Wiggins v. Smith* (2003) 539 U.S. 510, 524 [123 S.Ct. 2527, 156 L.Ed.2d 471] [defendant's mother was a chronic alcoholic and he was shuttled between foster homes, he was left once for days without food and he missed a lot of school]; *Eddings v. Oklahoma* (1982) 455

U.S. 104, 107 [102 S.Ct. 869, 71 L.Ed.2d 1] [defendant had a turbulent family history in that his parents were divorced, his mother was an alcoholic and possibly a prostitute, and he was beaten by his father]; *People v. Marsh* (1984) 36 Cal.3d 134, 144, fn. 8 [defendant was an only child, whose father was an alcoholic and mother had psychological problems and often left defendant home alone].) None of the cases cited, however, stand for the proposition that evidence of a defendant's family members backgrounds are also admissible. It is particularly irrelevant when, as here, the history sought to be admitted occurred prior to Gonzales's birth. A family member's history is relevant only if it sheds light on the defendant's character.

Here, Gonzales's family history was relevant and it was admitted. His parents, two sisters, uncle, aunt, and numerous others testified on his behalf. They described in detail how Gonzales was as a child, and his pleasant, Catholic, upbringing. Also, the court did allow evidence of where Gonzales's father and uncle worked, it merely instructed counsel to quickly move to the defendant's life. (96 RT 12286, 12294.)

Gonzales also claims the trial court excluded evidence of his parents courting and how his mother felt when he was brought home from the hospital after he was born. (AOB 149-150.) The trial court did not exclude such evidence. Both Gonzales's parents testified about how they met and started a family together. (96 RT 12294; 98 RT 12512-12514.) Gonzales's mother testified how she felt when she brought Gonzales home from the hospital. (98 RT 12514.) Gonzales's sister also testified as to her excitement when Gonzales was brought home from the hospital. (97 RT 12403.) The only thing the trial court excluded was Gonzales's aunt's description of Gonzales's mother's feelings upon bringing Gonzales home. (97 RT 12471-12472.) Thus, two witnesses testified to their excitement when Gonzales was brought home from the hospital. As the trial did not exclude such evidence, there was no error.

Gonzales also claims the trial court erred in excluding evidence of why his mother disapproved of his relationship with Veronica. (AOB 150.) Counsel asked a series of questions to Gonzales' mother about when she met Veronica and Veronica's mother. (98 RT 12564-12568.) During her direct examination, Gonzales' mother volunteered information about Veronica's mother, and how she was not "behaving" very well. (98 RT 12564-12565.) The prosecutor objected that Gonzales's mother's opinion of Veronica's mother was not relevant. (98 RT 12566.) The court ruled that she could not testify about Veronica's mother's character or Veronica's character, except to the extent that Veronica was abusive towards Gonzales. (98 RT 12573-12574.) Gonzales' mother testified that she did not feel Veronica was a good girlfriend for Gonzales and she tried to dissuade Gonzales from having a relationship with Veronica. (98 RT 12566-12568.) The court sustained the prosecutor's objection when Gonzales' mother was asked what she told her son in trying to dissuade him from having a relationship with Veronica. (98 RT 12568.)

The trial court properly excluded as irrelevant any testimony from Gonzales' mother about what she told Gonzales about his relationship with Veronica or why she disapproved of the relationship. Gonzales argues it was relevant because it "pertained to his background as well as the minor-participation and substantial-domination mitigating factors." (AOB 152.) Gonzales does not explain why his mother's opinion of his relationship with Veronica is relevant and it is difficult to imagine how it would be relevant. The only relevant evidence in this area that would show Gonzales's minor participation or he was substantially dominated would be evidence that Veronica was abusive towards him. The court specifically ruled Gonzales' mother could testify to such evidence. (98 RT 12574.) Thus, there was no error.

Gonzales next contends the trial court abused its discretion in ruling that evidence that Gonzales was supportive of Anthony, Veronica's son she had during their marriage as the result of an affair, would open the door to the prosecutor bringing in evidence that Gonzales was a bad parent because his house was dirty and he used drugs. (AOB 150, 152.)

Prior to the first trial, Gonzales moved to exclude evidence of the condition of his house. (20 RT 1692, 1698, 1715; 21 RT 1862; 6 CT 1335-1337.) The prosecutor sought to admit evidence that the apartment was filthy and "disgusting." (20 RT 1692.) The apartment did not have beds for the children, was cluttered, filthy, smelled like urine, was cockroach infested and had cockroach feces on the walls. (20 RT 1692-1693, 1722, 1724-1725.) The court ruled the evidence was not relevant and excluded it. (20 RT 1725; 21 RT 1863-1864.) The court indicated, however, that if Gonzales presented evidence that he loved his children and took good care of them, it would open the door to this evidence in rebuttal. (21 RT 1865-1866.) Additionally, although there was evidence Gonzales used drugs, the prosecutor did not request to elicit such evidence. (21 RT 1861.)

Prior to the penalty retrial, the court ruled it would allow evidence of Veronica's affair and resulting child, and that Gonzales was not abusive towards that child, Anthony. (82 RT 9703-9704.) If Gonzales wanted to show he was a good father, however, the trial court would allow the prosecution to rebut that with evidence of Gonzales's filthy house and drug use. (82 RT 9705, 9710-9711.)

During the penalty retrial, Gonzales presented evidence that Anthony was the product of Veronica's affair. (96 RT 12141-12142, 12164-12166.) Both Gonzales's sisters testified that Gonzales did not treat Anthony any different than his other children, and that he was not physically abusive towards

him. (95 RT 12082; 97 RT 12381.) Thus, Gonzales was able to solicit the evidence he claims the trial court prevented him from presenting.

Gonzales claims he "sought to introduce the evidence to show that because appellant did not single out Anthony for abuse or mistreatment, despite having a reason for doing so, he was not the person who singled out Genny for maltreatment." (AOB 152.) Gonzales presented such evidence. The trial court ruled it would allow the evidence in rebuttal that the house was filthy and that Gonzales used drugs only if Gonzales attempted to show he was a good father. (82 RT 9705, 9710-9711.) Gonzales does not claim he wished to present evidence that he was a good father. (AOB 152.) The trial court correctly ruled that Gonzales could not paint a false picture of his fathering skills to the jury, and that if he wanted to present evidence showing he was a good father, the jury would be entitled to know the condition in which his children lived. Thus, there was no error.

Gonzales claims the errors complained of violated his constitutional rights. (AOB 153-154.) As the trial court did not exclude the evidence, or only excluded irrelevant or inadmissible evidence, Gonzales's constitutional rights were not violated. As stated earlier, the general rule remains that

> 'the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.'

(*People v. Lawley, supra,* 27 Cal.4th at p. 155.) Gonzales also claims because victim impact evidence is admissible, fairness dictates that he be permitted to present execution impact evidence. (AOB 154.) Here, there was no victim impact evidence that was presented. Moreover, this Court has rejected the argument that execution impact evidence is admissible merely because victim impact evidence is admissible. (*People v. Smithey, supra,* 20 Cal.4th at p. 1000.)

Evidentiary rulings in the penalty phase of a capital trial are harmless errors if there is no reasonable possibility that the jury would have returned a different sentence in their absence. (*People v. Jones*, *supra*, 29 Cal.4th at pp. 1229, 1264, fn. 11; *People v. Jackson, supra,* 13 Cal.4th at pp. 1164, 1232.) Gonzales contends the exclusion of execution impact evidence was prejudicial, because had the evidence been admitted, there is a reasonable possibility he would not have been sentenced to death. (AOB 154.) Even if there were errors, there is no reasonable possibility the outcome of Gonzales' trial would have been different. Gonzales was allowed to present evidence that his children, including Ivan Jr., would be devastated by his execution. (97 RT 12495-12496.) He was allowed to present evidence of his family background, including his father's employment history, how and where his parents met and that his mother was excited when Gonzales was born and when she brought him home from the hospital. Gonzales was allowed to present any evidence that Veronica was abusive towards him. And Gonzales was allowed to present evidence that he did not single Anthony out for maltreatment. Thus, most of the evidence Gonzales claims was prejudicially excluded, was in fact admitted.

Gonzales claims the reason the jury returned a death verdict, and the initial jury could not reach a penalty verdict could have been that the first jury knew that Ivan Jr. played a role in securing the conviction. (AOB 155.) This is extremely speculative, and would require the first jury to find that Ivan Jr. was legally and morally responsible for his father's circumstances, and that they wanted to spare Gonzales's life because Ivan Jr. would feel he was responsible for his father's death. Gonzales, not his son, was responsible for his circumstances. Further, there is no basis upon which to infer that Ivan Jr. would feel responsible for something so clearly beyond his control. Moreover, Gonzales' prejudice analysis ignores the downside attendant with the jury being focused on the impact on Ivan Jr. being a witness against his father, as that

impact necessarily includes the jury also focusing on Ivan Jr. having witnessed Gonzales' crimes against Genny, and Gonzales placing his son in the position of being subjected to inquiry about Gonzales' abuse, torture and murder of Genny.

Gonzales also claims that the rulings prevented the jury from knowing Gonzales came from an upstanding family and that his father and uncle served in their country's armed forces, which underscored his defense that he was a minor participant and that his character had redeeming value. (AOB 155.) His argument ignores the fact that there was testimony that Gonzales's father was in the Air Force. (96 RT 12293.) The court did not exclude any evidence about Gonzales's "upstanding" family.

Gonzales claims his mother's testimony about her disapproval of her son's relationship with Veronica would have "buttressed the substantial-domination defense," (AOB 155), but does not explain how it would do so. Gonzales was not prevented from presenting evidence that Veronica abused him, so it is not clear how his mother's opinion of his relationship with Veronica would have supported his defense.

Lastly, Gonzales claims his relationship with Anthony cast doubt on the degree of his participation in the offense and shed positive light on his character. (AOB 155.) The trial court allowed such testimony, thus Gonzales's argument it was error to exclude it fails, and cannot serve any basis for finding prejudice.

Moreover, there was no prejudice because the torture of Genny was horrific. It was particularly egregious because it was committed against a helpless, dependent four-year-old child. Instead of taking care of Genny's needs as a caretaker, Gonzales tortured and abused her. After placing her in the scalding tub, Gonzales did not call for medical help; he went to the store to buy bread and beer, leaving her to slowly die. Given the facts of this case, even if

the jury knew that Gonzales's uncle was in the Air Force, every detail of his parents courting relationship, details of why his mother disapproved of Veronica, that he was a great parent to Anthony, and that Ivan Jr.'s testimony was used at the preliminary hearing, it is still not reasonably possible the outcome would have been different.

VI.

THE TRIAL COURT PROPERLY DENIED GONZALES'S MOTION FOR A NEW TRIAL ON THE SPECIAL CIRCUMSTANCE BECAUSE THE JUROR DECLARATIONS HE SUBMITTED TO IMPEACH THE VERDICT WERE INADMISSIBLE

Gonzales claims the trial court erred by denying his motion for a new trial of the special circumstance finding based on his claim the jury did not deliberate and find he intended to kill Genny as required for the torture-murder special circumstance. (AOB 156.) Gonzales further claims excluding the jurors declarations violated his constitutional rights. (AOB 170-171.) The trial court properly denied Gonzales's motion for a new trial because the declarations he submitted were of the juror's thought processes in deliberations, and were therefore inadmissible under Evidence Code section 1150 to impeach the verdict. Gonzales's claim that application of the statute violated his constitutional rights is also without merit.

After the court declared a mistrial on the penalty phase, it told the jurors that if they wanted to talk, "not to rehash the facts, but on any other issue," to let the bailiff know. (73 RT 9323, 9326.) Four of the jurors asked to speak to the court while other jurors spoke to the attorneys. (74 RT 9329-9330.) The court spoke to the jurors about ways to improve the system, and a "range of discussions" including one juror who wanted to see a teddy bear on a bookcase in the judge's chambers. (74 RT 9329-9330.) The court asked two of the

jurors, Jurors No. 6 and 12, how they had analyzed the "intent to kill issue," and the two jurors said that the jury had not believed Gonzales had intended to kill Genny. (74 RT 9330-9332.) The court did not inquire further, and said because of that "there could be some substantial doubt as to what the specifics were of what they meant or intended." (74 RT 9332.) The prosecutor stated that he asked the jurors whether they had any problems "on [the] specific intent-to-kill issue" or guilt phase issues, and the jurors indicated they did not. (74 RT 9332.)

Gonzales filed a motion for a new trial as to the special circumstance allegation. (11 CT 2409-2440.) He argued the jurors, by failing to discuss whether he had the intent to kill Genny, did not follow the law, therefore they committed misconduct. (81 RT 9507-9510.) Along with his motion, Gonzales submitted five juror declarations. (11 CT 2436-2440.) Juror No. 2 said the jury came to their finding on the special circumstance based on the acts of torture. He/she said, "the torture was proved one hundred times over and we used the acts of torture to find the special circumstance to be true. When deciding that allegation, we did not separately find that Ivan also intended to kill the child." (11 CT 2440.)

Juror No. 4 said the jury based their finding on the special circumstance "on the acts of torture alone, on all those ugly things that happened to Genny. In deciding that allegation, we did not separately analyze and find that Ivan intended to kill the child." He/she also said he/she did not personally believe Gonzales intended to kill Genny. (11 CT 2438.)

Juror No. 5 said the jury did not separately analyze and find there was an intent to kill Genny in its special circumstance finding. They carefully reviewed all the evidence and concluded that Genny was "clearly tortured" and died as a result. He/she also did not personally feel that Gonzales ever intended to kill Genny. (11 CT 2439.)

Juror No. 9 declared that the jury went through "critical evidence in great detail . . . and concluded that Ivan was guilty of torture. We then based our verdict as to the special circumstance allegation on the acts of torture alone. As I recall, we did not separately analyze and find that Ivan also intended to kill the child." Juror No. 9 said he/she personally believed that Gonzales may not have intended to kill Genny. (11 CT 2436.)

Juror No. 10 declared the jury did not "really discuss or emphasize" the issue of intent to kill for the special circumstance allegation. Their finding was based on the numerous acts of abuse and torture. He/she stated he/she did not personally believe that Gonzales intended to kill Genny. (11 CT 2437.)

The prosecutor filed an opposition to Gonzales's motion for a new trial, and submitted eight juror declarations; some were from the same jurors that filed declarations for Gonzales.[19] (11 CT 2455-2483.) The jurors explained that during deliberations, all jurors had access to the jury instructions. The foreperson read the instructions to the jury, including the special circumstance instruction, and copied the instructions onto a large flip chart. (11 CT 2472, 2474-2476, 2478-2479, 2481-2482.)

The foreperson, Juror No. 1, explained that the instructions were discussed at great length. He/she explained, "[r]egarding the special circumstance murder instruction, each sentence was highlighted and discussed. Specifically, the elements of intent to kill, aid[ing] and abett[ing], and intent to torture were underlined." (11 CT 2472.) The foreperson also declared that,

> I personally, and the jury in total, deliberated on all the events that led up to the death of Genny Rojas, including but not limited to her immersion in the tub, the subsequent omission to act by the defendant after Genny was severely burned, and the numerous acts of torture which occurred to Genny Rojas before her death–these issues were all discussed in reference to both the intent to torture and the intent to kill.

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19. Gonzales's counsel claimed she spoke to nine jurors but the other jurors were not willing to sign declarations. (11 CT 2415-2416; 81 RT 9503.)

(11 CT 2473.) The foreperson explained that defense counsel and an investigator interviewed her after the verdict. He/she explained the interview as follows:

> They wanted to know, among other things, how the jury analyzed the issue of specific intent to kill. They asked me the narrow question of whether I believed the defendant intended to kill Genny Rojas when he submerged her in the tub on July 21, 1995. I replied that I did not believe so. However, I was not questioned as to whether I believed the defendant intended to kill Genny Rojas based upon the defendant's omission to act after he had taken her out of the tub, or based upon the defendant's overall conduct towards the victim over the period she lived with the defendant and his wife, which I did consider in deciding whether the defendant intended to kill the victim.

(11 CT 2473.)

Juror No. 2, who also filed a declaration on behalf of Gonzales, considered during deliberations whether Gonzales intended to torture and kill Genny, and believed Gonzales did intend to torture and kill her. (11 CT 2474.) Juror No. 3 personally considered and believed Gonzales intended to kill Genny. (11 CT 2475.)

Juror No. 5, who had also filed a declaration for Gonzales, declared that

> [d]uring deliberations, the defendant's placing of the victim in the tub, the defendant's subsequent omission to act after he had taken the victim from the tub, and the totality of the acts of abuse directed at the victim for the period of time she lived with the defendant, were all discussed in relationship to the defendant's intent to kill and torture the victim.

(11 CT 2476.) He/she also declared that "I believe that the legal definition of intent to kill and torture were satisfied." (11 CT 2477.)

Juror No. 6 declared that he/she personally considered and believed that Gonzales intended to kill Genny. (11 CT 2478.) Juror No. 7 declared that

> [t]hroughout deliberations, the defendant's conduct, specifically, the act of immersing Genny Rojas in the tub of scalding water; the omission to help her after she was burned; and the numerous acts of abuse inflicted upon her body, were all discussed and considered in relation to the defendant's intent to kill and intent to torture her.

(11 CT 2479.) Juror No. 7 also declared that he/she believed, based on all the evidence, that Gonzales intended to torture and kill Genny. (11 CT 2480.)

Juror No. 8 declared that "[t]he issue of the defendant's intent to kill Genny Rojas was discussed during deliberations. In fact, I specifically discussed the issue with the juror seated in seat 12." (11 CT 2481.)

Juror No. 9, who also filed a declaration on behalf of Gonzales, stated that he/she understood the jury instructions. He/she also declared that "[d]uring deliberations there was discussion regarding the defendant's omission to act after removing Genny Rojas from the bathtub and the continued abuse and torture she had suffered for at least three weeks." (11 CT 2482.) He/she further declared that "I believe the legal definition of intent to kill was proven." (11 CT 2483.)

After lengthy argument of counsel (81 RT 9502-9549), the trial court issued a written ruling denying Gonzales's motion for a new trial. (11 CT 2510-2513.) It held the statements by the jurors were inadmissible under Evidence Code section 1150. (11 CT 2510-2511.) It further held Gonzales's due process and fair trial rights were not violated. (11 CT 2511.) It noted the policies underlying Evidence Code section 1150 and similar laws in other jurisdictions "are weighty and central to the jury system." (11 CT 1150.) The court quoted from *Tanner v. United States* (1987) 483 U.S. 107, 120-121 [107 S.Ct. 2739, 97 L.Ed.2d 90], which held the policies include the finality of jury verdicts, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, the community's trust in a system that relies on the decisions of laypeople, and not having jurors harassed and beset by the defeated party in an effort to secure evidence of facts that might establish misconduct. (11 CT 2511-2512.)

Weighed against these policy considerations, the court ruled, the declarations in this case did not "compel a constitutional override" of Evidence

Code section 1150. The court noted the jurors declared they did not separately analyze or separately find the intent to kill, but there is no legal obligation for the jury to have a separate oral analysis or make a separate finding on that issue. (11 CT 2512.)

Second, with respect to the statements they did not believe Gonzales intended to kill Genny, the court noted the declarations were executed more than two months after the verdict was rendered and were in the present tense. They were executed "after the jury had been released from the protective obligations that surrounded them as deliberating jurors and after they had been exposed to unknowable outside influences and personal second-guessing." The court noted that not one juror said he/she was unaware of the intent requirement, or that they were aware of the requirement but found the special circumstance true in wilful defiance of the law. Also, two of the jurors who expressed doubt about Gonzales's intent also signed declarations for the People stating they believed the legal definition of intent to kill was satisfied. The court concluded the declarations "are fraught with substantive weakness and credibility concerns." (11 CT 2512.)

A. The Trial Court Properly Denied Gonzales's Motion For A New Trial Because It Is Improper To Impeach The Verdict With Evidence Of The Jurors' Thought Processes

Although Gonzales does not directly state the jury committed misconduct, the essence of his claim is that the jury committed misconduct by not deliberating on whether Gonzales intended to kill Genny, thereby violating the trial court's instructions that it could not find true the special circumstance without unanimously finding that each element of the special circumstance had been proven beyond a reasonable doubt. (AOB 161-162.) California law provides that a motion for new trial based on jury misconduct requires the trial court to conduct a three-step inquiry. It must consider: (1) whether the

affidavits supporting the motion for new trial are admissible under California Evidence Code section 1150; (2) whether the facts establish that misconduct occurred; and (3) if misconduct occurred, whether it was prejudicial. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-398, 402; *People v Duran* (1996) 50 Cal.App.4th 103, 112-113; *People v. Dorsey* (1995) 34 Cal.App.4th 694, 703-704.) "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse clearly appears." (*People v. Carter* (2005) 36 Cal.4th 1114, 1210, quoting *People v. Williams* (1988) 45 Cal.3d 1268, 1318.)[20/]

Evidence Code section 1150 provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Pursuant to Evidence Code section 1150, juror affidavits can only be used to prove "objective facts." (*In re Stankewitz, supra,* 40 Cal.3d at p. 397.) Jurors may provide evidence of "'overt acts' -- that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and

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20. Citing *People v. Wisely* (1990) 224 Cal.App.3d 939, 947, Gonzales contends the denial of a new trial motion for jury misconduct is reviewed de novo. (AOB 159.) In *People v. Carter, supra*, however, this Court held the standard is abuse of discretion for a trial court's denial of a motion for a new trial based on juror misconduct. (*People v. Carter, supra*, 36 Cal.4th at p. 1210.) This Court has held that whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]'" (*People v. Majors* (1998) 18 Cal.4th 385, 417, quoting *People v. Nesler* (1997) 16 Cal.4th 561, 582.) Even if this Court were to review the ruling de novo, the trial court properly denied the motion, and Gonzales is not entitled to relief.

thus subject to corroboration' -- but may not testify to the "subjective reasoning processes of the individual juror . . . ."" (*In re Stankewitz, supra,* 40 Cal.3d at p. 398, citing *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350.)

Evidence Code section 1150 is violated by the admission of jurors' testimony describing their own mental processes, and may also be violated by the admission of testimony of statements made by jurors in the course of their deliberations. (*People v. Duran, supra,* 50 Cal.App.4th at p. 112, citing *People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419.) "[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror 'felt' or how he understood the trial court's instructions is not competent." (*People v. Steele* (2002) 27 Cal.4th 1230, 1261, quoting *People v. Morris* (1991) 53 Cal.3d 152, 231.)

Here, Gonzales's argument is a clear attempt to impeach the jury's verdict by inquiring into the jurors' mental or subjective reasoning process. The juror declarations were of how the jurors deliberated on the special circumstance finding. In the declarations, the jurors stated they did not "separately find that Ivan also intended to kill the child," "did not separately analyze and find that Ivan intended to kill the child," and did not "really discuss or emphasize the issue of intent to kill" for the special circumstance allegation. (11 CT 2436-2440.) Four of the jurors also said they did not personally believe Gonzales intended to kill Genny.[21/] (11 CT 2436-2439.) All the statements upon which Gonzales wishes to use to impeach the verdict concerned the deliberative process, which is necessarily the subjective reasoning process. The statements concern how the jurors arrived at their verdict. As the statements

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21. Two of these jurors submitted declarations for the prosecution. One declared that he/she did believe Gonzales intended to kill Genny, and the other declared that the legal definition of intent to kill was satisfied. (11 CT 2474, 2477.)

concerned the jurors' subjective reasoning process, the trial court properly ruled they were inadmissible under Evidence Code section 1150.

Gonzales erroneously views whether the jury discussed Gonzales' intent to kill Genny as something objective that could be verified by the jurors. From this erroneous premise, he then extrapolates the jurors' statements were admissible under Evidence Code section 1150 because the statements were "objectively ascertainable events that were subject to corroboration." (AOB 160-161.) Gonzales's argument is essentially that the jurors could verify what their subjective thought process was, therefore, their statements were admissible. To the contrary, how the jurors specifically found the special circumstance to be true and analyzed the evidence is their mental processes or reasons for assent or dissent, which are not admissible. (*People v. Steele, supra*, 27 Cal.4th at p. 1261.) These thought processes are not those open to sight, hearing, and the other senses, and are thus not subject to corroboration. This is evident by the jurors' disagreement about whether and how the intent to kill issue was analyzed and discussed. Many jurors stated Gonzales's intent to kill was analyzed and discussed. (11 CT 2473-2483.) Whether the matter was analyzed and discussed clearly encompasses the jurors thought process and the deliberative process.

Gonzales relies on *People v. Ramos* (2004) 34 Cal.4th 494, 518, fn. 7, as support for his position that the absence of the jurors' deliberations of intent to kill is not an individual juror's subjective reasoning process. (AOB 161.) The alleged juror misconduct at issue in *People v. Ramos* was whether the jurors read newspaper articles about the case during deliberations. (*Id.* at pp. 517-518.) Whether a juror relied on an extraneous source, such as a newspaper, in his/her deliberations is an objective fact, subject to corroboration. It concerns an "event occurring, either within or without the jury room, of such character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150.)

How the jury analyzed the evidence related to the special circumstance, as here, concerns the mental processes or reasons for assent or dissent, and is inadmissible. (*People v. Steele, supra*, 27 Cal.4th at p. 1261.) Thus, Gonzales's reliance on *People v. Ramos* is misplaced.

Next, Gonzales argues that because the finding of an element of an offense, such as the intent to kill, can be recorded as a special finding on a hybrid verdict form, it necessarily is an overt fact subject to corroboration. (AOB 161-164.) The jury here made the necessary finding. They unanimously found that Gonzales's murder of Genny "*was intentional* and involved the infliction of torture." (9 CT 2121, emphasis added.) When polled, the jurors affirmatively stated this was their finding. (64 RT 8219-8220.) Moreover, there is no requirement the jurors analyze the evidence in the same manner to come up with that finding.

Gonzales is attempting to impeach the juror's finding with evidence of the juror's subjective thought processes, on how they analyzed the evidence and arrived at that finding. For example, Juror No. 2 said in his/her declaration that the torture was proven "one hundred times over and we used the acts of torture to find the special circumstance to be true. When deciding that allegation, we did not separately find that Ivan also intended to kill the child." (11 CT 2440.) The declaration is specifically focused on what evidence was used to find the special circumstance allegation, i.e., the jurors' thought process.

As another example, Juror No. 5 submitted two declarations. In one, he/she said that the jury did not separately analyze and find there was an intent to kill Genny, but they carefully reviewed all the evidence and concluded Genny was "clearly tortured" and died as a result. He/she did not personally feel Gonzales ever intended to kill Genny. (11 CT 2439.) In his/her second declaration, Juror No. 5 explained on what evidence they based their special circumstance finding: "the defendant's placing of the victim in the tub, the

defendant's subsequent omission to act after he had taken the victim from the tub, and the totality of the acts of abuse directed at the victim for the period of time she lived with the defendant." He/she declared that these acts were discussed "in relationship to the defendant's *intent to kill* and torture the victim." (11 CT 2476, emphasis added.) He/she also declared that, "I believe that the legal definition of intent to kill and torture were satisfied." (11 CT 2477.) Thus, the declarations are of how the jurors arrived at the special circumstance finding that Gonzales's murder of Genny was "intentional and involved the infliction of torture." (9 CT 2121.) That "intent to kill" could have been a special finding does not change the nature of Gonzales's inquiry. The jurors found intent to kill and Gonzales is attempting to impeach that finding with how the jurors analyzed the evidence. Thus, that effort is foreclosed by Evidence Code section 1150.

Without citing any authority, Gonzales claims the two jurors' statements to the trial court immediately after the trial were admissible under Evidence Code section 1150. (AOB 164.) It is immaterial to whom the statements are made. If the evidence is to impeach a verdict based on the juror's mental or subjective reasoning processes, it is inadmissible. (*People v. Steele, supra*, 27 Cal.4th at p. 1261.) For the same reason the jurors declarations were inadmissible, the statements to the trial court are also inadmissible.

As a backup argument, Gonzales contends that even if the jurors' statements are of their subjective thought processes, this Court should nevertheless determine that the statements were admissible because the policies underlying Evidence Code section 1150 support their admissibility. (AOB 164-170.) Specifically, Gonzales claims the three policy reasons, preventing instability of verdicts, fraud, and harassment of jurors, does not justify exclusion of evidence in this case. (AOB 165.)

The policy reasons for the rule are sound, and applicable in this case. This Court has described the "important" policy goals as follows:

> It prevents a juror from impugning one or more jurors' reasoning processes. It excludes unreliable proof of thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by the losing side seeking to discover defects in the deliberative process and reduces the risk of postverdict jury tampering. It also assures the privacy of jury deliberations.

(*People v. Steele, supra*, 27 Cal.4th at pp. 1261-1262.) These policy goals are all furthered by application of Evidence Code section 1150 in this case.

Gonzales argues barring the statements in this case would not prevent juror harassment or fraud. (AOB 165-166.) His argument seems to be that because the court initiated the discussion with the jurors regarding the issue, it was not a "fishing expedition," and therefore, there would be no harassment or fraud. (AOB 165-170.) As a matter of policy, exploring these types of issues, regardless of how the ball got rolling, encourages the harassment of jurors by the losing side seeking to discover defects in the deliberative process. When the jurors spoke to the court, it was on their own initiative. Further contacts were not necessarily welcome. Numerous jurors were contacted by both sides after their jury service had ended. Three of the jurors in this case told the court they did not want their personal information to be given to counsel and they did not want to be contacted. (78 RT 9453-9454.) Thus, the policy of preventing juror harassment and fraud would be furthered by application of Evidence Code section 1150 in this case.

Contrary to Gonzales's assertion, application of Evidence Code section 1150 would advance the policy of preserving the stability of jury verdicts. Gonzales's argument is that because the statements were made close in time to the trial, and it was the court that initially spoke to the jury about this issue, excluding the statements would not sufficiently advance the state's interest in preserving the stability of jury verdicts. (AOB 166-167.) The jury's verdict

and special circumstance finding were on May 16, 1997. (9 CT 2120-2121.) The court spoke to the jurors on June 5, 1997, a few weeks later. (73 RT 9292, 9326.) Gonzales obtained his declarations from jurors between July 17, 1997 and August 8, 1997. (11 CT 2436-2440.) The prosecution obtained declarations from jurors from August 14 to August 28, 1997. (11 CT 2472-2483.) Over three months elapsed from when the jury rendered its verdict and when various jurors signed declarations. Furthermore, it is immaterial that it was the court that initially spoke to the jurors about this issue. Thus, while it was not years later that the jurors were contacted, months had elapsed from when the jurors deliberated on Gonzales's guilt.

This case illustrates the importance of the policy prohibiting jurors from impeaching their verdicts. The jury unanimously decided Gonzales was guilty of first degree murder, and they specifically found that the murder was intentional and involved the infliction of torture. (9 CT 2120-2121.) When it came time to decide the appropriate penalty, however, the jury could not come to a unanimous decision. (73 RT 9323.) The jury deadlocked eight to four. (73 RT 9322.) After it was deadlocked on the penalty, some jurors made the statements that they did not find intent to kill. Notably, there were only three jurors who signed declarations for the defense that were not clarified by declarations they signed for the prosecution. A reasonable inference is that those jurors who were not willing to return a death verdict were affected or influenced in terms of the statements in their declarations by their positions regarding the appropriate penalty, and in effect effectuating their viewpoint regarding penalty by impeaching the guilt verdict rendered in the case. Because of the subjective nature of the statements and the jurors' thought processes, it is difficult or impossible to determine how the evidence received during the penalty phase, and the arguments made at the penalty phase, may have influenced those jurors. Thus, the policy reason of preserving the stability of

jury verdicts is particularly strong in a case such as this, where the jurors are exposed to other information that may bear on their thought processes after they reach their verdict.

Gonzales also argues that countervailing policy considerations mandate the admissibility of the jurors' statements and declarations because the state has an interest in "not having people sit on death row, and in not executing people, if they are not eligible for a death sentence." (AOB 167-170.) Gonzales analogizes to a case of juror basing a verdict on ethnic or racial prejudice. (AOB 168-169.) Here there is no claim that a juror engaged in such despicable prejudice. Moreover, while the state's interest in upholding the death sentence only extends to those who are eligible for a death sentence, here, the jury followed the court's instructions and found the special circumstance true, which specifically required Gonzales have an intent to kill. (9 CT 2021.) Any second thoughts the jurors may have had after the case is over ought not impeach their unanimous verdict. As this Court has stated, "[n]ot all thoughts 'by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such [thoughts] cannot impeach a unanimous verdict; a jury verdict is not so fragile.'" (*People v. Steele, supra*, 27 Cal.4th at p. 1262, quoting *People v. Riel* (2000) 22 Cal.4th 1153, 1219.) Thus, the jury unanimously found true under proper instructions the special circumstance that Gonzales intentionally killed and tortured Genny, thereby rendering Gonzales eligible for a death sentence.

In *People v. Romero* (1982) 31 Cal.3d 685, 688, the jurors convicted the defendant of a burglary in count one, and acquitted him of burglary in count two. The defendant later claimed the jurors intended to convict him of count two, and acquit him of count one. This Court held the defendant could not be retried on count two, because of double jeopardy. This Court further held the affidavits of the jurors were not admissible under Evidence Code section 1150. (*People v. Romero, supra*, 31 Cal.3d at p. 689.) This Court discussed the

difference between clerical error and deliberative error, and concluded that even if there was a technical error, the judgment should not be set aside because there was no miscarriage of justice. (*People v. Romero, supra*, 31 Cal.3d at pp. 690-696.) Gonzales notes that the trial court relied on *Romero*, but argues here, being sentenced to death "though the jury found only one of two elements of the lone special circumstance, is an infinitely larger injustice than the one that occurred in *Romero*." (AOB 169.) As stated above, no injustice would occur here because the jury properly found Gonzales intended to kill and torture Genny. (9 CT 2021.) Moreover, Gonzales's argument would apply to any capital case in which a defendant sought to impeach a verdict. This Court did not hold that Evidence Code section 1150 does not apply in capital cases. Thus, Gonzales's point is meritless.

Gonzales argues the policy-based exception he advocates would only apply in the limited facts presented here, where the trial judge was the one who "uncovered the jury's failure" to find intent to kill, and where the "misconduct" was found quickly after the trial. (AOB 170.) That the trial judge initially brought the juror's statements to the parties attention does not have any bearing on the policy issues. Moreover, as argued above, while the statements were not gathered years after Gonzales's conviction, they were gathered after the jury was exposed to factors which may have influenced their thoughts. They had just deliberated and failed to reach a verdict on penalty. Thus, Gonzales's argument that there should be an exception to the long-standing policy of disallowing jurors to impeach their verdicts is unpersuasive.

B. Gonzales's Constitutional Rights Were Not Violated By Application Of Evidence Code Section 1150

Gonzales claims his constitutional rights under the Eighth and Fourteenth Amendments, and his state constitutional rights to due process, a fair trial, and a fair and reliable capital-sentencing determination were violated by application of Evidence Code section 1150 in this case. (AOB 170.) In *People v. Steele, supra*, this Court rejected the argument that application of Evidence Code section 1150 violated the United States and California Constitutions. (*People v. Steele, supra*, 27 Cal.4th at p. 1261.) This Court noted the long-standing rule, supported by a number of important policy goals. (*Ibid.*) Furthermore, the United States Supreme Court, in its holding in *Tanner v. United States, supra*, precluded a conclusion that such a rule would violate the United States Constitution. (*People v. Steele, supra*, 27 Cal.4th at p. 1262.)

Gonzales nevertheless argues that in this particular case, his due process rights are violated by the rule excluding such evidence. Specifically, Gonzales argues the excluded declarations were critical and favorable to his defense, and the state had no countervailing interest in excluding the evidence. (AOB 171.) As argued in detail above, the policy reasons for the rule are particularly applicable in this case, where the jurors made their statements after the penalty phase in which they were unable to reach an agreement. Moreover, although Gonzales argues the declarations were critical to his new trial motion, the court did not exclude critical evidence of his defense at trial. Also, contrary to Gonzales's argument, as stated above, the jury did find beyond a reasonable doubt all the elements of the special circumstance which rendered him eligible for the death penalty. (9 CT 2121.)

Without citing any authority, Gonzales argues an exception should be carved out to the long-standing rule only in those cases in which the jurors reveal to the judge immediately after trial that an essential element underlying

the defendant's death-eligibility was never proven. (AOB 173.) This factor is immaterial. The policy reasons underlying the rule do not depend on who initially spoke to the jurors. Gonzales's argument is unpersuasive.

Gonzales argues *Tanner v. United States* does not control this case because his argument does not arise under the Sixth Amendment. (AOB 173-174.) In *People v. Steele*, this Court held the same arguments apply whether analyzed under the Sixth, Eighth or Fourteenth Amendments. (*People v. Steele, supra*, 27 Cal.4th at p. 1263.) Thus, Gonzales's claim his constitutional rights were violated is without merit.

C. Gonzales Is Not Entitled To A New Trial On The Special Circumstance Finding

Gonzales requests this Court reverse the special circumstance finding and grant his request for a new trial, based on what he claims is "the uncontradicted evidence that the jury failed to find the intent-to-kill element." (AOB 174-180.) If this Court were to determine the trial court erred in ruling the juror declarations were inadmissible, Gonzales would not be entitled to a new trial. The declarations did not establish misconduct. The jury was properly instructed, and none of the jurors stated they failed to follow the law. They were instructed they must unanimously find the special circumstance to be true (10 CT 2282 [CALJIC No. 8.80.1]), and that to find the special circumstance of murder by torture they must find (1) Gonzales intended to kill, or with intent to kill, aided and abetted in the killing of a human being, and (2) Gonzales intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose (10 CT 2283 [CALJIC No. 8.81.18]). Their special finding specifically said Gonzales's murder was intentional and involved the infliction of torture. (9 CT 2121.) When polled, the jurors affirmatively stated this was their finding. (64 RT 8219-8220.)

The declarations did not state the jurors did not understand the law, or did not follow the law. Gonzales has not cited any authority that the jurors must "separately find" Gonzales intended to kill Genny (11 CT 2440 [Juror No. 2's declaration]), or "separately analyze and find" that Gonzales intended to kill Genny (11 CT 2436, 2438-2439 [Juror No. 4, 5 & 9's declarations]), or that they need to "really discuss or emphasize" the issue of intent to kill (11 CT 2437 [Juror No. 10's declaration].) Gonzales concludes based on these declarations that the jurors did not find he intended to kill Genny. Not one of the declarations, however, stated that the jurors did not deliberate on intent to kill, or that their finding was in error.

The foreperson read the instructions to the jury, including the special circumstance instructions, and even copied each instruction onto a large flip chart. (11 CT 2472, 2474-2476, 2478-2479, 2481-2482.) The special circumstance was highlighted and discussed, and the elements of intent to kill, aiding and abetting, and intent to torture were underlined. (11 CT 2472.)

Contrary to Gonzales's argument, numerous jurors did state in their declarations they found Gonzales intended to kill Genny, and that this issue was discussed in deliberations. (AOB 178; 11 CT 2472-2477, 2479, 2481.) Many of the jurors, including those who submitted declarations on behalf of Gonzales, stated they specifically deliberated on the special circumstance. (11 CT 2436-2440, 2473-2474, 2476, 2479, 2481-2482.) Thus, Gonzales's argument that "in this case there was an absence of deliberations regarding the intent-to-kill element" (AOB 179) is contradicted by the record.

If this Court were to find Gonzales's arguments persuasive that the trial court erred in excluding the juror declarations, and that the declarations, if true, established misconduct, the appropriate remedy would be to remand the case to the trial court to conduct an inquiry to resolve the factual issue raised by Gonzales–whether the jurors did deliberate on Gonzales's intent to kill Genny.

(*People v. Braxton* (2004) 34 Cal.4th 798, 818-819; *People v. Avila* (2006) 38 Cal.4th 491, 604; *People v. Hedgecock, supra*, 51 Cal.3d at pp. 415, 420-421.)

As detailed above, the declarations submitted by Gonzales and the prosecutor conflicted on whether the jurors specifically deliberated on Gonzales's intent to kill. Thus, remand for an evidentiary hearing would be appropriate so the trial court could resolve the factual issue of whether the jurors specifically discussed Gonzales's intent to kill. Contrary to Gonzales's argument, it was not "uncontradicted" that the jury failed to find the intent-to-kill element." (AOB 177-178; 11 CT 2472-2473 [juror declaration that the element of intent to kill was discussed and found true]; 11 CT 2474 [juror declaration that he/she considered during deliberations Gonzales's intent to kill]; 11 CT 2476 [juror declaration that jury discussed intent to kill]; 11 CT 2479 [juror declaration that intent to kill was discussed]; 11 CT 2481 [juror declaration that intent to kill was discussed].)

If the trial court resolved the credibility determinations in Gonzales's favor, and found that the jurors engaged in misconduct, prejudice would be presumed. (*In re Stankewitz, supra*, 40 Cal.3d at pp. 396-402.) If the prosecution could not rebut the presumption of prejudice, only then would Gonzales be entitled to a new trial on the special circumstance. (*Ibid.*) Thus, if this Court finds the trial court erred in excluding the declarations under Evidence Code section 1150, the appropriate remedy is to remand to the trial court for an evidentiary hearing. In any event, for the reasons detailed above, the trial court did not err.

VII.

THE TRIAL COURT DID NOT ERR BY EXCUSING PROSPECTIVE JUROR NO. 504 IN THE PENALTY RETRIAL

Gonzales claims his penalty must be reversed because the trial court improperly removed prospective Juror No. 504 for cause in the penalty retrial. (AOB 183.) The trial court did not abuse its discretion in removing prospective Juror No. 504 for cause because her responses to some of the questions on the written questionnaire, as well as her in-court responses, showed her views on the death penalty would prevent or substantially impair the performance of her duties as a juror in accordance with the instructions.

Prospective Juror No. 504, in her questionnaire, stated that, "[t]he death penalty should be abolished! Killing a human being does not serve as fitting punishment for crimes where the perpetrator needs to reflect on what has been done." (45 CT 10222; exclamation point original.) When asked her general feelings about life imprisonment without the possibility of parole, she answered, "[i]t gives criminals time to reflect on their crimes." (45 CT 10223.) She wrote she was "strongly opposed" to the death penalty, and it should not be imposed for any type of crime. (45 CT 10223.) She believed it was imposed "too often."

When asked whether the death penalty served any purpose, she said it gave a form of satisfaction to the victim's family. While she had previously believed the death penalty was a fitting punishment, her views on the death penalty changed when she found out how long it took for death to occur. She believed life in prison without the possibility of parole was a worse punishment than death because the defendant would reflect on the crime he or she committed. (45 CT 10223.)

In spite of those strong views, when asked whether she would always vote against the death penalty, prospective Juror No. 504 said, "no" because

"sometimes the death penalty is the only appropriate punishment." She also said that she would consider the death penalty as appropriate as a last resort. (45 CT 10224.)

Prospective Juror No. 504 had an uncle who had been "unjustly accused and convicted" of murder in the Virgin Islands. (45 CT 10212; 87 RT 10647.) When the court asked her whether that would affect her, she said "it would probably affect me" then stated she had mixed feelings about the death penalty. (87 RT 10647.) She said she was strongly opposed to the death penalty because juries have been known to be wrong and "you can't bring someone back." (87 RT 10648.) She reiterated that she thought the death penalty should be abolished because "I don't think taking a life for a life is, is fair." (87 RT 10648.) Upon further inquiry from the court, prospective Juror No. 504 said she could open-mindedly consider both potential punishments, and that it was possible she would impose death if the facts justified it. (87 RT 10649.) She followed up by saying it would be "very unlikely" she would ever impose the death penalty due to her strong views. (87 RT 10649-10650.)

Upon questioning by defense counsel, prospective Juror No. 504 said she was not "adamantly opposed" to the death penalty, and could impose it in certain situations. (87 RT 10701-10702.) Upon questioning by the prosecutor, prospective Juror No. 504 said if she were running the state, she would not have capital punishment. Instead, she would subject criminals to medical research to "make them useful for something." (87 RT 10718.) She said that Jeffrey Dahmer deserved to die. (87 RT 10719.) She said she could vote for death, and explained that she could "compartmentalize things and look at things individually. If something sickens me enough, regardless." (87 RT 10720.) She explained her opposition to capital punishment was a moral belief, and did not know whether she could give the "People of the State of California " a fair trial. (87 RT 10720.) The prosecutor asked prospective Juror No. 504 whether

she minded if he asked her some more questions, and she said, "Yes. I mind." (87 RT 10721.) She then went on to explain, "at times, it can sound very conflicting on the left, on one side, and on the right, on the other side. But it depends. Sometimes it depends on the day or it depends on the situation or the case that I hear on the news." (87 RT 10721.)

Gonzales objected to removing prospective Juror No. 504 for cause. (87 RT 10737.) The prosecutor argued that the juror was not telling the truth and the juror became "downright hostile" at a couple of points. He noted that she did not want to be questioned about her views, even though that is the purpose of voir dire. (87 RT 10739.) The court excused her because her views substantially impaired her ability to perform her duties as a juror. (87 RT 10740.) The court found that

> she may have been the least satisfying of the jurors that I've seen so far in trying to really get to the bottom of where she is. . . . I think all sides can be left with some real questions about exactly what her views are. . . . I don't think I've seen anybody like that. . . .

(87 RT 10740.)

A. Prospective Juror No. 504's Removal Was Not An Abuse Of Discretion

A trial judge may properly exclude a prospective juror in a capital case if the juror's views on capital punishment would prevent, or substantially impair, the performance of his or her duties as a juror in accordance with the trial court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Schmeck* (2005) 37 Cal.4th 240, 261.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Blair* (2005) 36 Cal.4th 686, 743.)

The determination of a prospective juror's qualifications fall "within the wide discretion of the trial court, seldom disturbed on appeal." (*People v. Thornton* (2007) 41 Cal.4th 391, 420.)

> 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. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts.

(*People v. Abilez, supra*, 41 Cal.4th at p. 497, quoting *People v. Roldan, supra,* 35 Cal.4th at p. 696.) There is no requirement that a prospective juror's bias for or against the death penalty be proven with unmistakable clarity. (*People v. Abilez, supra,* 41 Cal.4th at p. 497.) It is sufficient if the trial judge is "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*Id.* at pp. 497-498.)

The court did not abuse its discretion by removing prospective Juror No. 504 for cause. Prospective Juror No. 504 expressed strong feelings against the death penalty in her questionnaire. She stated it should be abolished (45 CT 10222; 87 RT 10648), and that she was "strongly opposed" to it (45 CT 10223; 87 RT 10648). Although she equivocated and said it was "possible" she would impose death under certain facts (87 RT 10649), she followed up by saying it was "very unlikely" she would ever impose the death penalty due to her strong views (87 RT 10649-10650). Moreover, prospective Juror No. 504 indicated she did not want to be further questioned on her beliefs. (87 RT 10721.)

Gonzales claims prospective Juror No. 504 was qualified to serve on the jury because "she was open-minded regarding the sentence [he] should receive, she would fairly consider both sentencing options, and that there was a real possibility she would vote for a death verdict." (AOB 185, 187.) The juror, when asked, said she would be open minded, but looking at all her answers in

context shows her anti-death penalty bias would prevent or substantially impair her ability to return a verdict of death in the case before her. When asked directly, she said it was "very unlikely" she would ever impose the death penalty due to her moral belief that she was "strongly "opposed to capital punishment. (87 RT 10649-10650, 10720.)

The record does not show, as Gonzales claims, that there was a "real possibility" prospective Juror No. 504 would vote for a death verdict. When the court asked her, she said it was "a possibility" she would vote for death if the facts justified it. (87 RT 10649.) A prospective juror must be able to do more than simply consider imposing the death penalty at the penalty phase; he or she "must be able to . . . consider imposing the death penalty as a *reasonable possibility*." (*People v. Ashmus, supra,* 54 Cal.3d at p. 963, disapproved on other grounds in *People v. Yeoman, supra*, 31 Cal.4th at p. 117.) Although she said it was "a possibility," it certainly was not a reasonable possibility. The trial court can consider factors such as the potential juror's true state of mind, tone of voice, and demeanor to determine his or her ability to impose the death penalty as a "reasonable possibility." Such factors do not necessarily appear in a cold record. Therefore, despite

> 'lack of clarity in the printed record . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . .[T]his is why deference must be paid to the trial judge who sees and hears the juror.'

(*People v. Schmeck, supra*, 37 Cal.4th at p. 263.)

Here, prospective Juror No. 504 made numerous inconsistent, conflicting statements and did not want to discuss her views. The trial court said that it had never seen somebody like her, and found it difficult to find out what her views were. Further compounding that was her expressed desire not to answer further questions on the subject. The trial court was within its broad discretion in finding that prospective Juror No. 504's views substantially impaired her ability

to perform her duties as a juror. The trial court's assessment of prospective Juror No. 504's state of mind is binding on this Court. (*People v. Abilez, supra*, 41 Cal.4th at p. 498.)

Gonzales claims that prospective Juror No. 504 was able to subvert her views on the death penalty to the rule of law, and willing to follow the trial court's instructions and fairly consider both sentencing options. (AOB 187.) The record does not support Gonzales's contention. She was asked,

> If you have a moral objection to capital punishment and you're sitting in a jury room possibly dealing with a real moral issue of whether or not a man should live or die based on his acts, do you think that you could override your morals and give the People of the State of California a fair trial?

Prospective Juror No. 504 answered, "I really don't know the answer to that question. I think I would have to hear more to be able to know if I would be able to do that." (87 RT 10720.) Immediately after that, she indicated she did not want to answer more questions on the subject. (87 RT 10721.) Thus, she was hesitant and uncertain whether she could consider both sentencing options, and the trial court's finding that her views would substantially impair the performance of her duties in this case is entitled to deference.

Gonzales argues prospective Juror No. 504's statement that it was unlikely she would impose the death penalty did not disqualify her from serving on the jury because a high threshold for imposing the death penalty does not provide grounds for challenging a prospective juror for cause. (AOB 187-188.) The court did not excuse prospective Juror No. 504 because she said it was unlikely she would impose the death penalty. The court based its determination that prospective Juror No. 504's views would substantially impair the performance of her duties as a juror based on her written questionnaire, her in-court questioning, and her demeanor. When asked whether, given her uncle's unjust conviction, she could "fairly sit on a jury" and decide another man's fate, prospective Juror No. 504 said, "I don't know." (87 RT 10647.) She explained

her uncle's situation would "probably" affect her, and then said she was going to jump ahead, and discussed her "mixed feelings" about the death penalty. (87 RT 10647-10648.) She reiterated her opposition to the death penalty, because it was not fair to take a life for a life. (87 RT 10648.)

As support for his position, Gonzales cites *People v. Stewart* (2004) 33 Cal.4th 425 and *People v. Heard* (2003) 31 Cal.4th 946, two cases where this Court reversed death judgements because the trial court erroneously excused potential jurors for cause. (AOB 188.) This is unlike the situation in *People v. Stewart* where the trial court excused some prospective jurors based solely on their questionnaire where they said it would be "very difficult" to impose the death penalty, and they were generally opposed to capital punishment. (*People v. Stewart, supra,* 33 Cal.4th at pp. 440-450.) In *Stewart*, the trial court excused the jurors without following up on whether, in spite of their views, the jurors would be willing to put aside their beliefs in deference to the rule of law. (*Id.* at p. 446.)

This is also unlike *People v. Heard* in which the trial court excused a prospective juror who, in spite of his feelings about the death penalty, said he would follow the law, and would not automatically vote for life. (*People v. Heard, supra,* 31 Cal.4th at pp. 958-967.) The record showed his views on the death penalty would not prevent or significantly impair him from following California law. (*Id.* at p. 965.)

This case is more akin to *People v. Lancaster* (2007) 41 Cal.4th 50, 78-80, where the trial court excused two prospective jurors who gave equivocal and conflicting responses to questions about capital punishment. One of the jurors said in his questionnaire he was "strongly against" the death penalty and that it was wrong. He said he would "probably not" vote for the death penalty. When questioned by the court he said he thought he could impose the death penalty as a "realistic, practical possibility" but was not sure. When questioned

by defense counsel he said he would follow the law, he believed he could follow the court's instructions, and said he thought he "might" be able to impose the death penalty. When questioned by the prosecutor he said it was "possible" he would impose the death penalty. (*People v. Lancaster, supra,* 41 Cal.4th at p. 79.) The second juror said in his questionnaire that he was "moderately against" the death penalty, and was "not sure" if he would always vote against the death penalty. He said the determination depended on the circumstances. He told the court he had "mixed emotions" about capital punishment, and did not know how he would react when it came time to make a decision. He said it was only a "remote possibility" he would impose death. In response to defense counsel's questions, he said he "guessed" he could follow the instructions and impose the death penalty based on the evidence. (*Id.* at pp. 79-80.)

This Court rejected the defendant's argument that the trial court erroneously excused the two jurors because their answers only showed they might have a higher than average threshold for imposing the death penalty. (*Id.* at p. 80.) This Court explained the prospective jurors

> gave answers during voir dire indicating there was only a slim possibility they could vote for the death penalty, regardless of the state of the evidence. While they also made more equivocal statements, we will not interfere with the trial court's resolution of the conflicts. '[W]e pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors.' Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times when 'the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'

(*Id.* at p. 80, quoting *People v. Cain* (1995) 10 Cal.4th 1, 60.)

Similarly, here prospective Juror No. 504 gave equivocal statements. Like the prospective jurors in *Lancaster*, she had strong feelings about the death penalty. She said it should be "abolished!," she was strongly opposed to it, and

that it should not be imposed for any type of crimes. (45 CT 10222-10223.) Also like the prospective jurors in *Lancaster*, she softened her views and gave equivocal statements when questioned. She said she had "mixed feelings," said she would consider it and that it was possible she would impose it, although it would be "very unlikely." (87 RT 10647, 10649-10650, 10701-10702, 10720.) Thus, as in *Lancaster*, she "gave answers during voir dire indicating there was only a slim possibility she would vote for the death penalty, regardless of the state of the evidence." (*People v. Lancaster, supra*, 41 Cal.4th at p. 80.) Additionally, the trial court's resolution of conflicts in determining the prospective juror's state of mind are given deference.

Next Gonzales isolates three individual statements by prospective Juror No. 504 and argues those statements by themselves did not disqualify her from sitting on his jury. The statements Gonzales relies on are her statements that (1) she would probably be affected by the irreversibility of a death sentence; (2) she would probably be affected by her uncle's wrongful murder conviction; and (3) convicted criminals should become subjects for medical experiments. (AOB 189-190.) The trial court did not base its decision to excuse prospective Juror No. 504 on any one of these statements individually, or even on just these three statements combined. The trial court based its decision on prospective Juror No. 504's answers in her written questionnaire and her in-court questioning by the trial court, defense counsel, and the prosecutor. As detailed above, there were numerous equivocal, halting and conflicting statements made by prospective Juror No. 504. Thus, the trial court's determination of her state of mind is binding on this Court. (*People v. Abilez, supra*, 41 Cal.4th at p. 497.)

VIII.

GONZALES WAIVED HIS RIGHT TO BE PRESENT DURING THE INITIAL MEETING WITH PROSPECTIVE JURORS IN THE JURY LOUNGE; ANY STATUTORY VIOLATION FOR FAILURE TO HAVE THE WAIVER IN WRITING WAS HARMLESS

Although he personally waived his right to be present during initial proceedings with the pool of prospective jurors in the jury lounge, Gonzales contends his waiver was not valid. (AOB 191.) Specifically, Gonzales contends that his right to be present was conditioned on being shackled in view of all of the prospective jurors, therefore it was invalid and violated his Sixth and Fourteenth Amendment rights. (AOB 191.) Gonzales also contends the waiver was not valid because it was not written, in violation of Penal Code section 997, subdivision (b)(1). Lastly, Gonzales contends the court exceeded the scope of his waiver during the first trial because it conducted further examination of the jurors in the courtroom regarding hardship outside of Gonzales's presence. (AOB 191.) Gonzales personally, voluntarily, knowingly and intelligently waived his right to be present during the initial session with prospective jurors. Although his waiver was not written, his presence would have served little purpose, thus any violation of the statute was harmless. Moreover, the court did not exceed the scope of Gonzales's waiver by conducting further hardship examinations in the courtroom, but if it did, any error was invited, and was harmless.

A. Gonzales's Waiver Of His Right To Be Present

Due to the large number of potential jurors, the court proposed the parties meet initially in the jurors' lounge. (32 RT 3398-3399.) The court indicated it intended to send out 3000 jury summons, and would expect 300 to 400 potential jurors to respond. (32 RT 3398.) The court proposed to tell the jurors it was expecting the trial to last three months. It would screen those

jurors that requested a hardship. (32 RT 3399.) With those jurors who did not request a hardship, the court would explain the charges, introduce the parties and explain how the process would work. (32 RT 3399.) The jurors would then stay in the lounge to fill out the questionnaire. (32 RT 3299.) The parties would go through the hardship requests in the courtroom. (32 RT 3400-3401.)

When the parties were discussing the jury questionnaire, the court stated that asking the potential jurors whether anything about Gonzales's appearance would bias a juror against him created a certain awkwardness because Gonzales may not want to be present in the jurors' lounge for the initial greeting and to pass out the questionnaire. (35 RT 3723.) The court explained:

> He's got a right to be present. If he wants to be, he will be. Most defendants don't want to do that. He will have to be–he'll be in custody. There will be extra marshals around him. He won't be in as secure a setting so there will be extra security. He'll be in waist chains and handcuffs which can, to some extent, be covered up by clothes. But the overall picture that's presented to the jury isn't going to be quite the same one that we would be able to do here in the courtroom.

(35 RT 3723.)

After taking a moment presumably to confer with Gonzales, counsel informed the court that Gonzales was waiving his right to be present on the day they met the entire venire. (35 RT 3723.) The court then explained to Gonzales that they were going to meet in the jurors' lounge because it was the only place big enough to accommodate all the jurors. The court explained what it would be telling the jurors, and that if Gonzales wanted to be present, he could, but there would be more security measures taken such as one or two extra marshals and that he would be in chains. (35 RT 3724-3725.) The court then took a personal waiver from Gonzales. (32 RT 3725.)

Prior to commencement of jury selection, the court reiterated that Gonzales had waived his presence for when they met in the jury lounge. (37 RT 4009.) Counsel asked the court to make sure Gonzales's paperwork

indicated he would not be present until the next court day following the day they were to meet the prospective jurors (and address jurors requesting a hardship excusal), so that he would not have to sit in the holding tank the day they met with the prospective jurors. (37 RT 4009.)

The court, as the parties had discussed, met the initial pool of jurors in the jury lounge, without Gonzales present. The court addressed the jurors and explained to them the procedure they would be going through to select a jury, including the time commitment if they were to serve on the jury and what constituted a hardship. (38 RT 4011-4022.) Those potential jurors who were requesting to be excused for a hardship were given a form to fill out and told to return at 1:30 p.m. for further instruction on where they would need to go. (38 RT 4020-4021.) The court addressed the other potential jurors and introduced the prosecutor and defense counsel. (38 RT 4023-4025.) The court told the potential jurors that "Mr. Gonzales is not present today but will be present at every future hearing." (38 RT 4025.)

The court read the charges and told the potential jurors that the prosecution had to prove the case beyond a reasonable doubt. (38 RT 4026.) The court gave some preliminary instructions, including telling the jurors what their duties would be, that they were not to discuss the case with anyone, and that all 12 jurors must unanimously agree on the verdict. (38 RT 4032-4037.) The court explained reasonable doubt, the presumption of innocence and told the potential jurors how the case would proceed. (38 RT 4027, 4030-4031.) The court then explained the procedure for filling out the questionnaires. (37 RT 4027-4028, 4037-4042.)

In the afternoon session, the court met in the courtroom with those potential jurors requesting to be excused for a hardship. (38 RT 4044.) The court spoke with some of the potential jurors individually to address their request for a hardship. (38 RT 4045-4107.)

Because of the large number of potential jurors requesting to be excused for a hardship, the court ordered some to return the following Monday morning. (38 RT 4044.) That day, the court stated that counsel was present, but Gonzales was not present, "having waived his presence for this initial phase of the jury selection." (39 RT 4108.) Again, the court addressed some potential jurors individually on their request for a hardship. (39 RT 4109-4156.) Ten of those potential jurors were not excused for hardship, and the court addressed them as a group, to introduce counsel, give the potential jurors the initial instructions, explain the charges and the process and explain and hand out the questionnaire. (39 RT 4157-4179.) The court told these potential jurors that, "Mr. Gonzales is not present in court today. He will be present for all future court hearings." (39 RT 4159.)

Prior to commencement of the retrial of the penalty phase, defense counsel brought up that the court needed to put on the record that Gonzales waived his right to be present when they initially met with the jurors in the jury lounge, and that Gonzales was willing to waive his presence. (83 RT 9831.) The court stated it was not sure it needed to be done again, but that it was probably a good idea. (83 RT 9831.) The court explained to Gonzales,

> Mr. Gonzales, last time we went over to that jury, you did not go and you waived your presence then. What we do essentially is just explain to them what kind of case it is, explain to them how to fill out the questionnaire. ¶ I give them time tables as to how the jury selection process is going to work and how long we think the case is going to take. I think it took an hour and a half, maybe two hours last time. ¶ Do you understand that that's what we'll be doing over there?"

(83 RT 9831.)

Gonzales said he understood and was willing to waive his right to be present. (83 RT 9831-9832.) Again, the court met in the jurors' lounge with 500 jurors and introduced counsel, gave some preliminary instructions,

explained how the case would proceed, and explained the questionnaires and the process for jury selection. (84 RT 9834-9861.)

B. Gonzales Waived His Right To Be Present During The Initial Session In The Jury Lounge, Thus His Constitutional Rights Were Not Violated

"[A]s a matter of both federal and state constitutional law, a capital defendant may validly waive his presence at critical stages of the trial." (*People v. Dickey* (2005) 35 Cal.4th 884, 923.) There is no heightened standard for such a waiver nor any sua sponte duty on the part of the trial court for particular admonitions. (*People v. Weaver* (2001) 26 Cal.4th 876, 967.) The validity of the waiver is judged by whether it was voluntary, knowing and intelligent. (*Ibid.*)

Here, Gonzales's waiver was voluntary, knowing and intelligent. With counsel present, Gonzales informed the court that he would waive his presence for the initial meeting with prospective jurors in the jury lounge. (35 RT 3723; 83 RT 9831-9832.)

In *People v. Ervin* (2000) 22 Cal.4th 48, the defendant in a capital case argued his constitutional rights were violated because the court allowed the prosecutor and defense counsel, outside of the defendant's presence, to screen out jurors based on the jurors' questionnaires for those jurors who would be subject to excusal or had a hardship. (*Id.* at p. 72.) This Court rejected the defendant's argument that his constitutional rights were violated because the defendant stipulated to every aspect of the challenged procedure, therefore, he was barred from raising on appeal defects in the procedure in which he acquiesced. (*Id.* at p. 73.) This Court held:

> While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of

> irregularities in jury selection to which the defendant did not object or in which he has acquiesced.

(*People v. Ervin, supra*, 22 Cal.4th at p. 73, quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 37-38.)

Here, as in *People v. Ervin*, Gonzales agreed to the procedure to select a jury, i.e., that the court meet in the less secure setting of the jurors' lounge to give the jurors the questionnaires and screen out those who were seeking to be excused based on a hardship. Like in *Ervin*, the process screened out prospective jurors, and the usual voir dire was conducted in open court in Gonzales's presence. (*People v. Ervin, supra*, 22 Cal.4th at p. 73.)

Gonzales contends that his waiver was invalid because the court required him to choose between his right to be present or his right not to be shackled. (AOB 193.) Gonzales was not shackled. The court told Gonzales that there would be extra security measures taken if he wanted to be present when they met the pool of prospective jurors in the jurors' lounge, and that he would be in waist chains and handcuffs, but that they would attempt to cover the chains up with clothes. (35 RT 3723.) Thus, the court was only going to take necessary security precautions, limited to a very short time in jury selection.

Moreover, Gonzales did not object to the court's determination that if he were to be present in the jurors' lounge during the initial meeting with prospective jurors, that he would be shackled. In order to raise a claim of unnecessary physical restraint or shackling, there must be an objection or the claim is waived. (*People v. Marks* (2003) 31 Cal.4th 197, 224.) Even had Gonzales objected, the trial court properly exercised its discretion in requiring shackles for security purposes.

The United States Supreme Court has held the Constitution "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (*Deck v. Missouri* (2005) 544 U.S. 622,

629 [125 S.Ct. 2007, 161 L.Ed.2d 953].) Thus, while trial courts cannot routinely shackle or restrain defendants in front of a jury, a judge can, in its discretion, do so "to take account of special circumstances, including security concerns." (*Id.* at p. 633.) A trial court's decision to shackle a defendant will be upheld absent a "manifest abuse of discretion." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1032.)

Thus, the trial court's decision that Gonzales would be shackled, not during the trial, but merely during the initial meeting with the prospective jurors, was within its discretion. The trial court indicated it would attempt to do so in a manner in which the prospective jurors would not see the shackles. Additionally, it would only be for the session that took place in the jurors' lounge, a less secure setting that was the only place big enough to accommodate all the prospective jurors. (35 RT 3724.)

Gonzales contends that the court did not make an on-the-record determination that Gonzales's actions required shackling, and that only the defendant's conduct, not the venue's characteristics, can create a "manifest need" for shackling. (AOB 195.) Cases have held that security concerns, in a particular case, can justify shackling. (*Deck v. Missouri, supra*, 544 U.S. at p. 633.) While here there was not a finding by the court specifically as to why Gonzales needed to be shackled if the proceedings were held in the less secure setting of the jurors' lounge, because Gonzales did not object to the court's determination, the court did not make specific an on-the-record findings as to why it required Gonzales to be shackled in the less secure setting. Thus, Gonzales's failure to object to the court's determination on security measures waived his claim. (*People v. Marks, supra*, 31 Cal.4th at p. 221.)

C. Any Claim That The Court Exceeded The Scope Of The Waiver By Conducting Hardship Voir Dire In Gonzales's Absence Was Invited Error

Gonzales also appears to argue that the court exceeded the scope of his waiver because it conducted hardship voir dire in the first trial in his absence. (AOB 196.) The trial court, after addressing the prospective jurors in the jurors' lounge, had some jurors who were requesting to be excused for a hardship in its courtroom later that afternoon, and finished screening hardship jurors the following court day. (37 RT 4044.) Gonzales was not present for these sessions. Gonzales's waiver was for the whole day that the parties met the entire venire. (35 RT 3723.) Clearly the court and counsel believed that Gonzales waived his presence for those proceedings to be concluded (39 RT 4108), a reasonable inference from Gonzales's waiver.

Moreover, Gonzales's counsel specifically requested Gonzales not be produced for these sessions so he "doesn't end up sitting in a holding tank." (37 RT 4009.) Thus, Gonzales's absence for that part of the proceedings was requested by counsel; any error is invited error. (*People v. Riel, supra,* 22 Cal.4th at p. 1214.) Even if the court exceeded the scope of Gonzales's waiver, as discussed below, any error was harmless.

D. Gonzales Did Not Waive His Rights In Writing, But Any Violation Of Penal Code Section 977, Subdivision (b)(1), Was Harmless

Gonzales claims his oral waivers of his right to be present during the limited proceedings violated Penal Code section 977, subdivision (b)(1). (AOB 196.) If there was a statutory violation, any error was harmless. Penal Code section 977, subdivision (b)(1) provides:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall

> be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be present . . . .

Although Gonzales was not absent when evidence was being taken or during one of the other listed proceedings, the statute provides he could only be absent if he made a written waiver. This Court has held, however, that there was no statutory violation in other capital cases in which the defendant was not present (and did not have a written waiver) during discussions of juror's hardship excusals. (*People v. Rogers* (2006) 39 Cal.4th 826, 855-856; *People v. Ervin, supra*, 22 Cal.4th at pp. 72-74.) "Defendant's presence at counsels' jury screening discussions . . . would have served little purpose [citation] and he accordingly had no state statutory or federal constitutional right to attend those discussions." (*People v. Rogers, supra*, 39 Cal.4th at p. 856, quoting *People v. Ervin, supra*, 22 Cal.4th at p. 74.)

Even if there was a statutory violation, it was harmless because it is not reasonably probable or possible that a result more favorable to Gonzales would have been reached in the absence of the error. (*People v. Weaver, supra*, 26 Cal.4th at p. 968 [standard to use during guilt phase is reasonable probability]; *People v. Dickey, supra*, 35 Cal.4th at p. 923 [standard to use during penalty phase is reasonable possibility].) This Court has held that

> generally 'the accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him, and the burden is upon him to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.'

(*People v. Ervin, supra*, 22 Cal.4th at p. 74, quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 103.)

Gonzales cannot demonstrate his absence prejudiced his case or denied him a fair and impartial trial. Gonzales's presence would not have been any value to his counsel. (*People v. Dickey, supra*, 35 Cal.4th at p. 924.)

Furthermore, the absence was for a short period of time. The proceedings in the jury lounge were much less formal than when the trial began in the courtroom. There were hundreds of jurors present. The record indicates it was very crowded in the room. (38 RT 4023 [court refers to potential jurors as being packed in like sardines]; 84 RT 9834 [court says there are a lot of jurors in the room and acknowledges they all can not see].) The court explained that they were meeting in that room due to the number of potential jurors. (38 RT 4011; 84 RT 9835.) Gonzales was present for every other proceeding in front of the jury, which for both trials was lengthy.

Gonzales argues his absence during this proceeding was not harmless because, given the severity of the charges, it left the jurors with the impression that he "callously did not bother to show up at his own capital trial." (AOB 197.) If the jurors in the crowded room noticed he was not there, there is no basis upon which to conclude he was not present because he did not want to show up or that he "callously did not bother" to be present. Any such argument is speculative, which does not support a finding of error. (*People v. Weaver, supra*, 26 Cal.4th at p. 968.) Additionally, Gonzales was present for the remainder of the lengthy trials, so the jurors who sat on the cases would not have thought Gonzales "callously" absented himself from the trials. Further, at least when the penalty phase started, the jurors knew Gonzales was in custody (68 RT 8642-8659; 96 RT 12554-12555; 97 RT 12340-12350), and would have therefore known that he could not control his whereabouts.

Given the severity of the charges, and the violent nature of the torture and murder of a helpless four-year-old child, the jury was not likely to conclude that Gonzales was callous from his absence during the first meeting with the jurors. To the contrary, the jury would likely determine that Gonzales was callous based on the torture, culminating in immersing Genny in a hot bathtub, then leaving her to ooze to death, and going to buy bread and beer instead of

summoning medical help. Thus, given the nature of the evidence, Gonzales's absence during a short, informal, preliminary session with potential jurors would not prejudice Gonzales.

Even if the stricter *Chapman* standard is used, as Gonzales urges (AOB 198), there is no error because any error was harmless beyond a reasonable doubt. As argued above, Gonzales's absence for such a short period of time, in a proceeding where no evidence was taken, and where defense counsel could not have been aided by Gonzales' presence, was harmless beyond a reasonable doubt.

IX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE VIDEOTAPED PRELIMINARY HEARING TESTIMONY OF IVAN GONZALES, JR.

Gonzales asserts the trial court abused its discretion by admitting the videotape of Ivan Gonzales, Jr.'s preliminary hearing testimony during the guilt phase. In addition to violating the Evidence Code, he contends admitting the videotape violated his constitutional rights to confront witnesses, to a fair trial, and to a fair, accurate and reliable capital-sentencing determination. (AOB 199.) The trial court properly admitted the videotape into evidence and such admission did not violate Gonzales's constitutional rights.

After the prosecutor subpoenaed Ivan Jr. for trial, an attorney appointed to represent Ivan Jr. moved to quash the subpoena. (20 RT 1622; 6 CT 1370-1401.) The court held a four day evidentiary hearing to determine whether to quash the subpoena. When asked his position, Gonzales said he neither joined in nor opposed the motion to quash the subpoena.[22/] (22 RT 1904.)

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22. The motion was heard prior to the trial court severing Veronica and Gonzales's case. Veronica joined in the motion to quash the subpoena. (22 RT 1904.)

A psychiatrist, Charles Marsh, testified that he performed an evaluation on Ivan Jr. and diagnosed him with post-traumatic stress disorder. (22 RT 1885, 1888, 1895-1896.) Dr. Marsh opined that if Ivan Jr. were to testify about what occurred in his home, it would interfere with his progress in therapy and he could suffer a recrudescence of post- traumatic stress syndrome. (22 RT 1936-1937.) The parties stipulated to admit the report of Edna Lyons, a marriage and family counselor who had been treating Ivan, Jr. (22 RT 1995, 1999.) In the report, Lyons opined that if Ivan Jr. were to testify it would retraumatize him. (6 CT 1387.)

The trial court ruled Ivan Jr. was unavailable as a witness under Evidence Code section 240 because substantial trauma would be visited upon him if he were called to testify. (25 RT 2587.) Based on the trial court's ruling, the prosecutor requested to admit Ivan Jr.'s videotaped testimony from the preliminary hearing. (6 CT 1251-1263.) Gonzales objected to admission of the testimony. (6 CT 1428-1443.) The court ruled the prior testimony was admissible. (29 RT 3247.) The court rejected Gonzales's argument that his cross-examination was not effective. Gonzales had a similar motive to cross-examine Ivan Jr. at the preliminary hearing as he would have at trial. (29 RT 3248-3249.) Any information discovered by Gonzales after the preliminary hearing about Ivan Jr.'s psychiatric status was admissible by bringing in that testimony. (29 RT 3249.) The court also rejected Gonzales's argument that Ivan, Jr. was not competent to testify because, after watching the testimony, the court found Ivan Jr. knew the difference between right and wrong, and knew of his obligation to tell the truth. (29 RT 3249.)

A. The Videotaped Testimony Was Admissible Under Evidence Code Section 1291 As Prior Testimony

Former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and "[t]he party against whom the former

testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subds. (a) & (a)(2).)

Gonzales does not challenge the trial court's finding that Ivan Jr. was unavailable. Rather, Gonzales bases his claim on three grounds: (1) he did not have a meaningful opportunity to effectively cross-examine Ivan Jr.; (2) the trial court erred in quashing the subpoena to protect Ivan Jr. from harm but allowing his preliminary hearing testimony to be admitted; and (3) the trial court erred in finding Ivan Jr. was competent to testify at the preliminary hearing. (AOB 203.)

1. Gonzales Had A Meaningful Opportunity To Cross-Examine Ivan Jr. At The Preliminary Hearing

Gonzales had a meaningful opportunity to cross-examine Ivan Jr. The motive to cross-examine the witness must not be identical, only "similar." (*People v. Zapien* (1993) 4 Cal.4th 929, 975.) Moreover, a defendant must be given the *opportunity* for effective cross-examination. The admissibility of the prior testimony does not depend on whether a defendant availed himself of that opportunity. (*Ibid.*) It is not the actual cross-examination that matters, it is whether counsel had the opportunity to cross-examine the witness with a similar interest and motive. (*People v. Smith* (2003) 30 Cal.4th 581, 611.) Here, Gonzales had a similar interest and motive to cross-examine Ivan Jr. at the preliminary hearing as he did at trial–to discredit him, while not offending or alienating the trier of fact by treating the witness harshly. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 850.) This Court has "routinely allowed admission of the preliminary hearing testimony of an unavailable witness." (*People v. Smith, supra*, 30 Cal.4th at p. 611.)

Gonzales claims he did not have a meaningful opportunity to cross-examine Ivan Jr. because Ivan Jr. had been placed in confidential foster homes, so his counsel could not interview him, the people with whom he lived, and the people in whom he confided. (AOB 203-204.) Gonzales claims these interviews would have lead to crucial information for a meaningful cross-examination, including his symptoms of post-traumatic stress disorder, hallucinations or illusions, improper influences in his recollection and testimony, and his foster mother's concern over his proclivity to lie. (AOB 204.) In other words, Gonzales claims that he did not have an opportunity for effective cross-examination because he did not have all of the pretrial discovery at the time he cross-examined Ivan Jr. This argument lacks merit. The only evidence there was any symptoms of post-traumatic stress syndrome prior to Ivan Jr.'s preliminary hearing testimony was a note that his therapist wrote that Ivan Jr. said he sometimes saw double and thought it was his soul. (6 CT 1447.) The other symptoms occurred after Ivan Jr.'s preliminary hearing testimony. (6 CT 1448 [report to therapist that he saw double and his memory was not very good in January 1996]; 6 CT 1386 [report that in April 1996, Ivan Jr. saw a bright orange light surrounded by white on two occasions which he thought was Genny]; 1 CT 35 [date of preliminary hearing was Nov. 9, 1995].)

Moreover, "[a]bsent wrongful failure to timely disclose by the prosecution, a defendant's subsequent discovery of material that might have proved useful in cross-examination is not grounds for excluding otherwise admissible prior testimony at trial." (*People v. Jurado* (2006) 38 Cal.4th 72, 116.) Also, "a defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars." (*People v. Harris* (2005) 37

Cal.4th 310, 333 [rejecting claim that because counsel found out after preliminary hearing about witness's illegal drug activities former testimony was not admissible as prior testimony].)

> Both the United States Supreme Court and this court have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.'

(*Ibid.*, quoting *People v. Wilson* (2005) 36 Cal.4th 309, 343.)

The case law cited by Gonzales to support his claim that he was denied a meaningful opportunity for cross-examination does not stand for the proposition that prior testimony should not be admitted. Rather, he cites case law regarding access to pretrial discovery. (AOB 206-207.) Gonzales does not raise an issue that he was denied pretrial discovery, therefore, the cases cited are not applicable.

While Gonzales's argument fails on legal grounds, it also rests with factual assertions that are not supported by the record, i.e. that Ivan Jr. had a proclivity to lie, that he had hallucinations and illusions that improperly influenced his recollection and testimony, and that his foster mother violated a court order by questioning Ivan Jr. about the case. (AOB 200, 205-206, 215.)

Gonzales's claims that in October 1995, Ivan Jr.'s foster mother discussed her concerns that Ivan Jr. had a proclivity to lie (AOB 200, 215), and that he lied "perpetually" and "repeatedly" (AOB 206) are not supported by the record. Gonzales's only citation to the record is to therapist notes on October 3, 1995, whereby the therapist stated, "[f]oster mo [*sic*] aired concerns about boys [Ivan Jr. and Michael] kicking and hitting ea. [*sic*] other & also lying." (AOB 200, 6 CT 1446.) The note is vague. It talks about both boys (Ivan Jr. and Michael) hitting and kicking each other and lying. It does not state what the "lie" was about, that it was Ivan Jr. who lied, that Ivan Jr. had a proclivity

to lie, or that he lied "perpetually" and "repeatedly." Thus, without more information from the social worker who wrote the note, or the foster mother who made the statement, the note is of little to no substance.[23]

Gonzales's claim that he did not have a meaningful opportunity to cross-examine Ivan Jr. because the symptoms that led to Ivan Jr.'s diagnosis of post-traumatic stress disorder improperly influenced his recollection and testimony is also without merit. Gonzales claims the symptoms undermined the credibility of his testimony. (AOB 204-205.) On August 2, 1996, Dr. Marsh diagnosed Ivan Jr. with post-traumatic stress syndrome. (22 RT 1895.) Marsh testified Ivan Jr. had post-traumatic stress syndrome from "him having been exposed to a number of different behaviors and witnessing a number of acts" in his home, including witnessing what his parents did to his cousin. (22 RT 1915-1916, 1930-1931.) The disorder is a group of symptoms that usually arises after a person has witnessed or been a participant in a tragic event. It may include flashbacks, memories or nightmares of the event, and can include depression, psychosis, anxiety, disturbances of sleep and appetite, withdrawal, isolation, and a flattening out of emotional responses. (22 RT 1896.)

Gonzales cannot point to any link between Ivan Jr.'s post-traumatic stress syndrome and a lack of credibility. The only evidence there were any symptoms prior to Ivan Jr.'s preliminary hearing testimony was a note that his therapist wrote that Ivan Jr. said he sometimes saw double and thought it was his soul. (6 CT 1447.) There is no indication he had any hallucinations or illusions related to his testimony. While he told his therapist he did not have a "good memory" (6 CT 1448), this occurred after Ivan Jr.'s testimony. (6 CT 1448 [note was written on January 4 1996].) Moreover, the note was not

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23. If the therapist notes were to be relied on, they would support Ivan Jr.'s testimony. For example, on October 10, 1995, Ivan Jr. told the therapist that his parents "hit his young cousin who died," and when she "pooped in the tub they would put the poop up to her mouth." (6 CT 1446.)

referring to witnessing the torture, abuse or murder of Genny. Likewise, Ivan Jr.'s reports of seeing double and thinking he saw his soul (6 CT 1447) in no way related to his ability to recall or testify regarding Genny. Furthermore, this statement was made in January 1996, after the preliminary hearing. (6 CT 1448.)

Gonzales claims he could have asked Ivan Jr. if he had seen double or seen his soul had he known of the information prior to the preliminary hearing. (AOB 204.) If Ivan Jr. answered yes, it would not have affected his testimony or credibility. Ivan Jr. witnessed traumatic events, thus, it is hardly surprising he would have post-traumatic stress syndrome, or the symptoms associated with it. Moreover, Gonzales was not prevented from presenting testimony that Ivan Jr. suffered from these symptoms. (29 RT 3249.)

Gonzales claims that the nightmares or hallucinations became his source of his memory of the incident, which explains the changes in Ivan Jr.'s statements. (AOB 205.) This argument is pure speculation. There is no basis in the record or otherwise to conclude that Ivan Jr. had nightmares, illusions or hallucinations. The record only reflects that prior to the preliminary hearing Ivan Jr. reported seeing double. (6 CT 1447.) That Ivan Jr. reported seeing double does not translate to having nightmares, hallucinations or illusions that would become his source of memory.[24/]

Also as support for his claim he did not have an opportunity for meaningful cross-examination, Gonzales points to the therapist report whereby Ivan Jr. said on two occasions he saw a bright orange light surrounded by white

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24. Ivan Jr.'s foster mother reported to the psychiatrist that evaluated Ivan Jr. that Ivan Jr. did not have any hallucinations. (22 RT 1921-1922.) Ivan Jr. told the psychiatrist that he had problems with blurred vision but that it had gone away. (22 RT 1924.) Additionally, that Ivan Jr. saw double and believed that he was looking at his soul did not necessarily constitute an illusion or hallucination as Gonzales claims. (AOB 204.)

that he thought was Genny. (AOB 201, 204.) Ivan Jr. reported this to his therapist in April 1996, therefore, as of the time of Ivan Jr.'s testimony, this information did not exist. Thus, this information that occurred after the preliminary hearing had no bearing on Ivan Jr.'s credibility, and could not have led to a more meaningful cross-examination of Ivan Jr.

The argument advanced by Gonzales that the foster mother violated a court order and questioned Ivan Jr. about the case, which would have been an area for meaningful cross-examination, is also speculative and unsupported by the record. (AOB 200, 205.) The social worker testified in a hearing outside the presence of the jury that Ivan Jr.'s foster mother thought the minor's attorney was aggressive and the attorney expressed concerns to the social worker that the foster mother may have asked Ivan Jr. questions about the case. (58 RT 7331, 7342.) The social worker said she did not have reason to believe the foster mother was asking Ivan Jr. questions about what happened to Genny. (58 RT 7337.)

Gonzales's offer of proof was that Roland Simoncini, the attorney appointed to represent Gonzales's children in juvenile court, had concerns that the foster mother was violating the court order that she not talk to Ivan Jr. about the case. (60 RT 7570-7577, 7763.) The attorney brought his concerns to the juvenile court judge, who instructed the social worker to inform the foster mother not to ask Ivan Jr. any questions about the case. (58 RT 7344-7345; 60 RT 7573, 7763.) Thus, the only proposed evidence was Simoncini's opinion that he believed the foster mother initiated conversations with Ivan Jr. (60 RT 7762-7777.)

Gonzales's offer of proof at trial was not that the foster mother contaminated Ivan Jr.'s testimony, or influenced him; rather it was that she initiated conversations with Ivan Jr. (60 RT 7762-7777.) Even had Gonzales been able to cross-examine Ivan Jr. on his conversations with his foster mother,

any argument that it would have revealed contamination is speculative. There is nothing in the record that shows the foster mother contaminated Ivan Jr.'s testimony. Moreover, Gonzales had the opportunity during the preliminary hearing to ask Ivan Jr. who he talked to, who initiated conversations with him, and the content of those conversations, all areas he now claims would have given him a meaningful cross-examination. (AOB 205.) Both Gonzales and Veronica pursued this line of questioning. (9 CT 1991-1994, 2034-2038.) Furthermore, contrary to Gonzales's argument (AOB 205, fn. 72), he was allowed to present any otherwise admissible testimony that the foster mother spoke to Ivan Jr. about the case or that someone interfered with Ivan Jr.'s memory. (58 RT 7320-7324, 7358, 7360; 60 RT 7776.)

2. The Trial Court Properly Admitted The Preliminary Hearing Testimony In Spite Of Its Ruling Quashing Ivan Jr.'s Subpoena Based On A Finding Under Evidence Code Section 240 That Testifying Would Cause Him Substantial Trauma

Without legal support, Gonzales argues the trial court abused its discretion in admitting the videotape of Ivan Jr.'s preliminary hearing testimony after finding it would cause harm to Ivan Jr. if he testified at trial and his father was ultimately executed. (AOB 208-210.) Gonzales' reasoning is that because the trial court found Ivan Jr. was unavailable to testify under Evidence Code section 240, the trial court's authority to protect children from harm was "incomplete and uneven" by admitting the prior testimony. (AOB 208.) The admissibility of prior testimony, however, does not require the court to consider the harm to the witness from admitting the prior testimony. Accordingly, the court properly analyzed the statutes and case authority. The court's finding that Ivan Jr. was unavailable under Evidence Code section 240 did not dictate whether the prior testimony was admissible under Evidence Code section 1291.

Evidence Code section 240 provides a witness is unavailable if they have an existing physical or mental illness or infirmity and testifying would cause substantial trauma. (Evid. Code, § 240, subd. (a)(3) & (c).) Gonzales does not challenge the trial court's finding that Ivan Jr. was unavailable pursuant to this section.

Evidence Code section 1291 is an exception to the hearsay rule, and provides former testimony is admissible if the witness is unavailable and the party against whom it is admitted had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing. (Evid. Code, § 1291, subd. (a)(2).) The "interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Carter, supra*, 36 Cal.4th at p. 1173, quoting *People v. Zapien, supra*, 4 Cal.4th at p. 975.) Evidence Code section 1291 does not have an exception if admission of the testimony would cause harm to the declarant. Thus, it is immaterial to the court's analysis under section 1291 that the trial court found Ivan Jr. to be unavailable because testifying would cause him substantial trauma.

Even if Gonzales's argument were accepted that the trial court was required to evaluate the effect on Ivan Jr. of admitting the videotape, the trial court properly found the risk to Ivan Jr. was not as great if his preliminary hearing testimony were admitted than if he were called as a witness in his father's capital trial. The trial court explained that it was drawing a line between Ivan Jr.'s live testimony and his "testifying through this preexisting, previously-made videotape" and that it believed the size of the risk was "somewhat reduced" in using the videotape. (29 RT 3252.)

Dr. Marsh testified that if Ivan Jr.'s preliminary hearing testimony were used, it would not result in major trauma to him. (22 RT 1977-1978.)

Gonzales's argument that Dr. Marsh's opinion was based on the assumption that the preliminary hearing has a limited purpose (AOB 209) is not supported by the record. Dr. Marsh testified that knowing the purpose of a preliminary hearing did not affect his opinion that Ivan Jr. would not suffer trauma if his preliminary hearing testimony were used. (22 RT 1977-1978,1980.)

Ivan Jr.'s therapist, Edna Lyons, was unclear about whether using the preliminary hearing testimony would cause Ivan Jr. harm. (22 RT 2030-2031.) Initially she said it would be worse to testify live because Ivan Jr. had become "much more fragile." (22 RT 2030-2031.) When questioned further whether the effect would be different if Ivan Jr. testified live versus through his preliminary hearing testimony, she answered, "I'm not sure of that." (22 RT 2031.)

Cynthia Jacobs supervised Lyons. (23 RT 2242.) She testified that if Ivan Jr. testified it could trigger post-traumatic stress disorder symptoms. (23 RT 2288-2289.) When asked whether the effect would be the same if Ivan Jr.'s preliminary hearing testimony were admitted, she opined that it would be traumatic when he later became aware of his role in the court proceedings. (24 RT 2297-2297.) Admitting the preliminary hearing testimony, however, would be "qualitatively different" than testifying, and would be "less traumatic in the short term and in the long term could potentially give him some rationalization" or "psychological cushion to rationalize how he thinks about his role in all this down the road." (24 RT 2297-2298.) Thus, Gonzales's argument is faulty because the mental health experts all testified that the harm would be greater if Ivan Jr. were to testify than if his preliminary hearing testimony were used. Admitting prior testimony does not require the court to consider the harm to the witness, and even if the law required the court to do so, the trial court properly found the harm to Ivan Jr. was not as great if his preliminary hearing testimony were admitted than if he were to testify live during Gonzales' trial.

3. Ivan Jr. Was Competent To Testify At The Preliminary Hearing

Prior to trial, Gonzales objected to admission of the videotape based on Ivan Jr.'s competency. (6 CT 1437-1440.) The court held a hearing to determine whether Ivan Jr. was competent to testify at the time of the preliminary hearing. (48 RT 5685-5760.) Gonzales called Yanon Volcani, a clinical psychologist, who testified that a child's memory is affected if that child has been traumatized. (48 RT 5685-5686, 5693.) Volcani testified that seven to nine-year-olds are more prone to confabulate their own fantasies and associations. (48 RT 5705.)

Volcani did not interview or test Ivan Jr. (48 RT 5699, 5736.) Based on his review of documents, the videotapes of Ivan Jr.'s statements and testimony, and his meeting with Gonzales's parents and children, he opined there was a "significant probability" that Ivan Jr.'s memory when he testified at the preliminary hearing was not necessarily accurate. (48 RT 5712-5713, 5715-5716, 5733.) He based his opinion on Ivan Jr.'s "chaotic" household when he lived with Gonzales, the length of time between Genny's murder and the preliminary hearing (almost four months), Ivan Jr.'s interview being at 4:30 a.m. after just experiencing the trauma of his cousin dying and the police officers telling him he was lying. (48 RT 5717, 5719, 5727-5728.) Volcani expressed concern because Ivan Jr.'s statements changed from when he was initially interviewed to when he testified at the preliminary hearing. (48 RT 5721, 5724-5725.) Volcani believed it was "possible" that Ivan Jr. had been influenced by others. (48 RT 5727.) He saw examples of Ivan Jr. attempting to accommodate the interviewer. (48 RT 5733.)

Volcani did not believe Ivan Jr. was incapable of understanding his duty to tell the truth. (48 RT 5734.) Ivan Jr. was able to understand the questions and express himself. (48 RT 5734.) The court asked Volcani whether Ivan

Jr.'s statements should be rejected out of hand, and Volcani said, "no." (48 RT 5743.)

The trial court ruled Gonzales had not met his burden of showing Ivan Jr. was not competent to testify. (48 RT 5760.) In addition to relying on Volcani's testimony, the court relied on the videotape of Ivan Jr.'s testimony and the information that Volcani relied on, including the expert witnesses that testified in the hearing on Ivan Jr.'s unavailability, and Ivan Jr.'s therapy notes. (48 RT 5760.) The court's found as follows:

> [Volcani's] testimony is, I think, clear and concise. He said that Ivan [Jr.] could understand his duty to tell the truth. Second, he said that Ivan [Jr.] could express himself so that he could be understood by others. I–I must say that in addition to listening to the doctor, I also watched that videotape with everyone else here in the courtroom, and it was certainly my impression that Ivan [Jr.] was oriented and was clear about what he was being asked; that he understood that he had an obligation to tell the truth; and, that he was able to speak and be understood, except on occasion when his voice dropped. That, of course, is something all witnesses–or many witnesses experience. And that was dealt with by asking him to speak up when it was necessary.
>
> The third issue's the one that's really at stake here, and the question is whether he understood the difference between truth and fantasy. The doctor's testimony on this strikes me as being less than direct. . . . ¶ All of that seems to lead me to the conclusion, just if I listened to the doctor's testimony and nothing else, that the factors the doctor's testified to here really go to the weight of Ivan's testimony, not to his fundamental ability to distinguish between truth and fiction. As I said earlier, I think all witnesses–I think all human beings . . . make innocent misrecollections. We have an instruction that tells jurors how to deal with that.
>
> I think what is focused on when that becomes a question of competence is something far more than holes or occasional distortions. I think it would have to be a far broader, far deeper, far more fundamental inability to distinguish truth from reality–or truth from fantasy.

(48 RT 5758-5759.) The court further stated that the evidence that had been adduced at the hearing may be admitted on the question of Ivan Jr.'s credibility. (48 RT 5760.)

Gonzales claims Ivan Jr. was not competent to testify because (1) he could not distinguish truth from falsehood and (2) his memory was not adequate. (AOB 210-211.) Evidence Code section 1291, which allows admission of former testimony, provides that the former testimony is not subject to "[o]bjections based on competency or privilege which did not exist at the time the former testimony was given." (Evid. Code, § 1291, subd. (b)(2).) Evidence Code section 701, subdivision (a) provides that "a person is disqualified to be a witness if he or she is: (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) Incapable of understanding the duty of a witness to tell the truth."

The party challenging a witness's competency has the burden of proof

> and a trial court's determination will be upheld in the absence of a clear abuse of discretion. . . . The challenging party must establish a witness's incompetency by a preponderance of the evidence. . . . Unlike a witness's personal knowledge, a witness's competency to testify is determined exclusively by the court.

(*People v. Avila, supra,* 38 Cal.4th at p. 589.)

Here, the trial court did not abuse its discretion in finding Ivan Jr. was competent to testify at the time of the preliminary hearing. Volcani testified he did not believe Ivan Jr. was incapable of understanding his duty to tell the truth and that he was able to understand the questions and express himself. (48 RT 5734.)

Moreover, Ivan Jr. testified he understood what telling the truth meant and acknowledged that his job was to tell the truth. (9 CT 1960, 1991.) On cross-examination, Ivan Jr. testified that he knew what a lie was, and described it as "not the truth." (9 CT 1995-1996, 2031.) He said if he lied he would get

in trouble. (9 CT 2032-2033.) He testified that he sometimes told little lies when he was younger. (9 CT 1996.) Ivan Jr. acknowledged that it was serious to lie in court. (9 CT 2033.) He testified numerous times that he was telling the truth. (9 CT 1996-1997, 2024, 2033.) Ivan Jr. testified that he decided to tell the truth about what happened because "I was feeling sad in my heart and I wanted to let it out." (9 CT 2024.)

Ivan Jr.'s testimony is unlike the testimony in *In re Cindy L.* (1997) 17 Cal.4th 15, cited by Gonzales for the proposition that a child witness's inability to distinguish between truth and falsity renders him incompetent to testify. (AOB 212.) In *In re Cindy L.*, the child witness in a dependency case in which her father was accused of molesting her was generally nonresponsive to questions, and when specifically asked who molested her, she answered, "the clown." (*Id.* at p. 20.) Here, Ivan Jr. was responsive, communicative, and clearly indicated he understood his duty and obligation to tell the truth. There is no indication from his testimony that he lacked the ability to distinguish truth from falsity.

Gonzales argues that the "uncontradicted testimony" showed that Ivan Jr. lacked the ability to distinguish truth from falsehood. (AOB 211.) To show a witness is not competent to testify, a defendant must show a witness is "[i]ncapable of understanding the duty of a witness to tell the truth." (Evid. Code, § 701, subd. (a)(2).) Volcani specifically testified that Ivan Jr. was not incapable of understanding that duty. (48 RT 5734.) Gonzales's citation to Volcani's testimony suggesting otherwise does not support his theory. Gonzales claims Volcani said that Ivan Jr. lacked the ability to distinguish truth from falsehood. (AOB 211, citing 48 RT 5733.) Volcani merely stated there was a "significant potential that his memory has been impaired so that he doesn't know whether he is stating the truth as he would have known it." (48 RT 5733.) This statement does not prove that Ivan Jr. could not distinguish

truth from falsehood. Volcani's testimony, along with Ivan Jr.'s clear testimony that he was able to understand what it meant to tell the truth, and that he was telling the truth, support the trial court's determination that Ivan Jr. was competent to testify. Thus, Gonzales's argument fails.

Gonzales also challenges Ivan Jr.'s ability to recollect the events, or whether he had an "adequate memory." (AOB 211.) The ability to recollect events, or whether a witness has an adequate memory, is "determined in a different manner" than the issue of competency to testify. (*People v. Anderson* (2001) 25 Cal.4th 543, 573.) A witness's ability to recollect, or their memory, does not go to the witness's competency, it is more appropriately analyzed under Evidence Code section 702, which analyzes the witness's personal knowledge. (*People v. Lewis* (2001) 26 Cal.4th 334, 356, fn. 4.) Evidence Code section 702 provides a witness's testimony is inadmissible unless he has personal knowledge of the matter, which includes the ability to perceive and recollect. (*Id.* at pp. 573-574.) A trial court can exclude the testimony of a witness based on a faulty memory, for a lack of foundation, "only if no jury could reasonably find that he has such knowledge." (*Id.* at p. 573) Thus, if there is evidence that the witness can perceive and recollect, "the determination whether he in fact perceived and does recollect is left to the trier of fact." (*Id.* at pp. 573-574.)

> A witness challenged for lack of personal knowledge *must* nonetheless be allowed to testify *if there is evidence from which a rational trier of fact could find* that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible.

(*Id.* at p. 574, emphasis original.)

Gonzales relies on cases that one cannot meaningfully cross-examine hypnotically aided testimony. (AOB 213-214, 217-218.) There is no evidence or suggestion Ivan Jr.'s testimony was hypnotically aided. Nor is Ivan Jr.'s

testimony analogous to hypnotically aided testimony. Gonzales's reliance on these cases is therefore misplaced.

Volcani did not interview or test Ivan Jr. (48 RT 5699, 5736.) Volcani's testimony that Ivan Jr.'s memory could be impaired was based on suppositions and speculation and was inconclusive. Additionally, Volcani did not say that Ivan Jr.'s memory was inadequate; rather, Volcani's opinion was qualified by it being a "potential" or "significant potential" that his memory had been impaired. (48 RT 5715, 5733.) When pressed what the probability that Ivan Jr.'s memory was accurate, Volcani testified that while he could not quantify it, he "just free associated" a figure of 68 percent. (48 RT 5747.) Volcani clarified that figure was his opinion of whether Ivan Jr.'s memory was influenced, and that "it doesn't mean they're not accurate." He continued, "[t]hat's why I want to take accuracy, in a way, out of it. Because the influence doesn't necessarily mean nonaccuracy." (48 RT 5748.) Thus, a rational trier of fact could conclude from Volcani's testimony that Ivan Jr. accurately perceived and recollected the events. Thus, it was for the jury to decide whether Ivan Jr.'s perceptions and recollections were credible. (*People v. Anderson, supra*, 25 Cal.4th at p. 573.)

B. Gonzales's Confrontation Rights Were Not Violated By Admission Of The Videotape

In *Crawford v. Washington* (2004) 541 U.S. 36 [136 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court held that the confrontation clause is not violated where testimonial statements are admitted into evidence if the defendant had a previous opportunity to cross-examine the declarant. (*Id.* at p. 59.) As noted above, Gonzales had a meaningful opportunity to cross-examine Ivan Jr. at the preliminary hearing. All the Confrontation Clause requires is the *opportunity* for cross-examination. Nothing more than the opportunity for cross-examination can be, or has ever been, the standard for

whether the requirements of the Confrontation Clause have been met. "[T]he high court has never held that the confrontation clause requires more than the **opportunity** to *ask the witness* questions pertinent to his or her credibility. [Citations]" (*People v. Anderson, supra,* 25 Cal.4th at p. 577; emphasis in original, citations omitted.) As discussed in detail above, Gonzales had the opportunity to cross-examine Ivan Jr. at the preliminary hearing, therefore, his confrontation rights were not violated.

For the same reasons Gonzales argued the trial court erred in admitting Ivan Jr.'s preliminary hearing testimony, he argues it violated his constitutional right to confrontation. (AOB 214-218.) For the reasons discussed above, admission of Ivan Jr.'s preliminary hearing testimony did not violate his confrontation rights.

Gonzales also claims he did not have an opportunity for meaningful cross-examination because "state action prevented [him] from gaining access to the information regarding Ivan Jr. prior to, and for many months after, the preliminary hearing."[25/] (AOB 215.) In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 [107 S.Ct. 989, 94 L.Ed.2d 40], the defendant claimed his confrontation clause rights were violated because he was not given access to records from a protective service agency that investigated accusations of child abuse involving his daughter, who accused him of raping and molesting her. (*Id.* at pp. 43-45.) In a plurality opinion, the United States Supreme Court rejected his argument. It held:

> The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. . . . In short, the

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25. Gonzales does not claim there was a discovery violation. (AOB 216.) The "state" action did not involve the prosecutor; the prosecutor did not have access to the confidential information either. (6 RT 651-663.)

> *Confrontation Clause* only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'

(*Pennsylvania v. Ritchie, supra,* 480 U.S. at pp. 53, emphasis original, footnote and citation omitted.) Otherwise, the Confrontation Clause would be transformed into a "constitutionally compelled rule of pretrial discovery." (*Id.* at p. 52.) Thus, on similar facts, a plurality of the United States Supreme Court has rejected a similar argument.

Gonzales attempts to distinguish the facts from *Ritchie* because Ivan Jr. did not testify at trial. (AOB 215.) The United States Supreme Court's analysis did not depend on whether the witness testified at trial. The determining factor was whether the defendant had an opportunity to cross-examine that witness. (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 52.) Because Gonzales had an opportunity to cross-examine Ivan Jr. during his preliminary hearing, his constitutional rights were not violated.

Gonzales also makes a perfunctory argument that admitting the videotape of Ivan Jr.'s testimony violated his constitutional rights to a fair trial, and to a fair, accurate and reliable capital-sentencing determination. (AOB 230.) For the same reasons Gonzales's confrontation rights were not violated, his other constitutional rights were not violated. Moreover, the videotape was not used in the retrial of the penalty phase, thus it had no bearing on his right to a reliable capital-sentencing determination.

C. The Municipal Court Did Not Err In The Preliminary Hearing By Allowing Ivan Jr. To Face Away From Gonzales And Sustaining An Objection To A Repetitive Question

Gonzales claims the judge who presided over the preliminary hearing erred by allowing Ivan Jr. to sit with his back toward Gonzales and in sustaining an objection to a question, thus infecting his trial. Neither contention has merit.

1. The Seating Arrangement Did Not Violate Gonzales's Right To Confrontation

Prior to the preliminary hearing, the prosecutor filed a motion requesting the court employ an alternative seating arrangement for Ivan Jr. and Michael's testimony whereby they were positioned so that they faced away from Gonzales and Veronica while they testified. (1 CT 24-31.) The request was based on the boys expression of

> great fear of the defendants in conversations with police and with members of the District Attorney's Office. [Ivan Jr. and Michael] have explicitly indicated that they actually fear for their lives. Furthermore, these young witnesses have stated that the defendants have on several occasions threatened them and warned them 'not to tell anyone' about the things that went on in their home, and specifically not to tell what they did to [G]enny R.

(1 CT 25.)

Gonzales objected based on his right to confrontation. (1 RT 9-10.) The court noted that it was trying to guard against children of tender age being intimidated. (1 RT 10.) The court explained how the parties would be seated:

> both defendants will be seated at the plaintiff's table. The podium, from where the lawyers will interrogate the two juvenile witnesses, will be placed over by your station, by the bailiff's station, so that eye contact by the young witnesses can be made to the lawyers. They will be allowed to scan the entire courtroom and make eye contact, should they desire, with the defendants, but I don't want them facing the defendants.

(1 RT 9.) The court explained that Gonzales would be able to make eye contact with the witnesses, and hear and see them. (1 RT 10.)

In *Coy v. Iowa* (1988) 487 U.S. 1012, 1016 [108 S.Ct. 2798, 101 L.Ed.2d 857] the United States Supreme Court held placing a screen between the child witnesses in a molest case and the defendant violated the defendant's right to a face-to-face encounter required by the confrontation clause. (*Id.* at p. 1020.) The court left for another day whether there were exceptions to the right of face-to-face confrontation. (*Id.* at p. 1021.)

Two years later, in *Maryland v. Craig* (1990) 497 U.S. 836, 857 [110 S.Ct. 3157, 111 L.Ed.2d 666], the court held the confrontation clause did not prohibit a child witness from testifying against a defendant at trial, outside the defendant's presence, by a one-way closed circuit television. (*Id.* at p. 855.) To do so, the trial court must make a case-specific finding that the procedure is necessary to protect the welfare of the child witness, that the child witness would be traumatized by the presence of the defendant, and that such emotional distress is more than de minimus, which is more than mere nervousness or excitement or some reluctance to testify. (*Id.* at pp. 855-856.)

In *People v. Sharp* (1994) 29 Cal.App.4th 1772, disapproved on other grounds by *People v. Martinez* (1995) 11 Cal.4th 434, the court in a situation similar to the seating arrangement here, held the defendant's confrontation rights were not violated. (*People v. Sharp, supra*, 29 Cal.App.4th at p. 1782.) In *Sharp*, the prosecutor sat or stood next to the child victim of a sexual molest so the victim could look away from the defendant while she was testifying. (*Id.* at p. 1780.) The defendant could see the back and side of the victim's head, but his view was limited to a portion of her face. (*Id.* at p. 1781-1782.) In rejecting the defendant's confrontation clause argument, the court explained, "[s]urely, appellant cannot be claiming a constitutional right to stare down or otherwise subtly intimidate a young child who would dare to testify against him. Nor can he claim a right to a particular seating arrangement in the courtroom." (*Id.* at p. 1782.) Here, Gonzales is claiming a right to a particular seating arrangement in the courtroom. As in *Sharp*, there was no physical barrier between Ivan Jr. and Gonzales. Gonzales was merely placed in a seat where the witness could make eye contact with Gonzales, but did not have to, and Gonzales would still be able to see and hear the witness. (1 RT 9-10.) Thus, the seating arrangement did not violate Gonzales's right to confrontation.

Gonzales argues that his rights were violated because he did not have a "face-to-face" encounter with Ivan Jr. (AOB 220.) He claims the court-ordered seating arrangement was similar to placing a physical barrier between the witness and defendant. (AOB 220-222.) There was no physical barrier here, and Gonzales could see and hear Ivan Jr. (1 RT 9-10.) That Gonzales did not have a full frontal view of Ivan Jr. did not violate his right to confrontation. Face-to-face confrontation does not require the witness to look at the defendant. "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." (*Coy v. Iowa, supra*, 487 U.S. at p. 1019.)

Next Gonzales argues *Maryland v. Craig, supra*, is no longer viable because it relied on *Ohio v. Roberts* (1980) 448 U.S. 56, 63 [100 S.Ct. 2531, 65 L.Ed.2d 597], which was overruled by *Crawford v. Washington, supra*. He argues the United States Supreme Court criticized *Robert's* departure from the confrontation clause's original meaning. (AOB 222-223.) In *Crawford*, the court did not decide the issue Gonzales raises, nor did the court intend to overrule any case that has cited or relied on *Roberts*. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268.)

Gonzales argues that if this Court determines *Maryland v. Craig* is still good law, the seating arrangement nevertheless violated his right to confrontation because the court did not make a case-specific finding that it was necessary. (AOB 223.) In *Maryland v. Craig*, the witness testified outside a defendant's presence by a one-way closed circuit television. (*Maryland v. Craig, supra*, 497 U.S. at pp. 840-841.) Here, Gonzales's right to confront witnesses was not infringed because Ivan Jr. was in the same room, and Gonzales was able to make eye contact with him, see him, and hear him. (1 RT 9-10.) Therefore, there is no requirement that the trial court make a case-

specific showing. (See, e.g., *State v. Miller* (N.D. 2001) 631 N.W.2d 587, 594-595 [reconfiguration of courtroom so child witness does not have to face the defendant does not require a hearing pursuant to *Maryland v. Craig*]; *Smith v. State* (Ark. 2000) 340 Ark. 116, 8 S.W.3d 534, 537-538 [same]; *Stanger v. State* (Ind.Ct.App. 1989.) 545 N.E.2d 1105, 1112 [same],overruled on other grounds by *Smith v. State* (Ind. 1997) 689 N.E.2d 1238, 1246-1247, fn. 11.)

If this Court were to determine a case-specific showing was required in a situation such as here, i.e. where the seats were changed so the witness did not have to look directly at the defendant, he is still not entitled to relief. The prosecutor filed a motion detailing case-specific reasons for requesting an alternative seating arrangement. (1 CT 24-31.) In it, the prosecutor explained Ivan Jr. and Michael feared Gonzales and Veronica and feared for their lives. Gonzales and Veronica had threatened them and warned them not to tell anyone what they had done to Genny. (1 CT 25.) These facts show a case- specific need for the alternative seating arrangement.

Gonzales's argument that the representations were unsworn and not subject to adversarial testing has been forfeited. (AOB 225.) Gonzales did not request an evidentiary hearing or challenge the facts presented to the court. Thus, he has forfeited any claim of error that the court did not hold an evidentiary hearing.

> [W]hen the alleged error involves the exercise of trial court's discretion based on factual findings and the particular circumstances of a case, the waiver rule is applied because it serves an essential function: It encourages the parties to present all relevant evidence so the court can resolve factual disputes upon which the ruling must be based, and permits the court to develop a complete record for review.

(*People v. Williams* (1999) 77 Cal.App.4th 436, 460.) Thus, Gonzales cannot now complain that the court did not have an adversarial hearing on the underlying facts.

Gonzales claims that courts in other jurisdictions have found similar seating arrangements, coupled with an absence of a case-specific showing of necessity, to violate the confrontation clause. (AOB 226.) To the contrary, numerous courts have held alternative seating arrangements do not violate the confrontation clause. (See, e.g., *State v. Miller*, *supra*, 631 N.W.2d at p. 594 [child witness did not face defendant]; *Smith v. State, supra*, 8 S.W.3d at pp. 537-538 [witness outside defendant's line of sight]; *State v. Brockel* (La. Ct. App. 1999) 733 So.2d 640, 644-646 [witness sat with back towards defendant]; *Brandon v. State* (Alaska Ct. App. 1992) 839 P.2d 400, 409-410 [witness sat in small chair perpendicular to defendant]; *State v. Hoyt* (Utah Ct. App. 1989) 806 P.2d 204, 209-210 [as here, the defendant sat at the prosecutor's table during the witness's testimony so the defendant would be out of line of sight]; *Stanger v. State, supra*, 545 N.E.2d at pp. 1112-1113 [witness chair was angled towards jury, away from defendant]; *Ortiz v. State* (Ga. Ct. App. 1998) 188 Ga. App. 532, 374 S.E.2d 92, 95-96 [witness was angled so not required to directly face the defendant]; *Ellis v. United States* (1st Cir. 2002) 313 F.3d.636, 649-650 [trial court was neither unreasonable nor obviously wrong in allowing alternate seating arrangement whereby victim faced away from the defendant].)

The few out of state cases cited by Gonzales are not persuasive. In *State v. Lipka* (Vt. 2002) 174 Vt. 377, 817 A.2d 27, the defendant claimed a seating arrangement whereby the witness was seated away from the defendant violated his confrontation rights. (*Id.* at p. 32.) The State conceded the issue, and argued it was harmless error. (*Ibid.*) In *People v. Tuck* (N.Y. Ct. App. 1989) 551 N.E.2d 578, the witness sat facing away from the defendant because she was not audible and the courtroom was not equipped with a sound amplification system. Although the court held the defendant's confrontation rights were violated, it held the error was harmless. (*Ibid.*) In *Commonwealth v. Johnson* (Mass. 1994) 417 Mass. 498, 631 N.E.2d 1002, the child victims sat in a

manner so the defendant could not see their faces. (*Commonwealth v. Johnson, supra*, 631 N.E.2d at p. 1005.) The court held the arrangement violated the Massachusetts Constitution, which gives defendants a right to meet their witnesses "face to face." (*Id.* at pp. 1005-1007.) Accordingly, the court did not base its decision on the Sixth Amendment or federal law. (*Id.* at p. 1005, fn. 4.)

Thus, the out of state cases that have decided this issue have held a defendant's right to confrontation is not violated by alternative seating arrangements. Moreover, the court's decision in *People v. Sharp, supra*, 29 Cal.4th at p. 1782, involved a similar situation and should be followed.[26/] As Gonzales was able to make eye contact with Ivan Jr., see him, and hear him (1 RT 9-10), his right to confrontation was not violated.

2. The Court Did Not Abuse Its Discretion In Sustaining An Objection To Gonzales's Question To Ivan Jr.

During cross-examination of Ivan Jr., counsel for Gonzales asked numerous questions about what it meant to tell the truth and whether Ivan Jr. knew that he had to tell the truth. (9 CT 2031-2033.) Ivan Jr. said he knew what it meant to tell the truth and that the truth was the opposite of a lie. (9 CT 2031.) Counsel asked what happened when he told a lie, and Ivan Jr. said he would get in trouble. (9 CT 2032.) Counsel asked who he would get in trouble with, and Ivan Jr. said, "I don't know." He asked some other, similar questions that were vague, and Ivan Jr. said he did not understand what counsel was asking.

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26. Gonzales cites *Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, 668-671 as persuasive authority but acknowledges it was decided prior to *Maryland v. Craig*. (AOB 227.) Not only is it distinguishable on this ground, it is also distinguishable because here, like in *Sharp*, it was not physically impossible for the defendant and witness to see each other. (Compare, *Herbert v. Superior Court, supra*, 117 Cal.App.3d at p. 664.)

Counsel then asked whether if he lied to a "gentleman" sitting there (presumably someone counsel pointed to), he would get in trouble with the gentleman. Ivan Jr. said he would. (9 CT 2032.) Counsel then asked, "And if I asked you a question and you gave me an answer and I said Ivan, you lied, would you get in trouble with me?" (9 CT 2032.) Ivan Jr. answered, "yes." The prosecutor objected, and the court sustained the objection. The court then asked its own questions stressing to Ivan Jr. that it was very serious to lie in court and that it was against the law. (9 CT 2033.) The court followed up and asked Ivan Jr. whether he was comfortable with what the court had explained about telling the truth in court, and Ivan Jr. said he was. (9 CT 2033.) The last question counsel asked, to which the court sustained the prosecutor's objection, is the basis for Gonzales's argument.

First, Gonzales has forfeited this claim by failing to make a proper objection. Gonzales could have raised this issue with the trial judge, and requested that Ivan Jr's answer stand. Additionally, Gonzales did not object to the court's excluding this question on the basis that it violated his right of confrontation. Accordingly, Gonzales's claim is forfeited. (*People v. Price, supra,* 1 Cal.4th at p. 430 ["Defendant may not challenge on appeal the admission of evidence on grounds not urged in the trial court"]; *People v. Ashmus, supra,* 54 Cal.3d at p. 972 [the general rule is that "questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal"].) Even if Gonzales had properly preserved the issue below, he would not be entitled to relief because the issue is without merit.

The trial court did not abuse its discretion in limiting Gonzales from asking the one question he complains of. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 [abuse of discretion is standard for admissibility of evidence].) Trial judges have "wide latitude . . . to impose reasonable limits on . . . cross-

examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" (*People v. Hernandez* (2003) 30 Cal.4th 835, 859, quoting *People v. Clair* (1992) 2 Cal.4th 629, 656.)

Ivan Jr.'s ability to understand his duty to tell the truth was relevant. The court allowed numerous questions on this issue. The specific question of whether Ivan Jr. would get in trouble with counsel if he lied to counsel was repetitive. Counsel had asked whether Ivan Jr. would get in trouble if he lied to a gentleman who was in court, and who he would get in trouble with if he lied. (9 CT 2032.) It was counsels third question regarding whether Ivan Jr. would get in trouble with a particular person if he lied, therefore the court properly excluded the third question on the same subject as being repetitive.

Without citing any authority, Gonzales claims the court committed further evidentiary and constitutional error "by asking Ivan Jr. leading questions that inevitably induced Ivan Jr. to testify that he had not lied during his testimony, he would get into trouble if he did lie, and would not get in trouble if he did not lie." (AOB 229.) Gonzales further claims the court's questioning of Ivan Jr. "undercut" his cross-examination. (AOB 229.) Gonzales did not object to the court's questioning of Ivan Jr., therefore, he has forfeited his claim. (*People v. Cook* (2006) 39 Cal.4th 566, 598.) Had Gonzales properly objected, he would still not be entitled to relief because his claim has no merit.

"A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony." (*People v. Cook, supra*, 39 Cal.4th at p. 597.) The court's questioning must be temperate, nonargumentative, and scrupulously fair. (*Ibid.*) Here, the court's questioning was proper. It explained the significance of lying in court and asked Ivan Jr., "so have you told us any lies today?" It explained that if he told the truth he would not "get in trouble." (9

CT 2033.) Contrary to Gonzales's argument (AOB 229), the court did not ask leading questions. Nor did the questions limit counsel's opportunity to follow-up on Ivan Jr.'s answers. Thus, the court did not commit error by asking Ivan Jr. some questions about his duty to tell the truth, and Gonzales's constitutional rights were not violated.

D. Admission Of The Videotape Did Not Prejudice Gonzales

Even if this Court were to determine the trial court erred in admitting the videotaped preliminary hearing testimony of Ivan Jr., any error was harmless. A violation of the confrontation clause is harmless if the reviewing court determines beyond a reasonable doubt that the outcome would not be different. (*People v. Geier, supra,* 41 Cal.4th at p. 608 [*Chapman v. California, supra,* 386 U.S. at p. 18, is standard to apply to confrontation clause violations].) The admission of evidence in violation of state law is harmless if the reviewing court determines it is not reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Under either standard, any violation is harmless.

As detailed in Argument I, subdivision C, the evidence against Gonzales was compelling. Although Ivan Jr. implicated Gonzales in Genny's murder, even without his testimony, the evidence against Gonzales was strong. Gonzales admitted repeatedly that he and Veronica put Genny in the bathtub, and he turned on the water. (8 CT 1760, 1762, 1774, 1796, 1803, 1812, 1823.) Gonzales also admitted engaging in some of the torturous acts leading up to Genny's murder. (See Argument I, subd. C.)

The prosecutor did not use Ivan Jr.'s testimony during the penalty retrial, and the jury still decided, based on the heinous acts he committed, Gonzales should get the death penalty. Thus, Gonzales's acts of murder and torture were proven without the videotape in the penalty phase, where the prosecutor relied on the circumstances of the offense as the sole aggravating factor.

If Gonzales believed the evidence impeaching Ivan Jr. was forceful, and that Ivan Jr. was a damaging witness without it, he could have chosen to present the testimony. (48 RT 5760 [the trial court stated that the evidence of Ivan Jr.'s impaired memory was admissible on the question of Ivan Jr.'s credibility].) For tactical reasons, Gonzales chose not to do so. He should not be able to now claim that admission of the videotape was prejudicial because the jury was not aware of the limitations of Ivan Jr. and the jury had an inaccurate impression of Ivan Jr.'s credibility. (AOB 232.)

Gonzales claims admission of the testimony "exaggerated the jury's impression of [his] personal involvement in the offense" and his intent to torture. (AOB 233-234.) Gonzales does not explain how this is so. It is undisputed that Genny was tortured and on her final day was placed in a scalding hot bathtub. As Gonzales acknowledges, he and Veronica were the potential perpetrators. (AOB 231.) Ivan Jr. testified he could see both parents in the bathroom the night of Genny's murder. (9 CT 1972.) On cross-examination, he said that he only saw Genny in the bathtub on the night she died. (9 CT 2021.) He explained that he had previously seen both parents put hot water on Genny in the bathtub, and that he believed both parents put Genny in the bathtub on the night of her murder because "they always did it." (9 CT 1941, 2021.) Thus, Ivan Jr.'s testimony implicated both his parents in Genny's torture and murder.

Gonzales concludes the jury "likely" viewed the videotape of Ivan Jr.'s testimony in deliberations because they asked for a VCR and television. (AOB 234.) There were other videotapes admitted into evidence that the jury may have viewed, including Gonzales's interview. (53 RT 6550-6551 [crime scene videotape]; 54 RT 6701 [videotape of view of bathroom from bedroom]; 54 RT 6705 [video of bathtub filling up]; 54 RT 6752 [videotape of Gonzales's

interview].) Therefore it is speculation that the jury watched Ivan Jr.'s testimony during deliberations.

Based on the strength of the prosecution evidence, as demonstrated by the second jury finding death was the appropriate punishment without seeing the videotape of Ivan Jr.'s testimony, any error in admitting the videotape was harmless using either standard of review for the guilt verdict and the special circumstance finding.

X.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING VERONICA'S SPONTANEOUS STATEMENT TO HER BROTHER-IN-LAW THAT GONZALES HIT HER

Gonzales contends the trial court committed prejudicial error in admitting a statement that Veronica made to her brother-in-law, Victor Negrette, that Gonzales had hit her. The trial court did not abuse its discretion in admitting the statement as a spontaneous statement, as Veronica was still under the stress of the excitement of the event.

In his case, Gonzales presented evidence that Veronica had been physically abusive towards him to support his defense that Veronica was the perpetrator of Genny's abuse, torture and murder, and to explain why he did not stop Veronica from hurting Genny. (33 RT 3468-3469; 56 RT 7079; 57 RT 7105-7106, 7135, 7215-7216, 7262, 7265-7266; 63 RT 8125, 8133-8136.) In rebuttal, the prosecutor called Victor Negrette, Veronica's brother-in-law, who lived in Corona. (60 RT 7709, 7711.) Negrette testified Gonzales and Veronica argued a lot. (60 RT 7710-7711.) One time Veronica called him from Chula Vista, where she lived. (60 RT 7711.) Veronica was upset; she was crying and sobbing. (60 RT 7711.) Veronica asked Negrette to pick her and the children up because she and Gonzales were arguing. (60 RT 7717.)

When Negrette was asked whether Veronica said Gonzales hit her, Negrette said, "Yea, I believe she did." (60 RT 7717-7718.)

Negrette and his wife drove an hour and a half to two hours to San Diego to pick up Veronica. (60 RT 7711, 7713, 7715, 7758.) When Negrette arrived in San Diego, Veronica was still upset. She was crying and had tears running down her face. (60 RT 7713.) While they drove back to San Diego, Veronica remained upset and was crying. (60 RT 7718.) In the car, Veronica said she and Gonzales had been fighting. (60 RT 7719.) The prosecutor asked Negrette whether Veronica said whether or not Gonzales had hit her, and the defense objected. (60 RT 7719.) Although the objection was overruled, the prosecutor moved into a different area of questioning. (60 RT 7719-7720.)

Gonzales objected to the testimony and after Negrette's testimony moved for a mistrial. (60 RT 7712, 7714, 7716-7717, 7780-7781.) Gonzales argued during his motion for a mistrial that his constitutional rights had been violated. (60 RT 7780-7781.) The court ruled the statements were admissible under Evidence Code section 1240, and denied Gonzales's motion for a mistrial. (60 RT 7717, 7781.)

A. The Trial Court Did Not Abuse Its Discretion In Finding Veronica Was Still Under The Stress Of Excitement From The Event And Admitting The Statements As Spontaneous Statements

A trial court's ruling on the admissibility of a hearsay statement is reviewed for an abuse of discretion. (*People v. Williams, supra,* 40 Cal.4th at p. 317; *People v. Phillips, supra,* 22 Cal.4th at p. 236 [spontaneous statement exception].) The trial court's resolution of questions of fact underlying its determination are reviewed for substantial evidence. (*People v. Phillips, supra,* 22 Cal.4th at p. 236.) Here, the trial court properly exercised its discretion. There was substantial evidence to support its determination that Veronica's statement was made while she was under the stress of the event.

As discussed in Argument III, Evidence Code section 1240 provides an exception to the hearsay rule for statements that purport to narrate, describe, or explain an act, condition, or event that are made spontaneously while the declarant was under the stress of excitement caused by such perception. Whether a hearsay declarant spoke "under the stress of excitement" is a factual determination reviewed for substantial evidence. (*People v. Brown, supra,* 31 Cal.4th at pp. 518, 540-541.) A spontaneous statement is one made without deliberation or reflection. (*People v. Raley, supra,* 2 Cal.4th at p. 892.) Lapse of time and whether the statement was made in response to a question are factors to consider in determining spontaneity. (*People v. Brown, supra,* 31 Cal.4th at p. 541.)

> Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*

(*Ibid.*, quoting *People v. Poggi, supra,* 45 Cal.3d at p. 319, emphasis original.)

Here, Veronica was sobbing, crying, and upset when she told Negrette on the phone that Gonzales hit her. (60 RT 7717-7718.) It was not made in response to a question, and was obviously made while she was still upset, without deliberation or reflection.

Gonzales contends, however, that "[t]he record provides no indication that Veronica uttered either of her hearsay statements sufficiently close in time to her altercation with [Gonzales.]" (AOB 238.) There was only one statement made by Veronica regarding Gonzales hitting her that was admitted–the one over the telephone. While it appears there was also a statement made to Negrette in the car, the prosecutor did not elicit it from him. The rest of the testimony regarding the car ride to San Diego involved Negrette's observations of Veronica, with the exception of her statement that she and Gonzales had been fighting. (60 RT 7719.)

It is not clear from the record exactly how much time had elapsed between when Gonzales hit Veronica and when she made the statement over the phone. In response to the question of when Veronica said the event happened, Negrette said, "that day." (60 RT 7716.) Even had time elapsed, that is not a determinative factor if the statement appeared to be "made under the stress of excitement and while the reflective powers were still in abeyance." (*People v. Brown, supra*, 31 Cal.4th at p. 541.)

This case is unlike that in *People v. Ramirez* (2006) 143 Cal.App.4th 1512, cited by Gonzales as persuasive authority. (AOB 238.) In *Ramirez*, a 16-year-old rape victim returned to the hotel she was sharing with others, and although upset, did not tell them she had been raped. (*Id.* at p. 1524.) She went with the rapist, whom she had met that day through some friends, in his car so he could take her home. She fell asleep in his car and woke up a few hours later in a strange apartment. (*Ibid.*) She then told someone about the rape and that she was worried about her brother's reaction if he found out she had been raped. (*Id.* at p. 1525.) She then left the apartment and walked back to the hotel, arriving four to five hours after the rape. (*Id.* at p. 1524.) The hotel clerk asked her twice what had happened, and the second time she told him she had been raped, and that she was worried her brother would find out. (*Id.* at p. 1525.)

In *Ramirez*, the court did not hold that the lapse of time rendered her statements inadmissible as spontaneous statements. Rather, it was the deliberative and reflective process that she was worried about what her brother would do to her that showed her reflective powers were not "in abeyance." (*Id.* at p. 1526.) Here, there is no indication from the record that Veronica engaged in any deliberative or reflective process. She called her brother-in-law, crying and sobbing, and asked him to come and get her because she and Gonzales had fought and Gonzales hit her. The trial court did not abuse its discretion in

finding the statement was made while Veronica was under the stress of excitement of the event even though it is unclear when during that day that Gonzales hit her.

B. Veronica's Statement Was Not Testimonial, Therefore, It Did Not Violate Gonzales's Right To Confrontation

Veronica's statement to her brother-in-law was not testimonial. A testimonial statement is one for which "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*People v. Cage* (2007) 40 Cal.4th 965, 982, quoting *Davis v. Washington* (2006) 547 U.S. ___ [126 S.Ct. 2266, 2273-2274; 165 L.Ed.2d 224].) Veronica's statement to Negrette was not to prove facts to use in a later criminal prosecution. The incident was not even reported to the police.

Nevertheless, Gonzales argues that Veronica's statement was testimonial due to its "accusatory nature," differentiating it from the "casual remark to an acquaintance that the United States Supreme Court has deemed the epitome of non-testimonial hearsay." (AOB 239.) Such casual remarks, "made without the 'solemn[ity]' and 'purpose' characteristic of 'testimony,' are not the concern of the confrontation clause." (*People v. Cage, supra*, 40 Cal.4th at p. 991.) Here, Veronica's statement to her brother-in-law was not testimonial.

Next Gonzales argues that even if Veronica's statements were not testimonial, they were not reliable, and *Roberts v. Ohio* "continues to govern the confrontation-clause analysis of nontestimonial hearsay." (AOB 239-240.) Subsequent to Gonzales filing his brief, this Court decided *People v. Cage, supra*, that rejected such an argument. "[T]here is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution." (*People v. Cage, supra*, 40 Cal.4th at p. 981, fn. 10.) Thus, Gonzales's argument is without merit.

C. Even If The Trial Court Erred In Admitting The Statement, Gonzales Was Not Prejudiced

Even if this Court were to determine the trial court erred in admitting the statement Veronica made to Negrette, any error was harmless. A violation of the confrontation clause is harmless if the reviewing court determines beyond a reasonable doubt that the outcome would not be different even if Veronica's statement had been excluded. (*People v. Geier, supra,* 41 Cal.4th at p. 608 [*Chapman v. California, supra,* 386 U.S. at p. 18, is standard to apply to confrontation clause violations].) The admission of evidence in violation of state law is harmless if the reviewing court determines it is not reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Partida, supra,* 37 Cal.4th at p. 439.) Under either standard, any error was harmless.

As detailed in Argument I, subdivision C, the evidence against Gonzales was compelling. His defense that he helplessly stood by while Veronica inflicted abuse, tortured and ultimately murdered Genny and that he did not obtain medical attention for her because he was scared of his five foot, two and a half inch wife (58 RT 7416-7417) was weak. The evidence showed Gonzales actively participated in the torture and murder of Genny, and that he turned the water on during Genny's final, fatal bath.

Moreover, the rebuttal evidence that Gonzales complains of, that Gonzales hit Veronica, was not very forceful. Negrette did not definitively say Veronica told him Gonzales hit her. When asked if Veronica said whether or not Gonzales hit her, Negrette said, "yea, I believe she did." (60 RT 7717-7718.) The strength of this case did not depend on this one weak statement. Also, contrary to Gonzales's argument, this was not the "only evidence" that Gonzales had ever used force against Veronica. (AOB 241.) Ivan Jr. testified that he thought Veronica was afraid of Gonzales because Gonzales was stronger

than Veronica and hit her many times. (9 CT 2024-2025.) Thus, had Veronica's hearsay statement been excluded, the jury would have still known that Gonzales had hit Veronica.

Further demonstrating the statement did not contribute to the verdict is that it was not used during the penalty phase retrial, yet the jury still found the death penalty appropriate based on the circumstances of the crime. The jury rejected Gonzales's penalty phase argument that he was a minor participant in the crime. (100 RT 12833-12884.) This shows the statement did not "tip[] the balance in favor of a conviction or a special circumstance finding," (AOB 242) as Gonzales contends. Had this one statement not been admitted, under either standard of review, the outcome of Gonzales's guilty verdict and special circumstance finding would not have been affected.

XI.

THE TRIAL COURT'S ADMISSION OF GONZALES'S VIDEOTAPED INTERVIEW DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS BECAUSE HE VALIDLY WAIVED HIS RIGHTS TO COUNSEL AND TO REMAIN SILENT

Gonzales contends the admission of his videotaped interview with police violated his constitutional rights because he did not validly waive his privilege against self-incrimination or his right to counsel. (AOB 243.) Gonzales acknowledged that he understood his constitutional rights to remain silent and to counsel, and the trial court correctly found he impliedly waived his rights. Therefore, the interview was properly admitted into evidence.

Detectives Richard Powers and Larry Davis interviewed Gonzales on July 22, 1995. (8 CT 1752; Court's Exh. 66.) After obtaining some background information from Gonzales, Detective Powers told Gonzales that they had seen Genny and her injuries, searched Gonzales's house, and spoken

to Veronica. (8 CT 1755-1756; Court's Exh. 66.) Powers explained to Gonzales that the physical evidence told a story of its own, and he wanted to get Gonzales's side of the story. Detective Powers explained, however, that he first wanted to read Gonzales his rights. (8 CT 1756; Court's Exh. 66.) Powers read Gonzales his *Miranda*[27] rights. (8 CT 1756-1757; Court's Exh. 66.) Gonzales nodded his head to indicate he understood his rights and mouthed "yes." (15 RT 1422, 1425, 1429-1430; Court's Exh. 66.) Detective Powers then asked Gonzales whether he would like to tell his side of the story. (8 CT 1757; Court's Exh. 66.) Gonzales's response was unintelligible. Detective Powers reiterated that he had already talked to Veronica and would like to get Gonzales's side of the story because the case would eventually go to court, and

> they're gonna look at Veronica's statement, they're gonna look at what we collect there, and they're gonna match it up with what you say. So that's why it's very important um to be perfectly honest with me. Would you like to tell me what happened, in your own words what happened?

(8 CT 1757; Court's Exh. 66.) Gonzales stated, "Um, well I," and Detective Powers said, "First of all let me, let me ask you this. Um. (pause)." Gonzales asked for a drink of water, and Detective Davis said, "Sure. Be right back." (8 CT 1757; Court's Exh. 66.) Detective Davis left and returned with a drink of water for Gonzales. (55 RT 6789-6790; Court's Exh. 66.) Powers then began asking Gonzales questions, and Gonzales answered the questions. (8 CT 1857; Court's Exh. 66.)

Two days later, on July 24, 1995, Detectives Powers and Davis attempted to question Gonzales again. (2 CT 340.) During this second interview, Gonzales asserted his right to counsel. (2 CT 340.)

Gonzales moved to suppress his July 22, 1995, statement because he claimed he did not knowingly and intelligently waive his *Miranda* rights. (2

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27. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

CT 338-346.) After watching the videotape of the interview containing the waiver and hearing argument, the trial court found that Gonzales clearly acknowledged he understood his rights, that he clearly waived his rights, and the interview was voluntary. (15 RT 1431.) The court thus denied Gonzales's motion because his behavior constituted a waiver. (15 RT 1432.)

Before a person in custody may be interrogated, he must be informed of and given the opportunity to exercise his right to remain silent and his right to the assistance of counsel. (*Miranda v. Arizona, supra,* 384 U.S. at p. 444; *People v. Whitson* (1998) 17 Cal.4th 229, 244; *People v. Bradford* (1997) 14 Cal.4th 1032-1033.) However, "[a]fter such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." (*Miranda v. Arizona, supra*, 384 U.S. at pp. 478-479.)

A suspect need not have uttered any particular words to waive the protections afforded by *Miranda*. The question is not one of form, but whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373 [99 S.Ct. 1755, 60 L.Ed.2d 286]; *People v. Whitson, supra*, 17 Cal.4th at p. 246.) Accordingly, a valid *Miranda* waiver may be express or implied. (*People v. Whitson, supra*, 17 Cal.4th at p. 247.) Waiver can be inferred from the actions, words, or other course of conduct of the person interviewed. (*Id.* at p. 246.)

A defendant's willingness to answer questions after acknowledging an understanding of the *Miranda* rights is sufficient to constitute an implied waiver. (*People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully, supra,* 53 Cal.3d at p. 1233; *People v. Johnson* (1969) 70 Cal.2d 541, 557, overruled on a different point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 89[illegible], fn. 8.) With regard to implied waivers, this Court has held:

> Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak

> and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them.

(*People v. Johnson, supra*, 70 Cal.2d at p. 558.)

If the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension, a trial court may properly conclude the *Miranda* rights have been waived. (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct.1135, 89 L.Ed.2d 410].)

> Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

(*Id.* at pp. 422-423; see also *People v. Whitson, supra,* 17 Cal.4th at p. 247.)

Reviewing courts must accept the trial court's ruling on all factual disputes and inferences, and its evaluation of credibility, if supported by substantial evidence. (*People v. Whitson, supra*, 17 Cal.4th at p. 248.) The reviewing court independently determines whether, from the undisputed facts and those properly found by the trial court, the voluntariness of the defendant's waiver and statements was established by a preponderance of the evidence. (*Ibid.*)

Here, Detective Powers advised Gonzales of his *Miranda* rights. (8 CT 1756; Court's Exh. 66.) Detective Powers asked Gonzales if he understood his rights and Gonzales nodded his head to indicate he understood his rights and mouthed "yes." (Court's Exh. 66; 15 RT 1422, 1425, 1429-1430.) The trial court found Gonzales's interview was voluntary and that he clearly understood his rights. (15 RT 1431.) Subsequent to being informed of his rights, Gonzales chose to make a statement. Thus, Gonzales's actions in making a statement, after being informed of his rights, constituted an implied waiver.

Gonzales's implied waiver was similar to that in *People v. Whitson, supra.* In *Whitson*, the defendant was convicted of two counts of second degree

murder for his speeding and driving through a red light, which caused a collision that resulted in the death of another driver and his own passenger. (*People v. Whitson, supra*, 17 Cal.4th at p. 223.) The defendant was interviewed a few times, including once three hours after the collision when the defendant was still in the emergency room. (*Id.* at p. 237.) The defendant was given his *Miranda* rights and indicated he understood them. (*Id.* at pp. 237-239.) After the defendant stated he understood his rights, the police officer began to question the defendant. (*Id.* at p. 237.) There was not an express waiver.

This Court upheld the trial court's admission of the defendant's statements, finding his waiver was voluntary, and that in spite of the serious injuries suffered during the collision, the defendant was aware of the rights he was abandoning. (*People v. Whitson, supra*, 17 Cal.4th at p. 249.) Based on decisions of the United States Supreme Court and the California Supreme Court, this Court held that an express waiver was not required where a defendant's actions make clear that a waiver was intended. (*Id.* at p. 250.)

Similarly, Gonzales's waiver was voluntary, and the record shows Gonzales was aware of the rights he was abandoning. Further demonstrating Gonzales was aware of his rights is his second interview, wherein Gonzales invoked his rights. That he invoked his rights a few days later shows Gonzales was aware he had the right to do so. (See *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1272 [subsequent demand for counsel showed the defendant was informed of and understood the content and importance of the *Miranda* rights].)

Gonzales argues that he never articulated any agreement to speak to his interrogators, and that answering questions was not sufficient to demonstrate a waiver. (AOB 245.) As stated above, there is no requirement of an express agreement to speak to his interrogators. By answering questions, after acknowledging he understood his rights, Gonzales impliedly waived his rights.

Gonzales acknowledges this Court has found implied waivers "from the mere fact that a suspect answered questions that the police posed during an interrogation," but argues that finding an implied waiver in this case would lower the burden of demonstrating an implied knowing, voluntary, and intelligent waiver that the United States Supreme Court established in *Miranda* and *Butler*. (AOB 245.) Gonzales appears to urge this Court to revisit its holdings finding an express waiver is not required. In *People v. Whitson, supra*, this Court analyzed United States Supreme Court precedent, including *Miranda* and *Butler*, and held a waiver may be implied. (*People v. Whitson*, 17 Cal.4th at pp. 244-247.) This Court concluded that "California law involving the implied waiver of a defendant's *Miranda* rights is in accord with the federal case authorities cited above." (*Id.* at p. 247.) Thus, this Court has determined that finding an implied waiver does not lower the burden of demonstrating a voluntary, knowing and intelligent waiver under *Miranda* and *Butler*. This Court's opinions are consistent with federal case law, and should not be changed as Gonzales suggests.

Gonzales also argues that Detective Powers misled him by telling him a court would use Veronica's statements against him, which Gonzales argues is further proof that he did not impliedly waive his *Miranda* rights. (AOB 245-246.) Detective Powers did not mislead or deceive Gonzales. Detective Powers told Gonzales that they had interviewed Veronica and the children, searched their house, and had seen Genny's injuries. (8 CT 1755-1756.) Powers told Gonzales they wanted to give him a chance to tell his side of the story. (8 CT 1756.) After Powers read Gonzales his rights, and Gonzales said he understood them, Powers said, .

> like I said I've already talked to Veronica and I've, and I've, like I said I've seen what's there so I know pretty much what happened. I just would like to get your side of the story okay. Because what's gonna happen is eventually this'll go to court okay. And they're gonna look at Veronica's statement, they're gonna look at what we collect there, and

> they're gonna match it up with what you say. So that's why it's very important um to be perfectly honest with me. Would you like to tell me what happened, in your own words what happened?

(8 CT 1757.)

Gonzales's argument is this passage is misleading because "it would be farfetched to assume that appellant knew that Veronica's statements could not lawfully be admitted against him in court." (AOB 245.) The interview was conducted the morning after Genny was murdered. Although Gonzales and Veronica had both been arrested, no charges had been filed, and the investigation was ongoing. Detective Powers could have believed that if Veronica implicated Gonzales and had not been charged, Veronica would testify against Gonzales. Thus, it is unclear in what way Gonzales believes that Detective Powers mislead him. Moreover, Detective Powers did not represent to Gonzales what evidence was admissible during trial; he merely said that eventually this case would go to court, and they would look at both parties' statements. Detective Powers's statement was not deceptive or misleading.

A police officer's use of misleading or deceptive tactics goes to the issue of voluntariness. Here, as in *People v. Whitson, supra,*

> the record is devoid of any suggestion that the police resorted to physical or psychological pressure to elicit statements from defendant. To the contrary, defendant's willingness to speak with the officers is readily apparent from his responses. He was not worn down by improper interrogation tactics, lengthy questioning, or trickery or deceit. . . . He was not induced to provide his statements by improper promises. The voluntariness of the waiver therefore is clear.

(*People v. Whitson, supra*, 17 Cal.4th at pp. 248-249.)

Even had Detective Powers mislead Gonzales by telling him that Veronica's statement would be admissible against him in trial, it would not invalidate Gonzales's statement. In *People v. Smith* (2007) 40 Cal.4th 483, the police falsely told the defendant they conducted the "Neutron Proton Negligence Test," which showed the defendant, who denied firing a gun, had

recently fired a gun. (*People v. Smith, supra*, 40 Cal.4th at p. 500) The test was a sham. On appeal, the defendant argued the deceptive tactic rendered his subsequent statements involuntary. This Court rejected the claim, noting courts "have repeatedly found proper interrogation tactics far more intimidating and deceptive than those employed in this case." (*Id.* at p. 505.) The cases this Court relied on included *Frazier v. Cupp* (1969) 394 U.S. 731, 739 [89 S.Ct. 1420, 22 L.Ed.2d 684] whereby an officer falsely told the suspect his accomplice had been captured and confessed; *People v. Jones* (1998) 17 Cal.4th 279, 299, where an officer implied he could prove more than he actually could; *People v. Thompson* (1990) 50 Cal.3d 134, 167, where officers falsely told the suspect they had evidence linking him to a homicide; *In re Walker* (1974) 10 Cal.3d 764, 777, where officers told the wounded suspect he might die before he reached the hospital, so he should talk while he still had the chance; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125, where an officer falsely told the suspect his fingerprints had been found on the get-away car; and *Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 495, where an officer falsely told the suspect he had been identified as an eyewitness. (*People v. Smith, supra*, 40 Cal.4th at p. 505.) Thus, even in cases where the police officers lied about evidence they claimed implicated the suspect, the subsequent statements were not found to be involuntary or unreliable.

Here, Detective Powers did not use such tactics. His statements were not misleading. At most, Detective Powers did not fully explain the admissibility of a statement of a jointly charged spouse. There is no requirement to explain such rules of evidence to a suspect prior to asking him or her questions. Thus, Detective Powers statement was not "so coercive that it tended to produce a statement that was involuntary or unreliable." (*People v. Smith, supra*, 40 Cal.4th at p. 506.) Nor was Gonzales "induced to provide his statements by improper promises." (*People v. Whitson, supra*, 17 Cal.4th at p. 249.)

Even if this Court determined Gonzales did not validly waive his *Miranda* rights, there was no error in admitting the evidence. Errors in admitting statements obtained in violation of *Miranda* are reviewed under the standard of whether they are harmless beyond a reasonable doubt. (*People v. Neal* (2003) 31 Cal.4th 63, 86, citing *Chapman v. California, supra,* 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].) Here, the error did not contribute to the verdict obtained. As detailed in Argument I, subsection C, the evidence against Gonzales was compelling.

It was uncontested that Genny was tortured and murdered. The contested issue was whether it was Veronica, Gonzales, or both who inflicted the torture and murdered Genny. Ivan Jr. testified that his parents were torturing Genny and he knew one day she would die. (9 CT 1934, 1939.) His testimony showed Gonzales and Veronica forced Genny to eat her feces when she had accidents, hit her, cut her skin with a knife, pulled her hair out, burned her with hot water in the bathtub, tied her hands with rope, and hung her in the closet. (9 CT 1932-1933, 1935-1938, 1946-1948, 1976-1977, 1979, 1982-1987, 2019-2022.) According to Ivan Jr., both his parents were in the bathroom with Genny when she was murdered. (9 CT 1938-1939, 1941, 1972.)

Ivan Jr. explained that both his parents told him not to tell anyone what was happening in their home or they would get hit. (9 CT 1951.) They closed the windows of their apartment so the neighbors could not hear Genny scream. (9 CT 1952.) Thus, based on the physical evidence, plus Ivan Jr.'s testimony, it was clear both Gonzales and Veronica tortured and murdered Genny.

Although Ivan Jr.'s testimony was not used during the penalty retrial, had Gonzales's statements been excluded, the prosecutor certainly would have used Ivan Jr.'s statements. Thus, for the guilt phase, there is no reasonable possibility the verdict would have been more favorable to appellant had his

statements not been admitted, and any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)[28/]

XII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A MANNEQUIN AND PHOTOGRAPHS OF GENNY INTO EVIDENCE

Gonzales contends the trial court erred by admitting into evidence gruesome autopsy photographs, crime scene photographs, a photograph of Genny prior to her death, and a mannequin the size of Genny. (AOB 248-252.) He also claims the rulings deprived him of his constitutional rights. (AOB 248.) The photographs of the victim were properly admitted to show Genny was tortured and to assist the expert witnesses in their testimony. The photograph of Genny before she was murdered was properly admitted to show how she looked before she was abused. The mannequin was properly admitted to show how Genny was grabbed and received some of her injuries.

A. The Photographs Of Genny's Torture Were Properly Admitted

Prior to trial, Gonzales filed a motion to limit photographic evidence. (2 CT 330-337.) He claimed the pictures of Genny prior to her death were not relevant and those of her after her death were unduly prejudicial.[29/] (2 CT 332-

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28. Gonzales argues Ivan Jr.'s testimony was erroneously admitted into evidence. (Argument IX.) In the unlikely event this Court concluded neither Ivan Jr.'s testimony nor Gonzales's statement should have been admitted, the evidence would not have been sufficient to convict Gonzales. Either Ivan Jr.'s testimony, or Gonzales's statements, however, in conjunction with the physical evidence, showed overwhelmingly that Gonzales tortured and murdered Genny.

29. Gonzales's motion was to exclude photographs of the victim, not other photographs of the crime scene, although he made oral objections to some of the crime scene photographs. (35 RT 3609-3623.) On appeal, he argues the trial court improperly admitted photographs of the victim and the crime scene. (AOB 248-249.) It is not clear from his brief which crime scene

337.) The prosecutor opposed Gonzales's motion. (5 CT 1079-1103.) The prosecutor explained the numerous photographs were necessary because it was a torture case with multiple injuries, multiple ages of injuries, multiple mechanisms of the injuries and multiple locations. (34 RT 3499.) The relevance and purpose of each photograph was explained by the prosecutor. (34 RT 3501-3532.) The prosecutor also explained that there were numerous other graphic photographs which he did not seek to admit. He only sought to admit those photographs that depicted what he intended to prove. (34 RT 3536.)

The court ruled it was not going to exclude all the photographs because the prosecution was required to prove Gonzales tortured and intended to torture and kill Genny, and the photographs would show how Genny was assaulted. (34 RT 3507.) The photographs were also admissible to aid the medical examiner in his testimony. (34 RT 3507.) The court weighed the probative value against the prejudicial effect of the photographs and found the photographs were not unduly prejudicial. (34 RT 3575-3576.)

The court explained that it had never seen a case such as this where virtually every square inch of Genny's body, from the tip of her head to the bottoms of her toes, either reflected an injury or evidence which explained other

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photographs, other than those of Genny, he claims were improperly admitted and on what basis. This Court should not consider his perfunctory claim that crime scene photographs, other than those of Genny, were improperly admitted. An objection to evidence must be made in such a way to alert the trial judge to the nature of the evidence and the basis for exclusion and give the prosecutor an opportunity to establish its admissibility. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) Beyond failing to properly preserve his claim below with a specific and timely objection in the trial court, this Court should reject the assignment of error on the basis it not properly presented as it is a perfunctory assertion without development. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; See also, Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Gray* (2005) 37 Cal.4th 168, 198; *People v. Smith, supra,* 30 Cal.4th at p. 616, fn. 8.)

injuries. (34 RT 3562.) Because of that, this case would necessarily require a substantially larger number of photographs than other cases. (34 RT 3562, 3577.)

Gonzales does not dispute the photographs were relevant. His only claim of error is that they were unduly prejudicial. (AOB 249-251.) Evidence Code section 352 provides the trial court with broad discretion in assessing whether the probative value of particular evidence is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125.) A reviewing court will not disturb a trial court's ruling under Evidence Code section 352 unless the trial court exercised its discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*Ibid.*) The reviewing court thus reviews the trial court's ruling for an abuse of discretion, while giving the trial court's determination deference. (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.)

The admission of victim photographs lies within the broad discretion of the trial court when they are claimed to be unduly gruesome and inflammatory. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453; *People v. Heard, supra,* 31 Cal.4th at p. 972; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1136.) Evidence is substantially more prejudicial than probative only if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Waidla, supra*, 22 Cal.4th at p. 724.)

Here, the trial court properly reviewed the photographs and balanced their probative value against their prejudicial effect. (*People v. Ramirez, supra*, 39 Cal.4th at p. 454.) The photographs were relevant because they showed how Genny was tortured, resulting in injuries on every square inch of her body. (*People v. Lucas* (1995) 12 Cal.4th 415, 450 [photographs were admissible to show intent to kill and torture element of torture-murder special circumstance];

34 RT 3562 [trial court noted numerous photographs were admissible to show the extensive injuries covering Genny's whole body].)

The photographs were highly relevant to show the nature and extent of Genny's injuries. (*People v. Ramirez, supra*, 39 Cal.4th at p. 453.) Intent to inflict pain is relevant to a charge of murder by torture. (*People v. Cole* (2004) 33 Cal.4th 1158, 1198.) That Genny had multiple injuries on her body showed Gonzales's intent to inflict pain on Genny. Moreover, the photographs were necessary to explain the testimony of the forensic pathologist (51 RT 6037, 6039, 6044, 6051, 6055, 6062, 6067, 6071, 6075-6076), the pediatric burn expert (53 RT 6497-6500, 6503-6505, 6508-6515), and the forensic odontologist (55 RT 6814-6815). (*People v. Ramirez, supra*, 39 Cal.4th at p. 453.)

Gonzales claims the photographs were "remarkably graphic,"and had "unusually severe gruesomeness." (AOB 249-250.) The photographs were unpleasant and gruesome. Gruesome photographs are admissible, however, if they are highly relevant to the issues or to clarify the testimony of a medical examiner. (*People v. Ramirez, supra*, 39 Cal.4th at p. 454.) They were unpleasant gruesome photographs because Gonzales committed an unpleasant, gruesome crime. (*Id.* at p. 454.) "[V]ictim photographs . . . in murder cases are always disturbing." (*Ibid.*, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 134.)

In support of his argument, Gonzales relies on studies that graphic photographs arouse jurors' emotions. He also claims the photographs impeded the ability of the jurors to "dispassionately" evaluate the evidence. (AOB 250.) The photographs here

> did no more than accurately portray the shocking nature of the crimes. The jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be

shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors.

(*People v. Ramirez, supra,* 39 Cal.4th at p. 454.)

Gonzales also argues the photographs were cumulative to other testimony. (AOB 251.) This Court has "'often rejected the argument that photographs of a murder victim should be excluded as cumulative to other evidence in the case.'" (*People v. Cole, supra*, 33 Cal.4th at p. 1199, see also *People v. Heard, supra*, 31 Cal.4th at p. 975.)

B. The Trial Court Did Not Abuse Its Discretion In Admitting A Photograph Of Genny Prior To Being Tortured

The prosecutor argued two photographs of Genny when she was alive were relevant to show the magnitude of Genny's injuries and what she looked like before she was abused and tortured, with a full head of hair. (34 RT 3532-3533.) The court ruled the prosecutor could use one, but not both, of the photographs. (35 RT 3564.) The photograph was relevant to show how Genny looked when she went to live with the Gonzaleses. (35 RT 3654-3655.)

While courts should be cautious in admitting photographs of murder victims while alive given the risk the photograph will generate sympathy for the victim, "the possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant." (*People v. Harris, supra,* 37 Cal.4th at p. 331.) As with other victim photographs, admission of photographs of a victim while alive fall within the discretion of the trial judge. (*Id.* at pp. 331-332.)

The photograph of Genny prior to being tortured was relevant "to show the extent of harm caused by [Gonzales's] actions." (*People v. Cole, supra*, 33 Cal.4th at p. 1198 [upholding trial court's admission of a photograph of a victim prior to being burned to death by her boyfriend].) That she was a "cute little tot" (AOB 251) in the photograph was not unduly prejudicial.

Additionally, Gonzales's argument that other evidence could have proven Genny was not injured when she came to live with the Gonzaleses is without merit. (*People v. Cole, supra*, 33 Cal.4th at p. 1199, *People v. Heard, supra*, 31 Cal.4th at p. 975.)

C. The Trial Court Did Not Abuse Its Discretion By Admitting A Mannequin

During the testimony of the forensic pathologist, Dr. John Eisele, the prosecutor marked Exhibit 15, described as a "foam doll." (51 RT 6075.) Dr. Eisele testified the mannequin was 38 inches tall. He demonstrated for the jury how a child would be grabbed to get bruises on her thighs. (51 RT 6091.) He described "grabbing from the front. The fingertip bruises would tend to be from the back outside. She would have to be grabbed from the back so the fingertips would be on the inside." (51 RT 6075.) After Dr. Eisele's direct testimony, Gonzales moved for a mistrial because he had not received notice that the mannequin would be used and it was prejudicial. (51 RT 6090.) The court denied Gonzales's motion for a mistrial. It ruled it did not see anything particularly dramatic or repelling about the mannequin. (51 RT 6093.)

The trial court did not abuse its discretion in admitting the mannequin into evidence. "Mannequins may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1291; see also *People v. Hinton* (2006) 37 Cal.4th 839, 896; *People v. Riel, supra,* 22 Cal.4th at p. 1195.)

Without citing any authority, Gonzales claims it was error to admit the mannequin into evidence. (AOB 251-252.) Gonzales argues that because it was a mannequin of a child, it had the "power to arouse jurors' emotions and sympathy." (AOB 251-252.) Had the mannequin been an adult size, however, it would not have served its demonstrative purpose. In addition, there was

nothing unduly prejudicial about the mannequin. As the trial court noted, there was nothing dramatic or repelling about the mannequin. (51 RT 6093.) Thus, Gonzales's claim the trial court abused its discretion by admitting the mannequin is without merit.

D. Gonzales's Constitutional Rights Were Not Violated

Additionally, admission of the photographs of Genny and the mannequin did not violate Gonzales's constitutional rights, as he claims. (AOB 252-253.) Contrary to Gonzales's argument, admitting the photographs and the mannequin did not render Gonzales's trial fundamentally unfair.

Gonzales claims the trial court "exacerbated the unfairness by treating the prosecution's demonstrative evidence disparately" from his demonstrative evidence because the trial court did not allow Gonzales to parade his four children in front of the jury. (AOB 253.) As explained in Argument IV, the trial court properly exercised its discretion by ruling Gonzales could not parade his children in front of the jury. Just because the court excluded irrelevant evidence in the penalty phase does not require it to exclude relevant evidence during the trial. Thus, this contention is illogical and legally unsound.

Gonzales also claims admission of the photographs and mannequin violated his right to a fair and reliable capital-sentencing determination. (AOB 253.) At the penalty phase, the prosecution has wide latitude to illustrate the crime through photographs because the "brutal circumstances assist the jury in making its normative penalty decision." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1055.) The jury was entitled to have a complete picture of the brutal manner in which Genny was tortured and murdered. The photographs accurately depicted the manner of her death, therefore, they were relevant to malice, aggravation, and penalty. (*Ibid.*) Thus, admission of the photographs did not violate Gonzales's right to a fair and reliable capital-sentencing determination.

E. Admission Of Photographs And The Mannequin Did Not Prejudice Gonzales

Violations of state evidentiary law do not generally rise to the level of a constitutional violation. (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) Accordingly, even if this Court were to determine the trial court erred in admitting the photographs and mannequin, any error was harmless because it is not reasonably probable the jury would have reached a different result had the photographs and mannequin been excluded. (*People v. Heard, supra*, 31 Cal.4th at p. 978.) The photographs and mannequin did not "disclose to the jury any information that was not presented in detail through the testimony of witnesses." (*Ibid.*) While the photographs were unpleasant, witnesses had described for the jury, in detail, the same injuries. Thus, had the photographs and mannequin been excluded, it is not reasonably probable a more favorable outcome would have occurred.

XIII.

SUFFICIENT EVIDENCE SUPPORTS GONZALES'S MURDER CONVICTION AND THE SPECIAL CIRCUMSTANCE FINDING THAT HE TORTURED GENNY

Gonzales contends there was insufficient evidence that he participated in Genny's murder and that he intended to torture and kill Genny. (AOB 255.) The evidence showed that either Gonzales alone, or acting in conjunction with Veronica, abused, tortured and murdered Genny. The type, number, and increasing frequency of injuries and abuse leading up to and culminating in Genny's death provided strong evidence that Gonzales and/or Veronica intended to torture and kill Genny.

In assessing a claim for insufficient evidence, the reviewing court must "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence–evidence that is reasonable,

credible and of solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Guerra, supra,* 37 Cal.4th at p. 1129; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The reviewing court will presume in support of the court's judgment the existence of every fact the trier of fact reasonably could infer from the evidence. (*People v. Kraft, supra,* 23 Cal.4th at p. 1053; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578.) The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial. (*People v. Holt* (1997) 15 Cal.4th 619, 669; *People v. Berryman* (1993) 6 Cal.4th 1048, 1084.) The same standard of review applies for the special circumstance finding. (*People v. Chatman* (2006) 38 Cal.4th 344, 389.)

It is the exclusive function of the trier of fact to assess the credibility of witnesses. (*People v. Alcala* (1984) 36 Cal.3d 604, 623; *People v. Lopez* (1982) 131 Cal.App.3d 565, 572.) The reviewing court is not to substitute its evaluation of a witness' credibility for that of the factfinder. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) It is not the function of the reviewing court to reweigh the evidence. (*People v. Perry* (1972) 7 Cal.3d 756, 785.)

> Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of the judgment. It is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends.

(*People v. Thornton* (1974) 11 Cal.3d 738, 754; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1126 [Even if the reviewing court might have made contrary findings or drawn different inferences, it is the jury, not the appellate court, that must be convinced beyond a reasonable doubt].)

A. There Was Sufficient Evidence Gonzales Was The Perpetrator

Gonzales concedes there was little doubt Genny was "mistreated" and killed in his apartment. (AOB 255.) There was also no doubt she was tortured and killed by Gonzales's hands. Ivan Jr.'s testimony and Gonzales's statement show Gonzales perpetrated the abuse, torture and murder on Genny.

Ivan Jr. testified that his parents were torturing Genny and he knew one day she would die. (9 CT 1934, 1939.) His testimony showed Gonzales and Veronica forced Genny to eat her feces when she had accidents, hit her, cut her skin with a knife, pulled her hair out, burned her with hot water in the bathtub, tied her hands with rope, and hung her in the closet. (9 CT 1932-1933, 1935-1938, 1946-1948, 1976-1977, 1979, 1982-1987, 2019-2022.)

Gonzales admitted that he was the main disciplinarian and that he disciplined his children by hitting them with a belt. (8 CT 1768-1770.) Gonzales said that both he and Veronica hit the children with a brush. (8 CT 1840-1841.) Gonzales admitted he spanked Genny "a few times." (8 CT 1786.) Gonzales also admitted he put Genny inside the two foot wooden box for a few hours "to scare her." (8 CT 1804-1805; 52 RT 6325.) Gonzales admitted he bought the handcuffs that were used on Genny, which caused ulcerations of her skin on her arms starting at her elbow, although he denied putting them on her. (8 CT 1783, 1822; 51 RT 6064-6065; 91 RT 11434-11435.)

In addition, Gonzales lied to the detectives about Genny's injuries, which show his consciousness of guilt. (*People v. San Nicholas* (2004) 34 Cal.4th 614, 667.) Gonzales told the detectives Genny's head injury was from pulling a hot pot off the stove. (8 CT 1770; 53 RT 6502-6503.) However, Genny's burn on her head was not accidental, and Ivan Jr. explained that Gonzales held Genny's head down while Veronica poured hot water on her. (9 CT 1976, 2019, 2021-2023, 2038; 53 RT 6501-6503.)

Hours prior to her death, Genny was burned by a blow dryer on her face, shoulders and biceps. (51 RT 6047, 6059-6060; 53 RT 6509; 55 RT 6833-6835, 6937-6838, 6848.) Genny's skin was indented and tissue had been charred. (55 RT 6814.) Nevertheless, Gonzales said he never saw the blow dryer marks on Genny's cheeks. (8 CT 1790, 1817-1818.) Gonzales lied to the detectives by telling them Genny's facial injuries were from falling on a mop and from his children throwing toys at her. (8 CT 1772, 1818.)

Genny was hung, suspended from the hook in the closet. (54 RT 6685.) Although Gonzales admitted he put the hook up in the closet "to scare [Genny]," (8 CT 1807, 1809), he lied by saying Genny's ligature marks on her neck were from the neighbor children pulling candy necklaces around her neck. (8 CT 1773).

The evidence also showed Gonzales perpetrated the murder. The evidence showed Genny was forcefully held in the scalding hot water, causing her skin and toenails to peel off her body and her eventual, painful, death. (51 RT 6068-6071, 6084; 53 RT 6476, 6481, 6554-6555, 6565; 56 RT 7008; 95 RT 11871.) Ivan Jr. testified both of his parents were in the bathroom with Genny when she died. (9 CT 1938-1939, 1941, 1972.) Gonzales admitted, repeatedly, that he and Veronica put Genny in the bathtub and he was the one who turned on the water. (8 CT 1760, 1762, 1774, 1796, 1803, 1812, 1823.) Gonzales said Veronica was never in the bathroom alone with Genny. (8 CT 1841.)

In addition to turning on scalding hot water, Gonzales did not seek medical attention for Genny after he burned her. Had Genny received medical intervention, she would have had a 70 to 90 percent chance of survival. (53 RT 6492.) Instead, in the three to six hours after Genny was scalded but prior to her death, Gonzales went to the store and bought bread and beer. (51 RT 6124; 52 RT 6242, 6260, 6533; 8 CT 1761.)

Gonzales disregards this evidence showing he was the perpetrator. Gonzales points out that Ivan Jr. made inconsistent statements regarding whether he saw both of his parents put Genny in the bathtub for her fatal bath. (AOB 256.) Conflicts in the testimony do not justify reversal of the judgment. (*People v. Thornton, supra*, 11 Cal.3d at p. 754.) The jury was responsible for judging the credibility of the witnesses, not a reviewing court. (*People v. Alcala, supra*, 36 Cal.3d at p. 623.)

B. There Was Sufficient Evidence Gonzales Intended To Torture And Kill Genny

For murder by torture, it must be proven the killing was "with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*People v. Chatman, supra*, 38 Cal.4th at p. 389.) "The jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the body." (*Id.* at p. 390.) To prove the torture-murder special circumstance, the jury must find the murder was intentional and involved the infliction of torture. (*Id.* at p. 391.)

Here, the evidence showed Gonzales repeatedly beat, burned, hanged and bound a helpless four and a half-year-old child. Given the brutal nature of the crime, the jury could infer Gonzales's intent to inflict extreme pain on Genny, particularly his act of forcefully submerging her in a scalding bath, then failing to obtain medical help. Gonzales acknowledges that evidence of intent to torture could be inferred from the abuse against Genny, but claims that evidence of his personal participation was lacking. (AOB 256.) As discussed in detail above, based on the physical evidence, Ivan Jr.'s statements and Gonzales's statements, there was sufficient evidence that Gonzales or Gonzales and Veronica tortured and murdered Genny.

Gonzales claims his admission to acts to scare Genny did not provide an adequate basis to infer he intended to inflict extreme pain. (AOB 256.) His admissions showed he personally participated in Genny's torture. He obviously lied and minimized his involvement, but that does not detract from the evidence that he beat, bound, burned and hanged Genny. Moreover, he admitted he turned on the scalding hot water for her final, fatal bath. (8 CT 1760, 1762, 1774, 1796, 1803, 1812, 1823.) The jury could reasonably infer that Gonzales intended to inflict extreme pain by forcefully placing Genny in scalding hot water. Hours prior to her death, Genny was burned with a blow dryer on both her cheeks, her shoulders and her biceps. (51 RT 6509; 55 RT 6833-6835, 6937-6938, 6848.) Burning her with a blow dryer, and then forcefully immersing her in hot water suggests a meticulous, controlled approach, and "strongly implies the use of controlled force designed to torture." (*People v. Elliott, supra,* 37 Cal.4th at p. 467.)

Gonzales also argues it would be unreasonable to infer his intent to torture from Ivan Jr.'s "implausible allegations." (AOB 256-257.) Contrary to Gonzales's argument and as detailed above, much of Ivan Jr.'s statements were corroborated by physical evidence. Moreover, as stated above, it was the jury which was responsible for judging the credibility of the witnesses, not a reviewing court. (*People v. Alcala, supra*, 36 Cal.3d at p. 623.)

Ample evidence also exists that Gonzales intended to kill Genny, as required for the torture-murder special circumstance finding. The type of abuse inflicted on Genny was that likely to cause death. Genny was abused over a period of time, with the abuse and injuries increasing until she died. Genny had a subdural hematoma on her brain, that was less than a day old, that was caused by a blow to her head or a violent shaking. (51 RT 6076-6077, 6079; 53 RT 6505.) This type of injury can be life threatening. (53 RT 6507.) Within hours of her death, Genny was burned with a blow dryer on her cheeks, her shoulders

and her biceps. (51 RT 6047, 6059-6060; 53 RT 6509; 55 RT 6833-6835, 6837-6838, 6848.) Within a day or two of Genny's death, she was hit in the eyes with blunt force causing black eyes. (51 RT 6040, 6045-6046.) Also within a day or two of Genny's death, she received an abrasion on the left side of her face (51 RT 6044-6045) and an abrasion on her nose (51 RT 6046).

Gonzales hanged Genny from a hook in his closet for a long enough period of time, and with enough resistance, that her hands bled. (9 CT 1946-1948, 1985-1987, 2028.) She had a ligature mark on her neck from chronic pressure that eroded the skin. (51 RT 6052-6053; 91 RT 11350.) Genny was handcuffed to the point her skin on her arms was eroded. (91 RT 11358; 92 RT 11434-11435.) Genny's scalp was infected from a burn caused by Gonzales holding her down as Veronica poured hot water on her head. (9 CT 2021-2023; 51 RT 6039-6040; 53 RT 6497; 91 RT 11332.) In addition to being violently shaken or hit, hanged and burned, there was evidence that Genny had been strangled. (51 RT 6082.)

Given the evidence that Gonzales or Gonzales and Veronica strangled, violently shook or hit, burned, and hanged Genny, a reasonable inference is that these acts were done with the intent to kill Genny. It is hard to conceive of any other reasonable inference. As argued above, contrary to Gonzales's argument (AOB 257) the evidence was sufficient from Gonzales's and Ivan Jr.'s statements that Gonzales personally participated in these heinous acts.

Gonzales argues that the acts were unlikely to result in death, and that an unsophisticated person such as Veronica or Gonzales would not be aware the fleeting exposure to hot water would be fatal. (AOB 257-258.) Even an eight-year-old child, Ivan Jr., knew the acts of torture would end up resulting in Genny's death. Ivan Jr. testified that his parents were torturing Genny and he knew one day she would die. (9 CT 1934, 1939.) It defies common sense to argue that severely shaking or a violently hitting, strangling, hanging and

burning a four-year-old child would not result in death. A reasonable inference can also be made that after Genny was burned so badly that her skin and toenails peeled off her body, Gonzales's failure to obtain medical help for Genny would result in her death. Gonzales's argument that these acts are not likely to result in death are lacking in common sense.[30/] Based on the acts of torture and abuse, and Gonzales and Ivan Jr.'s statements showing the torture, abuse and murder was inflicted by Gonzales, there was sufficient evidence to support Gonzales's conviction and the special circumstance finding.

XIV.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING HIS GUILT PHASE CLOSING AND REBUTTAL ARGUMENTS

Gonzales contends the prosecutor committed prejudicial misconduct during the guilt phase in his closing argument by suggesting he had evidence outside the record and "demoniz[ing]" Gonzales. (AOB 260.) The prosecutor did not commit misconduct. He properly referred to Gonzales's failure to call logical witnesses. His other comments were appropriate in the context of the facts. Moreover, even if there was misconduct, it was harmless.

Gonzales claims two arguments were improper. The first argument was during rebuttal. The prosecutor was responding to Gonzales's counsel's closing argument in which he claimed Ivan Jr. was improperly coached. (63 RT 8164.) The prosecutor argued Ivan Jr.'s testimony was credible, then said, "Why not

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30. Gonzales also argues, based on his contention the jury did not find intent to kill (Argument VI), there is no valid verdict to defer to. His claim the jury did not find intent to kill is without merit, for the reasons discussed herein in Argument IV. For these same reasons, Gonzales' argument is also unavailing in the context of his sufficiency of the evidence claim.

call Bruce Campbell,[31] the guy who's at the prelim, the man who is sitting next to Ivan Jr., when he was testifying? Why not call him? Why doesn't the defense–they put on witnesses." Gonzales's counsel objected, and the court overruled his objection. The prosecutor continued, "Why don't they call him? Why don't they call the process servers? Why don't they call Ivan, Jr.'s psychologist? Why don't they call whatever? Why don't they do something about that? Because they're all going to deny it." (63 RT 8165-8166.) Gonzales's counsel objected, and the court sustained the objection as to what the witnesses might have said because it was speculative. The court admonished the jury not to consider such speculation. (63 RT 8166.)

Gonzales also claims it was prosecutorial misconduct to refer in closing argument to Hitler and the conduct in Bosnia and to call Gonzales "Ivan the Terrible" and a "camp commandant." (AOB 261.) After discussing how Gonzales tortured Genny, beat her over and over again, stuffed her head into a wall, isolated her behind a door, stuffed her in a box and hanged her (63 RT 8029-8030), the prosecutor said,

> Take a second. Take a deep breath and relax. And look at this man. You are looking at a killer. You are looking at a torturer. You are looking at a murderer of epic proportion. And just because he's five [foot] two [inches] doesn't mean a thing. His conduct is so egregious that I have no problem comparing him to a person like Hitler.

The court sustained a defense objection. The prosecutor then continued and said "conduct that was embraced in Bosnia" to which the court sustained another objection. (63 RT 8031.)

The prosecutor then continued to explain how Gonzales had to "crumple [Genny] up and put her into this box." Then he said,

> Look at these photos. We flipped them all over so you don't get to see them; but this place is a museum of death. You take a look around this

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31. Campbell was a child advocate who accompanied Ivan Jr. to the preliminary hearing. (24 RT 2353-2354.)

> courtroom and all it is is photos of death. It's photos of what the defendant has done. ¶ He's not helpless. He's not crippled. Doesn't matter what his gender is. And he wants to be called a victim. He's Ivan the Terrible. He was the camp commandant and this was a campaign of terror.

The court overruled Gonzales's objection to the last statement. (63 RT 8031-8032.)

Defense counsel moved for a mistrial after closing argument based on the prosecutor's argument that Gonzales could have called logical witnesses. He argued his motion was based on the Sixth, Eighth and Fourteenth Amendments and the corresponding California Constitutional Amendments. (63 RT 8213-8214.) To the extent he failed to object to the comments about Hitler, Bosnia, Ivan the Terrible and camp commandant based on his constitutional rights, he has forfeited any claim of error. (*People v. Price, supra,* 1 Cal.4th at p. 430 ["Defendant may not challenge on appeal the admission of evidence on grounds not urged in the trial court"].)

A. The Prosecutor Did Not Commit Misconduct

The prosecutor did not violate the federal Constitution because he did not have "a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gray, supra,* 37 Cal.4th at p. 215; (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Nor did the prosecutor violate state law because his conduct did not render Gonzales's trial fundamentally unfair nor did he use "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) "It is settled that 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 therefrom." (*People v. Williams* (1997) 16 Cal.4th 153, 221.)

The prosecutor's statement that Gonzales did not call witnesses who could have testified Ivan Jr. was coached was proper argument to rebut the defense theory that Ivan, Jr. had been coached. It is not improper to comment on the failure to introduce material evidence or call logical witnesses. (*People v. Cornwell, supra,* 37 Cal.4th at p. 90.)

Gonzales claims the prosecutor committed misconduct by this argument because he referred to facts outside the record to bolster a witness's credibility. (AOB 261.) Gonzales cites *People v. Turner* (2004) 34 Cal.4th 406, 432-433 as support for his argument. (AOB 261.) In *People v. Turner*, the prosecutor repeatedly told the jury he had used the expert witness when he was a defense attorney, and personally expressed his admiration and respect for the witness. (*Id.* at pp. 431-432.) This Court held the prosecutor committed misconduct because he vouched for the witness's credibility. (*Id.* at p. 433.) Similarly, in *People v. Frye, supra,* 18 Cal.4th at p. 976, relied on by Gonzales (AOB 261), the prosecutor committed misconduct by explicitly referring to evidence outside the record. Here the prosecutor did not personally vouch for Ivan Jr.'s credibility, nor did he refer to facts outside the record. He merely commented on Gonzales's failure to call witnesses that could have testified Ivan Jr. was coached. Thus, it was permissible argument.

Nor did the prosecutor commit misconduct by his brief reference to Hitler, acts in Bosnia, Ivan the Terrible, or a camp commandant. "In general, prosecutors should refrain from comparing defendants to historical or fictional villains, especially where the comparisons are wholly inappropriate or unlinked to the evidence." (*People v. Jones* (1997) 15 Cal.4th 119, 180, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) During closing argument, however, counsel can argue matters not in evidence but

which are common knowledge or illustrations drawn from common experience, history or literature. (*People v. Williams, supra*, 16 Cal.4th at p. 221.) Moreover, to prevail on a claim of prosecutorial misconduct, Gonzales

> must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citations.] 'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.'

(*People v. Jablonski* (2006) 37 Cal.4th 774, 835 quoting *People v. Wilson, supra,* 36 Cal.4th at p. 337.)

Accordingly, this Court held it was not misconduct for a prosecutor to refer to Adolph Hitler and Charles Manson while arguing that because a murder was committed for irrational reasons does not mean that the perpetrator is insane. (*People v. Jones, supra*, 15 Cal.4th at pp. 179-180.) This Court has rejected claims of prosecutorial misconduct for equating a defendant with committing sadistic acts like Marquis de Sade in spite of his calm courtroom demeanor (*People v. Thornton, supra,* 11 Cal.3d at pp. 762-763, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684), comparing a nurse on trial for plotting a murder to "a Nazi working in the crematorium by day and listening to Mozart by night" (*People v. McDermott* (2002) 28 Cal.4th 946, 1003), comparing the defendant to Lorena Bobbitt and the Menendez brothers to illustrate a point about defenses shifting moral culpability for crimes away from a defendant (*People v. Jablonski, supra,* 37 Cal.4th at p. 836), suggesting that the defendant may have shared the same genocidal theories as Hitler where there was some evidence the defendant had strong views on genetic engineering and evidence that, like Hitler, the defendant was a poet (*People v. Hovey* (1988) 44 Cal.3d 543, 579), stating the defense argument was illogical and using as an example that if Hitler were alive, using the defense logic, he shouldn't get the death penalty (*People v. Smith, supra,* 35 Cal.4th at pp. 372-373), referring to Hitler to point out that murderers can look like

ordinary people (*People v. Maury* (2003) 30 Cal.4th 342, 420) and mentioning the Spanish Inquisition and the persecution of early Christians to make the point that fire has historically been used as an instrument of torture and causes extreme pain (*People v. Cole, supra*, 33 Cal.4th at p. 1203).

Here, the arguments were neither "wholly inappropriate" nor "unlinked to the evidence." (*People v. Jones, supra*, 15 Cal.4th at p. 180.) The comment about Hitler was made right after the prosecutor said Gonzales was a murderer and that his height was immaterial. (63 RT 8031.) His point appears to be that even someone like Hitler can be slight and still engage in heinous conduct. It is unclear what the prosecutor's point was in stating "conduct that was embraced in Bosnia" because the prosecutor's sentence was interrupted by an objection that was interposed and sustained. (63 RT 8031.)

Neither did the prosecutor commit misconduct by calling Gonzales "Ivan the Terrible" and a camp commandment. As the trial court later explained (when Gonzales asked the court to limit the prosecutor's argument in the penalty retrial), the reference to "camp commandant" was appropriate argument because there was evidence which showed Gonzales was the chief authority figure in his home where a vulnerable person was subjected to repeated abuse. (90 RT 11192-11193; 98 RT 12699.) The reference to "Ivan the Terrible" was appropriate argument because, as the trial court explained,

> where the defense posture is that the defendant is 'Ivan the Meek' and 'Ivan the Submissive,' I have no problem whatsoever with the prosecutor characterizing him as Ivan the Terrible. There is evidence from which the necessary underpinnings of that could be drawn.

(84 RT 10001-10002.) Thus, contrary to Gonzales's argument, there was evidentiary support for the prosecutor's argument. Moreover, "[i]t is long settled that a prosecutor may use appropriate epithets warranted by the evidence." (*People v. Adcox* (1988) 47 Cal.3d 207, 237.)

Nor did the prosecutor's argument constitute an improper appeal to the jurors' emotions, as Gonzales contends. (AOB 262.) The cases Gonzales relies on to support this position are unpersuasive. In *People v. Fosselman* (1983) 33 Cal.3d 572, 580-581, the prosecutor asked the defendant, "this isn't the first time you have testified, is it?" thereby implying he had previously been tried on other charges, even though there was no evidence of such. The prosecutor also stated his personal belief based on facts not in evidence, he brought out inadmissible character evidence, and he attempted to arouse sexual prejudice in the predominantly female jury by characterizing the defense as based on the premise that the victim was a "typical female who makes things up." (*Id.* at pp. 579-580.) This Court held that although each instance of the prosecutor's conduct in isolation would not necessarily lead to a conclusion of prosecutorial misconduct, viewed as a whole it was misconduct. (*Id.* at pp. 580-581.) Here, the prosecutor did not engage in any of the same type of conduct as the prosecutor in *Fosselman*.

In *People v. Jones* (1970) 7 Cal.App.3d 358, relied on by Gonzales (AOB 262), the court held it was not misconduct for the prosecutor to argue the defendant's behavior was consistent with animalistic or felonious tendencies, but that it was misconduct to argue that the jurors' sons should not buy motorcycles and ride in an area the defendant frequented because he has serious unprovoked reactions to people riding motorcycles. (*Id.* at pp. 361-362.) The court explained that the comment was a crude appeal to the jurors' fears and emotions. (*Id.* at p. 363.) Here, the prosecutor's remarks did not appeal to the jurors' emotions or fears.

The prosecutor's argument was not misconduct under state law, and did not violate Gonzales's constitutional rights, as he claims. (AOB 262-263.) The prosecutor did not violate the federal Constitution because he did not have "a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness

as to make the conviction a denial of due process.'" (*People v. Gray, supra*, 37 Cal.4th at p. 215.)

B. The Alleged Misconduct Was Harmless

Even if this Court were to find the prosecutor committed misconduct, that misconduct would be harmless. Reversal is required when prosecutorial misconduct implicates constitutional rights unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1130, citing *Chapman v. California, supra,* 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 704].) Misconduct that violates state law requires reversal only to the extent it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Hines* (1997) 15 Cal.4th 997, 1037-1038; *People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Watson, supra*, 46 Cal.2d at p. 836.) Under either standard, any error was harmless.

In *Darden v. Wainwright, supra*, the United States Supreme Court stated that,

> [i]t 'is not enough that the prosecutor's remarks were undesirable or even universally condemned.' [Citation.] The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.

(*Darden v. Wainwright, supra*, 477 U.S. at p. 181.)

> 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.

(*People v. Brown, supra*, 31 Cal.4th at pp. 518, 553-554.)

Here, there was no prejudice and Gonzales received a fair trial. During the prosecutor's argument that Gonzales failed to call logical witnesses, the trial court admonished the jury not to consider what such witnesses might have said because it was speculative. (63 RT 8166.) The jury is presumed to have understood and followed the court's curative instructions. (*People v. McDermott, supra,* 28 Cal.4th at p. 999.) Additionally, the trial court sustained Gonzales's counsel's objection to the prosecutor's reference to Hitler and Bosnia. (63 RT 8031.) Thus, any prejudice regarding that argument was cured. (*People v. Chatman, supra*, 38 Cal.4th at p. 385.)[32/]

Also, as detailed in Argument 1, subsection C, the evidence against Gonzales was compelling. Additionally, the comments were brief and fleeting (*People v. Brown, supra,* 31 Cal.4th at p. 554) and the trial court instructed the jury that statements of attorneys were not evidence. (10 CT 2227; 63 RT 8024; *People v. Hinton, supra,* 37 Cal.4th at p. 863 [court's instructions that attorney's statements were not evidence dispelled any prejudice].)

The prosecutor's comments during his guilt phase closing argument were not misconduct. If this Court were to find the argument was misconduct, it was harmless. Thus, Gonzales's conviction and special circumstance finding should be affirmed.

XV.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT AT THE PENALTY RETRIAL

Gonzales claims the prosecutor committed numerous instances of misconduct at the retrial of the penalty phase that deprived him of a fair trial

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32. To the extent the prejudice was not cured because the jury was not told to disregard the statements, any claim of error was forfeited because Gonzales did not request the court admonish the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

and violated his state and federal due process rights. (AOB 265-272.) The prosecutor did not commit misconduct during the penalty phase retrial, thus Gonzales's constitutional rights were not violated.

A. The Prosecutor Did Not Commit Misconduct

The standard for evaluating a claim of prosecutorial misconduct is detailed in Argument XIV and is incorporated herein by reference. In none of the instances cited by Gonzales did the prosecutor commit misconduct. If there was any misconduct, it was harmless.

1. The Prosecutor Did Not Commit Misconduct By Calling Gonzales "Ivan The Terrible" Or A Camp Commandant

Gonzales's first claim of prosecutorial misconduct during the penalty re-trial was the prosecutor's reference to Gonzales in his opening statement as a camp commandant, and in closing argument as Ivan the Terrible. (AOB 265.) This is the same argument Gonzales made in Argument XIV.

During the penalty phase re-trial opening statement, the prosecutor said, "Ladies and Gentlemen, he is not a minor participant; he is a major participant. He is the team leader. He is the camp commandant." The trial court overruled a defense objection that it was argumentative. (91 RT 11253.) During closing argument, the prosecutor said,

> We're all here because of this man's actions. He is not crippled. He is not helpless. He is not a victim. He is not a victim. He is not a victim. ¶ He annihilated this child beyond comprehension. You saw the photo of how Genny looked before she was attacked. You saw the photos of after. Can you believe it's the same child? Do you know that, even? I mean, it's a stark reality of torture. He is Ivan the Terrible. Him and his wife ran this camp with passion and zeal.

(99 RT 12745.)

Contrary to Gonzales's argument (AOB 265), and as detailed in Argument XIV, there was evidentiary support for these epithets, and they did not improperly appeal to the jurors' emotions.

2. The Prosecutor Did Not Commit Misconduct During His Opening Statement

Next Gonzales claims the prosecutor committed misconduct in his opening statement by saying, "[t]his case is the reason why we have capital punishment." (AOB 265.) The passage Gonzales claims was misconduct was as follows:

> This man here sits before you, not because he is a murderer. That sounds a little odd. Murderer is bad enough, taking the life of somebody else without justification nor excuse. And he sits here, not because he is a torturer. What could be worse than somebody who inflicts pain for the purpose of sadism? ¶ He sits here before you because he is a kid killer, he is a child torturer; and that is what he was convicted of. This case is the reason why we have capital punishment–

The trial court sustained an objection that the last comment was argumentative. (91 RT 11231.) Gonzales's argument appears to be that this statement was misconduct because it was argumentative and was not needed to prepare the jurors to follow the law. (AOB 266.) The statement in context was not inappropriate. The prosecutor was telling the jurors about the gravity of the crime. It was appropriate to prepare the jurors to more readily discern the "materiality, force, and meaning" of the evidence. (*People v. Dennis* (1998) 17 Cal.4th 468, 518.)

Even if it were argumentative, the trial court sustained Gonzales's objection, thereby dispelling any prejudice.[33] (*People v. Hinton, supra*, 37

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33. Although Gonzales objected to the statement, he did not request the court to admonish the jury. Any claim that there was prejudice because the court did not admonish the jury is forfeited by Gonzales's failure to request an admonishment. (*People v. Earp, supra,* 20 Cal.4th at p. 858.)

Cal.4th at p. 863.) Additionally, prior to opening statements the trial court instructed the jury to keep in mind that

> especially during opening statements, which are going to be beginning momentarily, that statements made by the attorneys during the course of the trial are not evidence. Evidence comes from the witness stand. It comes from exhibits offered to you; but statements by the attorneys are not evidence.

(91 RT 11221.) At the end of the trial, the court again instructed the jury that statements by attorneys during trial are not evidence. (99 RT 12726.) Thus, even if the statement was misconduct, there was no prejudice. (*People v. Hinton, supra*, 37 Cal.4th at p. 863 [instruction that attorney's statements are not evidence dispelled prejudice].)

Nor did the prosecutor commit misconduct by misleading the court as Gonzales contends by representing he would not use the epithet "camp commandant" during opening statement. (AOB 265-266.) The prosecutor indicated he would not refer to Gonzales as a camp commandant in opening statement but wanted to do so in closing argument. (90 RT 11192.) Although the court did not definitively rule prior to opening statement, it did state its views that "the camp commandant argument epithet probably fits the evidence and probably is within the range of argument to be made." (90 RT 11192-11193.) As detailed above, during opening statement the prosecutor said that Gonzales was not a minor participant–that he was the "team leader. He was the camp commandant." (91 RT 11253.)

In *People v. Hinton, supra,* the defendant claimed the prosecutor committed misconduct in opening statements by referring to evidence that the trial court had not yet ruled was admissible. (*People v. Hinton, supra*, 37 Cal.4th at p. 863.) This Court said it agreed with the trial court's determination that the safer path was to avoid those references until the issue was definitively resolved, but there was no prejudice because the statements were ultimately admitted at trial. (*Ibid.*) Here, like in *Hinton*, there was no prejudice in

referring to Gonzales as a "camp commandant" because the trial court ultimately determined it was fair argument. (98 RT 12699.)

Moreover, this conduct is unlike that in cases relied upon by Gonzales (AOB 266) whereby the government filed court papers where it deliberately omitted relevant information (*Korematsu v. United States* (N.D. Cal.1984) 584 F.Supp. 1406, 1420) or failed to disclose exculpatory information (*Demjanjuk v. Petrovsky* (6th Cir. 1993) 10 F.3d 338, 349-350).

3. The Prosecutor Did Not Commit Misconduct By Having A Chair In The Courtroom To Represent Genny

During the first penalty phase closing argument, the prosecutor said he had the bailiff reserve an empty seat "to represent somebody who cares about Genny Rojas." He further argued, "[t]here isn't anybody. Why should we care? She's dead." (70 RT 8936.) Prior to the penalty phase re-trial, Gonzales requested the court limit the prosecutor from referring to the bailiff because some jurors may see that as a sign that the court was not impartial. (84 RT 10005.) The prosecutor stated he would refrain from referring to the bailiff in his argument. (84 RT 10006.)

Later during the penalty phase re-trial, Gonzales asked the court to take down a sign on an empty chair that said, "Reserved." (92 RT 11383-11386.) The court stated it would not order the prosecutor to take down the sign, but he was not to refer to the bailiff in his argument. (92 RT 11385-11386.) Prior to closing argument, Gonzales asked the court to limit the prosecutor's argument that the chair was empty because no one cared about Genny based on Gonzales's offer of proof that Genny's parents cared about her but could not afford to come watch the trial. (98 RT 12699-12701.) The court ruled that based on the evidence, the prosecutor's argument was proper. (98 RT 12703-12704.)

In accordance with the court's ruling, during closing argument, the prosecutor told the jurors that he put the "Reserved" sign up and said,

> nobody's ever sat in this seat during this trial, and there's a reason for it: it serves as an illustration that somebody cares about Genny and that Genny does exist in all of our hearts and that a murder victim shall exist, until the trial is over, at least.

(99 RT 12828.)

The prosecutor's argument was fair comment on the evidence. Prosecutors are given wide latitude during closing argument at the penalty phase. (*People v. Schmeck, supra,* 37 Cal.4th at pp. 298-299.) The prosecutor's argument was proper because it did not call upon irrelevant facts, or lead the jury to be overcome by emotion. (*People v. Sanders* (1995) 11 Cal.4th 475, 550.)

> A prosecutor may identify those traits of the victim that made the victim vulnerable to crime when such characteristics are relevant to the charged crimes, and has no duty 'to shield the jury from all the favorable inferences about the victim's life or to describe relevant events in artificially drab or clinical terms.'

(*People v. Guerra, supra,* 37 Cal.4th at p. 1156, quoting *People v. Frye, supra,* 18 Cal.4th at p. 975.)

Genny was a vulnerable victim because she was a child. Gonzales's crime was aggravated in part because he and Veronica were the sole caretakers of Genny. That Genny had no one else who cared about her shows how Gonzales's crime was vicious, abusive, and callous, and thus the argument had an "obvious relevance to a moral assessment of the crime." (*People v. Haskett, supra,* 30 Cal.3d at p. 864.) Contrary to Gonzales's argument, the argument was derived from the evidence, and was not a "ploy" designed to appeal to the jurors' emotions. (AOB 267.) The prosecutor's argument was appropriate to point out the relevant fact that there was no one in court to represent Genny.

4. The Prosecutor Did Not Commit Misconduct By Commenting On Gonzales's Appearance

Gonzales claims the prosecutor committed misconduct by contrasting his appearance in court (clean shaven and dressed in a purple cardigan) with how he looked when he murdered Genny. (AOB 267-268.) During the testimony of one of the police officers, the prosecutor elicited that Gonzales was not clean-shaven on July 21, 1995. (95 RT 11986-11987.) He then asked whether Gonzales was wearing a purple cardigan sweater, and Gonzales objected as argumentative. The trial court overruled the objection. (91 RT 11987.) During closing argument, the prosecutor said,

> putting [Gonzales] in a purple cardigan, or whatever you call that, that doesn't make him more of a human. That's not what he wore around the Gonzales household. That's not even the way he looked, from what we can tell. Right, you heard evidence about that. He used to have facial hair. He doesn't have that anymore. Why?

(99 RT 12822.)

Gonzales did not object to the prosecutor's closing argument, therefore he has forfeited his claim of error. (*People v. Schmeck, supra*, 37 Cal.4th at p. 298.)[34/] Moreover, the prosecutor did not commit misconduct. In *People v. Schmeck*, the prosecutor displayed a photograph for the jury of the defendant taken at the time of his arrest and commented that his changed appearance at trial was so he did not look "like the dope dealing lying rat that he really is." (*Id.* at p. 298.) This Court held,

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34. In his brief, Gonzales states, "[t]he court overruled an objection to the questioning and concluded that the related argument was permissible." (AOB 267.) Gonzales's objection to the question of the police officer as argumentative did not preserve his claim that the prosecutor committed misconduct during closing argument. Neither did the court's later determination, in a motion for a new trial, that the prosecutor did not commit misconduct preserve the claim.

> the jury properly could be shown any differences between defendant's past and present appearance, and the prosecutor's remark constituted fair comment on the evidence. The prosecutor's remark came 'within the bounds of the 'wide latitude' given to prosecutors during closing argument' at the penalty phase.

(*People v. Schmeck, supra*, 37 Cal.4th at pp. 298-299, quoting *People v. Welch* (1999) 20 Cal.4th 701, 763.) Similarly, here the prosecutor did not commit misconduct by arguing Gonzales's purple cardigan did not make him more human.

The only authority Gonzales cites for his argument is *People v. Mayfield* (1997) 14 Cal.4th 668, 755, apparently for the proposition that asking irrelevant questions constitutes misconduct. (AOB 268.) *People v. Mayfield* did not address the issue Gonzales raises: whether it is appropriate to point out a defendant looks different at the time of trial than when he was arrested, thus his reliance on *Mayfield* is misplaced.

5. The Prosecutor Did Not Commit Misconduct During Closing Argument

Gonzales cites numerous instances of alleged misconduct during the prosecutor's closing argument, some of which were forfeited and all of which are without merit. Gonzales's first claim of prosecutorial misconduct during closing argument was the prosecutor's description of Gonzales's apartment, where the prosecutor said it smelled of feces and urine. (99 RT 12750.) Gonzales claims it was misconduct because the court had barred the prosecutor from eliciting evidence of the dirty condition of Gonzales's apartment. (AOB 268-269.) Gonzales did not object to the prosecutor's statement in closing argument, thus he has forfeited his claim. (*People v. Schmeck, supra*, 37 Cal.4th at p. 298.) Gonzales's claim also fails on its merits.

The trial court barred the prosecutor from presenting evidence of the stench and filth in the Gonzales apartment. (20 RT 1725-1726.) The court

ruled that it did not want any of that evidence to go "gratuitously" to the jury because it was unduly prejudicial. The court explained, however, that it was not its intent to exclude otherwise central prosecution evidence just because it also revealed some disorder in the house. (34 RT 3596-3597; 37 RT 3902.) For example, the court admitted testimony, a photograph and a videotape that showed the "deplorable" conditions that Genny was forced to sleep in--the wooden box with fecal matter in it or on a filthy blanket. (34 RT 3625; 37 RT 3909; 93 RT 11680-11681; 8 CT 1782, 1804, 1839; 9 CT 1985.) The blanket was soiled with blood and fecal matter. (52 RT 6419; 92 RT 11522, 11574.) Prior to argument, the court said it was not going to prohibit the prosecution from arguing based on the "dirty house evidence" that was admitted. (69 RT 8878.) From the evidence that was admitted, it was a reasonable inference that the apartment smelled of feces and urine.

As the trial court later stated (in denying Gonzales's motion for a new trial based on prosecutorial misconduct), the court did not order the prosecutor to refrain from such argument.

> I had issued an order that barred gratuitous evidence of the condition of the apartment. I did not bar all evidence of the abominable condition of the apartment and the comment was related to properly-received evidence on that issue and I think was proper.

(103 RT 12941.) The prosecutor argued reasonable inferences from properly admitted evidence. Thus, the prosecutor did not use closing argument to evade an adverse evidentiary ruling as Gonzales contends. (AOB 269.)

Gonzales next claims the prosecutor committed misconduct when he argued as follows: "Where else, where else in our history–think through history–where else was it condoned that you could burn a child, that you could hang a child, that you could stuff a child in a box? In concentration camps?" The court overruled Gonzales's objection, and the prosecutor continued,

> We've had concentration camps throughout history, whether it's in Eastern Europe, Rwanda, Bosnia, wherever it is, that's when you saw

> this type of conduct. And the defendant embraced it. He sought it out with zeal and passion. ¶ Yet, once again, we hear the same type of defense: 'I was just following orders. I'm a victim. I had to. I'm a victim. I was just following orders.' Not here, folks. Not this case, not Genny's case, huh-uh.

(99 RT 12744; AOB 268-270.) The prosecutor's remarks were not "inappropriate" or "unlinked to the evidence." (See *People v. Jones, supra*, 15 Cal.4th at p. 180.) The prosecutor's argument was appropriate to illustrate why Gonzales should not be viewed as a victim, and why he should not be seen as less culpable based on his theory that Veronica dominated him. (See *People v. Jablonski, supra*, 37 Cal.4th at p. 836 [comparison to Lorena Bobbitt and the Menendez brothers was appropriate to illustrate a larger point about defenses based on shifting moral culpability for crimes away from a defendant].)

Gonzales claims the prosecutor's argument was an "end run" because the trial court sustained an objection when the prosecutor referred to Hitler and conduct in Bosnia during the first penalty phase closing argument. (AOB 269-270.) The court did not rule the prosecutor could not make the argument he made, and in fact did not sustain Gonzales's objection to the argument as framed in the penalty retrial. (99 RT 12744.) Thus, it was not an "end run" around the court's ruling, nor was it inflammatory, designed to appeal to juror's emotions, or lacking in evidentiary support, as Gonzales claims. (AOB 269.)

Gonzales's next claim of misconduct during closing argument was the prosecutor's argument demonstrating that Genny's fatal burn in the bathtub was not a mistake or accident. (99 RT 12768.) The prosecutor explained, "If you were there–I mean, instead of your video camera, picture yourself there with a gun. You know, you see a couple peppering a child's face with fists and brushes. Do you use that gun? When do you say 'stop'?" The court overruled Gonzales's objection and the prosecutor continued,

> When do you say, 'Stop'? When the blow dryer is on her face? When you hear her shriek? Do you say 'stop,' then? ¶ You see the train

> coming down the tracks, folks. When they start hanging her and stuffing her in a box, can you see the inevitable result? You know, 'Don't you dare hang this child. What are you doing, you moron? Stop.' When do you stop him? When they put her in the boiling water or when they burn the hair off of her head? When do you say 'enough.'? ¶ They're running that tub, folks. They're running–he turned on the water and he's waiting for it to get high enough. Are you saying, 'don't you dare put her in that tub. If you put her in the tub, the inevitable is going to happen. She will die and so will you?' Give him another chance. ¶ She's out of the tub now. She is dying. She is dying right in front of his eyes. She has no skin on her legs. Okay? That's it. That is it. Go to a phone, call 911. Call the police. Call the authorities. Get her help. 'No, I won't.' 'All right. That is it. This is your last chance. The inevitable result is about to occur. Do you understand that she is going to die and so are you?' ¶ This was a train coming down the tracks for a few months, folks. The inevitable was going to occur. There was no 'why.' There is only what he did.

(99 RT 12769-12770.)

The prosecutor's argument was appropriate to demonstrate Gonzales's actions were not a mistake or accident and to show his intent was to torture and kill Genny. It also demonstrated the weakness of his defense that Veronica perpetrated the abuse while he idly stood by. The argument showed Genny's death was inevitable, given the abuse and torture, and was a "train coming down the tracks." (99 RT 12769.) This argument was appropriate given the evidence, and was not an inappropriate appeal to juror's emotions as Gonzales contends. (AOB 270.)

Citing *People v. Jackson* (1963) 59 Cal.2d 375, 381, Gonzales claims this Court has found the argument to be improper. (AOB 270.) In *People v. Jackson*, the prosecutor made the argument that had the jurors arrived on the scene of the crime as it was being committed, they would have killed the defendant to prevent it, therefore they should not be squeamish about giving the defendant the death penalty. (*Id.* at p. 381.) Here, the prosecutor did not make the same argument. His point was not that the jury should not be squeamish about voting for a death sentence.

Nor did the prosecutor improperly imply that the jurors should vote for a death verdict because it was the best available alternative to preventing Genny's death, as Gonzales claims. (AOB 270.) The argument demonstrated the events leading up to Genny's murder made her murder "inevitable" which showed Gonzales's intent to kill. It also showed the weaknesses in Gonzales's defense that Veronica was solely responsible for Genny's abuse, torture and murder.

Without providing any argument, Gonzales next cites a number of arguments he claims were prosecutorial misconduct. Gonzales claims the prosecutor misstated his argument and disparaged defense counsel with his statements in argument that, "[y]ou can always tell the veracity of a defense or the truth of the defense by the number of defenses. And you'll remember in opening statement that Veronica Gonzales did it and, if you think she did it, it's by accident." (99 RT 12819; AOB 269-270.) Gonzales objected, and the trial court overruled his objection and stated, "it is argument and the defense will be given an opportunity to clarify any disagreements they have." (99 RT 12819.) The prosecutor's argument was reasonably based on the defense Gonzales presented. (See 91 RT 11274-11278.) Gonzales did not object on the basis that the prosecutor disparaged defense counsel, nor did he seek an admonition, so any claim that this was misconduct is forfeited. (*People v. Schmeck, supra*, 37 Cal.4th at p. 298.) Even had Gonzales objected, his claim lacks merit. While it is generally improper for the prosecutor to accuse defense counsel of fabricating a defense, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) Here, the prosecutor described the deficiencies in opposing counsel's tactics. He did not accuse counsel of fabricating a defense. Thus, there was no misconduct for disparaging defense counsel.

Gonzales next claims it was misconduct for the prosecutor to argue it was a red herring that Gonzales is a victim,

> for he is not. Any efforts by his attorneys to humanize him is ridiculous. He is not a human being anymore. He checked out a long time ago. ¶ Putting him in a purple cardigan, or whatever you call that, that doesn't make him more of a human. That's not what he wore around the Gonzales household.

(99 RT 12822; AOB 269.)

Gonzales did not object to this argument or request an admonition, therefore, he has forfeited this claim of error. (*People v. Schmeck, supra*, 37 Cal.4th at p. 298.) Moreover, Gonzales's claim is perfunctory. He does not cite any case law or make any argument as to why this is misconduct, thus this Court should not consider his claim. (*People v. Smith, supra*, 30 Cal.4th at p. 616, fn. 8.) Even if this Court were to consider Gonzales's claim, it is without merit.

It is not misconduct to use an epithet that is reasonably warranted by the evidence. (*People v. Adcox, supra,* 47 Cal.3d at p. 237.) In *People v. McDermott, supra,* 28 Cal.4th at 946, 1002, this Court rejected the defendant's argument that the prosecutor committed misconduct by arguing the defendant was no longer a human being given the evidence presented. (*Id.* at pp. 1002-1003.) Likewise, here the prosecutor did not exceed the scope of permissible closing argument based on the facts presented, in that Gonzales abused, tortured and murdered a helpless four-year-old girl.

Gonzales's next claim of misconduct was the prosecutor's argument as he was going through the possible mitigating factors that the victim was not a participant in the homicidal conduct. He explained,

> red lights and sirens should be going off on this one. This does not apply. Okay. But–even if the defense argues it doesn't apply, remember this, when it is argued that it is an accident or that it was discipline out of control–which is the analysis of an accident, that's what they're arguing–that somehow Genny contributed to these homicidal acts–

The court overruled Gonzales's objection. (99 RT 12835.) The prosecutor continued to explain why, based on the evidence, this was not a mitigating factor.

Gonzales claims this was prosecutorial misconduct (AOB 269), but does not explain why or cite any cases as to why it is prosecutorial misconduct. His perfunctory claim should not be considered. (*People v. Smith, supra*, 30 Cal.4th at p. 616, fn. 8.) Even if Gonzales' contention is considered, the prosecutor's argument was proper. He was anticipating Gonzales's argument, and explaining to the jurors why there were no facts which showed Genny was a participant in Gonzales's homicidal conduct, and therefore, it was not a mitigating factor. Thus, the argument was well within the wide latitude given to prosecutors during closing argument at the penalty phase. (*People v. Schmeck, supra,* 37 Cal.4th at pp. 298-299.)

Lastly, Gonzales claims the prosecutor committed misconduct by arguing, "[i]f [Gonzales] was such a good father, why did he let his children see this?" (99 RT 12844; AOB 269.) Gonzales objected to this argument, but the court overruled his objection. (99 RT 12845, 12851-12853.) Gonzales claims this was misconduct because there was no evidence that his children saw what happened or that he was a good father, so the argument was not based on the evidence. (AOB 270.)

The prosecutor's argument was based on reasonable inferences from the evidence. The evidence showed Genny was abused over a period of weeks, resulting in visible injuries, which Gonzales's children would have seen. As the prosecutor explained just prior to his rhetorical question,

> these kids will always experience the trauma of living in that apartment. How are they ever going to forget what Genny looked like? How are they ever going to forget her bright red head, the grill marks on her face and the skin ripped off her body? How are they ever going to forget a

child's screams and anguish and fear? She was scary looking. I mean, you wouldn't even use that kind of exhibit on Halloween.

(99 RT 12844.)

Gonzales also claims this argument was misconduct because there was no evidence presented that Gonzales was a good father. (AOB 270.) Although the court ruled Gonzales could not present evidence he was a good father without opening the door to evidence of the condition of the house, it allowed Gonzales to present evidence that his children loved him. (66 RT 8407, 8410, 8416; 69 RT 8877-8881.) Gonzales presented evidence of cards his children had made for him, and that they loved him. (97 RT 12432-12436, 12458-12461, 12494-12496; 98 RT 12579-12582.) A reasonable inference from the evidence Gonzales presented was that he was a good father, therefore, the prosecutor did not commit misconduct by making the argument.

B. The Trial Court Did Not Abuse Its Discretion In Denying Gonzales's Motion For A Mistrial

At the conclusion of the trial, Gonzales moved for a new trial, in part based on the same prosecutorial misconduct arguments he makes here. (12 CT 2706-2711.) The court denied Gonzales's motion. (103 RT 12940-12941.) Gonzales claims the trial court's erroneous denial of his motion for a new trial based on prosecutorial misconduct was error. (AOB 270-271.) The trial court did not abuse its discretion in denying Gonzales's motion for a mistrial because his chances of receiving a fair trial were not irreparably damaged. (*People v. Silva* (2001) 25 Cal.4th 345, 372.) As detailed above, the prosecutor did not commit misconduct. Gonzales received a fair trial. Therefore, his argument lacks merit.

C. Gonzales's Constitutional Rights Were Not Violated

The prosecutor's argument was not misconduct under state law, and did not violate Gonzales's constitutional rights, as he claims. (AOB 271-272.) The

prosecutor did not violate the federal Constitution because he did not have "a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gray, supra*, 37 Cal.4th at p. 215.) As detailed above, the prosecutor's arguments were based on reasonable inferences from the evidence, and were not improper appeals to juror's emotions, as Gonzales claims. (AOB 271.)

Nor did the prosecutor violate Gonzales's right to a fair, accurate and reliable sentencing determination, as Gonzales claims. (AOB 272.) Likewise, contrary to Gonzales's claim (AOB 272), as detailed above, the prosecutor did not refer to facts that were outside the record or disparage counsel, thus his right to counsel and to confront witnesses were not violated.

D. Gonzales Was Not Prejudiced

Even if this Court determines the prosecutor engaged in misconduct, reversal is not required. It is inconceivable that any reasonable jury would have reached a different result in the absence of the alleged misconduct, given the facts and circumstances of the case. As detailed in Argument I, subsection C, the evidence against Gonzales was compelling. Any possible misconduct was not egregious conduct rising to the level of a due-process violation, nor did the prosecutor use deceptive or reprehensible means to persuade the jury. There was only appropriate advocacy by the prosecution. (*People v. Smith*, *supra*, 30 Cal.4th at p. 635 [permissible for a prosecutor to attack the defense case and argument because "[d]oing so is proper and is, indeed, the essence of advocacy"].) Accordingly, Gonzales' claims of prosecutorial misconduct in the penalty phase should be rejected.

XVI.

THE TRIAL COURT PROPERLY DENIED GONZALES'S PRE-TRIAL MOTIONS

Gonzales filed a number of pre-trial motions, many of which were denied. Although Gonzales concedes this Court has rejected most of his claims, he urges this Court to reconsider its prior rulings. Gonzales has not presented sufficient reasoning to revisit these issues, therefore, extended discussion is unnecessary.

A. The Trial Court Properly Denied Gonzales's Request For Sequestered Voir Dire

Although he concedes this Court has previously rejected his argument, Gonzales contends the trial court erred in denying his motion for individual voir dire. (AOB 274; 1 CT 207-208 [Gonzales's motion]; 14 RT 1238 [trial court denied motion]; 6 CT 1210 [chart noting court denied Gonzales's motion].) Proposition 115 abrogated the requirement to individually voir dire jurors. (*People v. San Nicholas, supra,* 34 Cal.4th at p. 633.) This Court defers to the trial court's discretion regarding the conduct of voir dire. (*People v. Waidla, supra*, 22 Cal.4th at pp. 713-714.) Gonzales has not presented a compelling reason for this Court to reject its precedent, thus his contention must be rejected.

B. The Trial Court Properly Denied Gonzales's Request To Instruct The Jury On Life Without Parole

Although he concedes this Court has previously rejected similar arguments, Gonzales argues the trial court erred in denying his request to instruct the jury that life without the possibility of parole means that he would not be eligible for parole, and that notorious killers such as Charles Manson and Sirhan Sirhan were sentenced under a different statutory scheme. (AOB 275; 2 CT 257-262 [Gonzales's motion]; 14 RT 1265-1267 [trial court denied

Gonzales's request].) This Court has consistently rejected this argument (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Smith, supra,* 30 Cal.4th at p. 635; *People v. Jones, supra,* 15 Cal.4th at p. 189) and should do so again here.

C. The California Statutory Capital-sentencing Scheme Is Constitutional, Therefore, The Trial Court Properly Rejected Gonzales's Motion To Set Aside The Indictment And Properly Refused To Instruct The Jury That It Had To Have Written Findings And That It Must Prove Aggravating Factors And That Death Is The Appropriate Punishment Beyond A Reasonable Doubt

Although Gonzales acknowledges this Court has previously rejected his arguments that California's capital sentencing scheme is unconstitutional, he argues the trial court erred in denying his request to set aside the indictment based on the alleged constitutional defects in California's death penalty scheme. (AOB 276-279; 2 CT 283-305 [Gonzales's motion]; 15 RT 1335-1336 [trial court denied Gonzales's motion]; 6 CT 1210 [chart noting trial court denied motion].) Gonzales has not presented any persuasive argument for this Court to reject its precedent.

This Court has repeatedly rejected the arguments advanced by Gonzales. The death penalty statute is not unconstitutional because of a failure to delete inapplicable aggravating factors. (*People v. Geier, supra,* 41 Cal.4th at p. 620; *People v. Schmeck, supra,* 37 Cal.4th at p. 305; *People v. Davenport* (1995) 11 Cal.4th 1171, 1230.) There is no requirement that California specify which factors are mitigating and which are aggravating. (*People v. Ramirez, supra,* 39 Cal.4th at p. 469; *People v. Schmeck, supra,* 37 Cal.4th at p. 305; *People v. Davenport, supra*, 11 Cal.4th at p. 1229.) The Constitution does not require written findings for aggravating factors. (*People v. Geier, supra,* 41 Cal.4th at p. 620; *People v. Smith, supra,* 35 Cal.4th at p. 374; *People v. Cornwell, supra,* 37 Cal.4th at p. 105; *People v. Jones, supra,* 29 Cal.4th at p. 1267.) Neither

does the Constitution require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Geier, supra,* 41 Cal.4th at p. 620; *People v. Carter, supra,* 36 Cal.4th at p. 1280; *People v. Robinson* (2005) 37 Cal.4th 592, 655; *People v. Blair, supra,* 36 Cal.4th at p. 753.) An absence of intercase proportionality review is not unconstitutional.[35] (*Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Geier, supra,* 41 Cal.4th at p. 618; *People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Smith, supra,* 35 Cal.4th at p. 374; *People v. Jones, supra*, 29 Cal.4th at p. 1267.) Use of the words "extreme" and "substantial" does not result in a failure to consider mitigating factors. (*People v. Geier, supra,* 41 Cal.4th at p. 620; *People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Schmeck, supra,* 37 Cal.4th at p. 304.) The aggravating and mitigating factors are not vague or arbitrary. (*People v. Williams, supra,* 16 Cal.4th at pp. 267-268; *People v. Box* (2000) 23 Cal.4th 1153, 1217.) The discretion afforded to prosecutors in seeking the death penalty does not permit arbitrariness, inter-county disparities, or invidious discrimination. (*People v. Harris* (2005) 37 Cal.4th 310, 366; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Crittenden* (1994) 9 Cal.4th 83, 152.) Gonzales presents no compelling reason for this Court to revisit any of his claims.

Gonzales makes related claims that the trial court erred by denying Veronica's motions, which he joined, to give him procedural protections by instructing the jury it had to find beyond a reasonable doubt the aggravating

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35. The California Constitution does not preclude "intracase" review (*People v. Bean* (1988) 46 Cal.3d 919, 957), and this Court does engage in "intracase" review to determine if penalty is disproportionate to the defendant's individual culpability. (*People v. Mincey* (1992) 2 Cal.4th 408, 476.) As explained herein in Argument XIX, Gonzales' punishment is not disproportionate to his individual culpability.

factors outweighed the mitigating factors and death was the appropriate punishment and that it needed written findings on unanimity on aggravating factors. (AOB 279.) He also claims the trial court erred by denying Veronica's motion to declare the capital sentencing statute unconstitutional on various grounds, including the failure to specify which factors were aggravating and which ones were mitigating. (AOB 279-280.) As explained above, with citation to supporting case law, this Court has rejected all of these claims, and should do so again here.

D. The Trial Court Properly Denied Gonzales's Motion To Strike The Special Circumstance Due To Constitutional Defects

Although Gonzales concedes this Court has previously rejected similar arguments, he contends the trial court erred by denying his motion to strike the torture-murder special circumstance as vague and overbroad, which he claims violated his constitutional rights. (AOB 280-282; 2 CT 306-319 [Gonzales's motion]; 15 RT 1337-1338 [trial court denied motion]; 6 CT 1210 [chart noting court denied Gonzales's motion].) This Court has consistently rejected this argument (*People v. Chatman, supra,* 38 Cal.4th at p. 394; *People v. Barnett, supra,* 17 Cal.4th at p. 1162; *People v. Raley, supra,* 2 Cal.4th at pp. 898-899) and should do so again here.

Gonzales further argues that the lack of nexus between the torture and the homicidal act was particularly problematic in this case, and it was "entirely possible" his intent to torture was weeks before, but not at the time of Genny's death. (AOB 280-282.) This Court has rejected the argument that CALJIC No. 8.81.18, given here, improperly fails to require a causal relationship between the torture and the victim's death. (*People v. Chatman, supra,* 38 Cal.4th at p. 394; *People v. Barnett, supra*, 17 Cal.4th at p. 1161.)

The trial court instructed the jury, pursuant to CALJIC No. 8.81.18 that

> [t]o find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> 1. [The] defendant intended to kill, or with intent to kill, aided and abetted in the killing of a human being;
>
> 2. [The] defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose[.]
>
> Awareness of pain by the deceased is not a necessary element of torture.

(10 CT 2283; 63 RT 8201-8202.)

Although the evidence showed Genny was tortured for weeks leading up to her murder, it was clear Genny's murder involved torture. Genny was forcibly held in a scalding bath, causing her skin and toenails to peel off her body and her eventual, painful, death. (51 RT 6068-6071, 6084; 53 RT 6476, 6481, 6554-6555, 6565; 56 RT 7008; 95 RT 11871.) The forensic pathologist opined that Genny was still conscious when she was taken out of the bathtub. (51 RT 6085.) Nevertheless, Gonzales did not seek medical treatment for Genny. Instead, he allowed her to die as he went to the store and bought bread and beer. (52 RT 6242, 6260, 6353; 8 CT 1761.) Clearly, there is a nexus between Gonzales's acts of torturing Genny and her death. Furthermore, the verdict form stated the jurors found true that the "murder was intentional and involved the infliction of torture." (9 CT 2121.) Additionally, the jurors found Gonzales guilty of murder by torture, and were instructed that the torturous acts "to inflict extreme and prolonged pain were a cause of the victim's death." (10 CT 2262; 63 RT 8192.)

Gonzales bases his argument, in part, on his claim that he was "not present in the apartment during the infliction of the fatal injuries." (AOB 282.)

Gonzales's claim is inconsistent with the evidence presented. There is nothing vague or overbroad in California's torture special circumstance.

E. The Trial Court Properly Denied Gonzales's Motion To Have A South Bay Jury Venire

Although Gonzales concedes this Court has previously rejected similar claims, he contends the trial court erred by denying his motion to have the jury venire drawn from the South Bay Judicial District instead of countywide. (AOB 282-283; 3 CT 652-660 [Gonzales's motion]; 15 RT 1417-1419 [court denied motion]; 6 CT 1210 [chart noting court denied Gonzales's motion].) Gonzales was not entitled to have his jury drawn from a particular judicial district. (*People v. Coddington* (2000) 23 Cal.4th 529, 573; *O'Hare v. Superior Court* (1987) 43 Cal.3d 86, 93-97.)

Gonzales does not argue his jury did not represent a fair cross-section of the community. Rather, he argues the venire should have been selected from the South Bay Judicial District because there is a higher percentage of Latinos and Mexican Americans than the countywide venire. (AOB 282-283.) Additionally, Gonzales claims it was "fundamentally unfair and discriminatory" that defendants charged with homicides occurring in North County were tried in the North County Judicial District but those charged with homicides occurring in South Bay had juries drawn from a countywide venire. (AOB 283.) There is no authority for Gonzales's position. Gonzales was entitled to, and did receive, a jury drawn from a representative cross-section of the community. (*People v. Horton* (1988) 11 Cal.4th 1068, 1087.) Thus, his argument does not have merit.

F. The Trial Court Properly Denied Gonzales's Motion To Quash The Venire Based On Its Exclusion Of Non-Citizens And Ex-Felons

Although Gonzales concedes this Court has previously rejected similar claims, he contends the trial court erred by denying Veronica's motion, which he joined, to quash the jury venire based on its exclusion of non-citizens and ex-felons. (AOB 283; 4 CT 784-806; 849-850 [Veronica's Motion; Gonzales's motion to join]; 16 RT 1469 [court denied motion]; 6 CT 1212 [chart noting court denied Gonzales's motion].) This Court has consistently rejected this argument (*People v. Beeler* (1995) 9 Cal.4th 953, 998 [resident aliens]; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Karis* (1988) 46 Cal.3d 612, 631-634) and should do so again here.

G. Gonzales Was Not Entitled To Discovery Regarding The District Attorneys's Charging Criteria; His Motion To Dismiss For Discriminatory Prosecution Was Properly Denied

Gonzales concedes that he did not provide a plausible justification for his discovery request of the District Attorney's capital charging criteria, but urges this Court to reconsider its precedent and lower the bar to be entitled to such discovery to establish discriminatory prosecution. (AOB 284-285.) Gonzales has not presented a compelling reason for this Court to do so.

Gonzales filed a discovery motion for the District Attorney's capital charging practices to show selective enforcement and racism. (3 CT 661-706.) The trial court held a hearing in which Gonzales presented evidence from three defense attorneys about three other murder cases. (15 RT 1368-1387, 1411-1416; 17 RT 1533-1546.) The trial court found Gonzales had not made a plausible justification for the materials and denied his motion. (17 RT 1570-1571.)

A ruling on a defendant's motion to compel discovery of a district attorney's charging practices is reviewed for an abuse of discretion. (*People v.*

Ashmus, supra, 54 Cal.3d at pp. 979-980.) Here, even if the cases presented by Gonzales showed they were charged differently, the trial court did not abuse its discretion in denying Gonzales's request for discovery and his motion to dismiss. "[O]ne sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 506.) As Gonzales acknowledges, he did not provide a plausible justification for his discovery request. (AOB 285.) This Court should decline Gonzales's invitation to reconsider its precedents showing otherwise.

XVII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY IN THE GUILT PHASE

Gonzales contends the trial court committed prejudicial error in the guilt phase by refusing his pinpoint instructions, giving CALJIC No. 2.04 (efforts by a defendant to persuade a witness to testify falsely) and in giving standard instructions. The trial court properly exercised its discretion in refusing Gonzales's pinpoint instructions because they were duplicative, confusing, or inapplicable. The trial court did not err in giving CALJIC No. 2.04 because there was sufficient evidence to support it. The trial court properly instructed the jury on the special circumstance with CALJIC No. 8.81.18, which this Court has previously approved. Moreover, Gonzales's argument that the standard instructions undermined the requirement of proof beyond a reasonable doubt have been previously rejected by this Court and Gonzales has not presented any reason for this Court to reconsider its prior holdings.

A. The Trial Court Properly Refused Gonzales's Pinpoint Instruction Because It Duplicated Other Instructions

Gonzales requested the trial court instruct the jury that:

> [i]n general, a person who fails to help another person by preventing a crime is not guilty of a crime. Likewise, a person is not guilty of murder simply because he or she failed to stop someone else from committing a murder. However, the law provides that a parent or other adult who has custody of a child may be guilty of the crime of neglect under certain circumstances.

(9 CT 2107.) The trial court declined to give the instruction to the jury because it was duplicative of other instructions and would be confusing. (62 RT 8004, 8007-8008, 8010.)

A trial court may refuse a pinpoint instruction if it is an incorrect statement of the law, argumentative, duplicative, potentially confusing, or if it is unsupported by substantial evidence. (*People v. Moon, supra,* 37 Cal.4th at p. 30.) Here, the suggested instruction was duplicative of other instructions. The trial court instructed the jury that "[m]ere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting," and "[m]ere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (CALJIC No. 3.01; 10 CT 2256; 63 RT 8189.)

Gonzales argues that "no other instruction explicitly informed the jury that permitting, or failing to prevent, Veronica from abusing or killing Genny did not make appellant legally culpable for murder." (AOB 288.) CALJIC No. 3.01 explicitly stated that being present at the scene of a crime and/or failure to prevent a crime does not amount to aiding and abetting. (10 CT 2256; 63 RT 8189.) Thus, if the jury believed that Veronica abused or killed Genny, the jury was explicitly told Gonzales was not culpable for his failure to prevent the crime.

Gonzales argues that in addition to violating state law, the trial court's refusal to instruct with his pinpoint instruction violated his due process right to receive a fair trial and impacted his constitutional right to present a defense. (AOB 289-290.) As the jury was properly instructed on Gonzales's defense and his instruction merely duplicated other instructions that were given, his constitutional rights were not violated. Gonzales does not cite any authority holding otherwise.

Even if this Court determines the trial court erred in refusing Gonzales's pinpoint instruction, any error was harmless. Gonzales claims the errors violated his federal constitutional rights, thus implicating the harmless error standard of *Chapman v. California, supra,* 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict. (AOB 306-307.) Any possible error was an error of state law only. However, even applying the more stringent *Chapman* standard, any error was harmless. As noted, the jury was already instructed that being present at the scene of a crime and/or failure to prevent a crime does not amount to aiding and abetting, therefore, the requested instruction would not have added anything of significance to the juror's deliberations. Moreover, as discussed in detail in Argument 1, subsection C, the evidence against Gonzales was compelling.

Gonzales claims at least one juror erroneously found Gonzales guilty because of his failure to prevent Genny's death. (AOB 306.) Gonzales cites to the juror's declaration, presented in Gonzales's motion for a new trial (see Argument VI). As explained in Argument VI, the declaration was submitted by Gonzales after the jury could not reach a verdict on the appropriate penalty, and is in direct conflict with the jury verdict that the jurors did find Gonzales intended to kill Genny. Thus, this one juror's declaration, submitted after the jury deadlocked on the penalty (to improperly impeach the jury's verdict),

cannot show Gonzales was prejudiced by the trial court's failure to give his pinpoint instruction, as the declaration is inadmissible. (Evid. Code, § 1150.)

B. The Trial Court Properly Refused Gonzales's Pinpoint Instruction Regarding Veronica's Consciousness Of Guilt

Gonzales requested the trial court instruct the jury that:

> [i]f you find that before this trial the co-defendant, Veronica Gonzales, made a willfully false or deliberately misleading statement concerning the crimes for which she will be tried, you may consider such statement as a circumstance tending to prove a consciousness of her guilt.

(9 CT 2108; 62 RT 8011.) Gonzales's counsel acknowledged that the jury was not being asked to determine Veronica's guilt. (62 RT 8011.) The court noted the parties agreed to instruct the jury they were not to determine Veronica's guilt, and this instruction instructed them otherwise, therefore it refused to give the instruction. (62 RT 8012.)

The trial court properly refused Gonzales's instruction because it was confusing, and did not apply in this trial. The trial court instructed the jury pursuant to CALJIC No. 2.11.5 that

> [t]here has been evidence in this case indicating that defendant's wife, Veronica Gonzales, was or may have been involved in the crime for which defendant is on trial. ¶ As I informed you at the outset of this trial, both Ivan and Veronica Gonzales have been identically charged with murder and special circumstances in this case. Their trials have been severed. Veronica Gonzales's trial will be held after this trial, before a different jury. ¶ You are not to consider Veronica Gonzales's case for any purpose, because it is not before you. Your sole duty is to determine whether the charges as they relate to Ivan Gonzales have been proved beyond a reasonable doubt.

(10 CT 2236; 63 RT 8180-8181.) Gonzales's requested instruction that the jurors may consider Veronica's false or misleading statements as consciousness of her guilt directly conflicts with this instruction. Two conflicting instructions would be confusing, and obviously could not both be correct statements of law.

Gonzales reasons that because third party culpability evidence is admissible, the jury should have been instructed on Veronica's culpability. (AOB 291.) A defendant may introduce evidence of a third party's culpability if such evidence raises a reasonable doubt about his guilt. (*People v. Abilez, supra*, 41 Cal.4th at p. 517.) It does not follow, however, that the jury must be instructed as to that third party's consciousness of guilt. The instructions on the presumption of innocence, the People's burden of proof and reasonable doubt properly instructed the jury on the applicable principles related to the jury's consideration of third party culpability evidence. (*Ibid.*)

Moreover, whether Veronica's statement showed her consciousness of guilt was a different issue than whether it raised a reasonable doubt about Gonzales's guilt. For example, the statements could show her consciousness of guilt in that both she and Gonzales tortured and murdered Genny, and she was trying to mislead the police. Thus, in Gonzales's trial, Veronica's consciousness of guilt was not material or determinative of Gonzales' culpabilty.

Gonzales does not cite any cases that directly support his position that the trial court should have instructed the jury on Veronica's consciousness of guilt. His citation to *People v. Farnam* (2002) 28 Cal.4th 107, 153 (AOB 291) is misplaced because in that case the issue was whether evidence of the defendant's consciousness of guilt was admissible, not that of a third party. Gonzales cites *People v. Blair, supra,* 36 Cal.4th at p. 744 (AOB 291) for the proposition that the trial judge had a duty to instruct on requested instructions pertaining to third-party culpability, however, *People v. Blair* is only authority for the general proposition that the trial court must instruct on relevant principles of law, thus it does not support Gonzales's position.

Additionally, contrary to his argument (AOB 292), Gonzales's constitutional rights to a fair trial and to present a defense were not violated by

the trial court's refusal to give an instruction that was confusing and inapplicable. Nor did it create an "impermissible imbalance" in the instructions, as Gonzales claims, because the jury was instructed that his false or misleading statements could show his consciousness of guilt. (AOB 292.) Gonzales was on trial, and his guilt was at issue, therefore, his consciousness of guilt was relevant. Veronica's culpability was relevant to the extent it raised a reasonable doubt as to Gonzales's guilt, but that did not require the court to instruct the jury that Veronica's false statements showed her consciousness of guilt. Thus, Gonzales's argument is without merit.

Additionally, there was no prejudice to Gonzales by the trial court's failure to give this instruction. The instruction informed the jury that Veronica's misleading statements could be considered for her consciousness of guilt. Veronica's consciousness of guilt was not determinative of Gonzales's culpability. Moreover, the jury had already been told that there was evidence indicating that Veronica Gonzales was or may have been involved in the crime. (10 CT 2236; 63 RT 8180-8181.) Gonzales's counsel was free to argue Veronica committed the crime based on the evidence. Thus, even had the trial court given the instruction, Gonzales would still have been convicted of first degree murder, and the special circumstance found true.

C. The Trial Court Properly Instructed The Jury With CALJIC No. 2.04

Over Gonzales's objection, the trial court instructed the jury with CALJIC No. 2.04 that,

> [i]f you find that a defendant attempted to or did persuade a witness to testify falsely such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are matters for your determination.

(10 CT 2232; 61 RT 7804; 63 RT 8179.) Gonzales contends there was insufficient evidence to give the instruction. (AOB 293.) The trial court did not err in giving the instruction.

CALJIC No. 2.04 is appropriate if there is "some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102.) Here, there was evidence that supported the inference that Gonzales attempted to persuade Ivan Jr. to testify falsely. When he was first interviewed, Ivan Jr. said Gonzales told him Genny was not breathing and drowned. (8 CT 1867; 9 CT 1939.) Ivan Jr. testified during the preliminary hearing that he was concerned his dad might be mad at him and that he was afraid of his dad because the testimony he was giving about Genny. (9 CT 1998-1009.) Gonzales and Veronica told Ivan Jr. they would hit him if he told visitors that they were hurting Genny. (9 CT 1951.) Ivan Jr. initially lied to the detectives about what happened because he was afraid he would get in trouble. (8 CT 1867-1868.) He was afraid that if he told the truth his mom and dad were going to hit him. (9 CT 1922.) Based on these facts, the trial court correctly concluded that

> it would be reasonable for the jury to conclude that the constellation of behaviors by the defendant terrorizing these kids from the outset, there is evidence of that, Ivan, Jr. being afraid of him, defendant locking the kids up while this event took place, lying to the kids afterwards as to the conduct, I think the jury could conclude that that was an effort to persuade the kids not to testify.

(61 RT 7807-7108.)

Even if there was insufficient evidence to warrant giving the instruction, any error was harmless, and Gonzales's constitutional rights were not denied, as he claims. (AOB 294, 307.) "'At worst, there was no evidence to support the instruction and . . . it was superfluous. [E]vidence of defendant's guilt was strong. Under the circumstances, reversal on such a minor, tangential point is not warranted" and his constitutional rights were not violated. (*People v. Cole,*

supra, 33 Cal.4th at p. 1123, quoting *People v. Jackson, supra,* 13 Cal.4th at p. 1225.) Moreover, "the cautionary nature of the instruction benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*Id.* at p.1224.)

In support of his position his constitutional rights were violated, Gonzales cites *County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157 [99 S.Ct. 2213, 60 L.Ed.2d 777]. In that case, the Supreme Court was not analyzing CALJIC No. 2.04. It held a permissive inference was impermissible only if the trier of fact could not rationally make the connection permitted by the inference. (*Ibid.*) Here, as explained above, the jury could rationally infer that Ivan Jr. was scared to testify against his father because Gonzales attempted to persuade him to testify falsely, and was coached into telling the police that Genny drowned. Thus, Gonzales's argument fails.

D. The Trial Court Did Not Err In Giving CALJIC No. 8.81.18

Although he did not object to it being given, Gonzales now claims the trial court erred by instructing the jury with CALJIC No. 8.81.18 that:

> [t]o find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> 1. [The] defendant intended to kill, or with intent to kill, aided and abetted in the killing of a human being;
>
> 2. [The] defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose[.]
>
> Awareness of pain by the deceased is not a necessary element of torture.

(AOB 294-296; 10 CT 2283; 63 RT 8201-8202.)

Gonzales did not object to this instruction (61 RT 7908-7909), therefore he has forfeited any claim of error. Normally, a defendant forfeits errors

regarding jury instructions by his failure to object at trial. An appellate court, however, may consider instructional errors if "substantial rights" of the defendant are affected. (Pen. Code, §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) Where, however, as here, the jury instructions correctly state the law but the defendant claims they were too general or incomplete, any claim of error is forfeited unless the defendant requested clarifying language at trial. (*People v. Coddington, supra*, 23 Cal.4th. at p. 584.) Thus, Gonzales has forfeited this claim of error.

Even had Gonzales properly objected to this instruction, his argument that it is insufficient because it does not require a nexus between the torture or intent to torture and the homicide (AOB 294) fails on the merits. This Court has rejected the argument that CALJIC No. 8.81.18 improperly fails to require a causal relationship between the torture and the victim's death. (*People v. Chatman, supra,* 38 Cal.4th at p. 394; *People v. Barnett, supra*, 17 Cal.4th at p. 1161.) Thus, Gonzales's argument that his constitutional rights to due process, trial by jury, and to be free from cruel and unusual punishment were violated (AOB 294-296) is without merit.

Even if this Court were to determine the instruction was insufficient, any error was harmless. The evidence showed Genny was tortured and the torture escalated leading up to her murder. In addition, it was clear Genny's murder involved torture. Genny was forcibly held in a scalding bath, causing her skin and toenails to peel off her body and her eventual, painful, death. (51 RT 6068-6071, 6084; 53 RT 6476, 6481, 6554-6555, 6565; 56 RT 7008; 95 RT 11871.) The forensic pathologist opined that Genny was still conscious when she was taken out of the bathtub. (51 RT 6085.) Nevertheless, Gonzales did not seek medical treatment for Genny. Instead, he allowed her to die as he went to the store and bought bread and beer. (52 RT 6242, 6260, 6353; 8 CT 1761.)

Clearly, there is a nexus between Gonzales's acts of torturing Genny and her death.

Furthermore, the verdict form stated the jurors found true that the "murder was intentional and involved the infliction of torture." (9 CT 2121.) Additionally, the jurors found Gonzales guilty of murder by torture, and were instructed that the torturous acts "to inflict extreme and prolonged pain were a cause of the victim's death." (10 CT 2262; 63 RT 8192.) Thus, even using the *Chapman* standard, as Gonzales urges (AOB 308), any error would be harmless beyond a reasonable doubt.

E. CALJIC Nos. 2.02, 2.21.2, 2.22, And 2.51 Were Properly Given And Did Not Undermine The Requirement Of Proof Beyond A Reasonable Doubt

Although Gonzales acknowledges this Court has previously rejected his claims that the standard instructions on circumstantial evidence, when a witness is wilfully false, weighing witness testimony and motive have been rejected, he urges this Court to reconsider its prior rulings. (AOB 296-297.) Gonzales has not presented a compelling reason for this Court to reject its prior precedent.

Gonzales did not object to the instructions (61 RT 7793-7796 [counsel suggests changes to CALJIC 2.02 and agrees with it as given]; 7849 [counsel agrees to CALJIC Nos. 2.21.2 and 2.22]; 7855 [trial court discusses CALJIC No. 2.51 and counsel does not object]), therefore, he has forfeited his claim of error. (*People v. Coddington, supra*, 23 Cal.4th at p. 584.) Even had Gonzales objected, his claims fail on the merits.

The trial court instructed the jury with CALJIC No. 2.02 on the sufficiency of circumstantial evidence to prove specific intent. It explained, in part, that

> if the evidence permits two reasonable interpretations, one of which points to the existence of the specific intent and mental state and the other to its absence you must adopt that interpretation which points to

> its absence. If, on the other hand, one interpretation of the evidence as to the specific intent and 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.

(10 CT 2259; 63 RT 8190-8191.) Gonzales argues this instruction violated his constitutional rights to due process, trial by jury, and a reliable capital trial because it compelled the jury to find him guilty of murder and to find the special circumstance true using a standard lower than proof beyond a reasonable doubt and created an impermissible mandatory inference that shifted the burden of proof. (AOB 297-300.) This Court has repeatedly rejected this argument (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1159; *People v. Guerra, supra,* 37 Cal.4th at pp. 1138-1139) and should do so again here.

The trial court also instructed with the standard instruction, CALJIC No. 2.21.2, witness wilfully false, that

> [a] witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

(10 CT 2422; 63 RT 8183.) This Court has rejected Gonzales's argument that this instruction lowers the burden of proof, and thereby violated his constitutional rights to due process, trial by jury, and a reliable capital trial. (AOB 300-303; *People v. Guerra, supra*, 37 Cal.4th at p. 1139; *People v. Nakahara* (2003) 30 Cal.4th 705, 714.) Gonzales has not presented any compelling reason for this Court to reject its precedent.

The trial court instructed the jury pursuant to CALJIC No. 2.22 that

> [y]ou are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting

> the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(10 CT 2243; 63 RT 8183-8184.) Gonzales claims this instruction lowered the burden of proof, thereby violating his constitutional rights to due process, trial by jury, and a reliable capital trial. (AOB 302-303.) This Court has previously rejected this argument (*People v. Guerra, supra*, 37 Cal.4th at p. 1139; *People v. Nakahara, supra,* 30 Cal.4th at p. 714) and should do so again here.

Lastly, Gonzales claims the standard instruction on motive shifted and lowered the burden of proof, thereby violating his constitutional rights to due process, trial by jury, and a reliable capital trial. (AOB 302-303.) The trial court instructed the jury with CALJIC No. 2.51 that

> [m]otive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(10 CT 2245; 63 RT 8184-8145.) This Court has previously rejected Gonzales's argument (*People v. Guerra, supra*, 37 Cal.4th at p. 1139; *People v. Nakahara, supra,* 30 Cal.4th at p. 714) and should do so again here. Gonzales's argument that this Court should reconsider its prior rulings, which he claims are "defective" is unpersuasive. (AOB 304-305.)

XVIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY PHASE JURY

Gonzales contends the trial court committed prejudicial error by refusing some of his requested instructions, and in giving the standard penalty phase instructions. (AOB 311-329.) The trial court properly refused Gonzales's special instructions because they were duplicative of other instructions.

Additionally, the court properly instructed the jury with the standard instructions.[36/]

A. The Trial Court Properly Denied Gonzales's Request To Replace CALJIC No. 8.85 With His Special Instructions That Delineated Aggravating And Mitigating Factors

Gonzales proposed two instructions to replace or supplement CALJIC No. 8.85. Gonzales's proposed instructions delineated which factors were aggravating and which were mitigating; specifically that factor (a) was the only aggravating factor, and the rest of the factors could only be considered as mitigating factors. (10 CT 2177-2180.) The trial court refused Gonzales's proposed instructions (69 RT 8812-8821), and instead instructed the jury with CALJIC No. 8.85 as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received in this trial. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> With regard to this factor, as I have already informed you, defendant has previously been found guilty of first degree murder. The special circumstance of torture murder has also been found true. These previous verdicts make the current penalty trial necessary. However, the particular circumstances of the crime and the defendant's involvement in it are still matters for you to determine and weigh as you deliberate on the appropriate penalty. Your conclusions about the circumstance of the crime and defendant's involvement must be based solely on evidence presented in this trial.

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36. During the penalty retrial, the rulings from the first trial remained in effect (75 RT 9382-9383), therefore, many of the citations are to the arguments made during the first penalty trial.

(b) The presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, 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, other than the crimes for which the defendant has been tried in the present proceedings.

(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 reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the 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 effects 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 and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less tha[n] death, whether or not related to the offense for which he is on trial.

(12 CT 2661-2663; 99 RT 12735-12737.)

Although Gonzales concedes this Court has previously rejected his argument that his constitutional rights were violated because the trial court

refused to delineate which factors were aggravating and which were mitigating, he urges this Court to reconsider its prior rulings. (AOB 311-312.) This Court has consistently rejected the argument that the trial court is required to specify which factors are mitigating and which are aggravating (*People v. Ramirez, supra,* 39 Cal.4th at p. 469; *People v. Schmeck, supra,* 37 Cal.4th at p. 305; *People v. Davenport, supra*, 11 Cal.4th at p. 1229) and should do so again here.

Gonzales acknowledges his proposed instructions inaccurately stated that factor (i), the age of the defendant at the time of the crime, could only be a mitigating factor, but claims the trial court should have allowed him to modify his instruction. (AOB 312.) As stated above, the trial court is not required to specify which factors are mitigating and which are aggravating (*People v. Ramirez, supra,* 39 Cal.4th at p. 469; *People v. Schmeck, supra,* 37 Cal.4th at p. 305; *People v. Davenport, supra*, 11 Cal.4th at p. 1229), therefore, the trial court properly rejected Gonzales's proposed instructions in their entirety.

B. The Trial Court Did Not Err By Refusing Gonzales's Proposed Instructions Regarding Factor "k"

Gonzales proposed two instructions to modify CALJIC No. 8.85, factor "k." The first one was a pinpoint instruction delineating his mitigating factors. It included whether there was any lingering doubt, whether the crime demonstrated a lack of premeditation and deliberation, whether the crime showed a lack of criminal sophistication or professionalism, whether he attempted to escape at the time of his arrest, and whether he used force and violence to avoid arrest. He then proposed a factor "l" that included any sympathetic, compassionate, merciful or other aspect of his background, character, record, or social history that the defendant offers as a basis for a sentence less than death, including the presence or absence of criminal activity or a felony record other than the charged crime, whether a death sentence would have a negative effect on his friends and family, whether he had a good jail

record, whether he is deserving of mercy, sympathy, compassion, or empathy, and whether there are any other facts that reduce his moral culpability. (10 CT 2178-2180.) Gonzales's second proposed instruction broke up factor "k" into two separate factors, thereby adding a factor "l." Specifically, it provided that factor "k" was "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and factor "l" was "[s]ympathy or any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the crime for which he is on trial." (10 CT 2194.)

Gonzales claims he was entitled to his proposed pinpoint instruction because it correctly stated the law and had evidentiary support. (AOB 314.) A trial court may refuse a pinpoint instruction if it is an incorrect statement of the law, argumentative, duplicative, potentially confusing, or if it is unsupported by substantial evidence. (*People v. Moon*, *supra*, 37 Cal.4th at p. 30.) Gonzales's proposed pinpoint instructions listing the factors he believed were mitigating were duplicative because the jury was instructed pursuant to CALJIC No. 8.85, factor (k), that they could consider

> [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(12 CT 2663; 99 RT 12737.) As Gonzales's pinpoint instruction was duplicative of CALJIC No. 8.85, the trial court did not err by refusing his instruction. (*People v. Ramos, supra,* 34 Cal.4th at p. 530; *People v. Lucero* (2000) 23 Cal.4th 692, 729.)

Gonzales also argues his pinpoint instruction would have informed the jury that compassion and mercy were permissible mitigating factors, which he contends factor "k" does not make clear. (AOB 314.) Factor "k" informed them they may consider "any sympathetic or other aspect of the defendant's

character or record" (12 CT 2663; 99 RT 13737) and CALJIC No. 8.88 informed the jurors they were free to "assign whatever moral or sympathetic value" they deemed appropriate to each and all the various factors. (12 CT 2666; 99 RT 12739.) Thus, the standard instructions given to the jury informed them that compassion and mercy were legitimate factors for its consideration and that either alone could justify a sentence of life imprisonment without the possibility of parole. (*People v. DePriest* (2007) 42 Cal.1, 59 [the standard penalty phase instructions properly inform the jury it can consider sympathy, mercy and any other aspect of the defendant's character and record in mitigation]; *People v. Hinton, supra,* 37 Cal.4th at pp. 911-912 [rejecting defendant's argument the trial court erred in refusing to instruct the jury that they can reject the death penalty based on compassion and sympathy alone]; *People v. Smith, supra,* 30 Cal.4th at p. 638 [court properly refused to instruct jury they could consider mercy because it was covered in other instructions].)

Similarly, the trial court did not err by refusing Gonzales's proposed instruction that split factor "k" into two mitigating factors. Gonzales's proposed instruction contained the same exact language as CALJIC No. 8.85. The only difference is it was broken down into two separate factors. As the jury was informed of the same information, the trial court did not err by refusing to instruct the jury in the manner proposed by Gonzales.

Gonzales claims that splitting factor "k" into two mitigating factors would eliminate ambiguity so the jury would not incorrectly believe that mitigating factors had to relate to the crime. (AOB 314.) The language in factor "k" is not ambiguous. It clearly tells the jurors they may consider any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death. This Court has repeatedly upheld the language of CALJIC No. 8.85. (*People v. Cornwell, supra*, 37 Cal.4th at p. 103; *People v.*

Moon, supra, 37 Cal.4th at p. 41; *People v. Wilson, supra*, 36 Cal.4th at pp. 360-361.) Gonzales's contention is without merit.

C. The Trial Court Properly Refused Gonzales's Proposed Instruction That It Could Consider Mitigating Factors That Were Not Delineated

Gonzales proposed an instruction that told the jurors that

> the mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence in this case.
>
> But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstance relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.
>
> Any one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case.

(10 CT 2181.) The trial court refused Gonzales's instruction. (69 RT 8824-8825.)

The trial court properly refused Gonzales's proposed instruction telling the jurors that they could consider mitigating factors other than those listed because it was duplicative of CALJIC No. 8.85, factor "k." (*People v. Lucero, supra*, 23 Cal.4th at p. 729.) Thus, the trial court did not err by refusing to give the requested instruction, and Gonzales's constitutional rights were not violated, as he claims. (AOB 315-316.)

D. The Trial Court Properly Refused To Give Gonzales's Proposed Instruction That The Jury May Return A Life Sentence For Any Reason

Gonzales requested the court instruct the jury that,

> [y]ou may spare the defendant's life for any reason you deem appropriate and satisfactory, or for no reason at all. If something arouses

mercy, sympathy, empathy or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto.

(10 CT 2186.) The trial court refused to give the proposed instruction. (69 RT 8832.) Although Gonzales concedes this Court has upheld the denial of a similar proposed instruction, he argues failure to give the instruction violated his constitutional rights and urges this Court to reconsider its decision. (AOB 316-317.) The instructions the court gave were proper, and the trial court was not required to instruct as Gonzales proposed. (*People v. Ledesma* (2006) 39 Cal.4th 641, 739.) Gonzales has not presented a compelling argument such that this Court should reconsider its prior rulings.

E. The Trial Court Properly Refused Gonzales's Request To Instruct The Jury That It Needed To Be Unanimous In Finding Aggravating Factors

Gonzales proposed two instructions to modify CALJIC No. 8.88, both of which would tell the jury that they did not have to be unanimous in their weighing of mitigating factors. (10 CT 2195-2197.) The trial court agreed to do so, but added language that the jurors did not have to be unanimous as to aggravating factors, either. (69 RT 8844-8849; 12 RT 2666.)

Although Gonzales concedes this Court has previously rejected his argument, he claims the court's instruction that the jury did not have to be unanimous as to aggravating factors violated his Sixth, Eighth, and Fourteenth Amendment rights because it imposed a death sentence when there was no assurance the jury unanimously (or by a majority) found a single set of aggravating circumstances that warranted the death penalty. (AOB 317-318.) This Court has previously rejected Gonzales's argument (*People v. Brown* (2004) 33 Cal.4th 382, 401-402; *People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Prieto* (2003) 30 Cal.4th 226, 263) and should do so again here. Likewise, this Court has rejected Gonzales's argument that failure to require unanimity of aggravating factors violates his rights to equal protection because

noncapital defendants are provided more rigorous protection. (AOB 318-319; *People v. Cook* (2007) 40 Cal.4th 1334, 1367.)

F. The Trial Court Did Not Err In Refusing To Instruct The Jury On Lingering Doubt

During the first penalty trial, the trial court instructed the jury that "[a]ny lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty." (10 CT 2302; 70 RT 9022.) During the penalty retrial, the court expressed concern that the jury would be confused by a lingering doubt instruction because Gonzales had already been found guilty of murder, and the special circumstance found true. (84 RT 9974-9975.) Thus, the trial court added some language so it would be clear to the jury that they were not bound by any findings of fact by the previous jury, but did not use the word "doubt." (99 RT 12710-12711.) The trial court, therefore, instructed the jury that although Gonzales had been found guilty of first degree murder and the special circumstance of murder by torture was found true,

> the particular circumstances of the crime and the defendant's involvement in it are still matters for you to determine and weigh as you deliberate on the appropriate penalty. Your conclusions about the circumstances of the crime and defendant's involvement must be based solely on evidence presented to you in this trial.

(12 CT 2661; 99 RT 12736.)

Gonzales claims the trial court erred because it did not give a "lingering doubt" instruction, thereby violating his constitutional rights. (AOB 319-320.) This Court has repeatedly held a defendant is not entitled to a lingering doubt instruction. (*People v. DePriest, supra*, 42 Cal.4th at pp. 59-60; *People v. Geier, supra*, 41 Cal.4th at p. 615; *People v. Millwee* (1998) 18 Cal.4th 96, 165-166.) Gonzales has not presented a compelling reason for this Court to revisit these rulings.

G. The Trial Court Did Not Err By Instructing The Jury With CALJIC No. 8.88 That If The Aggravating Circumstances Were So Substantial In Comparison To The Mitigating Circumstances That They Warrant Death, They Shall Return A Judgment Of Death

Over Gonzales's objection, the trial court instructed the jury that

> 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. If you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead of life without parole, you shall return a judgment of death. However, if you are unable to come to this conclusion, you shall bring back a judgment of life without parole.

(12 CT 2666; 99 RT 12713-12715 [Gonzales's objection to instruction], 12739 [court instructs jury].)

The language used by the court is similar to the language in Penal Code section 190.3. The United States Supreme Court in *Boyde v. California* (1990) 494 U.S. 370, 376-377 [110 S.Ct.1190, 108 L.Ed.2d 316] held such an instruction did not violate the federal Constitution.

Gonzales argues that the instruction "ran afoul of state law." (AOB 320.) In *People v. Brown* (1985) 40 Cal.3d 541, this Court held instructing the jury that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death" was confusing because the jury might erroneously infer it could perform the balancing process by comparing the number of factors in aggravation by those in mitigation or by an arbitrary assignment of weights to the factors. It held it could also be confusing because it could allow the jury to return a death verdict without deciding that the death penalty was appropriate under the facts and circumstances of the particular case. (*Id.* at p. 544, fn. 17; *People v. Clark* (1992) 3 Cal.4th 41, 164.)

Here, the jury would not have been confused about the balancing process because the trial court also instructed the jury that

> [t]he 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. Each of 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.

(12 CT 2665-2666; 99 RT 12738-12739.) "This instruction made clear the weighing process was not mechanical and, by informing the jurors they should decide the weight and force of the factors, ensured they understood they had discretion to determine the appropriate penalty." (*People v. Carpenter, supra,* 15 Cal.4th at p. 419 [holding similar instructions eliminated confusion].)

Also, here the jury would not have been confused that the instruction would allow the jury to return a death verdict without deciding that the death penalty was appropriate under the facts and circumstances of the particular case, because here, unlike in *Brown*, the trial court instructed that "[i]f you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances *that they warrant death instead of life without parole*, you shall return a judgment of death." (12 CT 2666; 99 RT 12739, italics added.) Thus, the trial court's added language, italicized above, eliminated the confusion this Court was concerned about in *Brown*, as the jury here was instructed that they would only return a judgment of death if they decided that the aggravating circumstances were so substantial in comparison to the mitigating circumstances that the jury believed they warranted death.

Gonzales claims this case is different than other cases in which this Court has found there was no *Brown* error because the trial court instructed the jury after this Court decided *People v. Brown* and was therefore "aware that California law bars such mandatory language." (AOB 321.) The trial court was well aware of *Brown*, and modified the instruction to conform with this Court's

concerns. The court modeled its language after that in *People v. Noguera* (1992) 4 Cal.4th 599, 640-641, which this Court upheld. (99 RT 12712-12713.) In the trial court's instruction, as in that in *People v. Noguera*, there was no "reasonable likelihood that a juror would have misunderstood the nature of his or her role in the capital sentencing process–either as one involving a mechanical quantification of relevant factors or requiring the imposition of the death penalty." (*Id.* at p. 641.) Thus, the trial court did not err in instructing the jury under state law, nor did it violate Gonzales's constitutional rights.

H. The Standard CALJIC Instructions Did Not Violate Gonzales's Constitutional Rights

Although Gonzales concedes this Court has previously rejected his arguments that the standard penalty phase CALJIC instructions violated his rights, Gonzales asks this Court to reconsider its previous decisions. (AOB 322-328.) Gonzales has not presented any compelling reason for this Court to do so.

1. Penal Code Section 190.3, Factor (a) Is Not Overbroad

Gonzales argues Penal Code section 190.3, factor (a), is overbroad because it allows prosecutors to argue every conceivable circumstance aggravate the crime, even those that reflect starkly opposite circumstances, thereby violating his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 322-323.) This Court has rejected this argument.

> It is not inappropriate . . . that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1051; see also *People v. Ramos, supra,* 34 Cal.4th at p. 533; *People v. Maury, supra,* 30 Cal.4th at p. 439.) Furthermore,

> the jury is engaged in an *individualized* sentencing process [citation], and the jury appropriately has very broad discretion in determining whether the death penalty is imposed. [Citation.] A jury should consider the circumstances of the crime in determining penalty [citation], but this is an individualized, not a comparative function.

(*People v. Jenkins, supra,* 22 Cal.4th at p. 1052.) Gonzales has not presented any reason to reconsider this issue, therefore, his claim should be rejected.

2. There Is No Constitutionally Required Burden Of Proof At The Penalty Phase

Gonzales contends the instructions violated his constitutional rights under the Sixth, Eighth and Fourteenth Amendments because the penalty phase jury was not instructed on a burden of proof regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors and the appropriateness of the death penalty. (AOB 324-325.) This Court, in previously rejecting Gonzales's position, has explained: "Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]." (*People v. Lenart, supra,* 32 Cal.4th at pp. 1135-1136, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 643.) The penalty phase determination is "not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process–such as burden of proof–are not necessary.'" (*People v. Lenart, supra*, 32 Cal.4th at p. 1136 quoting *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.)

Nor was the trial court required to instruct the jury that there is no burden of proof, as Gonzales contends. (AOB 324-325.) This Court has held that no instruction on the burden of proof is required, either as to the presence

or absence of any such burden. (*People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Cornwell, supra,* 37 Cal.4th at p. 104; *People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Dunkle* (2005) 36 Cal.4th 861, 939.) Gonzales has not presented any persuasive reason for this Court to revisit these rulings.

3. There Is No Requirement The Jury Be Instructed There Is A Presumption Of A Life Sentence

Gonzales contends his constitutional rights to due process, to be free from cruel and unusual punishment, to a reliable sentence determination and equal protection under the Eighth and Fourteenth Amendments were violated because the trial court did not instruct the jury that there is a presumption of life in the penalty phase. (AOB 325.) This Court has repeatedly rejected Gonzales's argument that the jury must 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. Abilez, supra,* 41 Cal.4th at p. 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp, supra,* 26 Cal.4th at p. 1137.) Gonzales has not presented any compelling reason for this Court to revisit those holdings.

4. The Phrase "So Substantial" In CALJIC No. 8.88 Is Not Impermissibly Broad

Gonzales contends the phrase "so substantial" in CALJIC No. 8.88, where the jury was instructed that "[i]f you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead of life without parole, you shall return a judgment of death" 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, thereby violating his rights under the Eighth and Fourteenth Amendments. (AOB 326; 12 CT 2666; 99 RT 12739.) This Court has previously rejected Gonzales's argument (*People v. Moon, supra,* 37

Cal.4th at p. 43; *People v. Boyette, supra,* 29 Cal.4th at p. 465) and should do so again here.

5. CALJIC No. 8.88 Is Not Unconstitutional Because It Does Not Tell The Jury That Death Must Be The "Appropriate" Punishment

Gonzales argues CALJIC No. 8.88 is unconstitutional because it instructs the jury they can return a death verdict if the aggravating evidence "warrants" death, instead of whether death is the "appropriate" punishment. (AOB 326.) This Court has previously rejected Gonzales's argument (*People v. Moon, supra*, 37 Cal.4th at p. 43; *People v. Smith, supra,* 35 Cal.4th at p. 370) and should do so again here.

6. The Standard Instructions Did Not Violate Gonzales's Equal Protection Rights

Gonzales contends the standard instructions violated his equal protection rights under the Fourteenth Amendment because there are fewer procedural protections for those facing a death sentence than those in a non-capital case, such as written findings for a sentence, aggravating and mitigating factors established by a preponderance of evidence, enhancements established beyond a reasonable doubt, and unanimity on an enhancement. (AOB 327-328.) This Court has previously rejected Gonzales's argument (*People v. Carey* (2007) 41 Cal.4th 109, 136; *People v. Smith, supra,* 40 Cal.4th at p. 527) and should do so again here.

I. Gonzales Is Not Entitled To A New Trial

Gonzales argues he is entitled to a new trial because the trial court committed error in instructing the penalty phase jury. (AOB 328-329.) As the trial court properly instructed the jury, Gonzales is not entitled to a new trial.

XIX.

THE TRIAL COURT PROPERLY DENIED GONZALES'S AUTOMATIC MOTION TO MODIFY THE DEATH SENTENCE

Gonzales contends the trial court erred by denying his automatic motion to modify the penalty verdict thereby violating his Eighth Amendment rights. (AOB 330-331.) The trial court properly considered Gonzales's motion, independently reweighing the evidence of aggravating and mitigating factors and finding that the circumstances of Gonzales's crimes outweighed his mitigation evidence.

Penal Code section 190.4, subdivision (e) provides that in every case in which a jury returns a verdict of death, the defendant is deemed to apply for a modification of such verdict. The judge shall

> review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.

In *People v. Steele, supra,* 27 Cal.4th at 1230, this Court explained the trial court's duty as follows:

> Section 190.4 provides for an automatic motion to modify the death verdict. In ruling on the motion, the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict. The court must state the reasons for its ruling on the record. On appeal, we independently review the trial court's ruling after reviewing the record, but we do not determine the penalty de novo.

(*Id.* at p. 1267.)

Here, after its independent weighing of the aggravating and mitigating factors the trial court found that the jury's determination was appropriate. (103 RT 12959-12965; 12 CT 2812-2814.) The court stated:

> Factor (a) is the circumstances of the crime and the special circumstances charged and found true in this case. The–This case involved and the evidence showed the murder of a four-year-old girl left in the defendant's care. The ongoing, and to my heart and mind, numbing course of torture over a period of weeks which featured beating, tying, binding, burning, scalding, hanging, all done within the sanctity of the home and apparently in the presence of his six children, who are now additional victims of his conduct.
>
> I have been involved in criminal law for over 26 years at this point, and this may be the most aggravated, continued torture of a single victim I have ever seen. The weight of this factor is simply enormous.

(103 RT 12961-12962; 12 CT 2812.)

The court then went through the mitigating factors. It found Gonzales was not a passive or minor participant in the crime. (103 RT 12692-12964.) Under factor (k) the court found it mitigating that Gonzales was a nice, quiet, shy boy who was loved by family and friends, and that his children will be emotionally damaged by his execution. (103 RT 12964-12965.) The court concluded, "But I do not believe that the size and love of his family, even of his children, outweighs the factors relating to the crime itself, the lengthy, extensive, violent, sadistic course of conduct, to justify anything less than the death penalty." (103 RT 12965.) Thus, the court denied Gonzales's motion to modify the verdict. (103 RT 12965.) The trial court properly weighed the aggravating and mitigating factors and determined death was the appropriate penalty. Gonzales's conclusion otherwise is not supported by the record.

Nor is Gonzales's death sentence disproportionate to his individual culpability as Gonzales contends. (AOB 330-331.) Upon request, a capital defendant is entitled to a determination of whether the death penalty is grossly disproportionate to his personal culpability. (*People v. Lenart, supra,* 32 Cal.4th at p. 1130.) To be entitled to relief, the penalty must be "so disproportionate to the crime for which it is inflicted that it shocks the

conscience and offends fundamental notions of human dignity." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1042.) The reviewing court considers the

> circumstances of the offense, including the defendant's 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 defendant's age, prior criminality and mental capabilities.

(*People v. Guerra, supra,* 37 Cal.4th at pp. 1163-1164.)

Here, Gonzales beat, burned, hung and bound a helpless four and a half year-old girl who had been entrusted to his care. His torture included burning Genny's head with hot water, burning her face and body with a blow dryer and curling iron, tying her hands together with rope, handcuffing her, pulling her hair out, hanging her from a hook in a closet and stuffing her in a small wooden box in his closet. These acts of Gonzales's torture resulted in scars, abrasions, bruises and wounds all over the small child's body. After these acts of torture, Gonzales forced Genny into scalding hot water, severely burning her, causing her skin and toenails to peel off her body. Then instead of getting medical help for his helpless victim who was dying a painful death, Gonzales went to the store and bought bread and beer. Given these facts, Gonzales's death sentence in this case is not disproportionate to his personal culpability.

XX.

THERE WAS NO CUMULATIVE ERROR

Gonzales contends reversal is required based on the cumulative effect of the errors that undermined the fundamental fairness of the trial and reliability of the death judgment. (AOB 332-335.) "[A]ny number of 'almost errors,' if not 'errors' cannot constitute error." (*Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.) Moreover, even assuming evidentiary and instructional error, taken individually or together, these errors do not require reversal of Gonzales's conviction. (*People v. Slaughter, supra,* 27 Cal.4th at

p. 1223; *People v. Koontz, supra,* 27 Cal.4th at p. 1094 [guilt phase instructional error did not cumulatively deny defendant a fair trial and due process]; *People v. Cooper, supra,* 53 Cal.3d at p. 830 ["little error to accumulate"].) Gonzales is entitled to a fair trial, but not a perfect trial. (*People v. Stewart, supra,* 33 Cal.4th at p. 522.) Gonzales received a fair trial.

XXI.

CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW

Although he concedes this Court has previously rejected his argument, Gonzales contends California's use of the death penalty as a regular form of punishment violates international law in violation of the Eighth and Fourteenth Amendments. (AOB 336.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Panah, supra*, 35 Cal.4th at p. 500, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ward, supra,* 36 Cal.4th at p. 222; *People v. Elliot, supra*, 37 Cal.4th at p. 488.)

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: January 8, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 86733 words.

Dated: January 8, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. IVAN JOE GONZALES**
Case No. : **S067353**

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 January 15, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 15, 2008, at San Diego, California.

ANNETTE AGUILAR
Declarant

Signature

80196481.wpd