IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WILLIAM ALFRED JONES, JR.,

Defendant and Appellant.

S076721

CAPITAL CASE

Riverside County Superior Court No. RIF73193
The Honorable Robert George Spitzer, Judge

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **WILLIAM ALFRED JONES, JR.,** Defendant and Appellant.	S076721 **CAPITAL CASE**

INTRODUCTION

Jones moved in with his parents after being paroled following two felony convictions for sexual assault on 16 year old Toni P. The first time his parents left him unsupervised to go on vacation Jones admittedly went to the home of his sleeping, 81 year old neighbor, Ruth Eddings, for the purpose of having sex. As Jones later told police, it had been a long time since he had sex and when he had the urge, it did not matter what age the female. When Eddings, who had been a neighbor of and friend to Jones' parents for 20 years, made the mistake of opening her door to him, Jones brutally beat her – fracturing her rib cage in 23 places, completely severing her spine and rendering her paraplegic. Jones, in turn, raped and sodomized Eddings. He also strangled her to death with such force that he broke her hyoid bone and thyroid cartilage.

Jones initially fled the scene in his truck but decided to return to destroy the evidence of his crimes. After three attempts, Jones lit Eddings' home on fire and severely burned over 90 percent of her body. As Jones had done after the sexual assault on his Toni P., Jones also washed his clothes and took a shower before the police arrived. When Jones recounted to the police what he

had done, the only time he cried was for himself because he feared his return to prison and possibly the death chamber.

On appeal, as at trial, Jones does not dispute the fact that he (1) murdered Eddings; (2) sexually assaulted her; and, (3) set fire to Eddings' body and her home. The gravamen of his defense is that he formed the intent to rape and sodomize Eddings after he killed her. Although Jones' testified to that effect at trial, his self-serving statements of after-formed intent were belied by his earlier statements to police. That Eddings was alive during the course of Jones' sexual assault was further corroborated by the coroner's testimony as well as by Jones' history of prior sexual and/or violent assaults on very vulnerable and unsuspecting women. Contrary to Jones' claims, the trial court properly admitted evidence of Jones' prior sexual attack on Toni P. and the coroner's opinion that Eddings was alive during Jones' attack and properly excluded Jones' "mental defense" evidence. Nor is there any error in the penalty phase. The jury was appropriately death-qualified and instructed with the standard penalty phase instructions and the trial court properly admitted victim impact evidence.

STATEMENT OF THE CASE

On February 18, 1997, a Riverside County grand jury filed an indictment charging William Alfred Jones, Jr. with the murder of Ruth Eddings (Pen. Code, § 187, subd. (a)) and with three special circumstances of murder during the commission of rape, sodomy and burglary (Pen. Code, § 190.2, subd. (a)(17)). The information additionally charged Jones with arson of Eddings' home (Pen. Code, § 451, subd. (b)) and alleged two priors "strikes" within the meaning of Penal Code section 667, subdivisions (c)-(e), two prior serious felony convictions within the meaning of Penal Code section 667, subdivision

(a) and a prior prison term within the meaning of Penal Code section 677.5, subdivision (b). (1 CT 2-4).

Following the determination of numerous pretrial motions,[1/] a jury trial commenced on October 29, 1998. (16 CT 4517.) On November 24, 1998, the jury found Jones guilty as charged and found true all special circumstances and sentence enhancement allegations. (18 CT 4863-4872.)

On December 1, 1998, the penalty phase began and the jury returned a verdict of death on December 15, 1998. (18 CT 4979, 5064.)

On February 8, 1999, the court denied Jones' motion pursuant to Penal Code section 190.4, subdivision (e), and declined to modify the verdict and sentenced Jones to death. On that same day, the trial court also sentenced Jones to 25 years to life for arson and five years for the serious felony prior. (19 CT 5149, 5151, 5157-5160.)

This appeal is automatic.

STATEMENT OF THE FACTS

GUILT PHASE

Ruth Eddings was a 4'11", 90 pound, 81 year old woman who lived next door to Jones' parents, Mina and Bill Jones.[2/] Eddings had a friendly relationship with Mina and Bill for almost 20 years, including paying Jones for small jobs around her house when he lived with his parents. (18 RT 1907; 20 RT 2179-2180, 2182-2183; 17 CT 4579, 4612-4613, 4643, 4655.) As Jones

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1. The specific details of the various motions in both the guilt and penalty phase will be fully set forth and detailed in the briefing, as necessary, to determine the issues raised by Jones.

2. For the sake of clarity respondent will refer to Jones' family members who share the last name Jones by their first names.

himself expressly acknowledged, Eddings was a nice person and had been good to him. (17 CT 4580, 4611, 4625, 4685, 4687; 24 RT 2551.) Jones, on the other hand, was a convicted felon and sexual offender standing almost six feet and weighing about 200 pounds. (24 RT 2575; 17 CT 4685.) And, despite Eddings past kindness to Jones, her age and frailty, Jones decided to rape her. (17 CT 4811-4813.)

On June 18, 1996, Jones left work, picked up some beer and returned to his parents' home around 6:00 p.m. (17 CT 4572, 4756, 4761.) Jones had been living with his parents for the past year and a half since he was paroled following his convictions for forcible oral copulation and assault with intent to commit rape against 16 year old Toni P. (20 RT 2178-2179; 24 RT 2575; 17 CT 4619, 4701.) His parents had just left on their first vacation since Jones moved in after being released from prison. (20 RT 2179, 2189.) Jones drank four to six beers, checked the mail, read the newspaper and listened to music. (17 CT 4605, 4615, 4621-4622, 4643, 4660, 4666, 4691, 4698, 4765, 4769, 4772.) At some point Jones decided that he wanted to have sex since he had not had it for years. (17 CT 4809 [Jones explains that he had been out of prison for two years and had not "been with a broad yet."]; see also, 17 CT 4812, 4827; 24 RT 2569.) As Jones later admitted to police, he has urges to force sex on women and he did not distinguish between younger or older women. (17 CT 4807; 18 CT 4860.) Jones considered going out to get a "hooker" that night but instead decided to have sex with Eddings. (24 RT 2559; 17 CT 4812.)

Around 9:00 p.m., long after Jones knew Eddings went to sleep, Jones went to Eddings' home to have sex with her. (20 RT 2192; 23 RT 2504, 2509; 17 CT 4756, 4812.) He went by way of his backyard, jumping over a six foot high chain link fence to get into Eddings' yard. (16 RT 1745; 17 CT 4647-4648.) Eddings was very security conscious, always kept her door locked and would only open it to someone she knew. (20 RT 2192-2193; 17 CT 4803.)

So, when Jones knocked on her door and told her it was "Bill," Eddings opened the door. (17 CT 4806, 4810.) She was in her nightgown. (17 CT 4810.)

Jones admitted to police that he fought with Eddings after she opened the door. He observed that Eddings "surprisingly" put up a good fight. (17 CT 4815.) He bore scratches on his face, arms, hands, abdomen, hips and legs from Eddings. (17 RT 1854; 17 CT 4733, 4750, 4755-4756, 4776-4777, 4810; 7 CT 1864-1867 [Exhs. 73A-M].) And Jones recalled Eddings' bloodied head and face. (17 CT 4720, 4749, 4775, 4797.) Ultimately, however, Eddings lost her fight and Jones raped and sodomized her. Jones admitted he was sexually aroused and he ejaculated. (17 CT 4807, 4811, 4813-4814; 24 RT 2566-2567.) In addition to beating Eddings, Jones admitted strangling her to death. (18 RT 1880; 23 RT 2508; 24 RT 2567.) Jones told police that he did not know why it "seems like it is always women" that he attacks. (17 CT 4807.)

Dr. DiTraglia, a forensic pathologist, and Riverside County coroner, confirmed Eddings was alive when Jones savagely beat, raped, sodomized and strangled her. (18 RT 1915, 1922; 1957-1958; 19 RT 2023-2024, 2026, 2043, 2049, 2060.) Eddings suffered 23 rib fractures involving her entire rib cage–the front, back and both sides. (18 RT 1915.) Dr. DiTraglia was of the opinion that the fractures suffered by Eddings were caused by multiple, significant and severe blows. (18 RT 1972-1974.) The number and placement of the fractures were inconsistent with an 81 year old woman falling down or being tackled by a 200 pound, six foot tall man. (18 RT 1973-1974, 1978-1979.)

Additionally, Jones broke Eddings' spine in half (at level T9) and displaced it. (18 RT 1918-1919.) Dr. DiTraglia explained that the fracture to Eddings' spine severed the spinal cord itself, which is the soft tissue structure that carries nerve impulses from the brain to the periphery of the body. The injury would have made Eddings a paraplegic during the attack and prevented any movement from the level of the T9 downward. (18 RT 1921.) Dr.

DiTraglia noted that the severe spinal fracture and displacement caused by Jones "requires a tremendous amount of force. It is not easy to break and displace someone's spine." (18 RT 1920.) He estimated the force Jones used to cause Eddings' spinal fracture was the equivalent of a fall from six, seven or eight stories, the type of injury seen in motor vehicle versus pedestrian, train versus pedestrian and aircraft accidents. (18 RT 1920.) Dr. DiTraglia rejected the notion that the spinal injury suffered by Eddings could have occurred by Eddings falling from a standing position and hitting the floor. The fact that Eddings was 81 years old and would have more brittle bones than a younger person was considered by Dr. DiTraglia but it did not affect his conclusion that her injury could not have been caused by a fall from a standing position. (18 RT 1920.) He was of the opinion that someone who is 81 years old could not have suffered that type of injury simply by falling, even with a man the size of Jones falling on top of her. (18 RT 1921.)

Jones' strangulation of Eddings was also markedly brutal. Dr. DiTraglia found four fractures in her neck to the hyoid bone and the thyroid cartilage (larynx). (18 RT 1922-1924.) In strangulation cases it is common to have only one fracture but here there were four. (18 RT 1928.) Dr. DiTraglia observed that the number of fractures is indicative of the amount and type of force used and, to a lesser extent, it is an indication of the duration of force. Further, the hyoid is even less likely to be broken because it is very high in the neck and is protected, to some extent, by the jaw. (18 RT 1929-1930.)

Dr. DiTraglia determined that the cause of death of Eddings was strangulation and blunt force trauma. (18 RT 1880.) In order to strangle someone to death, the perpetrator must apply continuous pressure on his victim's throat for a full minute. Dr. DiTraglia estimated a person would lose consciousness within the first 10 to 15 seconds of being strangled. (18 RT 1931-1932.) Dr. DiTraglia also recovered a 4x4 inch piece of cloth from

Eddings' vaginal canal and Jones' semen from her rectum. (18 RT 1910-1911; 24 RT 2566-2567.)

After his attack on Eddings, Jones returned home where he initially "did nothing but sit at home and freak out over what to do." (17 CT 4729.) Jones decided to change his clothes and run. He got in his truck and headed up to Woodcrest. Then, while driving Jones realized Eddings' place would have his fingerprints. He drove back to his house and that's when the lighter fluid idea came to him and Jones decided to burn down Eddings' home to avoid detection. (17 CT 4729, 4731, 4734.) Jones returned to Eddings' home around midnight. (17 CT 4731.) Jones knew Eddings "was alive before the fire" but "she wasn't alive during the fire" because he remembered "checking." (17 CT 4811, 4813; see also 17 CT 4787-4788.)

With lighter fluid in hand, Jones climbed the six foot fence back into Eddings' yard and over the course of hours Jones lit at least three separate fires to try and burn away the evidence against him. (17 CT 4779-4781, 4819.) First, he tried to light Eddings' body on fire and then the inside of her home. (17 CT 4709.) He paced, waiting for the fire to catch. He "figured if it caught fire, then you know, you all wouldn't, you know" blame him for the killing. (17 CT 4732-4733.) When his efforts only produced smoke, Jones retrieved a gas can from his home and poured gasoline inside Eddings' home and used a lighter to light it. (17 CT 4710-4713.) Because the fire did not take, Jones then spread more gasoline. He lit the fire near Eddings because he "figured, ya know, the carpet would light and then . . . the place would burn down." (17 CT 4715, 4718-4719.) After the third attempt, Jones returned home and did not go back to confirm if the fire had started because he was getting too scared to go back again. (17 CT 4715.)

Instead, Jones, who recalled physical evidence being taken from his fingernails following his arrest for sexually assaulting Toni P., took a shower.

(17 CT 4644, 4651-4652, 4715.) That morning he also washed his clothes and a pair of shoes. (17 CT 4651-4652, 4716-4717, 4795.) Around 4:39 in the morning a neighbor pounded on Jones' window and asked him to call 911 because Eddings' home was on fire. (16 RT 1719-1720, 1727-28; 17 CT 4721.)

Riverside Sheriff Deputy Methany discovered Eddings' dead body when he entered her home. Eddings lay face down, with her legs spread eagle and her head facing away from the front door. Over 90 percent of her body was charred from the fire. (16 RT 1716-1717; 22 RT 2398.) Dr. DiTraglia, the coroner, explained Eddings suffered severely burned skin and subcutaneous tissue and in some places on the body there was no skin or subcutaneous tissue remaining. (18 RT 1913.)

Riverside County Detective Eric Spidle spoke to Jones after he observed matches on Eddings' driveway and a gas can in Jones' yard. He also observed a scratch on the side of Jones' face. (16 RT 1744, 1747; 17 RT 1861, 1866-1867.) Jones submitted to several interviews first at his home, accompanied by his brother Donald, and then two interviews at the station following his repeated waiver of his *Miranda*[3] rights. During the interviews, Jones was offered food, allowed to drink and was given cigarettes. (See e.g. 17 RT 46.) The interviews, while probing, were essentially calm and respectful toward Jones. (17 CT 4759, 4793; Exhs. 13j-10j.)

Initially, in an attempt to continue to avoid detection, Jones lied and denied any responsibility for what happened to Eddings. (23 RT 2505; 24 RT 2548, 2550-2551, 2553, 2557, 2559-2560, 17 CT 4578-4696.) In the face of the mounting evidence he lit the fire Jones eventually admitted burning Eddings' home but denied killing her. He claimed he found her dead body and

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

decided to light the fire because he assumed he would be a suspect since he was on parole for his sexual assault against Toni P. (17 CT 4685, 4696-4697, 4730-4733, 4764, 4774-4784.) Eventually, Jones admitted that he had gone to Eddings' home for sex, fought with and forced himself upon her and strangled her to death. He also admitted setting fire to her home to destroy the evidence. (17 CT 4807, 4811, 4813-4814; 18 RT 1880; 23 RT 2508; 24 RT 2566-2567.) He continually maintained that he was not drunk at the time and only consumed between four and six beers over the course of five hours. (17 CT 4605, 4615, 4621-4622, 4643, 4660, 4666, 4691, 4698, 4765, 4769, 4772.) Throughout the interview Jones expressed dismay for his predicament, how he knew was going to prison and possibly the death chamber because of special circumstances, and he wept for himself. (See e.g. 17 CT 4759 ["My life sucks."], 17 CT 4819 ["Why me?"], and 17 CT 4701 ["Why did you leave mom and dad? Why did you leave me?"]; see also, 17 CT 4619, 4693-4694, 4701, 4722, 4758, 4764, 4806, 4808; Exh. Tape 14 J [Jones becoming weepy].)

In 1990, when Jones was left alone for the first time with his sister's 16 year old niece, Toni P., he sexually assaulted her. While Toni P. cried, Jones forced her down to the floor, removed her clothes, took off his pants, forced her to orally copulate him and then attempted vaginal intercourse. (17 RT 1821-1823, 1845-1847; 21 RT 2359, 2362-2364.) Toni P. did not detect any alcohol on Jones. (17 RT 1847.) Afterward, Jones directed Toni P. to the bathroom and gave her a damp wash cloth to wash, told Toni P. not to say anything and left. (17 RT 1823-1824.) Toni P. contacted the police. (17 RT 1824.)

By the time the police arrived at Jones' home following Toni P.'s report, he had showered and washed his clothes. (24 RT 2558.) Also, without being told why the police were present, Jones volunteered: "I didn't touch the little girl. I want to turn myself in and clear this up." (25 RT 2671.) Following his arrest and waiver of *Miranda* rights, Jones told the arresting officer that he had

been partying pretty hard the night before and had felt pretty wasted so he stopped at his sister's house to sleep instead of driving all the way home. (25 RT 2674.) When asked whether he had sex recently Jones admitted he had but claimed that between 4:00 and 5:00 a.m. he had picked up a "hooker" for "head" (i.e. oral copulation). (24 RT 2558, 2561; 25 RT 2674-2675.) When the officer asked Jones why the police would seize a wash cloth as evidence Jones said he had had one on his head for a cold compress. A few moments later Jones blurted out, "There was come on my shirt." (25 RT 2675.) He explained the "hooker" left ejaculate on his shirt but "that's not going to do you any good" since "[i]t's already been washed." (24 RT 2562; 25 RT 2675-2676.) A physical examination of Jones' penis showed a fresh abrasion on one side of the tip from something sharp and consistent with teeth marks. (25 RT 2678.) While taking swab for vaginal fluids from his penis Jones motioned with his finger that he touched the vagina of the hooker and when the deputy asked how that related to his penis he said, "Oh yeah, I guess you're right." (25 RT 2679-2680.)

During Jones' trial on the Toni P. incident a court clerk overheard Jones tell his brother Donald that it looked pretty good and that he would beat this one too. (25 RT 2702-2704.) In 1991, Jones was convicted of forcible oral copulation and assault with intent to commit rape for the sexual assault on his niece, Toni P. (24 RT 2575.)

Before Jones attacked Toni P., when he was 18, he attempted to rape Barbara Cady, a next door neighbor and mother of a girlfriend. (18 CT 4859; 24 RT 2564; 26 RT 2856.) At 15, Jones stabbed high school teacher Norma Knight in the back. (24 RT 2563, 2569.)

Defense

Jones did not deny killing or sexually assaulting Eddings or the arson. His defense was that he did not premeditate and deliberate or intent to rape when he killed Eddings and formed the intent to rape and sodomize her body post mortem. In support of his defense, Jones testified at trial and claimed for the first time that he had consumed 12 beers and was not sober before going to Eddings' home around 9:00 p.m. (23 RT 2501-2504.) Although it was not his responsibility, and his mother said he had never checked on Eddings in the past (20 RT 2189-2190), Jones said that he went to check on Eddings to make sure "she was not hurt, or anything." He went over to her home even though he knew she went to bed early and might be in bed. (23 RT 2503.) Jones said after Eddings let him in, "she went off on" him, swinging at him and knocking a beer from his hand. "It got out of hand and I killed her." (23 RT 2502-2503.) Jones, who admittedly disrobed Eddings, maintained she was not breathing when he decided to "stick" his "penis down there." (24 RT 2576, 2586, 2604.)

Jones's explanations for his statements to the police that he was not drunk when he decided to go over to Eddings for the purpose of having sex and that he did not know why he had these urges to force women to have sex were varied. On the one hand Jones said he lied about his level of intoxication, the killing and arson because he was trying to avoid going back to jail. On the other hand he claimed he admitted he went to Eddings for the purpose of sex and admitted he had a problem with sexual urges because he was tired and scared and thought that it was what the detective wanted to hear. (23 RT 2505, 2588.)

In support of his defense that he raped and sodomized Eddings post mortem Jones presented the testimony of Dr. Barry Silverman, a pathologist. Dr. Silverman concurred Eddings died by blunt force trauma and strangulation. (22 RT 2283-2285.) Although Jones never testified or stated to the police that

he tackled Eddings, Dr. Silverman was of the opinion Eddings' rib and spinal injuries were more consistent with suffering a single "tackling blow" by Jones rather than by a beating. (22 RT 2293, 2480-2481.) He was also of the opinion Jones sexually assaulted Eddings post mortem because the lack of visible trauma to her vagina, labia and rectum. He did not think the thermal injury caused to over 90 percent of Eddings' body would have affected evidence of trauma. (22 RT 2305-2313, 2315.) Dr. Silverman did not believe the several studies relied upon by Dr. Traglia indicating between only ten and thirty percent of women in cases of rape sustain genital injuries were probative of the issue of whether Eddings would have sustained injury based on his assumption that rape murders are more brutal and Eddings' age and physical condition made her bones very fragile and skin paper thin. (22 RT 2339-2373; 23 RT 2374-2417, 2419-2420.)

PENALTY PHASE

Jones' Long History Of Violent And/Or Sexual Offenses

Jones had a life long history of violent sexual offenses against females of all ages and at no time did he have regard for the consequences of his actions except as it pertained to himself.

Unprovoked Stabbing Of High School Teacher Norma Knight

In 1972, when Jones was 15 years old he stabbed Norma Knight, a high school teacher, in the back. (29 RT 3066.) Knight had taught at the high school for nine or ten years and was head of the home economics department at the time of Jones' unprovoked attack. (29 RT 3054-3057.) Knight was in her classroom alone when Jones, who had not been one of her students, approached her desk and asked her the time. He continued to approach her

desk after she directed him to the clock and the next thing she knew Jones plunged a knife into her back and left her classroom. (29 RT 3058.)

Knight did not testify personally about the stabbing. One of Knight's four children, her son Tracy Knight, testified because his mother has been under psychiatric care for "quite some time." Knight had a mental breakdown while driving to school following the stabbing, was institutionalized for a couple of weeks and has been under psychiatric care ever since. (29 RT 3062-3063.) She never returned to work. (29 RT 3060-3069.)

Thomas Lindley, the vice-principal at Knight's former school, testified that when Knight returned to work she appeared "very frightened, very nervous, extremely apprehensive, just in the context of her daily business." She had not previously exhibited these traits. (29 RT 3068.) In contrast, Jones was able to laugh about his attack on Knight when he described it years later to one of his girlfriends. (30 RT 3100.)

Immediately after the stabbing, Jones was charged with the stabbing as a juvenile. He was treated at a mental health facility for two years until his repeated escapes resulted in his placement in juvenile hall. Jones stayed in juvenile hall until he was released from custody at the age 18. (32 RT 3532-3533, 3555-3556.)

Attempted Rape Of Neighbor Barbara Cady

In 1975, at 18 years old, Jones attempted to rape Barbara Cady, a neighbor for the past 13 years and the mother of a girlfriend. (26 RT 2856; 29 RT 3073; 32 RT 3532-3535; 18 CT 4859.) Cady testified at the penalty phase that she awoke one night to find Jones sitting on her chest with his hands around her throat trying to strangle her. She struggled to breathe and managed to say, "Billy." Jones stopped, started to cry and walked out of her bedroom. Cady did not detect any alcohol odors from Jones. (29 RT 3073-3075.) Jones

went into the living room and said he was on something and needed help. By the time Cady got dressed and went into the living room Jones had gone. (29 RT 3075-3076.) When Cady returned to her bedroom she noticed a knife laying on her pillow. (29 RT 3076.) Jones committed himself to Patton Hospital for three days and then checked himself out. (32 RT 3535.)

Physical Abuse Of Long Term Girlfriend Terry Garrison

In 1975, at 19 years old, Jones moved to St. Louis, where he lived on and off for 20 years. (32 RT 3536.) Jones began a long term relationship with Terry Garrison that lasted from 1975 through 1979. Garrison had two girls who were three years old and eight months when she started dating Jones and she and Jones had three children together. (30 RT 3089-3091, 3106, 3243.) Garrison testified Jones began abusing her in 1977. (30 RT 3092.) He started out pushing before escalated to punching, kicking, and eventually hitting her in the head with the blunt end of an axe. Garrison recalled Jones was drunk when he used the axe but Jones' abuse did not always occur after he had been drinking. All he needed to abuse her was to have a bad day. (30 RT 3092-3093, 3103.) For example, when Garrison was five months pregnant with their second child, William Jones, Jr., Jones came home in a "one of his moods." He was not high or drunk. Garrison did not know what it was that had made him mad. Jones first shoved Garrison face first into a wall. When Garrison went to the bathroom to wipe off her mouth Jones shoved her into the bathtub and caused premature labor. Garrison delivered the baby in the end of February although the baby was not due until the beginning of May. The baby remained in the hospital until March. (30 RT 3094-3095.) She was hospitalized another time because Jones "busted her head, busted her eye and injured [her] ribs." Garrison further testified Jones tried to choke her one time while complaining "why didn't [she] understand that he loved [her]." (30 RT 3095-3096.) Jones

threatened to kill Garrison if she ever left him but she finally did in 1979. (30 RT 3095-3096.) Garrison delivered their third child, a daughter, after she and Jones separated. (30 RT 3100-3103.)

Thereafter, Garrison also learned that Jones had raped her oldest daughter Angela. (30 RT 3096.) When Garrison initially confronted Jones with the fact that the Department of Family Services suspected him sexual abuse of Angela, Jones asked whether she thought he could do such a thing. When Garrison told him yes, he just laughed. (30 RT 3111.)

Rape And Molest Of Angela C.

Garrison's daughter, Angela C., also testified at the penalty phase. (30 RT 3238.) Jones started to molest Angela sometime before kindergarten. She recalled the first time Jones was laying on the couch. He placed her on top of his groin and started rotating his hips. When she started to cry he told her not to be a baby, that he knew her dad taught her how to do that, and he wanted her to take off her pants. Angela cried for her mother and Jones called her at work and told her to come home. Garrison came home from work angry and when Angela told her Jones had wanted her to take off her pants Garrison slapped Angela. Jones and Garrison then got into a fight. (30 RT 3239.) Around the same time, Jones would also punished both Angela and her younger sister by ordering them to disrobe, lay face down spread eagle and not to look behind them while he sat behind them. (30 RT 3240.)

Jones raped Angela when she was six or seven. Jones ordered her to take off her nightgown and had intercourse with her. Angela screamed and Jones told her it was because she was so curious. By "curious" Angela understood Jones to be referring to a night when Angela had heard noises coming from her mother's room and believed Jones was hurting her mother so

she went to check. He and Garrison were having sex and Jones made her remain in the room until they were done. (30 RT 3241-3242.)

Angela also confirmed Jones' hit Garrison. They both fought, screamed and drank a lot. In 1981, all of the children were removed from Garrison's custody and all three of Jones' children were thereafter adopted. (30 RT 3240, 3244-3245.)

Rape And Beating Of Elsie S.

Elsie S. was 21 when she met Jones around 1982 in St. Louis. They had an even more abusive on and off again relationship than he and Garrison. It started with an invitation by Jones to go for a ride. Jones became sexually aggressive once they parked but eventually stopped after her repeated requests. However, two months later Jones again asked Elsie to go for a ride. She said yes and this time Jones raped her. Nevertheless, Elsie continued to see Jones because, as she said, she felt that some affection was better than none. Although their sexual relationship from that point was mostly consensual there were at least five or six times Jones forced her to have sex unwillingly. (30 RT 3124, 3126-3128, 3133, 3143, 3135.)

Regarding her involuntary sexual experiences with Jones, Elsie said Jones had tied her up, held knives to her throat and put his hands around her throat while they engaged in sexual relations. Sometimes Jones penetrated her with foreign objects against her will. One time Jones choked her with a pair of underwear during sex until she became dizzy. She told him she could not breath, he stopped and told her to take a pill. She passed out and when she awoke, Jones was gone. These assaults did not always involve alcohol. (30 RT 3128-3130.)

Elsie did call the police during one incident where Jones punched her in the eye, ran a knife down her chest and threatened to cut her up beyond

recognition. She recalled that Jones always carried a knife. (30 RT 3129, 3132.) When Officer Anderson arrested Jones he found a pocket knife with a three inch blade. He also observed an abrasion on Elsie. (30 RT 3170-3175.)

Elsie stopped seeing Jones in 1988, shortly after she was in a fight with another of Jones' on and off again girlfriends, Tina Perfator Kidwell.[4/] Kidwell cut Elsie in the face with a box cutter because Elsie accused her seeing Jones at the time and she was not. (30 RT 3138-3141, 3168-3169, 3189.)

Physical Assault Of Tina Kidwell

Tina Kidwell was 18 when she started dating Jones. She dated him on and off between 1980 and 1982. (30 RT 3181-3182, 3191.) During their relationship Jones hit her with closed fists about five times. He also shoved her out of her home with a threat to "beat her ass," and threw food and her across a room and turned over a table because she cooked chicken improperly. (30 RT 3182-3184, 3208-3209.) One time at a Christmas party Jones put his fist threw a window, breaking it. (30 RT 3185.) Kidwell recalled that Jones could be violent when drinking or by simply having a bad day. He verbally threatened Kidwell as well. (30 RT 3188-3189.)

Rape Of Cathy D.

Cathy D. knew Jones while he lived in St. Louis in 1983. He was good friends with her boyfriend Harvey Temple but she had only socialized with him twice. She testified that one night when she and Temple had gone out with Jones and another woman the four ended up at Jones' place. At some point the other woman left and Jones, unbeknownst to Cathy, had arranged for Temple

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4. By the time of trial Tina Perfator had married and assumed her husband's last name. (30 RT 3138, 3180.)

to be called away so he could be alone with her. When Jones told Cathy what he had done, she said no so he grabbed her and pulled her into his bedroom. Cathy struggled to get away but Jones threw her onto his bed. He held her arms down with one hand, while he undid her pants and jerked them down with the other. Cathy screamed and cried for Jones to stop but he raped her. He also told her to told her to shut up, which she did out of fear. After Jones was done with intercourse he said words to the effect, "that was good for me, was it for you?" (30 RT 3213-3220, 3222.) Jones had been drinking at the time. (30 RT 3232.)

Attempted Rape Of 65 Year Old Frances Stuckinschneider

Also in 1983, while Jones was still living in St. Louis, he also attempted to rape 65 year old Frances Stuckinschneider. Stuckinschneider had been a friend of one of his uncle's and his uncle did odd jobs for her. (30 RT 3261-3264; 18 CT 5009.) Her granddaughter, Sherry Melson, testified about Jones' attempted rape because she had been nearby and Stuckinschneider died sometime after her 75th birthday. (30 RT 3260-3261.) Melson lived in the same building as her grandmother and shared a common entry at the time of Jones' attack. That day she heard someone enter Stuckinschneider's residence while she was in her own. (30 RT 3261.) Ten to fifteen minutes later Melson heard a loud boom, boom, boom, like someone falling or running downstairs. When she looked outside her door she caught sight of a male figure leaving. Melson went upstairs to check on Stuckinschneider and her grandmother said, "Willy tried to rape me." She was nervous, crying, angry and disheveled. Melson also noticed that the top button of her top was undone, which was not usual. (30 RT 3264-3265.) Stuckinschneider explained to Melson that Jones had said he needed a glass of water, went into the kitchen and returned with a knife drawn. Jones told her that he "was going to fuck her." He grabbed

Stuckinschneider's breast and groped her between the legs. Stuckinschneider managed to back Jones out of her apartment with warnings that her family would be home soon and he fled. (30 RT 3266-3267; 31 RT 3305-3307.) Melson's husband, Michael Melson, went to the home of Jones' uncle that evening to confront Jones but the family denied Jones was home. Jones' aunt called his mother and told her that Jones had made sexual advances at Stuckinschneider (32 RT 3553-3554) and Jones returned to California (30 RT 3267-3268; 31 RT 3289-3293).

Impact Of Eddings' Brutal Murder And Rape On Her Family

Eddings' daughter Helen Harrington, two of her nieces and a great niece all testified that Eddings was an attentive and loving person who stayed close with her family and extended family and that they were deeply affected by her loss.

Helen was one of Eddings' two daughters. She explained that Eddings was her everything growing up. She loved to garden, cook, bake, and do little things for her family and neighbors. (31 RT 3338.) Eddings remained generous as she aged, even sharing her own social security benefits. (31 RT 3352.) Mother and daughter remained close up until the time of Eddings' death. Harrington visited her mother frequently. (31 RT 3353.) Eddings was also very attentive to her grandchildren and great grandchildren. (31 RT 3340.) Harrington went over assorted family photos depicting Eddings happily spending time with her immediate and extended family. (31 RT 3341-3351.)

The morning of Eddings' murder, Harrington recalled getting a call from another neighbor that her mother was dead and that there had been a fire. (31 RT 3354.) Harrington had wondered why the Joneses had not called since they lived directly next door to her mother. (31 RT 3355.) Eddings' death made her go into a deep depression and she was prescribed Prozac. She also had trouble

sleeping because she suffered a recurring dream. She testified: "And I'm sure nothing like this even happened, but just in my dream I saw her running, screaming, 'Help me Jean. Help me, Jean.'" She would wake up from it crying and in a sweat. (31 RT 3355-3356.) Harrington missed her mother so much she had imaginary phone conversations with her. She dialed her mother's phone for over a year after Eddings died. (31 RT 3356-3357.)

Eddings' niece, Donna Velasquez, also testified that Eddings had become a surrogate mother to her and she was devastated to learn of Eddings' death. (31 RT 3314, 3316-3317.) Velasquez had grown up spending a lot of time with Eddings, particulary after her own mother had died when Velasquez was 16. (31 RT 3314-3315.) Velasquez's parents were poor and Eddings was always so generous with them and their family. She brought them food and clothing. (31 RT 3315.) Velasquez still thought of Eddings a lot, on birthdays, Christmas or no occasion at all. (31 RT 3317.) Velasquez also made a collage of photos her cousins retrieved from Eddings' burned out home, "burned edges and all." (31 RT 3324.) She carries on a soothing practice that Eddings did with her, Velasquez rubs her grandchildren's earlobes while they sit in her lap. (31 RT 3314.) However, she also does not go out as much since Eddings murder because she worries it could happen to her. (31 RT 3324-3325.)

Ernestine Pierson, another one of Edding's nieces, also testified. She visited Eddings about every two weeks and sometimes more often. (31 RT 3334.) Pierson noted that Eddings was "very loving, considerate, most any of the adverbs you could give." (31 RT 3326.) Eddings also loved to bake and Pierson couldn't leave her home without a piece of pie. (31 RT 3327.) Pierson recalled when she visited Eddings in the hospital during Eddings' hip replacement the staff "loved her." (31 RT 3328.) When Pierson heard of the murder she immediately drove over. She felt empty when she saw the burnt out home. (31 RT 3329.) Pierson thinks about the way Eddings died constantly.

She finds it very difficult to sleep imagining what Eddings went through. Both Pierson and her husband were close to Eddings, cried over her loss and still miss and feel the pain of her loss. (31 RT 3330-3332.)

Lastly, Shirely Grimmet, one of Eddings' great nieces, testified. She decribed Eddings as a "very, very sweet lady. She was independent. She was funny. And she was always there if you needed her." (31 RT 3367.) Grimmet usually spoke with Eddings daily and Eddings was always very interested in her family. (31 RT 3368.) Now Grimmet's son, Eddings' grandson, Larry, has trouble sleeping as a result of Eddings' murder. He suffers anger and misses Eddings deeply. (31 RT 3368-3370.) Grimmet's other son Steve is angry over the murder of Eddings and refuses to talk about it. Additionally, Grimmet's daughter, Karen, and her husband had trouble making love for a month after the murder because they "thought of all the torment and everything that [Eddings] had gone through" as a result of Jones' rape. As of trial, Karen still could not drive by Eddings' former home without falling apart. Also, Eddings' former home is now an empty lot and it does not look like she ever lived there. (31 RT 3370-3371.) Grimmet herself thinks about how Eddings must have felt whenever she hears or sees anything about a girl or woman being raped. (31 RT 3374.)

Jones' Mitigation Evidence

Jones' mitigation evidence consisted of attempting to discredit the claims of previous sexual assaults, including his convictions for sexually assaulting Toni P.; showing that Jones' father had been physically abusive to Jones and his brothers; and establishing that Jones' had a personality disorder and his behavior changed when he drank or was under the influence.

Other Crimes Evidence

Defense counsel's first witness was Wesly Daw, an investigator for the district attorney's office in this case. Six months before Stuckinschneider died Daws briefly interviewed her about Jones' attack while they sat in her car. Stuckinschneider said Jones grabbed her leg and "got fresh." She denied he touched her "private parts." (30 RT 3281-3285, 3384-3385; 31 RT 3387; 18 CT 5008.) But Sherry Melson testified that within six months of her death Stuckinschneider was on medication that sometimes made her feel confused. (30 RT 3280-3281.) Stuckinschneider also did not like to talk about Jones' sexual assault and did not even mention that she had been interviewed about it in connection with this case. (30 RT 3279.)

The defense also called defense investigator Danny Davis. He interviewed Garrison, Kidwell and Cathy D. Davis testified Garrison said that she and Jones regularly drank alcohol and smoked marijuana and that the majority of their physical confrontations occurred while they were under the influence. Garrison also told him Jones regularly beat her. Davis also said that Garrison told him that Jones had been a good to their kids, although at trial Garrison denied making any such statement. (31 RT 3409-3420, 3447-3449.) Kidwell confirmed Jones became extremely physically abusive toward her. She said that Jones' physical abuse normally occurred while Jones drunk and expressed surprise that Jones actually murdered someone. Davis also testified that Kidwell said Jones was a good father. (31 RT 3409-3425.) Cathy D. told Davis that Jones was a nice guy when he was sober and short-tempered and violent when drinking or using drugs. She also characterized the incident between them as Jones becoming sexually aggressive with her. (31 RT 3429-3433.) Davis acknowledged on cross-examination that a woman could be uncomfortable discussing rape with a man she did not know. (31 RT 3436.)

Evidence Related To Claim Of Troubled Childhood And Mental Problems

Jones' sister, two brothers and mother testified regarding Jones' claim of a troubled childhood. Jones' sister, Sandra Seneff, explained that she is older than Jones by two years and that Jones is one of four boys. Both parents worked; Mina worked at night and Bill worked in the day. Seneff noted that her father drank excessively and had used hands, belt, "whatever" to physically abuse the boys. She couldn't describe that abuse as frequent but considered it "severe." Seneff never saw marks on Jones as a result of a beating. She did see marks on her other brother Donald. Their mother was not around when the beatings occurred. (32 RT 3463-3469, 3478.) Seneff heard about Jones stabbing Knight did not discuss it or Jones subsequent hospitalization with his family. (32 RT 3468, 3486.)

After the Knight stabbing Seneff did not have much contact with Jones. She moved out of her parents' home when she was 18. He had contact with her children once (they were 12 and 14 by the time of trial) and came to her home three times. The last time Jones came by was when he sexually assaulted her husband's niece, Toni P. Although Seneff expressed disbelief about Toni P.'s sexual allegations in her testimony during Jones' penalty phase she never did so when she testified at the trial on the Toni P. related charges. She never saw Jones after he got out of prison for his Toni P. offenses. Seneff also told her mother that she did not want Jones near her children. (32 RT 3473-3478, 3482.)

Donald Jones, Jones' younger brother by two years, was the closest to Jones. He corroborated Seneff's story of physical abuse by their father and was of the opinion Jones suffered most of the beatings. Donald could not say what impact the abuse had on him personally but he had not committed a crime or been in prison. (32 RT 3484-3491.) He was married and had a daughter.

Donald confirmed that he would not leave either his wife or daughter alone with Jones. (32 RT 3499-3500.) He knew Jones to be violent with women and men and was aware of Jones' attack on their niece Toni P., schoolteacher Knight and their neighbor Cady but not the others. (32 RT 3496-3497.) Donald saw Jones the morning before Jones sexually assaulted Toni P. Jones had looked like he had been drinking and doing drugs. After Donald left Jones alone with Toni P. to go to a job interview he turned around and belatedly went back home out of concern for what Jones might do. (32 RT 3494-3495.) Jones denied sexually assaulting Toni P. and claimed he had been with a hooker the night before. (32 RT 3501-3502.)

Donald also saw Jones the morning of Eddings' murder. When he saw Jones he knew just by looking at him that Jones was responsible for the murder even though Jones lied and denied it. Jones continued to lie when initially in jail. He called Donald and denied responsibility. (32 RT 3495-3496.) As he had done with Toni P. Jones also claimed that he had been with a hooker the night before. (32 RT 3502.)

Another brother, Richard Jones, also testified. He was one year older than Jones. (32 RT 3503-3504, 3510.) He testified that their father Bill drank to intoxication usually on Fridays and Saturdays. He was physical with Richard a few times and with Jones "quite a few times." Richard recalled one time when Bill beat him with a belt on bare skin until he bled. Richard still has scars. (32 RT 3506-3507.) Richard described Jones as hyperactive and that he aggravated his father "on occasions." (32 RT 3508.) Richard was 17 when Jones stabbed Knight. He did not visit Jones in the hospital and was on active duty in the military before Jones was released. Richard estimated he saw Jones three times between 1974 and 1992. Once he was out of the service in 1992 he saw Jones twice but visited his parents every couple of months. He did not see his father drinking anymore. (32 RT 3508-3511, 3513-3514.) Richard

acknowledged that he never tried to stab a teacher or tried to rape a girlfriend's mother. (32 RT 3513.) Richard was in fact a correctional officer at Calipatria State Prison at the time of trial. (32 RT 3503, 3516.)

Jones' mother Mina testified that she learned of the beatings by her husband Bill from Seneff. She told Bill to stop and did not hear of any other incidents except for the beating of Richard (32 RT 3524-3525.) She believed Bill usually drank heavily on the weekends but was not aware of him drinking on weekdays. She considered Bill to be an attentive father with babies and less so as the kids got older. He nevertheless helped raise the family and they went on family trips such as camping several times a year. (32 RT 3527-3529.)

Regarding Jones, Mina described him as hyperactive by the time he started kindergarten but not violent. He had been an average "C" student. They had no cause to be worried about Jones until he stabbed Knight. At that point doctors advised Mina he could be dangerous to young girls and women. (32 RT 3530-3531, 3544, 3555.) Mina admitted that the family had a rule prohibiting Jones from being left alone with the children of the family. The rule was to protect the children and to keep Jones out of prison. (32 RT 3554-3555.)

Dr. Kania, a forensic psychologist, evaluated Jones for mental problems. He found Jones had an I.Q. of 85 or slightly below average intelligence but did not evidence any organic brain damage or gross motor impairment. He found there was no area where Jones exhibited either great strength or great difficulties. (32 RT 3564-3575.) Dr. Kania, however, diagnosed Jones with "a severe personality disorder with paranoid and dependent features and that also present is (sic) an alcohol abuse or dependence problem that has been episodic." Although the doctor recognized that Jones did not always drink heavily he found alcohol "seemed to be a significant factor in the impairment that he suffers from." (32 RT 3584.) He concluded Jones lacks controls on his

behavior and it is exacerbated by use of alcohol. (32 RT 3591.) Dr. Kania was of the opinion Jones was under the influence of alcohol when he attacked Eddings based on Jones' statements he drank 15 beers. (32 RT 3565, 3645, 3594.) He also testified that Jones expressed remorse toward the end of their 30 hours of interview. (32 RT 3565, 3597.) Dr. Kania was also of the opinion that Jones would function better in a prison setting because he would be away from conflicted relationships, away from women and clear requirements and because he did fine in his prior incarceration. He also thought Jones was not a hardened person who did not care about the effect of his behavior on other people. (32 RT 3599-3600, 3607.)

On cross-examination, Dr. Kania admitted that he did not look at the evidence of other crimes with the exception of Daw's interview of Stuckinschneider and that he relied on Jones' versions of his prior relationships. Jones did not describe any violence on his part in his past relationships. Regarding Garrison he said he tried to leave her and finally did when she abandoned her children (three of which were his). Jones called Elsie S. "retarded" and said she accused him of things he did not do. (32 RT 3611-3613.) Also, Dr. Kania only reviewed the transcript of Jones' last interview as opposed to all of the interviews. He accepted Jones' version that Eddings attacked him and that he went into a rage. Jones never admited to Dr. Kania that he choked Eddings. (32 RT 3640, 3651-3655.) Dr. Kania admitted that a diagnosis is only as good as the information provided. (32 RT 3631.) Additionally, Dr. Kania confirmed that there was no evidence Jones had a psychiatric disorder and at no time was Jones requested or transferred to a mental hospital during the pendency of this case. (32 RT 3617, 3620.)

Prior Prison Adjustment

Jones offered evidence of his good behavior during his prior prison adjustment to show he would be a good prisoner if given life without the possibility of parole. (33 RT 3684-3688.)

ARGUMENT

GUILT PHASE

I.

THE TRIAL COURT DID NOT ERROR REGARDING OTHER CRIMES EVIDENCE

Jones contends the trial court prejudicially erred by admitting evidence of his prior sexual assault on Toni P. under Evidence Code sections 1101, subdivision (b) and 352 to prove Jones' intent when he entered Eddings' home. He asserts the trial court compounded the error by instructing the jury that, for purposes of assessing his intent or state of mind under the other crimes evidence instructions, the jury could consider not only evidence of the Toni P. sexual assault but also evidence of his attacks on Barbara C. and Norma Knight.[5/] (AOB 48-79.)

The trial court properly admitted evidence of Jones' sexual assault on Toni P. under Evidence Code sections 1101, subdivision (b) and 352 to prove Jones' intent to commit rape and sodomy when entering Eddings's home. In any event, there is no prejudice because the evidence was also admissible under

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5. Jones argues the same instructional error in connection with his rape of Cathy D. (AOB 70.) Although the trial court ruled the prosecutor could cross-examine Jones regarding his rape of Cathy D. for impeachment purposes there was no evidence introduced about this criminal behavior. (24 RT 2535.)

Evidence Code section 1108, governing propensity evidence to show Jones disposition to commit sex offenses, and as impeachment once Jones took the stand. As for the other crimes instructions Jones claims permitted the jury to consider his attacks on Barbara C. and Knight on the issue of intent as well as credibility, Jones waived any claim of error. Moreover, the other crimes instruction only inured to Jones' benefit by placing greater restrictions on the consideration of this evidence that what was permissible under the law. Finally, any error concerning other crimes evidence is also harmless given the evidence related to Jones' intent to sexually assault Eddings. Jones' intent was amply established by his own admissions that he intended to sexually assault Eddings, and that consistent with those admissions, the evidence showed that he had raped and sodomized Eddings.

A. The Trial Court's Admission Of And Instructions On Jones' Other Bad Acts

Jones was charged with first degree murder with special circumstance allegations of murder committed during the commission of burglary, rape sodomy. (1 CT 2-4.) The prosecution proceeded on alternate theories of liability with respect to the murder charge: (1) the murder was premeditated and deliberate; and (2) the murder was committed during the course of a burglary in which Jones entered Eddings' home with the specific intent to commit rape or sodomy. (26 RT 2782-2783.) Thus, the murder charge and special allegations required proof of, among other things, an intent to kill, commit burglary, commit rape and sodomy. (Pen. Code, §§ 187, 189, 190.2, subd. (a)(17)(A).)

The prosecutor moved to introduce evidence of Jones' sexual assault on Toni P. under Evidence Code section 1101, subdivision (b), allowing evidence of prior bad acts to show intent or common scheme or plan, and Evidence Code

section 1108, allowing evidence of prior sexual offenses to show a propensity to commit such offenses. The prosecutor asserted the evidence was relevant in this case to prove Jones' common scheme, plan or intent to commit burglary, rape and sodomy since both offenses involved a violent sexual assault against a female Jones' knew. The prosecutor also noted the reliability of proof that the Toni P. sexual assault occurred given that Jones had been convicted of the offenses committed against Toni P. (8 RT 578-579, 584-585, 597; 3 CT 665-669, 876-877.)

Defense counsel objected. Defense counsel argued that there were insufficient common denominators to rise to the level of a common scheme within the meaning of Evidence Code section 1101, subdivision (b), and lack of a sufficient similarity to support any inference that Jones' probably harbored the same intent when he attacked Eddings as when he attacked Toni P. He observed Jones' sex acts were different, as were the ages of the victims and Jones was never accused of murder, arson or burglary in connection with the Toni P. offenses. Defense counsel also asserted such evidence of intent would relieve the prosecution of their burden to prove specific intent. Alternatively, defense counsel argued evidence of the Toni P. offenses were inadmissible because it was unduly prejudicial within the meaning of Evidence Code section 352 because it was overly prejudicial and likely to inflame the jury. (4 CT 944-946, 953; 8 RT 586-587, 599-601.) Regarding Evidence Code section 1108, defense counsel noted that the issue of its constitutionality was pending review before this Court in *People v. Falsetta* (1999) 21 Cal.4th 903[6/] and objected based on lack of timely notice. (4 CT 942-943, fn. 4; 8 RT 587, 589.)

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6. Subsequent to Jones' trial, this Court upheld the constitutionality of Evidence Code section 1108 in *Falsetta*. (*People v. Falsetta, supra*, 21 Cal.4th at pp 907-908, 910-922.)

The trial court found evidence of the Toni P. offenses admissible under Evidence Code section 1101, subdivision (b), as evidence tending to show Jones' intent or state of mind in entering Eddings' home, which was relevant to the burglary special circumstance. (8 RT 603.) The trial court observed the Eddings and Toni P. offenses both involved sexual assaults accomplished within a short period of time of access to the victim. In particular, the trial court found the rapidity with which Jones acted to accomplish his sexual assault once alone with Eddings and Toni P. were corroborative of his intent to sexually assault Jones while alive. Further, the trial court indicated it would limit the purpose for which the jury could consider the evidence of Toni P. to the issue of intent. (8 RT 604-605.) The trial court also identified another basis for relevance depending on how the defense wished to proceed, namely, "on the issues relating to the reliability of Jones' admissions or statements made to Detective Spidle." (8 RT 595)

In considering the prejudicial value, the trial court noted "it is hard for the Court to view in light of all the circumstances in this case how the jury would arrive at an erroneous, emotionally laden conclusion because of the introduction of this evidence." (8 RT 605.) The trial court stated:

> With regard to the evidence that would be presented before [Toni P.] testifies, as I understand it, the People are going to have to introduce evidence concerning the death of Miss Eddings, the autopsy examination of Miss Eddings, the results of serological testing of specimens taken from Miss Eddings – and that's either by way of testimony or stipulation – which is going to indicate the presence of bodily fluids that were donated by the defendant, and they will hear, based on the Court's prior rulings, the defendant's account of these circumstances, including the defendant's acknowledgment of sexual relations with the decedent.
>
> The issue of whether or not all of that evidence is somehow going to taint the way the People – the jurors view the evidence associated with [Toni P.] on the discrete issue of whether or not the defendant

committed a burglary, I don't believe that the jurors are likely to be confused or prejudiced in this area.

(8 RT 605-606.)

The trial court declined to admit the Toni P. evidence under Evidence Code section 1108 to "avoid issues on appeal" since it found the evidence admissible under Evidence Code section 1101, subdivision (b) and the issue of the constitutionality of section 1108 was then pending. The trial court also overruled defense counsel's objection of inadequate notice under section 1108. (8 RT 587-588, 590.)

Thereafter, when Toni P. began testifying, the trial court instructed on the limited purpose of the evidence as follows:

> Ladies and gentlemen, I should indicate before we proceed much further that this evidence from [Toni P.] is being presented to you for a limited purpose. She is going to be discussing an event that occurred, obviously, in 1990. And you may consider it for the limited purpose, if it is helpful for you, in evaluating the state of mind of the defendant . . . on June 19th, 1996, including the state of mind and the existence or nonexistence of the specific intent which may be element of the crime charged or of the special circumstances which are alleged in this case. [¶] For that limited purpose at this time you may consider the evidence and for no other purpose.

(17 RT 1818.)

Once Jones elected to testify, and over defense counsel's objections, the court ruled it would also allow the prosecutor to cross-examine Jones about his attempted rape of Barbara C. and stabbing of Norma Knight as acts of moral turpitude within the meaning of *People v. Wheeler*.[7] (24 RT 2541-2542.) In connection with this testimony the trial court instructed the jury as to its limited purpose as follows:

> Ladies and gentlemen, let me remind you of something that I indicated to you earlier. There was testimony early on, a couple weeks ago from [Toni P.], and then again today there has been testimony from

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7. *People v. Wheeler* (1992) 4 Cal.4th 284.

Mr. Jones about incidents that occurred before June 19th or 18th, 1996. You may consider those incidents for a limited purpose.

At this point in time, with regard to the incidents that Mr. Jones has testified to, you may consider those incidents insofar as they may weigh on your determination of the witness' credibility. The fact that an individual, for example, has been convicted of a felony offense or has committed a criminal act evidencing dishonesty or moral turpitude may be considered by you in weighing the credibility of such a witness.

The fact of such a conviction or such activity does not necessarily discredit or destroy the testimony of a particular witness. However it is a factor which the law says you may take into account in weighing the credibility of such a witness.

In addition to that, you may consider such evidence if it has a tendency to show the existence or nonexistence of the required specific intent or mental state which is an element of the crime or special circumstance which is charged in this particular case. At least at this point in time, and for no other purpose, you may consider such evidence.

(24 RT 2599-2600.) Defense counsel made no objection to the instruction.

As a result of Jones' election to testify and his decision not to have the jury's determination of the truth of the sentencing enhancements bifurcated, the trial court also admitted evidence that showed Jones' had been convicted of the forcible oral copulation and assault with intent to commit rape of Toni P. (24 RT 2575.)

At the conclusion of the evidence, pursuant to the request of both the defense and the prosecutor (25 RT 2735), the trial court instructed the jury concerning their consideration of other crimes evidence pursuant to CALJIC No. 2.50 as follows:

Evidence has been introduced for the purpose of showing that the defendant committed crimes other than those for which he is currently on trial. Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining, if it tends to show, the existence on or about June 19th,

1996, of the specific intent or mental state which is a necessary element of the crime or special circumstance charged. For these limited purposes and as I previously instructed with you regard to the credibility of witnesses, you must weigh such evidence in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

(26 RT 2901-2902; 6th Supp. CT 25.) The trial court also instructed the jury with the corresponding instructions concerning proof of other crimes by a preponderance of the evidence. (CALJIC Nos. 2.50.1 and 2.50.2; 6th Supp. CT 25.)

The trial court instructed the jury concerning their consideration of Jones' acts of moral turpitude pursuant to CALJIC No. 2.23.1 as follows:

Evidence has been introduced for the purpose of showing that a witness, William Alfred Jones Jr., engaged in past criminal conduct indicating dishonesty or moral turpitude. This evidence may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in such past criminal conduct, if it is established, does not necessarily destroy or impair the witness' credibility or believability. It is, however, one of the circumstances that you may take into consideration in weighing the testimony of that witness.

(26 RT 2872-2873; 6th Supp. CT 5.) Defense counsel made an unspecified objection to this instruction. (25 RT 2719.)

Finally, the trial court instructed the jury concerning evidence received for limited purpose generally pursuant to CALJIC No. 2.09, at the request of both parties, as follows:

During the trial, certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider such evidence for any purpose except the limited purpose for which it was admitted originally.

(25 RT 2720; 26 RT 2874; 6th Supp. CT 6.)

B. The Trial Court Properly Admitted Evidence Of Jones' Sexual Assaults On Toni P. Under Evidence Code Sections 1101, Subdivision (B) And 352, As Evidence Of Jones' Intent To Sexually Assault Eddings

Evidence of uncharged misconduct is generally inadmissible to show bad character or criminal disposition, but it may be admitted to prove some material fact at issue, such as motive, intent, knowledge, or identity. (Evid. Code, § 1101, subd. (b); *People v. Roldan* (2005) 35 Cal.4th 646, 705.) The highest degree of similarity between the charged and uncharged offenses is required when the uncharged offense is offered to prove identity. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "[A] lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent." (*Ibid.*) Jones' sexual assaults on Toni P. were admitted to show intent. "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 121.)

On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. (*People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Scheid* (1997) 16 Cal.4th 1, 14.) Under this standard, abuse may only be found "if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Here, the trial court did not abuse its discretion.

There is no dispute Jones' intent upon entry of Eddings' home is a material issue in this case given the charges and the fact that Jones' principle defense was that he formed the intent to rape and sodomize Eddings after he

killed her. (17 CT 4807; 18 CT 4860.) Jones' sexual assaults on Toni P. and Eddings bore sufficient similarities to justify the admission of Jones' sexual assaults on Toni P. to show Jones' probably harbored the same intent when he entered Eddings' home and sexually assaulted her. Each involved forcible sex crime, against a vulnerable, solitary female, to whom Jones only had access by virtue of the victim's trusted relationship with the Jones' family. As pointed out by the trial court, the sexual assaults also occurred within moments of Jones' contact with the victims, providing further circumstantial evidence of his sexual intent in making contact with his victims. Both victims were also alive when Jones assaulted them to secure their compliance with his sexual acts.

Jones argues the offenses were insufficiently similar because Toni P. and Eddings were of different ages, Jones' used different degrees of force and accomplished different sex acts. (AOB 65-66.) None of these differences are material. Based on Jones' statements to Detective Spidle, which were before the trial court and were to be admitted in the prosecution's case in chief, age was of no consequence to Jones once he decided to force sex on a female. (17 CT 4807; 18 CT 4860.) The different degree of force is also of little significance and may be explained by how much Jones' victim fought against his sexual assault. Based on the injuries Eddings inflicted on Jones (scratches on his face, arms, hands, abdomen and legs) and he on her (broken back, ribs and hyoid bone and thyroid cartilage), Eddings fought hard to resist Jones' sexual assault. The far more relevant fact, and the one that is common to both, is Jones' willingness to use force as a means to accomplish sexual gratification. Similarly, the actual sex acts ultimately committed by Jones' do not constitute a meaningful distinction given both sets of offenses were forcible sex acts against females. Moreover, the actual acts were sufficiently similar. Jones' raped and sodomized Eddings. He attempted to rape Toni P. and was convicted of assault with intent to commit rape. (See *People v. Branch* (2001) 91

Cal.App.4th 274, 281.) Even if any of these differences identified by Jones were material, admissibility under intent requires the least degree of similarity between offenses and that standard is amply met here. Accordingly, the trial court properly found the Toni P. offenses relevant evidence of Jones' intent to sexually assault Eddings under Evidence Code section 1101, subdivision (b).

The trial court also properly admitted evidence of the Toni P. offenses under Evidence Code section 352. Evidence that qualifies for admission under Evidence Code section 1101, must still satisfy the admissibility requirements of other evidentiary rules, including Evidence Code section 352. (*People v. Cole, supra,* 33 Cal.4th at p. 1195.) "Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid.*) Factors relevant to the determination of whether uncharged offenses should be admitted under this section include: the tendency of the evidence to demonstrate a material fact other than character; whether the source of the information regarding uncharged crime is independent of the source of the charged crime; whether the uncharged crime resulted in a conviction; whether the uncharged crime is more serious or inflammatory than the charged crime; the time lapse between the charged and uncharged crimes; and whether the information is cumulative. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-407.) A trial court's rulings under Evidence Code section 352 are likewise reviewed on appeal for an abuse of discretion. (*People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Lewis* (2001) 25 Cal.4th 610, 637.) Again, the trial court properly exercised its discretion.

On balance, the scale weighed very heavily in favor of admission. As set forth above, the details of Jones' sexual assaults upon Toni P. were highly relevant to his requisite intent to commit the charged offenses and to refute his

claim of after-formed intent to sexually assault Eddings. Additionally, the source of information for the uncharged offenses was independent from the charged offenses, coming directly from the testimony of Toni P. The reliability that the offenses in fact occurred was also established by Jones' convictions for forcible oral copulation and assault with intent to commit rape. Nor were the Toni P. offenses remote as argued by defense counsel and here on appeal. There was a six year difference for which all but a year and a half Jones was in prison for the Toni P. offenses. "[T]he prior convictions were not remote in time because the defendant was essentially in prison during the time between the convictions, and thus his convictions had not "'been followed by a legally blameless life.'"[.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 607, quoting *People v. Beagle* (1972) 6 Cal.3d 441.) The remaining year and half, when Jones' lived with his parents, is not a significant period of time and was also explained by Jones' parents decision to never leave him unsupervised. (20 RT 2179, 2189.) Jones attacked Eddings the first time his parents left him unsupervised. Since the Toni P. offenses were the only other crimes to be admitted (before Jones decided to testify), they were clearly not cumulative.

While the Toni P. offenses were prejudicial in that they bolstered the evidence of Jones' intent to rape and sodomize Eddings when he entered her home, that is not the prejudice Evidence Code section 352 is designed to prevent. The prejudice referred to in section 352 applies to evidence that uniquely tends to evoke an emotional bias against one party as an individual and has very little effect on the issues. (*People v. Wright* (1985) 39 Cal.3d 576, 585.) As found by the trial court, the Toni P. offenses, particularly when compared to what Jones did to Eddings, were not the type of offenses which would compel a jury to arrive at an "erroneous, emotionally laden conclusion." (8 RT 605.) Nor did the evidence of the Toni P. offenses constitute an undue consumption of time. Toni P.'s testimony in the prosecution's case in chief

consisted of less than 24 pages. Although the prosecution introduced more evidence on rebuttal that was because Jones insisted upon his innocence of the offenses when he took the stand notwithstanding the convictions. Accordingly, the trial court acted within its discretion in finding the admission of evidence of the Toni P. offenses more probative than prejudicial.

C. Evidence Of Jones' Sexual Assaults On Toni P. Were Admissible Pursuant to Evidence Code Section 1108 As Evidence Of His Propensity To Commit Forcible Sexual Offenses

Even assuming this Court finds the trial court improperly admitted evidence of Jones' sexual assaults on Toni P. pursuant to Evidence Code section 1101, subdivision (b), there is no error in the evidence being considered by the jury since the evidence was admissible under Evidence Code section 1108. The fact that the trial court, in an abundance of caution, declined to rule on the admissibility of the Toni P. evidence under section 1108 because this Court's decision in *Falsetta* was pending, makes no difference. It is well settled: "'"a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]'" [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 976; *People v. Smithey* (1999) 20 Cal.4th 936, 972.)

Evidence Code section 1108 permits the admission of evidence of a defendant's commission of other sexual offenses to prove a propensity to commit sexual offenses "if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108.) Admissibility under section 1108 does not require the sex offenses be similar; "it is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41.) Here, there is no question that both sets of offenses were

sex offenses and that Jones' sexual assaults on Toni P. were relevant to show his propensity to commit sexual offenses generally. (*People v. Falsetta, supra*, 21 Cal.4th at p. 907; *People v. Soto* (1998) 64 Cal.4th 966, 989-990.) They were also relevant to show he was predisposed to committing sexual offenses on live females, not dead ones. Thus, just as the evidence was admissible pursuant to Evidence Code section 1101, subdivision (b), the evidence of the Toni P. sexual assaults were highly probative and admissible pursuant to Evidence Code section 352, and therefore admissible pursuant to Evidence Code section 1108. This is because the only prejudice from the evidence was the appropriately incriminating nature of the evidence. Therefore, evidence of his propensity was properly admitted pursuant to section 1108.

D. The Trial Court Properly Admitted Jones' Other Crimes Evidence As Impeachment Once Jones Elected To Testify

In any event, evidence of Jones' sexual assault on Toni P. was also properly admitted as impeachment once Jones elected to testify, both because his offenses resulted in felony convictions and because of the nature of the offenses. (*People v. Bonilla* (1985) 168 Cal.App.3d 201, 204 [assault with intent to commit rape, and forcible oral copulation and forcible sodomy, are crimes involving moral turpitude]; Evid. Code, § 352.) The admission of Jones' actual convictions punish him for the Toni P. offenses and hence, there is even less likelihood of prejudice. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405.)

In that regard, any error in admitting the Toni P. offenses was also harmless. For the most part, even in capital cases, the mere erroneous exercise of discretion under the ordinary rules of evidence does not implicate the federal constitution. The applicable standard of prejudice is that for state law error as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Cudjo*

(1993) 6 Cal.4th 585, 611.) Even assuming the federal harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], any error was harmless. Evidence of Jones' guilt, and specifically his intent to sexually assault Eddings while she was alive was overwhelming. Jones' himself admitted to going to over to Eddings to force sex on her and he in fact did so. Clearly, she was not dead when Jones' had his pants off because she managed to scratch his bare legs and abdomen while resisting his assault upon her. (Exhs. 73-D, 73-E, 73-K, 73-M.) The only reasonable inference as to why Jones' would be physically struggling with Eddings while his pants were off would be consistent with an intent to sexually assault her while she was alive. He then burned her home in attempt to conceal his crime. Finally, the Toni P. offenses, while corroborative of Jones' intent, paled in comparison to the overwhelming evidence of Jones' guilt.

E. The Instructions Inured To Jones' Benefit And Any Error Was Either Waived Or Invited And Harmless

The trial court instructed the jury on how to consider evidence of other criminal behavior showing dishonesty or moral turpitude for the purposes of assessing credibility and on how to consider evidence of other crimes on the issue of Jones' intent in committing the charged offenses and special circumstances without distinguishing which crimes or criminal behavior fell within either category. Therefore, Jones argues, the jury was improperly permitted to consider evidence concerning his attempted rape of Barbara C. and stabbing of Knight for purposes of assessing his intent to sexually assault Eddings as opposed to the limited purpose of assessing his credibility. (AOB 70-72.)

Jones forfeited and/or invited any claim of error concerning this omission. First, he did not object to the limiting instruction given during trial that suggested his criminal behavior (the attempted rape of Barbara C. and stabbing of Knight) was subject to consideration for purposes of assessing his intent. He also requested the trial court instruct pursuant to CALJIC No. 2.50, concerning the consideration of other crimes evidence for purposes of assessing intent, without seeking any clarification concerning the different offenses. A defendant "may not . . . 'complain on appeal that an instruction, correct in law and responsive to the evidence was too general or incomplete.'" (*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.)

Citing *People v. Rollo* (1977) 20 Cal.3d 109 and *People v. Caitlin* (2001) 26 Cal.4th 81, 140 and Jones asserts the trial court had a sua sponte duty to specify which evidence fell under either the other crimes instruction or the credibility instruction. (AOB 71.) But *Rollo* is distinguishable. In *Rollo*, this Court found instructional error because the trial court, on its motion, gave a limiting instruction that had no apparent application to the facts. Specifically, the trial court instructed the jury pursuant to CALJIC No. 2.23 regarding a prior conviction that was admitted only for purpose of impeachment. Then the trial court sua sponte added an instruction that evidence of other uncharged crimes could be considered in determining the defendant's intent or knowledge to commit the offense even though no uncharged crimes evidence had been admitted for this purpose. In contrast, in Jones' case, both sets of instructions applied and were properly given. Under these circumstances, Jones had a duty to seek clarification and his failure to do so forfeited any claim on appeal. (*People v. Valdez, supra,* 32 Cal.4th at p. 113.) In *People v. Catlin, supra*, 26 Cal.4th 81, also relied upon by Jones, the Court considered an argument that the trial court failed to clarify a limiting instruction as suggested by *Rollo*. The

Court, however, did not reach the merits of the argument, but ruled that "any error in failing to modify CALJIC No. 2.50 was harmless beyond a reasonable doubt." (*People v. Catlin, supra*, 26 Cal.4th at p. 147.) Thus, *Catlin* is not authority for a sua sponte duty to clarify limiting instructions pursuant to footnote six in *Rollo*.

Moreover, in both *Rollo* and *Caitlin*, this Court found any error harmless. Similarly, any error in the instructions in this case was harmless as there is no reasonable likelihood the jury misunderstood the instructions in a manner that affected the verdict. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn.4 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Avena* (1996) 13 Cal.4th 394, 417.) By its very terms the trial court's instructions concerning the consideration of other crimes evidence for purposes of assessing Jones' intent to commit the charged offense only permitted the jury to consider such evidence if it first determined the evidence was relevant for that purpose. The only way the Knight stabbing would have been relevant to determining Jones' intent was as it related to his credibility, an appropriate consideration by the jury. In other words, the credibility of his admission to police that he went to Eddings before he murdered her as well as the credibility of his admission to police that he went to Eddings' for the purpose of forcing sex on her. (26 RT 2788-2790.)

Even though Jones' attempted rape of his sleeping older neighbor Barbara C. undermined Jones' credibility generally (like the Knight offense) and specifically tended to prove Jones' harbored the same intent when he went to Eddings, there still was no error in this regard. As a threshold matter, the evidence of Jones' attempted rape of Barbara C. was also admissible as either evidence of intent (Evid. Code, § 1101, subd. (b)), or evidence of propensity (Evid. Code, § 1108). By jumping on a sleeping Barbara C., with intent to rape, Jones once again attacked a live, vulnerable, solitary female in order to commit

a sex offense. Hence, Jones' attempted rape of Barbara C. was properly subject to consideration under the other crimes evidence instructions. Even assuming the evidence of Jones' attempted rape of Barbara C. did not fall within Evidence Code sections 1101, subdivision (b) or 1108, there was still no prejudice. The relevance of the evidence was effectively the same under either the other crimes evidence or credibility instruction, namely, whether Jones' denial that he lacked the intent to sexually assault Eddings was a lie. In order to assess Jones' credibility the jury necessarily had to determine whether and under what circumstances the other criminal conduct occurred. In particular, the jury had to decide which of Jones' version concerning his attack on Barbara C. to believe, i.e., whether he had intended to rape Barbara C., or had no such intent. That determination also properly bore on the assessment of which of Jones' version concerning Eddings the jury decided to believe, i.e., did he intend to rape and sodomize Eddings before she was dead or did he formulate an intent to rape and sodomize her only after she had died. In other words, for purposes of this case, there was no practical significance between the two inquiries–credibility or intent–since both focused on evidence concerning the credibility of Jones' stated intent toward Eddings. Consequently, there is no possibility of prejudice in relating either the Knight or Barbara C. incidents to an assessment of Jones' intent at the time he committed the Eddings' offenses.

Moreover, contrary to Jones' contention (AOB 77), the instructions ultimately benefitted Jones because they expressly precluded Jones from considering any of the other bad acts or crimes evidence as either propensity or bad character evidence even though it would have been proper for the jury to do so. This prohibition was further reinforced by the argument of both counsel. (26 RT 2841, 2856-2857.) Finally, regardless of how the jury considered the evidence of Jones' assault on Barbara C. and Knight, there is no possibility

such consideration affected the verdict given the overwhelming evidence Jones' harbored the intent to sexually assault Eddings when he entered her home.

II.

THE TRIAL COURT PROPERLY ALLOWED DR. DITRAGLIA, A FORENSIC PATHOLOGIST, TO RENDER AN OPINION THAT JONES' RAPED AND SODOMIZED EDDINGS

Jones claims the trial court prejudicially erred in admitting the testimony of Dr. DiTraglia regarding whether Jones sexually assaulted Eddings ante or post mortem on the grounds that Dr. DiTraglia was unqualified, and his opinion was not sufficiently helpful to the trier of fact, as well as unduly prejudicial. (AOB 80-99.) There was no error. Essentially, Dr. DiTraglia testified that, in his opinion, this case involved a rape murder. He based his opinion on the manner of Eddings' death – blunt force trauma and strangulation, and the evidence of sexual assault – the presence of the cloth in the vagina and semen in the rectum, as well as his experience and training establishing blunt force trauma and strangulation as the most common methods used to accomplish a rape murder. Dr. DiTraglia, an experienced forensic pathologist generally and specifically concerning rape murders, was amply qualified to render the opinion. The opinion was also helpful and not unduly prejudicial to the jury's determination of whether Jones assaulted Eddings to accomplish the rape and sodomy or whether, as Jones' claimed, he only decided to sexually assault Eddings after he killed her. In any event, any error is harmless.

The trial court's determination that a witness qualifies as an expert is a matter of discretion which will not be disturbed absent a showing of manifest abuse. (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322.) In that regard, a determination that a witness qualified as an expert will only be found erroneous if the evidence shows that the witness clearly lacked qualifications as an expert.

(*People v. Farnam* (2002) 28 Cal.4th 107, 162.) Once a witness establishes sufficient knowledge of a subject to entitle their opinion to go to the jury, the question of the degree of their knowledge goes to the weight of the evidence and not its admissibility. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.) Concerning the subject matter of expert testimony, it is well-established "[t]he jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission." (*People v. Farnam*, *supra*, 28 Cal.4th at pp. 162-163 [quotations and citations omitted].) Similarly, a trial court's determination to admit expert evidence will not be disturbed on appeal absent a showing the court abused its discretion in a manner that resulted in a miscarriage of justice. (*People v. Robinson* (2005) 37 Cal.4th 592, 630.) There is no abuse of discretion.

As a threshold matter, there is no dispute that Dr. DiTraglia is qualified as a forensic pathologist. At trial Dr. DiTraglia confirmed that he is a medical doctor and board certified both in anatomic and forensic pathology. (18 RT 1905.) He obtained an undergraduate degree in chemistry and medical degree at St. Louis University. Dr. DiTraglia completed a four year residency in anatomic and clinical pathology at University of California, at Irvine, and two fellowships, one in surgical pathology and the other in forensic pathology. (18 RT 1904.) He has been working as a forensic pathologist since 1987, working first as a coroner for Los Angeles County and then Riverside County. (18 RT 1887.) Dr. DiTraglia explained his job:

> A forensic pathologist is obviously a medical doctor who first specializes in laboratory medicine, the diagnosis of death and disease through things like autopsies and lab tests and tissue biopsies, and then further subspecializes in the area of forensic pathology, which simply means that you relate the two fields of pathology and law. Typically, you perform autopsies on certain kinds of cases, determine the cause of death, sometimes the manner of death, and relate those findings in legal settings like this one.

By the time of his testimony, Dr. DiTraglia had performed around 3,000 to 3,500 forensic autopsies and testified approximately 150 times, including ten times before the trial judge in Jones' case. (18 RT 1887, 1905; 20 RT 2088-2089.)

Additionally, there is no dispute as to Dr. DiTraglia's qualification to render an opinion as to the cause of Eddings' death. In addition to his education, training and experience, Dr. DiTraglia personally performed the autopsy of Eddings. Dr. DiTraglia explained his usual practice before an autopsy is to obtain preliminary information about the case from the autopsy request form and by speaking with law enforcement. The practice helps tailor the examination and collect necessary information. (18 RT 1907-1908, 1940, 1946.) He conducted an external and internal exam of Eddings including x-rays, dissection and visual inspection. Due to the nature and extent of Eddings' injuries to her skeleton and neck area, namely, the 23 broken ribs around her entire circumference, broken spine, broken hyoid bone and torn thyroid cartilage, Dr. DiTraglia determined Eddings had been savagely beaten and strangled. Based on the presence of hemorrhaging, Dr. DiTraglia determined that Eddings was alive at the time of the beating and up and until she was strangled to death. (18 RT 1909, 1914.) Based on the condition of her lungs and the lack of soot, Dr. Traglia concluded Eddings was dead by the time of the fire. (18 RT 1935.)

Since the circumstances of the death were consistent with a sexual assault, Dr. DiTraglia also collected evidence which would be germane to determining whether a sexual assault had occurred. In forming an opinion concerning sexual assault, Dr. DiTraglia testifed he considers the "autopsy itself, the presence or absence of trauma, foreign bodies in body cavities, sexual assault evidence like sperm, proteins, DNA." (18 RT 1947.) He also gathers information about the crime scene itself, sometimes going to the crime scene or

looking at photographs. (18 RT 1947.) In that regard, there is no dispute on appeal that Dr. DiTraglia's was qualified to render opinion regarding whether a sexual assault occurred generally. (AOB 92.) Dr. DiTraglia had significant experience in conducting autopsies of murder victims who had been raped. (18 RT 1945.) Additionally, his experience included training and research in the area of homicide victims who were raped and sodomized. (18 RT 1937-1938.) Some of the articles he relied upon were: (1) *Forensic Science Aspects of Fatal Sexual Assaults on Women*, the Journal of Forensic Sciences, Volume 28, No. 3 (1983) at pages 572-576; (2) *Factors that Correlate with Injuries Sustained by Survivors of Sexual Assault*, Journal of Obstetrics and Gynecology, Volume 70 (1987); (3) *Toluidine Blue in Corroboration of Rape in the Adult Victim*, The American Journal of Emergency Medicine, Volume 5 at pages 105-108 (1987); (4) *Rape in the District of Columbia*, American Journal of Obstetrics and Gynecology, Volume 113 (1972) at pages 91-97; (5) *Clinical Findings and Legal Resolution in Sexual Assault*, Annals of Emergency Medicine, May 1985, Volume 14 at pages 447-453; and (6) a study that's described in the textbook Forensic Pathology by DiMaio and DiMaio, page 391, where he describes a study performed at Parkland Hospital in Dallas on 451 rape victims. (19 RT 2012-2013.) Dr. DiTraglia had also testified between five and 25 times concerning whether the victim of a homicide had been sexually assaulted. (18 RT 1940.)

Regarding Eddings specifically, Dr. DiTraglia ultimately recovered a cloth in the vaginal canal forced inside by a penetrating object like a penis. The edges of the cloth were burned along with Eddings' skin around the area of the vagina. (18 RT 1911, 1950-1951.) He also recovered Jones' semen in Eddings' rectal cavity. (18 RT 1910-1911; 24 RT 2566-2567.) Dr. DiTraglia did not observe external trauma due to severity of the burn on the external peritoneum, the skin, and the subcutaneous tissue surrounding the vagina and

the rectum. The skin and the subcutaneous tissue for the most part were not present. (18 RT 1936-1937.) Dr. DiTraglia noted: "It's impossible to evaluate the presence of abrasions, bruises, lacerations when the tissue doesn't even exist." (18 RT 1937.) Also Dr. DiTraglia did not find evidence of trauma to internal parts of the vaginal canal and rectal cavity, a part of the body not actually burned away by the fire. While he found this information relevant, Dr. DiTraglia explained that it is not determinative of whether a rape occurred. (18 RT 1935-1937.) He based his statement on the fact that "by the methods we use at autopsy, it is not uncommon to find no traumatic injuries" and because of studies demonstrating "approximately 10 to 30 percent of women that have been raped will show traumatic injuries." (18 RT 1936-1937; 19 RT 2020.) In other words, 70 to 90 percent of women who have been raped do not show traumatic injuries to vaginal rectal cavity. Consequently, there is no question the jury had properly before it the fact that, in Dr. DiTraglia's expert opinion, Eddings' was savagely beaten and strangled and ultimately sexually violated.

The only dispute is over Dr. DiTraglia's additional opinion, rendered over defense counsel's objection, that Eddings was alive at the time of the sexual assault or, in other words, that this case involved a rape murder. (AOB 90-95; 18 RT 1957-1958.) Dr. DiTraglia was equally qualified to render an opinion on the subject. In additions to his qualifications discussed above (and which alone would be sufficient) Dr. DiTraglia also testified he had "an understanding of the connection between rape and murder." (18 RT 1947.) As Dr. DiTraglia explained, because rape is such an intimate act, "[t]he most common cause of death in rape-murder is strangulation, and strangulation is coupled . . . many times with beating – blunt force trauma like this case." (18 RT 1947-1948, 1952-1953.) In so stating, Dr. DiTraglia relied on his own experience as well as studies and text books about rape homicides that confirm "that strangulation and/or blunt force trauma and/or stab wounds is by far and

away the leading cause of death." (18 RT 1955-1956; 20 RT 2079.) Further, in Dr. DiTraglia's experience, the trauma, "when it is present, is often severe and brutal, like it is in this case." (18 RT 1953.) And, in none of his cases of murder rape did the rape occur after the murder. (18 RT 1945.) Given Dr. DiTraglia's undisputed credentials and experience, the trial court did not manifestly abuse its discretion in finding him qualified to testify on whether Eddings was raped and sodomized.

Jones contends Dr. DiTraglia was not qualified to render an opinion on whether the sexual assault occurred before or immediately after death because he had no experience or training in necrophilia, psychiatry or a crime scene reconstruction and he was not a criminalist. (AOB 82.) Dr. DiTraglia did not have to have any training or experience in these areas because his opinion fell squarely within the ambit of his experience and training as a forensic pathologist. In other words, "the opinion evidence here at issue did not require that the witness have expertise *beyond* that which was shown." (*People v. Robinson, supra,* 37 Cal.4th at p. 631 [rejecting the argument that only a crime-scene reconstructionist could opine about the position of gunshot victims where the testifying forensic pathologist possessed extensive familiarity with gunshot wounds].) As noted above, once an expert establishes sufficient knowledge of the subject, the question of the degree of his knowledge goes to the weight and not its admissibility. (*People v. Bolin, supra,* 18 Cal.4th at p. 322.) And, as found by the trial court in this case, any deficiency in the expert's opinion is appropriately fleshed out on cross-examination. Which is what defense counsel did in this case. (19 RT 1995-1996, 2007-2011, 2023-2026.)

Jones' reliance on *People v. Hogan* (1982) 31 Cal.3d 815 and *People v. Williams* (1992) 3 Cal.App.4th 1326, are to no avail. Unlike this case, a trial court in *Hogan* had erroneously permitted a criminalist to offer blood spatter testimony where the criminalist had merely observed many bloodstains without

any inquiry, analysis, or experiment. (*Id.* at pp. 852-853.) Similarly, in *Williams*, the trial court found an arresting officer in a driving under the influence case had sufficient expertise to recognize nystagmus, but was not qualified to express an opinion regarding the cause of nystagmus because the officer had no training in chemistry or physiology. Because Dr. DiTraglia had training and extensive experience in rape murder cases, and his testimony did not exceed the area of his expertise, *Hogan* and *Williams* are distinguishable.

Jones also complains Dr. DiTraglia's opinion lacks foundation because it was not based on anatomical findings but on extrinsic factors such as Jones' statements to Detective Spidle. (AOB 90-93.) The blunt force trauma and strangulation observed by Dr. DiTraglia, however, are anatomical findings and served as a principal basis for his opinion. And there is nothing inappropriate about Dr. DiTraglia also considering Jones' statements or the placement of Eddings' body at the crime scene. There is no basis for Jones' assertion that Dr. DiTraglia's opinion could only rely on whether there was physical injury to the vagina or the rectum. (AOB 80.) As testified by Dr. DiTraglia, examining all of the evidence, physical, anatomical and otherwise, is precisely what forensic pathologists do in forming their opinions as to the cause and manner of death. (18 RT 1905, 1946; 19 RT 1995.) In *People v. Mayfield* (1997) 14 Cal.4th 668, this Court reiterated that a pathologist may offer an expert opinion "not only as to the cause and time of death but also as to circumstances under which the fatal injury could or could not have been inflicted." (*People v. Mayfield, supra*, 14 Cal.4th at p. 766.) Accordingly, the trial court did not abuse its discretion in favorably assessing Dr. DiTraglia's expert qualifications.

Alternatively, Jones' argues Dr. DiTraglia's opinion this was a rape murder was not sufficiently helpful to the jury since he simply drew a conclusion they were equally equipped to draw based on so-called "extrinsic evidence," namely, the evidence Eddings was beaten and strangled to death,

sexually violated, the position of Eddings' body at the crime scene and Jones' admissions he intended to and did sexually assault Eddings. (AOB 93-95.) But only Dr. DiTraglia was aware of the connection between rape and blunt force trauma and strangulation in rape murder cases. As such, Dr. DiTraglia's testimony helped connect the manner and cause of death to the accomplishment of rape and sodomy; two concepts which would seem to be mutually exclusive but appeared to be inextricably intertwined in this case. "The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.) The court in *Gonzalez* upheld the admissibility of expert evidence addressing gangs "to understand an inmate's cold-blooded attempt to murder a nearly naked, defenseless fellow inmate who did nothing to provoke the attack" even though most people were familiar with activities of street gangs and can imagine circumstances that could lead to a crime of passion. (*People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1551.) Moreover, the fact that the jury could reach the same conclusion without Dr. DiTraglia's ultimate opinion does not make Dr. DiTraglia's opinion improper. "The jury need not be wholly ignorant of the subject matter of the expert opinion in order to justify its admission." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1121; internal quotations and citation omitted.) "Expert testimony will be excluded only when it would add nothing at all to the jury's common fund of information." (*Ibid.*)

Finally, Jones asserts the evidence should have been excluded under Evidence Code section 352 as more prejudicial than probative. (AOB 96.) Jones did not make this objection below and therefore has forfeited the claim. (*People v. Bolin, supra,* 18 Cal.4th at p. 321; Evid. Code, § 353.) Moreover, it is not well taken. As set forth above, the evidence that Jones' manner of beating and killing Eddings were consistent with other rape homicides was very

probative of Jones' intent in assaulting Eddings. Nor was it unduly prejudicial. Dr. DiTraglia's ultimate opinion that Eddings was raped and sodomized was but a small part of his overall testimony explaining the nature and extent of all of Eddings' injuries and not the type of evidence uniquely designed to evoke an emotional or irrational response.

In any event, any error is harmless. The erroneous admission of evidence is usually governed by the *Watson* standard but Jones again argues the error is of federal constitutional dimension and the federal standard should apply. (AOB 97.) Under either standard the error is harmless because of the overwhelming evidence Jones' murdered Eddings to accomplish rape and sodomy. Independent of any expert opinion by Dr. DiTraglia this was in fact a rape murder. The jury had properly before it the fact that Eddings died as a result of blunt force trauma and strangulation, Jones' penetrated her vaginally and anally, Dr. DiTraglia's opinion that blunt force trauma and strangulation are the most common methods to accomplish rape murder, Jones' statements admitting his intent to sexually assault Eddings and that he did so, Jones' prior sexual assault on a live female, his attempt to conceal the evidence of his crimes by arson and last, but not least, the fact that Eddings left scratches on Jones' abdomen and thigh while fighting to resist Jones' sexual assault. Again, the only reasonable inference from the injuries to Jones' bare legs and abdomen inflicted during his struggle with Eddings is that he was intent upon sexually assaulting her while she was alive. In sum, there was no error and any error was harmless beyond a reasonable doubt.

III.

THE TRIAL COURT PROPERLY DECLINED TO REOPEN THE DEFENSE CASE TO ALLOW ADDITIONAL PSYCHOLOGICAL EVIDENCE AND STRUCK EVIDENCE OF JONES' PRIOR MENTAL HEALTH COMMITMENTS

Jones contends the trial court violated his state and federal constitutional rights to present a defense and to due process by improperly excluding evidence relating to his psychological condition namely, the testimony of Dr. Kania explaining his personality disorder and the effect of intoxication on him and evidence of Jones' two youthful mental health commitments. (AOB 100-123.) There was no error. Defense counsel sought to introduce Dr. Kania's testimony after he rested and, as found by the trial court, defense counsel was not diligent and the offer of proof was lacking. The trial court also properly struck the evidence of Jones' hospitalizations because it was either based on hearsay or there was no evidence explaining its relevance. Any error was also forfeited or harmless.

A. Relevant Trial Proceedings

At the beginning of trial, on October 18, 1998, defense counsel advised the trial court that he had consulted with Dr. Kania "early on" but had not yet made the decision to call him as a witness. He made arrangements with Dr. Kania to meet with him the following week. (9 RT 616-617.) In response to the prosecutor's concern about timely discovery, the trial court indicated that, "given the fact that the defendant has not raised any psychiatric defenses," Dr. Kania would likely testify in the penalty phase, "not for the purpose of justifying Jones' conduct but explaining and mitigating his behavior." (9 RT 617.) The trial court admonished the defense to turn over any relevant discovery to avoid substantial continuances. (9 RT 617.)

On November 2, 1998, during pretrial in limine motions, the prosecutor noted that she still had not received any report from Dr. Kania. (15 RT 1670.) At this point, defense counsel confirmed that Dr. Kania was a possible witness but stated that Dr. Kania had not completed his report and needed more information. (18 RT 1992-1993.)

On November 10, 1998, at the close of the prosecution's case in chief, defense counsel advised the trial court that he intended to call Dr. Kania but had not been able to get a hold of him directly and that Dr. Kania still had not provided a report. (20 RT 2134, 2144.) The trial court attempted to clarify for what purpose defense counsel wanted to call Dr. Kania and asked, "Does Dr. Kania indicate or is he prepared to testify that on or about the 19th of June, 1996, the defendant suffered from some mental disease, defect, or disorder?" (20 RT 2145.) Defense counsel answered, "no," and explained: "I'm making a distinction, your Honor, between mental disease, defect, or disorder from diminished actuality, which doesn't fall within these parameters." (20 RT 2145.) The trial court appropriately found "the current offer of proof is totally lacking in any substance relevant to the proceedings in this case, at least in the guilt phase." (20 RT 2153.) The trial court explained:

> If Dr. Kania is not prepared to testify about the existence of a mental disease, disorder, or defect on the part of the defendant on or about June 19th, 1996, then he has no relevant evidence to present at this phase of the proceedings.
>
> I would direct counsel's attention to the provisions of Penal Code Section 29, which indicates that he cannot testify about diminished actuality or intent, knowledge, malice aforethought, or anything of that sort. What he can testify to is about mental diseases or defect because he may be an expert in that area, but if he doesn't have an opinion in that regard, then his testimony is irrelevant and he will not be permitted to testify. That would make those portions of Miss Seneff's testimony that relates to the conduct of the defendant's father or – and other things that

occurred within the family irrelevant in these proceedings. It does not go to a defense in the guilt phase.

(20 RT 2153.)

Later, defense counsel raised the possibility that Dr. Kania could testify concerning intoxication and cited *People v. Saille* (1991) 54 Cal.3d 1103. Specifically, defense counsel asserted that based on his interviews with Jones and "any other persons that he had interviewed" Dr. Kania can formulate an opinion that intoxication in this case resulted in diminished actuality which in turn would and did prevent Jones' ability to form the requisite specific intent. (20 RT 2202-2203.) The trial court remarked that it would review *People v. Saille* again. The trial court also correctly recognized evidence of voluntary intoxication was relevant to whether the defendant actually formed the specific intent pursuant to Penal Code sections 22, 28 and 29 and, based on the evidence received and in an abundance of caution, would instruct the jury concerning voluntary intoxication. (20 RT 2210-2211.) But the trial court observed, "voluntary intoxication is one thing, mental disease or defect is another." (20 RT 2211.) The trial court explained again:

> Normally, what I would expect from a forensic alienist is for that person to testify, for example, obviously not in this case but defendant Smith was examined on such and such day on October 1st, 1997, and upon my examination I determined that he suffered from the following mental disease or defect, paranoid schizophrenia – and I have an opinion as to whether or not he was suffering from that disease on June 18, 1996. My opinion is that, yes, he was suffering from that disease on that day, in my opinion, and the effect of that disease on a person and his ability to think is x, y, and z.
>
> That's the extent to which the expert witness under Penal Code section 28 is allowed to testify.

(20 RT 2211.)

The trial court further correctly observed Penal Code section 29 precluded any expert from giving an opinion that based on mental defect or

intoxication the defendant did not form the requisite intent. (20 RT 2211.) Nevertheless, the trial court agreed to review *Saille* again and any other authorities defense counsel wished to offer and reconsider its position on Thursday, November 12, 1998. (20 RT 2212.)

On November 12, 1998, the trial court inquired regarding whether there was any report from Dr. Kania and was advised there was no report. (21 RT 2242.) The trial court reiterated its tentative ruling based on the offer of proof at that time. (21 RT 2241.) Although the trial court remained open to additional offers of proof, the trial court cautioned counsel against any more delay, noting:

> Dr. Kania was consulted early on in this matter and there is no justification that I am currently aware of why a report has not been prepared prior. [¶] I don't want to hear an explanation at this point in time, but that's the concern in the back of my mind, because since I know when he was originally retained and consulted it would be unacceptable under the Court's view that he be retained and be told, well, you don't have to write any reports at this point in time, we will wait until after the trial starts before Im going to need one. And I think you appreciate that concern.

(21 RT 2241-2242.)

Consistent with the trial court's ruling regarding evidence of intoxication, defense counsel questioned Jones' mother and his brother Donald about Jones' behavior when drinking. His mother, Mina, testified that she had seen Jones drink alcohol. (20 RT 2184.) She noticed some change in his behavior; Jones would "get maybe hyper, a little antsy." (20 RT 2184.) He was never belligerent toward his parents nor could Mina recall seeing Jones belligerent with anyone else. (20 RT 2184.) Donald testified Jones appeared hung over the morning after he killed Eddings. (24 RT 2639.) On cross-examination, Donald could not remember whether he told Detective Spidle Jones appeared hung over. He did say Jones looked like he had a "hard night." (24 RT 2641.)

On November 17 and 19, 1998, Jones also testified about his alcohol consumption on the night he attacked Eddings. Contrary to his statements to the police that he drank only four to six beers and was not drunk, Jones claimed he drank approximately 12 pack of beer and that he was not sober when he went to Eddings' home. (23 RT 2502, 2504; 24 RT 2545.) He also said for the first time that when Eddings opened the door and saw him with a beer she hit it out of his hand and started swinging at him. (20 RT 2208-2209; 23 RT 2502-2503.) In that regard, Jones did not assert that he went into a rage that night and there was no evidence in the guilt phase that he acted out in a rage as suggested on appeal. Rather, Jones specifically denied acting out in rage during his police interview and made no mention of rage during his trial testimony. (17 CT 4696, 4698; 24 RT 2552.) Over the prosecutor's objection, the trial court permitted Jones to testify that he was hospitalized for a mental condition when he was 14 years old. (24 RT 2600.)

Over the prosecutor's hearsay and relevancy objections the trial court also permitted defense counsel to question Eddings' family members about Eddings' attitude toward people who drink alcohol in light of Jones' testimony she hit the beer out of his hand. (20 RT 2209; 24 RT 2613-2621.) But in the end Eddings' daughter testified that Eddings was not critical of her or her family when they had a drink. While Eddings did not like to see people lose control with alcohol and had, in the past, become upset with her husband for drinking (before he stopped drinking entirely in the 1970's), there was no evidence Eddings behaved aggressively or violently toward drinkers. (24 RT 2623-2524, 2634-2636.)

At the conclusion of the defense case on November 18, 1998, the trial court permitted defense counsel to recall Mina Jones and elicit evidence that Jones was hospitalized in a mental institution when he was 15 years old. (24 RT 2645.) She also stated that she heard Jones had been hospitalized a second

time but the trial court granted the prosecutor's motion to strike on the grounds of hearsay. (24 RT 2646-2647.) Thereafter, defense counsel rested without requesting or calling Dr. Kania to the stand. (24 RT 2647.)

While the defense case was proceeding, defense counsel provided the prosecution with a report by Dr. Kania. The prosecution received the report on November 16, 1998, before Jones' testified on the 17th. The prosecutor filed a motion in limine to exclude Dr. Kania's testimony on November 17, 1998, and the motion was scheduled to be heard on the 18th. However, the motion was not heard because defense counsel did not seek to call Dr. Kania and rested after questioning Mina Jones. Consequently, the prosecutor objected to the evidence Jones was hospitalized and moved to strike stating: "I was completely blindsided by this testimony about the defendant having been hospitalized. It was never indicated in the offer of proof, and I don't understand the Court's ruling it is admissible or relevant to any issues before the jury in this case." (24 RT 2647-2648.) The trial court responded:

> When the issue was first broached by Mr. Cabrera in his cross-examination of the defendant, he indicated – and the Court asked for a showing of relevance. Mr. Cabrera indicated that it related to foundational evidence associated with Dr. Kania's testimony, and based on that offer of proof, I overruled your objection and let it in. And the same – the Court was thinking along the same lines when he called Mina Jones and asked her those questions concerning hospitalization.
>
> The defense has now rested and Dr. Kania is not testifying, so the Court will entertain a motion to strike with regard to that evidence which is now irrelevant.

(24 RT 2648.) Defense counsel asked the trial court to defer consideration of any motion to strike until the next morning to give him time to consider his response and the trial court agreed. (24 RT 2648.)

The next morning, on November 19, 1998, defense counsel asked to reopen so he could put Dr. Kania on the stand on the issue of diminished actuality. He specifically tied the testimony to voluntary intoxication, arguing:

> Voluntary intoxication is recognized as one of those items that can create the issue or the state of diminished actuality. In this case there has been testimony from at least two witnesses, one from Mr. Jones himself, as to the state of his intoxication and as to the amount of alcohol which he consumed, and secondly, the opinion and observations of his – of Mr. Donald Jones as to Mr. Jones' condition early the morning of the 19th.

(25 RT 2651-2652.)

After ensuring defense counsel had nothing more to add the trial court noted its decision to admit of evidence regarding Jones' use of alcohol and Eddings' attitudes. (25 RT 2652; see also 2655 ["The Court does not quarrel with the idea that issue is still before the jury, may be argued to the jury, and the jury under the instructions requested by both counsel will be instructed on that area insofar as it relates to voluntary intoxication."] However, the trial court observed there was no evidence of the relevancy of Jones' hospitalization and therefore no basis for its admission. Specifically, the trial court stated:

> During the examination of two defense witnesses, both the defendant and Miss Mina Jones, there was testimony that at some point in time during his adolescent years defendant was hospitalized implicitly but not explicitly for some mental health condition.
>
> The Court has before it a report from Dr. Kania. I would note that the report itself – at least on my recollection of the report – correct me if I'm wrong here, Mr. Cabrera – does not mention anything regarding prior psychiatric treatment of the defendant nor does it indicate that Dr. Kania has reviewed documents relating to that psychiatric treatment.

(25 RT 2652.)

The trial court then turned to Dr. Kania's diagnosis, observing:

> In the second from the penultimate paragraph, Dr. Kania writes "Mr. William Jones suffers from a severe personality disorder and a significant drinking problem that results in a sudden change in his personality. This change is primarily the result of a weakening of his already weak controls. He lacks adequate psychological resources to deal with stressful situations, and alcohol only serves to weaken these taxed resources. Underlying this control is considerable anger and a dependency on other people. He has a feeling that his affectional needs

have never been met, a profound sense of loneliness, and very low appraisal of himself and his abilities."

Dr. Kania in his report does not offer a differential diagnosis of a mental disease or disorder, some diagnosis that might be found in the Diagnostic and Statistical Manual, Fourth Edition, of the American Psychiatric Association.

(25 RT 2652-2653.)

Based on the offer of proof, the trial court denied defense counsel's motion to reopen and call Dr. Kania. (25 RT 2653.) Additionally, the trial court found defense counsel's request untimely and an unwarranted disruption to the proceedings. Specifically, the trial court stated:

I would note sort of collaterally in this area, when there was first an announced intent on the part of the defense to call Dr. Kania, the People presented and filed with the Court on the 17th of November a motion in limine to exclude that psychiatric evidence, and it's in the context of those discussions, the report from Dr. Kania, People's motion which was made on the 17th, yesterday afternoon, and in the middle of the afternoon of the 18th the defense indicated to the Court that they were going to rest that I don't think we can now go back and revisit all of these issues.

At this point in time it is still the Court's opinion that Dr. Kania cannot testify to the ultimate facts in this case, namely, his opinion as to whether or not the defendant actually formed the required specific intent or whether or not he premeditated or deliberated the killing of Ruth Vernice Eddings, and insofar as he has no opinion, apparently, concerning the existence of any mental disease, defect, or disorder which was operating with regard to the defendant on or about the 19th of June, 1996, his testimony is irrelevant at this stage of the proceedings.

The Court's ruling at this point in time in no way is to suggest that Dr. Kania's testimony would be irrelevant or inappropriate should the case proceed to a penalty phase in the trial.

(25 RT 2653-2654.)

The trial court also struck the evidence pertaining to Jones' hospitalization. (25 RT 2655.) Based on statements by defense counsel and Dr.

Kania the trial court subsequenlty learned that Jones' hospitalization records following the Knight stabbing had been destroyed but that Jones had mentioned the hospitalization to Dr. Kania during his interview and that his mother had alluded to it when she spoke to Dr. Kania. The additional information did not alter the trial court's ruling. (25 RT 2654-2655, 2658.)

Thereafter, the trial court instructed the jury pursuant to CALJIC No. 4.21.1 concerning intoxication as follows:

> Under the law it is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of being in such condition. . . . However, there is an exception to this general rule, namely, where a specific intent is an essential element of a crime or special circumstance allegation. In such event, you should consider the defendant's voluntary intoxication in your determination of whether the defendant possessed the required specific intent at the time of the commission of the alleged crime.
>
> Thus in the crime of first-degree murder and the three alleged special circumstances, a necessary element is the existence in the mind of the defendant of a certain specific intent which is included in the definition of the crime and the special circumstances set forth elsewhere in these instructions.
>
> If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether or not the defendant had the required specific intent.
>
> If from all of the evidence you have a reasonable doubt whether the defendant had such specific intent, you must find that the defendant did not have such specific intent.
>
> Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug, or other substance knowing that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect.

Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug, or other substance.

(26 RT 2903-2904.)

Defense counsel argued extensively that Jones' lacked the specific intent to commit the charged offenses due to intoxication as follows:

I'm not here to tell you, ladies and gentlemen – and understand this, please, I'm not saying that Mr. Jones when this can was slapped out of his hands and she made her statements and came at him that he somehow was in fear for his life and he had to defend himself against, you know, this firebrand. That isn't the issue, ladies and gentlemen, that's not our position. I'm not on – going to insult your intelligence.

But what you have to keep in mind, and you're going to have evidence – instruction on the law as to the effect of alcohol on Mr. Jones's ability to formulate an intent to commit, as the specific intent of burglary or rape.

Again, I told you in opening statement, I think Miss Erickson went through it in great detail during voir dire – I'm not excusing my client's behavior because he was drunk, and you shouldn't either. That's not what we are talking about here. Did he kill her? Yes. Must you punish him for that? Yes.

What does alcohol have to do with it, then? It makes the difference, ladies and gentlemen, on whether this man, because of his own voluntary intoxication – and, again, ladies and gentlemen, I recognize life is a series of choices. He made a bunch of bad ones that night. So, you know, we're not arguing that my poor little client he was drunk and therefore don't convict him. That's not what I am saying. But it's a far cry, ladies and gentlemen, from saying that he went over there to murder with the intent to sexually brutalize this woman.

So think about it. When he comes in, what does the evidence demonstrate to us so far? He is drunk. He has got a can of beer in his hand. Mrs. Eddings sees it, smells the booze, says something about being drunk, comes at him. And we have already heard as to what a troubled background Mr. Jones has regarding women. I told you that in opening statement that was going to come out. And it did. Ladies and

gentlemen, I'm not trying to hide anything from you. I told you it would and it has.

What happens – here he goes over there to check on this woman, she knocks the beer can and comes at him, and he starts fighting, starts trying to grab her, pushing her back. To me, that's fighting, ladies and gentlemen. I don't care what anybody else calls it. But to convert that – and there is no doubt in my mind that as Bill told you when he – he grabbed her, no doubt about it, those are all batteries, he grabbed her, threw her to the ground.

[¶] . . . [¶]

The strangulation is a second injury. But there was evidence of that in the testimony of Mr. Jones, wasn't there? When he went in all hell broke loose, if you will remember, and he had her, hand by the neck. (Indicating.) He didn't demonstrate which hand. I happen to be using my right. But that's my demonstration, ladies and gentlemen, only, and it's only for demonstrative purposes. Trying to push her back.

And he said – he told you, both on the tapes and on the stand, as I recall, it got out of hand and I killed her. It got out of hand and I killed her. But the prosecution would have you believe, as does Dr. DiTraglia, that this statement that Mr. Jones made somehow – you know, some months or – hours after this incident, that he had gone over to have sex with her. Well, indeed, if you're a person who at age 15 has put a knife in a teacher's back, as you have already heard, ladies and gentlemen, I can't change history. We have someone who is functioning with the problem. Was that the specific intent? And that's what their burden is.

And that's why this evidence points to a manslaughter.

[¶] . . . [¶]

And in this case the burden was on the prosecution. And the evidence has demonstrated that Mr. Jones indeed went over, he indeed knocked on the door, he was indeed admitted entry into Mrs. Eddings's house, he indeed went inside, and indeed a fight broke out, and indeed Mr. Jones ended up killing her. [¶] And after she was dead, as the evidence has demonstrated, there was sexual penetration.

(26 RT 2834-2838.)

B. Jones' Lack Of Diligence And Inadequate Offer Of Proof Did Not Justify Reopening His Case

As a threshold matter, Jones' claim that the trial court's exclusion of his psychological evidence or refusal to reopen violated his federal and state constitutional rights to present a defense is forfeited because he did not object on this ground below. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1; Evid. Code, § 353.) Additionally, a defendant's constitutional right to present evidence does not extend to a right to reopen his case to present evidence in order to do so. (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) Rather, the decision to reopen is a matter left to the discretion of the trial court. (*People v. Monterroso* (2004) 34 Cal.4th 743, 779.) In determining whether a trial court acted within its discretion, this Court considers several factors: (1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence. (*People v. Marshall, supra,* 13 Cal.4th at p. 836.) A consideration of these factors supports the trial court's exercise of discretion in this case.

Although the defense had just rested and the prosecution had yet to start rebuttal when defense counsel sought to reopen, the psychological evidence Jones' sought to introduce was indisputably available during trial and defense counsel offered no excuse for failing to secure a ruling regarding its admissibility during the presentation of his case. The trial court was entitled to rely on defendant's lack of diligence in denying the motion to reopen. (*People v. Monterroso, supra*, 34 Cal.4th at p. 779.) As noted by the trial court, defense counsel consulted with Dr. Kania very early on in the representation. Further, the record demonstrates he had contact with Dr. Kania throughout the trial. Defense counsel also had Dr. Kania's report before resting, even before Jones

testified, as well as the prosecutor's motion in limine based on that report. Nevertheless, defense counsel elected to rest without seeking to call Dr. Kania.

Defense counsel's decision to rest also reflects on the last factor to be considered, namely, the significance of the evidence. The decision to rest also refutes Jones' contention on appeal that Dr. Kania's testimony was part of Jones' "main line of defense." (AOB 120-121.) Dr. Kania's testimony concerning Jones' personality disorder was simply not relevant to the issues in this case which necessarily involved diminished actuality or mental disease or defect. A personality disorder does not have any legal relevance to either defense.

Consistently, as found by the trial court, the offer of proof was lacking. To support a claim of erroneous exclusion of evidence, the substance, purpose, and relevance of the excluded evidence must be made known to the trial court by an offer of proof. (Evid. Code, § 354; *People v. Livaditis* (1992) 2 Cal.4th 759, 778.) The offer of proof should be specific enough to show the relevance of the evidence – i.e., the offer "must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) The trial court's determination of relevance is also a decision subject to abuse of discretion standard. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

On appeal Jones' identifies two aspects of Dr. Kania's proposed testimony he contends were relevant to the issue of whether Jones' actually formed the requisite mental states such as premeditation and deliberation and the specific intent to commit burglary, rape and sodomy: (1) the effect Jones' mental disease or defect and (2) the effect of Jones' intoxication. As Jones' acknowledges, evidence of a mental disorder or voluntary intoxication is no longer admissible to negate a defendant's capacity to form a mental state but is admissible on the issue of whether the defendant actually formed the required

mental state. (Pen. Code, §§ 22, 25, 28; *People v. San Nicolas* (2004) 34 Cal.4th 614, 661; *People v. Saille,* 54 Cal.3d at pp. 1111-1112.)

At trial, however, defense counsel repeatedly disavowed relying upon Dr. Kania to establish Jones' suffered a mental defect other than intoxication that could and did prevent him from forming the requisite specific intent. (20 RT 2145, 2202-2203; 25 RT 2651-2652.) Hence, such a claim is either forfeited on appeal or invited error. "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.)

Moreover, as noted by the trial court, there was no diagnosis of a mental disorder or disease within the meaning of the Diagnostic and Statistical Manual, particularly one that was relevant to the issue of Jones' specific intent. (25 RT 2652-2653.) While Dr. Kania vaguely described Jones' has having a "severe personality disorder" that included low self-esteem, a feeling that his affectional needs have never been met and anger (25 RT 2652; see also 32 RT 3617 [no evidence of a psychiatric disorder]), there was nothing offered to connect this "disorder" to the issue of whether Jones actually formed the requisite specific intent to commit the charged offenses. As the trial court observed early on in the proceedings, Jones' personality disorder may have offered a mitigating reason for Jones' deciding to do what he but it did not negate his specific intent. (9 RT 617.) Thus, the trial court acted within its discretion in finding any testimony by Dr. Kania concerning Jones' personality disorder irrelevant to the issues in this case.

Jones contends the evidence was relevant to bolster his defense that he misperceived an attack, lashed out angrily and then sexually assaulted Eddings

in an expression of rage and that this would have precluded a first degree murder conviction by negating his specific intent. (AOB 100.) But nothing in the offer of proof showed that Dr. Kania believed Jones' personality disorder was so profound or all encompassing that it altered the reality of the situation, i.e., thinking he was in more danger than he really was. There was also no evidence or argument at the guilt phase that Jones' sexually assaulted Eddings after he killed her in "an expression of rage." Dr. Kania did opine that Jones' had "weak controls" over his behavior but again this does not translate into an offer of evidence supporting the inference that Jones' did not know or intend what he was doing.

Citing *People v. Coddington, supra*, 23 Cal.4th 529, overruled on another point in *Price v. Superior Court, supra*, 25 Cal.4th at p. 1069, footnote 13, Jones suggests his personality disorder was admissible on the issue of his intent and improperly excluded. (AOB 112-113.) *Coddington* demonstrates quite the opposite. In *Coddington*, there was evidence from several doctors that the defendant "suffered from a delusional or paranoid disorder of the grandiose type described in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev.) (DSM-III-R)" and "was psychotic and delusional." (*People v. Coddington, supra*, 23 Cal.4th at pp. 558-560.) The trial court issued a ruling conditioning the admission of evidence of whether or how such a defect or disease would affect the defendant's mental state on the psychologist testifying outside the jury's presence that he believed the defendant did not premeditate or deliberate. The trial court also precluded hypotheticals regarding the effect of mental defect or illness on a person's ability to premeditate or deliberate. (*Id.* at p. 582.) Coddington, as here, elected not to put on any mental illness evidence in the guilt phase and waived any claim of error as a result. This Court held in *Coddington*:

> Had the evidence he introduced at the sanity phase about his mental illness offered a basis from which the jury could infer that he did not premeditate or deliberate the murders, that evidence could have been introduced at the guilt phase. Inasmuch as he failed to offer any evidence at the guilt phase and the record does not reflect that this was due to the court's ruling, the issue is not properly preserved or presented.

(*People v. Coddington, supra*, 23 Cal.4th at pp. 583-584.)

Moreover, although this Court generally observed in *Coddington* that "an expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence vel non of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing" (*People. v. Coddington, supra*, 23 Cal.4th at pp. 557-558), this in no way means that Jones' personality disorder constituted such evidence. Indeed, this Court's alternative holding that any error regarding Coddington's mental illness evidence was harmless shows otherwise. This Court observed: "None of the experts, either court-appointed or defense-retained, all of whom testified that appellant was mentally ill [in the sanity phase], suggested that his illness precluded or would affect his ability to premeditate and deliberate." (*Id.* at p. 584.) Nor do *People v. San Nicolas, supra*, 34 Cal.4th 614 or *People v. Breaux* (1992) 1 Cal.4th 281, also relied upon by Jones, show otherwise. Although the trial court in each case permitted evidence concerning the defendant's personality disorder, among other psychological problems, this court did not hold such evidence was in fact properly admitted – just that given the evidence admitted the defendant could not establish any prejudice. Moreover, the psychological evidence was far more extensive and more connected to a defendant's ability to form a particular mental state. (*People v. San Nicolas, supra,* at pp. 662-663; *People v. Breaux, supra*, at p. 303.) In sum, the only evidence Jones offered regarding any mental problems (not intoxication) was

irrelevant to the issues at hand and the trial court properly excluded that testimony.

Although it is not clear whether defense counsel in fact sought Dr. Kania's testimony concerning Jones' mental health commitments there is no error in any case. The trial court also properly determined that Dr. Kania had no basis for testifying concerning Jones' hospitalizations because he did not have any reliable information regarding those hospitalizations. The only information Dr. Kania had was from Jones and an allusion to the hospitalization by Jones' mother. He did not have any records from the hospitals. Any inferences concerning the significance of the hospitalization would have been purely speculative. The fact that Jones had been hospitalized in a mental institution over twenty years ago in and of itself was of no relevance to Jones' behavior on the day he attacked Eddings. The trial court has broad discretion to decide whether evidence is relevant, and it has no to duty to admit evidence which provides only speculative inferences regarding disputed issues in the case. (*People v. Babbit* (1988) 45 Cal.3d 660, 681.) It also has no duty to reopen to put on new evidence not sufficiently connected to any defense evidence in this case. (*People v. Monterroso, supra,* 34 Cal.4th at p. 779.)

Similarly lacking an adequate offer of proof was Dr. Kania's testimony concerning Jones' voluntary intoxication. As found by the trial court, defense counsel sought to introduce prohibited testimony. In his offer, defense counsel stated that based on interviews with Jones and his family Dr. Kania would formulate an opinion that intoxication in this case resulted in diminished actuality which in turn would and did prevent Jones' ability to form the requisite specific intent. (20 RT 2202-2203.) However, an expert testifying about the defendant's voluntary intoxication "shall not testify as to whether the defendant had or did not have the required mental states, which include[s] . . . intent . . . , for the crimes charged. The question as to whether the defendant

had or did not have the required mental states shall be decided by the trier of fact." (Pen. Code, § 29; see *People v. Nunn* (1996) 50 Cal.App.4th 1365 [applying Pen. Code, § 29 to testimony on voluntary intoxication and holding expert could not conclude defendant charged with attempted murder acted impulsively, in other words, without intent to kill]; *People v. Rangel* (1992) 11 Cal.App.4th 291, 302 [Pen. Code, § 29 includes effects of voluntary intoxication on the mental processes].) Thus, there was no error.

Finally, any error in excluding Dr. Kania's testimony about Jones' personality disorder, hospitalization or intoxication was also harmless whether evaluated under the state standard for evidentiary rulings, which respondent asserts applies (*People v. Cunningham* (2005) 25 Cal.4th 926, 998-999), or the federal constitutional error standard. As repeatedly demonstrated above, the evidence of Jones specific intent to rape and sodomize Eddings was overwhelming. Even fully elucidated at the penalty phase, Dr. Kania's testimony did nothing to undercut the evidence of Jones' specific intent. If anything, as anticipated by the trial court, it confirmed Jones' acted out his intentions and just provided an explanation for why he chose to act the way he did. Moreover, as demonstrated by the prosecutor during the penalty phase, Dr. Kania's opinion was based almost entirely on Jones' self-serving and false assertions. Jones denied being physical or violent with Kidwell, Garrison, Swarringim and Toni P. Jones did not even admit to Dr. Kania that he strangled Eddings to death. (32 RT 3657.) Dr. Kania also accepted Jones' version that the previously sleeping, 90 pound, 81 year old Eddings just started swinging at him. (32 RT 3651.) With the exception of the interview with Stuckinschneider and the last few moments of Jones' interview, Dr. Kania did not look at the evidence in this case or speak with the other women Jones' attacked. (32 RT 3608-3609.)

Regarding intoxication, the trial court did allow evidence of Jones' intoxication into the guilt phase, however thin, and correctly instructed the jury on how to consider it in connection with assessing Jones' specific intent. Jones was not entitled to anything more. "The proffered evidence would have had little impact on lay jurors, who presumably know as well as any expert how to assess the effect of alcohol on impulse and inhibitions." (*People v. Stitely* (2005) 35 Cal.4th 514, 549-550, citing, *People v. Seaton* (2001) 26 Cal.4th 598, 654-655 [upholding exclusion of expert testimony on how defendant's blood-alcohol level affected criminal intent since evidence "contained little if any information a layperson would not know"].)

Further, Dr. Kania's opinion that Jones was intoxicated that night was based on the entirely unreliable statements made by Jones to him that he drank 15 beers. Again, Dr. Kania accepted Jones' version without any consideration of Jones' prior statements to police claiming he drank only four to six beers and without regard to any of the evidence of Jones' post rape murder conduct. Even at a quantity to which Jones' ultimately testified to, "almost" 12 beers, that would not be sufficient to negate specific intent of 200 pound man drinking over the course of five hours. It clearly did not negate Jones culpability for his crimes. Regardless of how much he had to drink, Jones had the wherewithal to: (1) repeatedly jump a 6' fence between his parents' property and Eddings; (2) flee the scene in his truck; (3) reassess his decision to flee and decide to return to destroy the evidence; (3) formulate a plan to destroy the evidence by arson; (4) execute his plan to commit arson; and (5) return home and wash away more evidence by taking a shower and washing his clothes. None of these actions are consistent with a person too drunk to formulate the requisite specific intent to be held criminally liable for their crimes. Under these circumstances, any error in excluding Dr. Kania's testimony is harmless beyond a reasonable doubt.

IV.

THE ABSTRACT OF JUDGMENT SHOULD BE CORRECTED TO ACCURATELY REFLECT THE TRIAL COURT'S SENTENCE

Jones correctly asserts that the abstract of judgment does not accurately reflect the trial court's sentence on count two. (AOB 121-123.) In count two Jones was found guilty of arson and the jury found true the allegations he had two strikes, two serious felony priors and one prison prior. (18 CT 4863-4872.) At the sentencing hearing the trial court imposed sentence on count two as follows:

> Because those prior offenses have found to be true, the Court imposes under Count II the sentence of 25 years to life imprisonment. [¶] For the first, second, and third prior convictions which were alleged in this case, the Court would note that they are convictions for the same offense as under the first and second special prior, and under the provisions of Penal Code Section 667.5(b), the Court imposes a sentence of one year, and I order that stayed pending the completion of the term.
>
> With regard to the first and second prior offenses which are alleged pursuant to 667(a), insofar as they involve the same offense, the Court imposes the mandatory term of five years on each of those, but I order the second five-year term stayed insofar as it arises out of the same facts and circumstances.
>
> The indeterminate term, therefore, under Count II is 25 years to life with an additional determinate term of five years pursuant to 667(a).

(35 RT 3961.)

The various abstracts of judgment, including the amended abstract of judgment, however, incorrectly reflect a sentence of 25 years to life plus an 8 year determinate term. (19 CT 5157, 5160, 5163.) This Court has the inherent power to correct clerical errors in the judgment at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, the abstract of judgment should be corrected to reflect the actual sentence imposed by the trial court on count two,

namely, 25 years to life plus five years for the unstayed prior serious felony enhancement.

PENALTY PHASE

I

THE TRIAL COURT PROPERLY APPLIED *WAINWRIGHT v. WITT* IN DECIDING WHICH PROSPECTIVE JURORS TO DISMISS FOR CAUSE

Jones contends the trial court violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights to an impartial jury and reliable sentencing by inconsistently and arbitrarily applying *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841], governing the dismissal of jurors for their death penalty views. Specifically, he asserts the trial court erred in granting the prosecutor's motion to dismiss for cause prospective jurors Elizabeth R., Patrick P., Patricia N., Beverly D. and Minnie B. and in denying defense counsel's motion to dismiss for cause prospective juror Cynthia B. and prospective alternate Larry L. (AOB 124-171.) Additionally, Jones contends the prosecutor exercised her peremptory challenges to exclude life-inclined jurors, further denying him a fair and impartial jury. (AOB 171-176.) Jones waived any claim of error. In any event, there was no error, and no violation of Jones' constitutional rights, by the trial court's application of *Wainwright v. Witt* or by the prosecutor's use of peremptory challenges.

A. Jones Waived Any Claim He Was Deprived Of An Impartial Jury

During voir dire, defense counsel challenged 10 prospective jurors concerning their views on the death penalty. The trial court granted the motion as to five of those individuals and denied the motion as to Elizabeth R., Patrick

P., Patricia N., Beverly D. and Minnie B. (12 RT 1075-1076, 1152-1153, 1212-1213, 1216-1222; 13 RT 1357, 1396-1397, 1425-1428). Defense counsel used his peremptory challenges to excuse the remaining five. (12 RT 1084, 1214; 13 RT 1358.)

The prosecutor challenged four prospective jurors concerning their views on the death penalty and the trial court, over defense counsel's objection, excused one, namely, Cynthia B. (12 RT 1078-1079; 13 RT 1288.) The prosecutor exercised her peremptory challenges to excuse the other two jurors, as well as twenty others, without objection by the defense. The trial court also excused on its own, without objection by defense counsel, two additional prospective jurors for their views on the death penalty and a third prospective juror over defense counsel's objection. (11 RT 952-953, 958-959.)[8/] There is no challenge with respect to the later dismissed juror.

Regarding the selection of alternate jurors, defense counsel challenged two prospective jurors and the court excused one for his views on the death penalty. (14 RT 1544, 1587-1588.) Defense counsel used a peremptory to excuse the other. (14 RT 1548.) There is no issue on appeal regarding this ruling. The prosecutor successfully challenged two prospective alternates for cause without objection by the defense, including Larry L., who Jones now argues was improperly dismissed. (14 RT 1544-1546, 1565-1566.)

Without exhausting his peremptory challenges defense counsel accepted the jury on three separate occasions, including prior to his exercising a peremptory challenge to excuse Minnie B. (13 RT 1358-1359, 1429.) He then accepted the alternate jurors without exercising all of his peremptory challenges.

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8. The voir dire was not limited to death penalty qualification and the trial court excused some jurors due to hardship or general inability to be a diligent juror. (See e.g. 13 RT 1330; 12 RT 1162-1163; 12 RT 1188; 14 RT 1565-1566.)

(14 RT 1547-1549, 1588-1589.) Additionally, defense counsel did not object to the jury as constituted on the ground it was not impartial.

Jones waived any claim of error with respect to the trial court's refusal to excuse for cause Elizabeth R., Patrick P., Patricia N., Beverly D. and Minnie B. It is well established: "'To preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so. [Citations.]'" (*People v. Ramirez* (2006) 39 Cal.4th 398, 448; *People v. Millwee* (1998) 18 Cal.4th 96, 146.) Jones did neither. Without objection, Jones accepted the jury as finally constituted with five peremptory challenges remaining. (13 RT 1358-1359, 1429.)

Jones also waived his claim the prosecutor's exercise of peremptory challenges to excuse life-inclined jurors denied him an impartial jury. In order to preserve this claim for appeal Jones was required to object at trial. (*People v. Hill* (1992) 3 Cal.4th 959, 1005.) He did not object below. Jones contends any objection would have been futile and hence unnecessary. (AOB 174.) Given the trial court ruled in Jones' favor at least 50 percent of the time his argument is not well taken. Also, even if the odds had been against him, "it does not justify the failure to preserve the issue." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487.) Moreover, Jones' argument wrongly assumes the prosecutor exercised all of her peremptory challenges based on the prospective juror's death penalty views but that was not the only purpose of voir dire. (See fn. 8, *supra.*) The questionnaire, the court and counsel also probed jurors' other qualifications to sit on the jury, and any one of these other reasons could have served as a basis for the prosecutor's peremptory challenge. In that regard, Jones belated recitation of dissatisfaction with the jury is also precluded as speculative. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1211.)

Jones failure to object to the trial court's ruling granting the prosecutor's motion to dismiss for cause prospective alternate Larry L. should also be waived. In *People v. Lewis* (2006) 39 Cal.4th 970, this Court observed the law is unclear as to whether a procedural bar applies to defendant's failure to challenge a trial court's dismissal of a juror for cause and declined to resolve the issue. (*Id.* at p. 1007, fn.8.) Instead, this Court assumed the defendants in *Lewis* had preserved their right to appeal because "the question whether defendants have preserved their right to raise this issue on appeal is close and difficult." (*Id.* at pp. 1007-1008, fn.8.) By failing to object, the defense implicitly concedes the merit of the prosecution's motion, which may or may not have been the basis for the trial court's ultimate ruling to excuse for cause. (See e.g. discussion of the dismissal of prospective alternate Larry L., *infra.*) Accordingly, as with other timely objection requirements an objection requirement here would have given the trial court the opportunity to consider the defendant's objection and either reconsider its ruling or fully explain the basis for the ruling on the record. Thus, in order to preserve a claim the jury was not impartial, whether based on a denial or grant of a motion to dismiss for cause, the defense should be required to make that objection at the time of the motion and at the time the jury is finally constituted.

In any case, Jones' claim that he was denied his constitutional rights to an impartial jury by virtue of the denial of his motions to dismiss for cause Elizabeth R., Patrick P., Patricia N., Beverly D. and Minnie B., and the exercise of the prosecutor's peremptory challenges are clearly waived. Moreover, there was no error, the trial court properly applied the *Wainwright v. Witt* standard in deciding which jurors to exclude based on their death penalty views.

B. The *Wainwright v. Witt* Standard

In *Wainwright v. Witt*, the United States Supreme Court confirmed the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. (*People v. Roldan* (2005) 35 Cal.4th 646, 696.) That standard is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*People v. Lewis, supra,* 39 Cal.4th at p. 1006, quoting *Wainwright v. Witt, supra*, 469 U.S. at p. 424.) "Because this determination involves an assessment of the juror's demeanor and credibility, it is one 'peculiarly within a trial judge's province.' [Citation.]" (*Id.* at pp. 1006-1007.) "If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence. [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 671.)

Extensive briefing (2 CT 504-514; 3 CT 649-658) and the voir dire summarized below demonstrate that trial court and counsel were well versed with the *Wainwright. v. Witt* standard and that the trial court properly applied the standard in deciding which jurors were subject to dismissal for cause under the *Wainwright v. Witt* standard.

C. The Trial Court Properly Denied Jones' Motion To Dismiss For Cause Prospective Jurors Elizabeth R., Patrick P. And Patricia N.

Elizabeth R., Patrick P. and Patricia N. were voir dired together and the record demonstrates the trial court properly denied Jones' motion to dismiss these jurors for cause.

In her questionnaire prospective juror Elizabeth R. indicated her general thoughts about the death penalty as follows: "If a person has been found guilty

in a court of law and the death penalty was a consideration I feel the death penalty should then be given." (14 CT 3918.) She also indicated that she would not vote automatically for either penalty based on her views on capital punishment and without regard to the evidence. (14 CT 3920.) During defense counsel's voir dire Elizabeth R. did respond affirmatively to the question about whether she would automatically vote for the death penalty if the defendant were convicted of first degree murder and special circumstances were found true. But defense counsel's question did not address the duty to consider and weigh mitigation or follow the law. (11 RT 1039-1040.)[9/] During the trial court's voir dire of Elizabeth R., the court specifically clarified whether Elizabeth R. meant that she would always vote for death if a defendant is guilty of murder and there is a special circumstances finding. Elizabeth R. replied: "Not always. I feel that I am for the death penalty but I would – I would look at all of the evidence. . . ." (11 RT 962; see also 963.) Elizabeth R. recognized the difference between discussing the death penalty in the abstract and personally evaluating whether someone should receive that penalty. (11 RT 964.) She also repeatedly reaffirmed to the trial court and later to both counsel

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9. An example of the nature of defense counsel's questions in this area is as follows:

> How many of you of the 18 that are currently seated feel that if – in response to question number C on page 16, that if – if my client was found, number one, guilty of murder in the first degree, number two, that the special circumstances – and for purposes of this question were all proven, one or all – one, two, or three of those special circumstances were proven. How many feel an obligation because death penalty – at that point in time there would be two options, death penalty or life without possibility of parole. How many of you feel that it would be your obligation to vote for the death penalty?

(11 RT 1039-1040.)

that she was open to the possibility of either punishment, could be fair to both sides, that she would make her determination based on the evidence and would follow the law requiring her to weigh the mitigating and aggravating circumstances. (11 RT 963-964, 1037, 1039,1052-1053.) The prosecutor's questioning eliminated any doubt about whether Elizabeth R. would automatically vote for death in violation of the law.

> MS. ERICKSON: If the judge tells you at that point even though you favor the death penalty, even though you think it's fair under most circumstances involved with special circumstances – if the judge told you at that point deciding death or life without parole, you must weigh the factors, the good things in the defendant's life, the bad things in his life – I'm implying aggravating and mitigating factors. Would you be able to do that? Would you follow the law?
>
> PROSPECTIVE JUROR [ELIZABETH R.]: Yes.
>
> MS. ERICKSON: By refusing to consider life without parole, you would not be following the law. Do you understand that?
>
> PROSPECTIVE JUROR [ELIZABETH R.]: I do understand that. I would go by the law. I feel strongly about the death penalty, but I would go by the law given by the judge.
>
> MS. ERICKSON: I appreciate that. Your feelings are important, and you shouldn't negate them or discount them or be ashamed of them.
>
> PROSPECTIVE JUROR [ELIZABETH R.]: I also know that's not – I can't be swayed by my feelings. I understand that I must follow the law, the judge's instructions.
>
> MS. ERICKSON: Would you do that?
>
> PROSPECTIVE JUROR [ELIZABETH R.]: Yes, I would.

(11 RT 1052-1053.)

Prospective juror Patrick P. explained his views on the death penalty in the questionnaire as "I feel it is a part of the justice system and should be used when the law provides for it" and confirmed that he would not automatically

vote for or against the death penalty without considering the evidence. (10 CT 2591, 2593.) In response to the same type of questions defense counsel asked Elizabeth R., namely whether Patrick P. would feel obligated to vote for death or would automatically vote for death if Jones were found guilty of murder and the special circumstances were found true, Patrick P., like Elizabeth R. gave somewhat confused and contradictory responses. He stated he would automatically vote for the death penalty if Jones were found guilty of murder and all three special circumstances. But he also volunteered, "If that went in accordance with the judge's instructions and the law provided for it." (11 RT 1041-1043.) Again, the prosecutor clarified any misunderstanding on the part of the prospective juror concerning his obligations to follow the law. She asked him the same questions as Elizabeth R. and he similarly said he would follow the law. (11 RT 1053.) The prosecutor additionally confirmed:

> MS. ERICKSON: You appreciate it's important in a case of this severity – it's important to follow the law?
>
> PROSPECTIVE JUROR [PATRICK P.]: Yes.
>
> MS. ERICKSON: Every instruction the judge gives you, it's your statement you would follow the law?
>
> PROSPECTIVE JUROR [PATRICK P.]: Yes.
>
> MS. ERICKSON: I want you to assume you're in that situation. As a member of the jury, you found the defendant guilty of murder, special circumstances. You've heard the evidence presented at the penalty phase. Now you have to decide. Would you consider all of the evidence presented to you?
>
> PROSPECTIVE JUROR [PATRICK P.]: I would – I would follow the judge's instructions. I don't know the law. I would have to consider both. I know nothing.
>
> MS. ERICKSON: That's why I'm trying to clarify that. I appreciate you're all in the dark. You've never been in this situation before. You

haven't read the judge's instructions. The judge tells you you must consider both. You must weigh evidence to support both.

PROSPECTIVE JUROR [PATRICK P.]: That's what I would do.

(11 RT 1053-1054.)

Prospective juror Patricia N. indicated in her questionnaire that she felt the death penalty was an appropriate punishment for a murderer but that she would not automatically vote for the death penalty simply because a defendant has been found guilty of murder with special circumstances. (9 CT 2500, 2502.) She also recognized a defendant's background and character may be relevant to determining penalty because "there may be something said about an individual's character and how they have conducted themselves to the 'this' point." (9 CT 2503.) During the trial court's voir dire, Patricia N. assured the court that she could be fair to both sides without a doubt. (11 RT 1034.) Patricia N., like Patrick P. and Elizabeth R., gave a confused and somewhat contradictory response when trying to answer defense counsel's questions regarding if Jones were found guilty of murder with all the special circumstances. She indicated that she would feel obliged to vote for death to the exclusion of life. (11 RT 1041-1043.) However, like her predecessors, Patricia N. also confirmed her willingness to follow the law when asked follow up questions by the prosecutor. (11 RT 1054.) Additionally, the prosecutor confirmed:

MS. ERICKSON: Would you appreciate how important it is to follow the law?

PROSPECTIVE JUROR [PATRICIA N.]: I do.

MS. ERICKSON: Again, would you disregard the law and refuse to even consider life without parole?

PROSPECTIVE JUROR [PATRICIA N.]: No, I wouldn't.

(11 RT 1054.)

Defense counsel moved to dismiss for cause Elizabeth R., Patrick P. and Patricia N. on the ground they gave inconsistent responses during voir dire and their ultimate assurances to follow the law were not convincing. (12 RT 1075-1076.) The prosecutor opposed, noting "all three individuals were clear in response to the Court's questions that they would apply the law, that they could be fair and impartial and they would consider both the death penalty and life without parole." (12 RT 1076-1077.) The Court denied the motion. At the outset the trial court agreed with defense counsel that each prospective juror gave somewhat conflicting responses and that "[e]ach of them clearly has a bias or an inclination in favor of the death penalty." (12 RT 1077.) But the trial court found:

> Each of them has also stated clearly that they will consider both penalties and consider the evidence in the case. I don't believe that Mr. Cabrera's questioning was ambiguous or tricky in any way.
>
> What he asked them to do, however, in that instance – and I would indicate that he was not alone in this style of questioning – was he was asking the jurors at certain stages to prejudge the evidence, to say what they would decide now when they haven't heard the evidence, simply based on some assumed facts – questions insofar as they asked the jurors to prejudge the evidence were unfair, and I would not use that as a basis to excuse someone for cause.

(12 RT 1077-1078.)

In the end, the trial court concluded:

> Each of the jurors attempted to honestly answer the questions that were posed to them. And the Court finds that each of them at this point in time are able to consider and have indicated their willingness to consider the full range of possible punishments, including life without the possibility of parole.

(12 RT 1078.)

The trial court properly exercised its discretion. While Elizabeth R., Patrick P. and Patricia N. expressed approval for the death penalty, each agreed, unequivocally to follow the law and to consider both penalties. Patricia N. also

expressly acknowledged that she would consider Jones' background. Not once did they say they would not or could not follow the law or were concerned with their ability to do so. Also, their somewhat confusing and conflicting responses concerning the automatic imposition of the death penalty were attributable to the voir dire proceedings and the nature of the questions.[10/] As noted in *People v. Fudge, supra*, 7 Cal.4th 1075:

> 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 by the nature of the questions posed.

(*People v. Fudge, supra*, 7 Cal.4th at p. 1094.) More importantly, the trial court, who actually observed these prospective jurors, found each sincere concerning their willingness to abide by the law and consider both penalties and that finding is binding on this Court. (*People v. Lewis, supra,* 39 Cal.4th at pp. 1006-1007.)

In that regard, Elizabeth R., Patrick P. and Patricia N.'s answers and the trial court's ruling denying defense counsel's motion to dismiss for cause are analogous to answers and rulings examined and upheld by this Court in *People v. Ledesma, supra,* 39 Cal.4th at pages 672-673. For example, prospective juror Glenn H. "stated several times that he definitely would vote for the death penalty if a deliberate, premeditated murder were proved." (*Id.* at p. 672.) Glenn H. also added, which neither Elizabeth R., Patrick P. or Patricia N. did, that he would not be willing to give weight to the defendant's background.

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10. Although the trial court did not find defense counsel's questions regarding automatically imposing the death penalty tricky or ambiguous, they were confusing because defense counsel did not make it clear that he was asking whether each prospective juror would automatically impose the penalty irrespective of the law and their duty to consider Jones' mitigating evidence. In that regard, the questions were incomplete and any inference of equivocation on the part of Elizabeth R., Patrick P. and Patricia N. is further undermined by the nature of the questions posed.

However, like Elizabeth R. and the others, Glenn H. agreed, if instructed, to consider mitigation and the possibility of life imprisonment without the possibility of parole. (*People v. Ledesma, supra,* 39 Cal.4th at p. 672.) Similarly, prospective juror James L. stated that someone who commits murder should get the death penalty and that he would automatically vote for the death penalty if he were convinced an intentional murder had been committed. But he also stated this was only his opinion, that he would keep an open mind as to both penalties and that he would follow the law. (*People v. Ledesma, supra*, 39 Cal.4th at pp. 672-673.) The trial court declined to excuse Glenn H. and James L. because, although death inclined, each prospective juror agreed he would follow the requiring him to consider both penalties. This Court upheld the trial court's ruling. (*Ibid.*) This Court's rulings in *Ledesma* apply equally here.

D. The Trial Court Properly Denied Jones' Motion To Dismiss For Cause Prospective Jurors Beverly D. And Minnie B.

The questions and answers of prospective jurors Beverly D. and Minnie B. are along the same lines as Elizabeth R., Patrick P. and Patricia N. and the trial court properly refused to excuse them as well.

In prospective juror Beverly D.'s written questionnaire she indicated she was strongly in favor of the death penalty, stating: "If it is good enough for the victim it's good enough for the killer." (6 CT 1569.) She stated that she would not automatically vote for either penalty upon a conviction for murder and special circumstance finding based on her death penalty views without regard to the evidence. (6 CT 1571.) During questioning by the trial court, Beverly D. stated that she could weigh the aggravating and mitigating circumstances to decide the appropriate penalty. Consistent with her questionnaire Beverly D. also said that she would not want to automatically vote for the death penalty. (12 RT 1161.) Beverly D. expressed the same willingness in response to

defense counsel's questioning. (12 RT 1199.) Although she then answered affirmatively defense counsel's question about whether she would automatically vote for death if Jones was found guilty of first degree murder and the special circumstances were proven (12 RT 1199), she, too, clarified her answer upon additional questioning by the prosecution.

> [Ms. Erickson]: Miss [Beverly D.], you indicated in response to a question by the defense attorney that you would automatically impose the death sentence if you were in a penalty phase. My question, ma'am, is does that mean that if you find yourself in a penalty phase, at that point you would stop listening to the evidence, you would stop listening to the judge's instruction and simply automatically impose a death sentence without consideration of the evidence or the judge's instruction?
>
> PROSPECTIVE JUROR [BEVERLY D.]: No.
>
> MS. ERICKSON: You are indicating no. Would you in fact follow the law as the judge tells you?
>
> PROSPECTIVE JUROR [BEVERLY D.]: Right.
>
> MS. ERICKSON: And would you in fact listen to all the evidence presented?
>
> PROSPECTIVE JUROR [BEVERLY D.]: Right.
>
> MS. ERICKSON: Now, at that point, assuming you have heard evidence that the defendant has done some good things in his life and some bad things in his life, would you in fact follow the judge's instruction and weigh the evidence –
>
> PROSPECTIVE JUROR [BEVERLY D.]: Right.
>
> MS. ERICKSON: – before reaching a verdict of death or life without parole?
>
> PROSPECTIVE JUROR [BEVERLY D.]: Yes.
>
> MS. ERICKSON: Yes, you could do that?
>
> PROSPECTIVE JUROR [BEVERLY D.]: Yes.

MS. ERICKSON: So when you indicated you would automatically impose a death sentence, what did you mean by that, ma'am?

PROSPECTIVE JUROR [BEVERLY D.]: If we found out the other were true, the burglary, the sodomy, the rape.

MS. ERICKSON: And the aggravating circumstances outweigh the mitigating – it's a two-phase case. Maybe I am getting more confusing for you. The first phase is determining whether or not the defendant is guilty and the special circumstances are true. If you find he is guilty and the special circumstances are true, then you go into phase number two, the penalty phase.

PROSPECTIVE JUROR [BEVERLY D.]: Uh-huh.

MS. ERICKSON: Now, at that point you have to do a weighing process. Can you do that?

PROSPECTIVE JUROR [BEVERLY D.]: Yeah.

MS. ERICKSON: Can you then consider all the evidence on both sides?

PROSPECTIVE JUROR [BEVERLY D.]: Uh-huh.

MS. ERICKSON: That's yes?

PROSPECTIVE JUROR [BEVERLY D.]: Yes.

(12 RT 1203-1205.)

The trial court thereafter further clarified Beverly D.'s state of mind. After the trial court explained more about the two step process of guilt and penalty, Beverly D. agreed that in determining the penalty she would "weigh the good with the bad" and assuming they were equal or the bad did not substantially outweigh the good she could vote for life. (12 RT 1211-1212.)

Prospective juror Minnie B., in her juror questionnaire, indicated she held pro death penalty views and that she did not agree with life imprisonment because the "the victim had no choice." (13 CT 3555; 13 RT 1307.) She stated

that upon a finding of guilt for murder and one or more special circumstances that she would not automatically vote for either punishment because of her views and without regard to the evidence. (13 CT 3557-3558.) She reiterated that position during oral questioning by the trial court. Minnie B. explained that while she leaned in favor of the death penalty "if those factors are true," she would have to listen to the evidence and all of the court's instructions before deciding the penalty. (13 RT 1307.) Upon additional questioning she reiterated:

> Well, again, I would have to – I would have to hear all the evidence, I would have to listen to all of your instructions, and I would probably lean to that if all of those factors were true. In other words, if – maybe I am like someone else said here – I would have to listen to what you say and maybe put my thoughts aside for that time and disengage my mind from my heart.

(13 RT 1308.) Minnie B. also said she would try to have an open mind going into the penalty phase. (13 RT 1309.)

Defense counsel moved to dismiss both prospective jurors and the trial court denied the motion. (12 RT 1213; 13 RT 1357.) The trial court properly disallowed the challenges for cause of Beverly D. and Minnie B. Beverly D. presents a virtually identical situation to Elizabeth R., Patrick P. and Patricia N. Although the prospective juror favored the death penalty and gave somewhat conflicting and confusing responses to defense counsel's questions about automatically imposing the death penalty upon a first degree murder conviction and special circumstance finding, he unequivocally agreed to follow the law and keep an open mind as to penalty. Minnie B. was similarly situated. The trial court was entitled to accept their representations each would follow the law and its rulings are in accord with this Court's decision in *People v. Ledesma, supra,* 39 Cal.4th at pages 671-674. Indeed, Jones does not meaningfully challenge the trial court's specific rulings disallowing his challenges for cause but rather focuses on what he perceives to be the disparate treatment by the trial court in finding no cause to dismiss Elizabeth R., Patrick P., Patricia N., Beverly D. and

Minnie B. and finding cause to dismiss Cynthia B. and Larry L., whom the prosecutor challenged. (AOB 165-171.) As will demonstrated more fully below, the trial court appropriately distinguished between the responses of Elizabeth R., Patrick P., Patricia N., Beverly D. and Minnie B. on the one hand, and Cynthia B. and Larry L., on the other hand, based on the prospective juror's ability (or inability) to comply with the law regardless of their views on capital punishment.

In any event, because neither Elizabeth R., Patrick P., Patricia N., Beverly D. or Minnie B. sat on Jones' jury, Jones "could not possible have suffered prejudice as a result of the trial court's refusal to excuse them at his request." (*People v. Hillhouse, supra,* 27 Cal.4th at p. 488.)

E. The Trial Court Properly Granted The Prosecutor's Motion To Dismiss Prospective Juror Cynthia B. And Prospective Alternate Juror Larry L.

The trial court properly granted the prosecutor's motion to dismiss prospective juror Cynthia B. and prospective alternate juror Larry L. The trial court properly excused Cynthia B. because, unlike Elizabeth R., Patrick P., Patricia N., Beverly D. and Minnie B., Cynthia B.'s voir dire established that her views on the death penalty would prevent or substantially impair her ability to be a fair juror. The trial court did not excuse Larry L. because of his views on the death penalty, which he generally favored, but because Larry L. exhibited a highly emotional bias concerning mental health issues due to his son's mental health problems and that bias would have prevented him from fullfilling his obligation to follow the law and consider other penalties in a case involving mental health issues.

Cynthia B. indicated in her written questionnaire that she did not "feel the death penalty is the appropriate action to take against a person." (8 CT 2051.) She also indicated she was strongly opposed to the death penalty based

on her religious beliefs. (8 CT 2051-2052.) However, Cynthia B. denied that she would automatically vote against the death penalty because of her views. (8 CT 2053.) During voir dire, the trial court probed Cynthia B.'s views on the death penalty. Cynthia B. twice admitted that "It's kind of hard to say" whether she could be open to consider the death penalty because of the way she feels about it and could not deny the possibility she would automatically vote for life. (11 RT 974-975.) In response to initial questioning by the prosecution Cynthia B. did state that while she was uncomfortable with imposing the death penalty she would respect the law. (11 RT 1060-1061.) But when probed a little bit more by the prosecutor, Cynthia B. candidly concluded, "Personally, I don't think I could do it just because of my beliefs." (11 RT 1063.) She also admitted she was "not sure" she could impose death even where the aggravating circumstances outweighed the mitigating circumstances. (11 RT 1068-1069.)

The prosecutor challenged Cynthia B. for cause, observing:

> Miss [Cynthia B.] who indicated in response to both the Court's question and mine that she could not tell us that she could consider the death penalty. And she was very adamant about that that she has more convictions and she truthfully could not say that she could consider the death penalty, and she found herself in that position where based on the evidence a death verdict was appropriate.

(12 RT 1078.)

Defense counsel maintained Cynthia B.'s responses were not dissimilar to Elizabeth R., Patrick P. or Patricia N. because she said she would follow the law (12 RT 1079). The trial court disagreed:

> The Court's evaluation of her responses is that although saying ultimately at the end she didn't know what she would do, everything else about her answers and her body language made it unmistakably clear that she had a position in this case with regard to the ultimate punishment. And she did not appear to the Court to be open to the possibility of considering equally, based on the evidence, the two possible alternative punishments in this matter.

(12 RT 1081.)

The trial court properly excused Cynthia B. for cause. Unlike Elizabeth R. and the others, Cynthia B. did not unequivocally state that she could follow the law regardless of her death penalty views. Instead, she repeatedly and candidly admitted that she did not know or was not sure whether she could follow the law and consider the death penalty because of her death penalty views. Her comments are comparable to those of juror V.Z. in *People v. Roldan, supra*, 35 Cal.4th 646. In *Roldan*, V.Z., a teacher, explained she generally did not like the death penalty and always felt badly when someone was executed but understood why sometimes it is necessary. However, when asked several questions probing whether her views on the death penalty would affect her ability to follow the law, V.Z. stated: "I don't think so," "I honestly don't know," and finally "I don't think I could ever vote for death." This Court upheld the trial court's excusal of V.Z. for cause. (*Ibid.*) Similarly, here, the trial court properly determined Cynthia B. would be unable to faithfully and impartially follow the law based on the same type of equivocal responses. (*Ibid.*; see also, *People v. Holt* (1997) 15 Cal.4th 619, 652 [prospective juror's inability to follow the law justified excusing for cause].)

Cynthia B. indicated a desire to be fair and follow the law, but the trial court found her assurances unconvincing. Cynthia B.'s unwillingness to consider the imposition of the death penalty need not appear with "absolute clarity." It is enough that following voir dire "'the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.' [Citation.]" (*People v. Roldan, supra,* 35 Cal.4th at pp. 697-698.) In that regard, contrary to Jones' contention (AOB 135), the trial court appropriately relied upon its observations of Cynthia B.'s body language in deciding that her views on the death penalty substantially impaired or prevented her from fulfilling her obligation to consider both penalties. The trial court's unique ability to observe the prospective juror's demeanor and judge

credibility during the course of equivocal or conflicting responses is precisely why this Court has determined that a trial court's ultimate conclusion as to the prospective juror's state of mind is binding on this Court. (*People v. Roldan, supra,* 35 Cal.4th at pp. 696-697.)

Jones also contends the trial court improperly applied a more rigorous standard to Cynthia B. by demanding that she consider the two penalty options, life imprisonment and the death penalty, "equally" and by not making that same demand on Elizabeth R. and the others. (AOB 169.) Jones takes the word "equally" as used by the trial court in questioning out of context. The record confirms that the trial court consistently sought to determine whether each prospective juror, including Cynthia B., would follow his or her obligation under the law to weigh the evidence and consider the possibility of both penalties. Given Cynthia B.'s responses and her body language, the trial court's properly concluded that Cynthia B.'s views on the death penalty would substantially impair her ability to follow the law and excused her for cause.

Larry L. was questioned as a prospective alternate. In his juror questionnaire Larry L. indicated he was strongly in favor of the death penalty but he would not automatically vote either way. (9 CT 2356, 2366.) Before being questioned, however, Larry L. sent the trial court a note stating: "If mental health problems are part of the this trial I have strong personal feelings on this and I feel they should not be discussed in open jury selection." (14 RT 1461, 1501.) Out of the presence of other jurors Larry L. later advised the court that his son suffers sever emotional problems for ten years, has been violent with his mother and that the family is very involved with his care. (14 RT 1502.) He explained:

> I mean, up until last year you could walk into my house and there would probably be very few walls that did not have holes that had been knocked in them, doors that had been kicked down. And I wanted the Court to be aware of this, because I have very strong feelings of this type of problems.

[¶] . . . [¶]

As far as trying to get help for the people. You know, my wife and I have gone way out of our way, probably way out, most people would say, to help our child, which as a parent that's my responsibility.

As far as this case would be concerned, I would have to admit, not knowing the evidence, if any, that would be involved in this, and listening to the psychologist or psychiatrist, whichever, it would be really tough for me to sit here and say that if I got to the second phase of this trial that I could even, without hearing the evidence, impose either one of those sentences on anyone. And that's my personal beliefs. But not knowing the evidence, I can't really say.

(14 RT 1503.)

When specifically asked by defense counsel whether Larry L. meant he could not follow the trial court's instructions, Larry L. truthfully stated he "would do his best" but "it would be very difficult for me to say yes." (14 RT 1504.) Upon additional questioning Larry L. repeated the same sentiment to the trial court (14 RT 1504-1505) and the prosecutor (14 RT 1506-1507). For example, when the trial court asked: "And if you found after hearing the evidence that Mr. Jones had not been given that opportunity [for treatment], would you be able to consider either death or life without the possibility of parole?" Larry L. again admitted, "I think it would be very difficult." (14 RT 1507.) The trial court's additional questioning produced similar answers.

Q. And if you were in that position where you had to pick one or the other, would you consider them both equal or would you automatically go with the lesser of the two sentences?

A. It's really a tough question to have to answer not knowing the evidence, you know, because I think – I mean, you can go back on these type of issues to early childhood, you know, and not knowing the complete background and all the evidence that would be – I think it would be a difficult thing to really answer at this point.

I would probably have to say, you know, not knowing any of the things that's going to be involved in this, as much as I hate to admit it,

> I could possibly see my son doing a type of crime because of not being medicated properly. I could actually see that, because we are at the point right now where – that my wife and I are probably going to have to go to court next year to maintain control of him when he turns 18.

(14 RT 1507.)

Larry L. assured the trial court that his feelings would not prevent him from finding guilt but he could not give similar assurances regarding penalty. (14 RT 1509-1510.)

The prosecutor moved to dismiss for cause on the ground that Larry L. would not consider the option of death if there is evidence of inadequate mental health treatment and defense counsel submitted. (14 RT 1545.) The trial court dismissed for cause but not for the reasons given by the prosecutor. The trial court explained:

> My problem with [Larry L.] is not what Miss Erickson argues. The problem with [Larry L.] is his I think quite candid response to the difficulties this case is going to present him. The questions asked by Miss Erickson – and I believe were probably objectionable insofar as they asked him to prejudge the evidence and come to a conclusion, but the ultimate result in response that came back was that he indicated a difficulty in – in doing – not following the judge's instructions. That wasn't his problem. It was fulfilling the oath that he would take to make a decision based on the evidence and law that was presented.
>
> And although he responded affirmatively with regard to what would happen in the guilt phase of the proceedings, and that his concern over possible penalty would not interfere with his decision in the guilt phase, he indicated a profound inability or concern about his ability to make a decision in the penalty phase. I don't think he has made up his mind necessarily.

(14 RT 1545.)

The trial court properly excused Larry L. for cause. Larry L., like Cynthia B., evidenced an inability to follow the law, although for different reasons. Contrary to Jones' contention (AOB 149-150), Larry L.'s problem was not that he placed great mitigating weight on mental health but that his personal

experiences in the mental health area would have prevented him from following the law. In that regard, the trial court's removal was not based on Larry L.'s death penalty views but his bias concerning mental health issues as a result of his highly emotional experience with his son. (See Civ. Code, §§ 228, 229, subd. (f).)

In any event, the removal of Larry L. was of no consequence. Any error in excusing Larry L. is not reversible, because reversal is not required for an error in excusing a juror for reasons unrelated to the jurors' views on the death penalty. If excused for views unrelated to the death penalty, the general rule is that the erroneous exclusion of a juror for cause provides no basis for overturning a judgment. A defendant has a right to jurors who are competent and qualified, but does not have the right to any particular juror. (*People v. Mickey* (1991) 54 Cal.3d 612, 683; *People v. Holt, supra*, 15 Cal.4th 619.) Moreover, there is no possibility of prejudice as a result of excusing Larry L. since he was questioned as an alternate and would not have served on Jones' jury in any case. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 488; *People v. Bandhauer* (1970) 1 Cal.3d 609, 617-618.)

F. The Prosecutor's Exercise Of Peremptory Challenges Did Not Deny Jones' A Fair And Impartial Jury

Jones lastly claims the prosecutor's exercise of 22 peremptory challenges improperly culled life inclined prospective jurors from his jury. He goes through portions of the questionnaires of each of the excused jurors. (AOB 171-173.) As noted above, this claim was waived and wholly speculative. Moreover, even assuming the prosecutor did exercise peremptory challenges in the manner argued by Jones, systematic exclusion by prosecution peremptory challenges of potential jurors who merely have reservations about the death penalty does not deprive the defendant of a representative jury at the guilt phase.

(*People v. Zimmerman* (1984) 36 Cal.3d 154, 161; *People v. Turner* (1984) 37 Cal.3d 302, 315.) Finally, the appropriate inquiry under *Witherspoon*[11] and *Witt* is whether the jury that was actually empaneled was impartial. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 86 [108 S.Ct. 2273, 101 L.Ed.2d 80].) Jones makes no attempt to show, nor could he demonstrate, that his particular jury was not impartial.

In sum, the record amply demonstrates that the trial court properly applied *Wainwright v. Witt* in granting and denying counsels' motion to dismiss for cause and that was Jones was not denied a fair and impartial jury.

II

THIS COURT HAS CONSIDERED AND REJECTED JONES' VARIOUS CHALLENGES TO THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY LAW

Jones challenges the constitutionality of California's death penalty on a variety of grounds. (AOB 177-239.) These same claims have been presented to, and rejected by, this Court. Because Jones fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should all be rejected without additional legal analysis. (*People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

Jones contends the death penalty scheme is unconstitutional because the special circumstances fail to provide adequate constitutionally required narrowing function. (AOB 178-182.) To the contrary, California's death penalty scheme satisfies the constitutionality mandated narrowing fuction. (*People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Dunkle* (2005) 36

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11. *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].

Cal.4th 861, 939; see also *Brown v. Sanders* (2006) ___ U.S. ___ [126 S.Ct. 884, 889, 894, 163 L.Ed.2d 723] (recognizing Pen. Code, § 190.2 in its current form was designed to satisfy the narrowing requirements and specifically finding the robbery-murder and witness-killing special circumstances did so).) Jones's assertion that the voters enacted the 1978 Death Penalty Law intending to make every murderer death-eligible, thereby not expecting to satisfy the constitutional narrowing requirement has already been rejected by this Court. (*People v. Gray* (2005) 37 Cal.4th 168, 237, fn. 23.)

Jones contends that factor (a), the circumstances of the crime, is overly broad, permitting contradictory and generic facts to be found aggravating. (AOB 182-189.) Factor (a) is not unconstitutionally overbroad. (*People v. Morrison* (2004) 34 Cal.4th 698, 729, citing *People v. Lewis* (2001) 26 Cal.4th 334, 394; see also, *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

Jones argues the statute is constitutionally deficient for failing to require aggravating factors be proven beyond a reasonable doubt, that aggravation be proven to outweigh mitigation beyond a reasonable doubt, and that the jury make those findings unanimously. (AOB 189-213.) However, neither jury unanimity nor proof beyond a reasonable doubt apply to those determinations. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939.) Moreover, the decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny, do not change that conclusion. (*People v. Stitely, supra*, 35 Cal.4th at p. 573 [*Blakely*,[12/] *Ring*,[13/] and *Apprendi* "do not require reconsideration or modification of our long-standing conclusions in this

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12. *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].

13. *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556].

regard"]; *People v. Gray, supra,* 37 Cal.4th at p. 237; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see *People v. Smith* (2003) 30 Cal.4th 581, 642.)

Alternatively, Jones claims some burden of proof was required under Evidence Code section 520, or the jury should have been instructed that there was no burden of proof. (AOB 214-217.) Neither contention has merit. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939.)

Jones contends the lack of written findings by the jury denied him meaningful appellate review. (AOB 217-220.) Written findings are not a prerequisite to meaningful appellate review in a capital case. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939.)

Jones contends lack of inter-case proportionality review violates the Eighth Amendment and equal protection. (AOB 221-224.) To the contrary, the absence of inter-case proportionality violates neither the Eighth Amendment nor Due Process. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Horning* (2004) 34 Cal.4th 871, 913, and *People v. Morrison, supra,* 34 Cal.4th at p. 731.)

Jones claims reliance on previously unadjudicated criminal activity violates the constitution. (AOB 225.) This Court has already rejected this same claim. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Kraft* (2000) 23 Cal.4th 978, 1078.)

Jones claims the use of restrictive adjectives in several of the mitigation factors imposed an unconstitutional barrier to the jury's consideration of relevant mitigating evidence. (AOB 226.) This same complaint has been repeatedly rejected by this Court. (*People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Dunkle, supra,* 36 Cal.4th at p. 939, citing *People v. Monterroso* (2004) 34 Cal.4th 743, 796.)

Jones contends the trial court failed to advise the jury that mitigating factors could only be considered mitigating and therefore violated the constitution. (AOB 226.) Jones is wrong on the law and the facts. This Court has repeatedly found no error in this regard. (*People v. Moon, supra,* 37 Cal.4th at p. 42, citing *People v. Morrison, supra,* 34 Cal.4th at p. 730.) Moreover, although not required, the trial court in this case in fact modified standard CALJIC No. 8.84 to identify which factors were mitigating and instructed the jury that the absence of any mitigating circumstance could not be considered aggravating. (29 RT 3045-3047; 33 RT 3778-3779.)

Jones claims that the absence of intercase proportionality review at trial or on appeal violates his right to equal protection of the law under the Fourteenth Amendment of the United States Constitution. (AOB 221.) Jones maintains it is unfair to afford non-capital inmates such review under former Penal Code section 1170, subdivision (f), of the determinate sentencing law, but not to allow such review to capital defendants. Jones acknowledges that this Court rejected this claim in *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288, but he nevertheless urges a re-examination of the issue. (AOB 230-232.) Since *Allen* this Court has consistently rejected the claim that Equal Protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Cox* (2003) 30 Cal.4th 916, 970; *People v. Lewis, supra,* 26 Cal.4th at p. 395; *People v. Anderson* (2001) 25 Cal.4th 543, 602; *People v. Jenkins* (2000) 22 Cal.4th 900, 1053; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen*, *supra*, 42 Cal.3d at pp. 1287-1289.) As aptly noted by this Court in *People v. Cox*:

> [I]n *People* v. *Allen, supra*, 42 Cal.3d 1222, we rejected "the notion that equal protection principles mandate that the 'disparate sentencing' procedure of section 1170, subdivision (f) must be extended to capital cases." (*Id.*, at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by

> which the Board of Prison Terms reviews comparable cases to determine if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) *"[P]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause [citations]."* (*People v. Williams, supra*, 45 Cal.3d at p. 1330.)

(*People v. Cox, supra*, 53 Cal.3d at p. 691, emphasis added.)

Accordingly, Jones's Equal Protection claim should be rejected, since he is not similarly situated to a defendant sentenced under the determinate sentencing law.

Finally, Jones contends use of the death penalty as a "regular" form of punishment violates international norms as well as the constitution. (AOB 235-239.) This Court has repeatedly rejected this claim. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)

III

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE

Jones asserts the trial court erred in admitting victim impact evidence under factor (a) (circumstances of the crime), factor (b) (other violent criminal activity) and Evidence Code section 352 in violation of his Fifth, Fourteenth and Eighth Amendment rights to reliable sentencing. (AOB 240-274.) There was no error, constitutional or otherwise. The trial court properly admitted under factor (a) the testimony of Eddings' daughter, two nieces and great niece describing Eddings' unique characteristics and the impact of her loss to their family. Additionally, the trial court properly admitted under factor (b) evidence of the impact of Jones' stabbing on Knight. Any error was also necessarily harmless given the overall brevity of the victim impact evidence and the other, overwhelming evidence in aggravation.

G. Factors (A) And (B) Properly Allow For Admission Of Victim Impact Evidence

Jones claims this Court has broadly construed factor (a) to allow evidence about the victim's life that were not known or reasonably foreseeable to the defendant at the time of the murder rendering it unconstitutionally vague. (AOB 252-261.) This argument has been repeatedly and consistently rejected by this Court and Jones presents no compelling reason to revisit the issue. (*People v. Lewis, supra,* 39 Cal.4th at p. 1057; *People v. Cook* (2006) 39 Cal.4th 566, 608-609; *People v. Roldan, surpa*, 35 Cal.4th at p. 732.) That is because, as the United States Supreme Court held in *Payne v. Tennessee* (1991) 501 U.S. 808, 826 [111 S.Ct. 2597, 115 L.Ed.2d 720]:

> [A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." [Citation.]

(*Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

Moreover, the nature of murder is such that the tragic consequences should always be "known" or foreseeable to the defendant:

> The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

(*Payne v. Tennessee, supra*, 501 U.S. at p. 838 (conc. opn. of Souter, J.).) Thus, victim impact evidence is not limited to facts known to the defendant at the time of the offense.

California law is consistent with these principles. "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant as a circumstance of the crime under section 190.3, factor (a)." (*People v. Lewis, supra*, 39 Cal.4th at pp. 1056-1057.) Accordingly, contrary to Jones' contention, the trial court properly admitted victim impact evidence of Eddings' murder under factor (a) regardless of whether this impact was actually known by Jones before raping, sodomizing, and murdering Eddings.

Regarding factor (b), Jones contends that the trial court mistakenly determined it allowed for victim impact evidence related to other violent criminal activity based on dicta in *People v. Mickle* (1991) 54 Cal.3d 140, 186-187, and *People v. Garceau* (1993) 6 Cal.4th 140, 200-202. (AOB 263-265.) But this claim, too, has been repeatedly and expressly rejected by this Court and Jones presents no compelling reason to reconsider these decisions. (*People v. Demetruilias* (2006) 39 Cal.4th 1, 39 ["[T]he circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b)."]; see also, *People v. Halloway* (2004) 33 Cal.4th 96, 143; *People v. Mendoza* (2000) 24 Cal.4th 130, 185-186.) Thus, as with factor (a), there is no error per se in admitting victim impact evidence related to a defendant's other violent crimes under factor (b).

H. The Trial Court Properly Determined The Victim Impact Evidence Was Relevant And Not Unduly Prejudicial

Of course, admission of victim impact evidence is not without limits. It "only encompasses evidence that logically shows the harm caused by the defendant" and is not "so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's constitutional right to due process under the Fourteenth Amendment. (*People v. Brown, supra*, 33 Cal.4th

at p. 396, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 835 and *Payne v. Tennessee, supra,* 501 U.S. at p. 825, respectively.) In admitting the victim impact evidence in this case, the trial court expressly acknowledged and abided by these principles. (28 RT 2967-2969.)

There was extensive and thorough litigation, both written and oral, of what was appropriate victim impact evidence. (27 RT 2942-2951; 28 RT 2965-2975; 18 CT 4898-4903, 4981-4995.) At the conclusion of the litigation, the trial court excluded the prosecution's proposed seven minute video of Eddings' life that was set to music. It contained 42 photos covering Eddings' long life and her death. (27 RT 2943; 28 RT 2970-2971.) The trial court observed that although each individual photo may be relevant and admissible, it was "the combination which pushes this document over the line from evidence into argument." (28 RT 2970.) The trial court explained:

> What the Court must guard against is a situation where the effect is so overwhelming that the jurors are unable to follow the instructions of the Court where they are unable to set and put in perspective their emotional response and the emotional response of the family in light of the other evidence that is presented.

(28 RT 2975.)

The trial court further limited victim impact testimony by prohibiting the opinions of family members about the crime, about the defendant, or the appropriate punishment on the ground that such evidence has little or no relevance. The trial court extended the prohibition to the witness's exposure to facts of the crime during the trial or to the impact that the trial proceedings have had on the family members themselves. (28 RT 2971-2972.)

Over defense counsel's objections, the trial court ultimately allowed Eddings' daughter, her two nieces, and a great niece, all of whom were very close to her, to testify about who Eddings was, what she meant to them and their family and how they were affected by her loss. (See Statement of Facts, Penalty Phase, § B (victim impact evidence), *supra*.) For the majority of the testimony

the witnesses recounted basic facts about Eddings that were not particularly emotional such as Eddings was a loving and attentive mother, grandmother and aunt (31 RT 3315, 3326, 3331, 3340-3350), she loved to garden, cook and bake (31 RT 3327, 3335, 3338), and was very generous (31 RT 3315, 3352). In connection with their testimony, the trial court admitted 32 photos depicting how Eddings had lived her life.[14/] Her daughter, Helen Harrington, authenticated a majority of the photos and described them in brief, matter of fact terms. A typical exchange was as follows:

Q. People's No. 131 for identification. Who is in that photograph, Helen?

A. This is me and my granddaughter Megan, my mother, and my father.

Q. People's No. 132. Who is that, Helen?

A. That's me and my mother.

Q. No. 133?

A. That's my mother and my father. That's at their house.

(31 RT 3347.)

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14. The photos were as follows: Exh. #104 [Eddings with nephew in law] (31 RT 3315, 3379); Exh. #105 [Eddings with great nephew] (31 RT 3316, 3379); Exh. #106 [Eddings with niece] (31 RT 3316, 3379); Exh. #107 [Eddings with immediate family] (31 RT 3327, 3379); Exh. #108 [Eddings with her sisters and husband] (31 RT 3328, 3379); Exhs. #109-112, 134-135 [Eddings with assorted family members including her late husband] (31 RT 3368-3369, 3379); Exhs. #114, 116, 117, 137-138 [birthday parties] (31 RT 3340-3342, 3349, 3379); Exh. #115 [harvesting from son in law's garden] (31 RT 3341, 3379); Exhs. #118-119 [Christmas celebrations] (31 RT 3343- 3344, 3379); Exhs. #120-128, 131 [Eddings with various grandchildren and great grandchildren] (31 RT 3344-3347, 3379); Exh. #129 [Eddings with daughter in 1950] (31 RT 3347, 3379); Exh. #130 [Eddings with both daughters in 1939] (31 RT 3347, 3379); Exhs. #132 and 136 [Eddings with daughter] (31 RT 3342, 3351, 3379); Exhs. #133-134 [Eddings with husband] (31 RT 3328, 3379).

There was some emotional testimony in terms of how Eddings' family felt upon learning of her death, seeing her burned out home or how her loss and the manner in which she died affected various family members. (See Statement of Facts, Penalty Phase, § B, *supra*.) Such evidence of the immediate and lasting impact of the Jones' brutal attack and murder of Eddings all fell well within the ambit of appropriate victim impact evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 357 ["Contrary to defendant's suggestion, her statements permissibly concerned the "immediate effects of the murder," i.e., her "understandable human reactions" on hearing someone had killed her brother for money."]; *People v. Brown, supra,* 33 Cal.4th at pp. 397-398 [recognizing the propriety of a victim's testimony about the immediate effects of the murder such as circumstances of the night of the killing when the victim was informed of the death of her husband or the residual and lasting impact victims continue to experience–such as a brother's feelings when passing the grave of his murdered brother].) Further, unlike cases where the murderer was a stranger, this type of impact evidence was not just foreseeable in the abstract because Jones knew Eddings and her family. Indeed, recognizing the traumatic impact of Eddings' death upon her family Jones even admitted to police (while he was still pretending that he had nothing to do with it) that he couldn't bring himself to call Eddings' sister to tell her about the fire. (4 CT 884.)

In arguing the evidence was excessively emotional or prejudicial Jones specifically refers to portions of Harrington's testimony where she spoke of her unconscious habit of calling her mother on the phone and having imaginary phone conversations with her for the first year following Eddings' murder (AOB 271; 31 RT 3356-3357) and to the testimony of Eddings' niece, Shirely Grimmet, that her daughter, Karen, and her husband had trouble making love for a month after the murder because they "thought of all the torment and everything that [Eddings] had gone through, just in that simple act." (31 RT

3370-3371). As found by this Court in *People v. Jurado* (2006) 38 Cal.4th 72, 133, "[t]his testimony is not dissimilar from, or significantly more emotion-laden than, other victim impact evidence that has been held admissible." (*Ibid.* and cases cited therein.)

In *Jurado*, the testimony that the defendant complained was overly emotional but this Court upheld its admission was:

> In the testimony of Teresa Holloway's mother, Joan Cucinotta, . . . among other things, her statements that "there is nothing worse to me than the death of a child," that she lunged at and wanted to hit the detective who told her Holloway was dead, that she visits Holloway's grave every week and at first she would "cry, sobbing, cry and cry, throw [her]self on the grave," and that Holloway's daughter, when she visits the grave, "says a prayer and kisses her [mother's] picture." In the testimony of Holloway's father, James Cucinotta, . . . among other things, his statements that he and his wife visit Holloway's grave every week, that they "couldn't take a look at her [Holloway] for the last time because of the condition that she was in . . . [a]nd of course she'd laid out in the road for a couple days," that while he was making the funeral arrangements for Holloway he "had to stuff everything" (meaning suppress his emotions) and "because of that stuffing, [he] started to do a lot of inappropriate things," his "drinking got out of hand," and he "had to finally go to a treatment center and get that taken care of," that as a result of Holloway's death his son, who was 34 years old, was "not the same anymore" and was "in a recovery home here in San Diego," and that during the first year after Holloway's death he and his wife "didn't even have a holiday in the house," they "didn't have a turkey for Thanksgiving . . . didn't have a Christmas tree for Christmas."

(*People v. Jurado, supra*, 38 Cal.4th at p. 133.)

There is nothing materially different between the victim impact evidence in *Jurado* (and cases cited therein) and the evidence introduced concerning the death of Eddings that would compel a contrary finding in this case. Nor does Jones point to, nor the record reflect, that the jurors were so overwhelmed by emotion that they were unable to make a rational determination of penalty.

Finally, the testimony of Eddings' family only constituted a total of 58 pages of the of the roughly 700 pages of evidence in the penalty phase. Jones'

mitigating evidence constituted approximately 300 pages. So, not only was the evidence appropriate it was not particularly voluminous. Nor was the evidence cumulative since the bulk of the prosecution's evidence in aggravation related to Jones' numerous brutal acts against women. Accordingly, the trial court properly admitted the victim impact evidence related to Eddings' murder.

Similarly, the evidence of the impact of Jones' stabbing of Knight was not the type of evidence that would evoke some irrational emotional response. The testimony regarding Knight's mental state following the stabbing was less than three pages and matter of factly indicated that Knight has received mental health care since the stabbing. Indeed, Jones does not identify any particular piece of evidence as unduly prejudicial but falls back on his erroneous argument that this type of evidence is simply not admissible. (AOB 271.) Accordingly, there was no error in admitting any of the victim impact evidence.

Even assuming arguendo there was some error in admitting some victim impact evidence, any error is necessarily harmless given the overwhelming weight of evidence in aggravation, exclusive of any victim impact evidence. Jones brutally and without remorse beat, raped and burned Eddings and he has a long history of repeated remorseless brutality, sexual or otherwise, against women. In that regard, contrary to Jones' contention (AOB 274), it was the brutality of what Jones did that the prosecutor emphasized to the jury during closing, not the impact of what he did to the victims. Her references to the impact on the lives of Jones' victims were brief and not the type of statements to evoke an irrational emotional response. (See e.g. "You can consider the effects on the lives of these women who have survived Billy Jones and the effects on the family members of Ruth Eddings who have to live with what he did to Ruth Eddings.") (34 RT 3881.) Jones' evidence in mitigation paled in comparison and given his siblings with a similar upbringing did not turn out like

Jones and his family's repeated attempts to protect and care for Jones, it hardly constituted mitigating evidence at all.

IV.

THE TRIAL COURT HAD NO DUTY TO GIVE JONES' REQUESTED SPECIAL INSTRUCTIONS AND ANY ERROR IS HARMLESS IN LIGHT OF THE STANDARD INSTRUCTIONS GIVEN

Jones asserts the trial court's refusal to give certain defense requested special instructions concerning juror sentencing responsibilities generally and his mitigation evidence specifically violated his rights to present a defense, reliable sentencing and proper instructions because the standard penalty phase instructions, CALJIC Nos. 8.84, 8.84.1, 8.85 and 8.88, were inadequate. (AOB 274-309.) The trial court properly refused Jones' special instructions as either argumentative, confusing, incorrect statements of the law or duplicative of other, properly given instructions. In that regard, the trial court adequately instructed the jury concerning their sentencing responsibilities, including the consideration of mitigation, pursuant to standard penalty phase instructions, CALJIC Nos. 8.84, 8.84.1, 8.85 and 8.88, precluding any claim of prejudice.

A. The Trial Court Properly Instructed The Jury Pursuant To Standard Penalty Phase Instructions

The United States Supreme Court recently reaffirmed a State's capital sentencing obligations under the federal constitution in *Kansas v. Marsh* (2006) __ U.S. __ [126 S.Ct. 2516, 165 L.Ed.2d 429].[15/] The Court observed:

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15. In *Kansas v. Marsh*, the Supreme Court upheld against an Eighth Amendment challenge the Kansas death penalty statute that directed the imposition of the death penalty when the state have proven that mitigating circumstances do not outweigh aggravating, including where the two are in equipoise. (*Kansas v. Marsh, supra*, 126 S.Ct. at pp. 2522-2524.)

> This Court noted [in *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511] that, as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement. *Id.*, at 652, 110 S.Ct. 3047 (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 307, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990)). The Court also pointedly observed that while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence. 497 U.S., at 652, 110 S.Ct. 3047 (citing *Boyde v. California*, 494 U.S. 370, 374, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death. 497 U.S., at 652, 110 S.Ct. 3047 (citing *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion)). Indeed, *Walton* suggested that the only capital sentencing systems that would be impermissibly mandatory were those that would "automatically impose death upon conviction for certain types of murder." 497 U.S., at 652, 110 S.Ct. 3047.

(*Kansas v. Marsh, supra*, 126 S.Ct. at p. 2523.)

In other words, so long as the jury is permitted to consider any relevant mitigating evidence, states have wide latitude in structuring its consideration of mitigation and the defendant has no right to have the jury instructed on mitigation in a particular way. (*Ibid.*; see also, *Buchanan v. Weeks* (1998) 522 U.S. 269, 276 [118 S.Ct. 757, 139 L.Ed.2d 702] ["We have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigation evidence."].) *Ayers v. Belmontes* (2006) 549 U.S. ___ , Scalia, J., concurring op.,["a jury need only 'be able to consider in some manner all of a defendant's relevant mitigating evidence,' and need not 'be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant."].)

This Court has repeatedly held "that the standard CALJIC penalty phase instructions 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 569; *People v. Gurule, supra*, 28 Cal.4th 557, 659; *People v. Moon, supra*, 37 Cal.4th at pp. 41-42.) *People v. Crew* (2003) 31 Cal.4th 822, 858; see also United States Supreme Court authority in accord *Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *Tuilaepa v. California, supra*, 512 U.S. at p. 979.) Jones identifies no new arguments that would justify this Court's reconsideration of these decisions.

In accordance with this authority, the trial court here instructed pursuant to CALJIC Nos. 8.84, 8.84.1, 8.85 and 8.88. Both at the beginning of the penalty phase and at the conclusion of evidence, the trial court instructed the jury concerning their sentencing responsibilities pursuant to CALJIC No. 8.84 as follows:

> The defendant in this case, William Alfred Jones Jr., has been found guilty of murder of the first degree. The allegations pursuant to Penal Code Section 190.2, Subdivision (a), Subparagraph (17), that the murder was committed under the special circumstances of during the commission or attempted commission of the crimes of rape, unlawful sodomy, and burglary have been found to be true.
>
> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in state prison for life without the possibility of parole in any case in which the special circumstances alleged in this case have been specifically found to be true.
>
> Under the law of this state, you must now determine which of said penalties, life imprisonment without the possibility of parole or death, shall be imposed upon the defendant.

(29 RT 3044-3045; 34 RT 3898-3899; 18 CT 5068; CALJIC No. 8.84.)

The trial court similarly instructed the jury pursuant to CALJIC No. 8.85, concerning the consideration of aggravating and mitigating circumstances. The trial court advised the jury:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial in this case. That includes all the evidence that you have heard so far and the evidence that you will hear over the next few days in this matter.
>
> In determining which penalty is to be imposed on the defendant, you shall consider and take into account and be guided by the following factors if applicable. Here there are a number of factors and they are lettered A through K:
>
> A, as a factor in either aggravation or mitigation, the circumstances of the crime of which the defendant has been convicted in the present proceedings and the existence of any special circumstance found to be true;
>
> B, as a factor in aggravation, 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 involve the use or attempted use of force or violence, or the express or implied threat to use force or violence;
>
> C, as a factor in aggravation, the presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present
> proceeding;
>
> D, as a factor in mitigation, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> E, as a factor in mitigation, whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
>
> F, as a factor in mitigation, whether or not the offense was committed under the circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct;

G, as a factor in mitigation, whether or not the defendant acted under extreme duress or under the substantial domination of another person;

H, as a factor in mitigation, 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, as a factor in aggravation or mitigation, the age of the defendant;

J, as a factor in mitigation, whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

K, as a factor in mitigation, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, in any sympathetic or other aspect of the defendant's character or record that the defendant offers as basis for a sentence less than death, whether or not related to the offense for which he is on trial.

You must disregard any jury instruction given you in the guilt or innocence phase of this trial which conflicts with this general principle. You may not consider the absence of any of the above statutory mitigating factors as a factor in aggravation.

(29 RT 3045-3047; 34 RT 3909-3911; CALJIC No. 8.85.)[16/]

At the conclusion of the evidence, after repeating CALJIC No. 8.84, the trial court instructed pursuant to CALJIC No. 8.84.1 as follows:

You'll now be instructed as to all of the law that applies to the penalty phase of this trial.

You must determine what the facts are from the evidence received during the entire trial unless you're specifically instructed otherwise. You must accept and follow he law that I state to you. In arriving at a decision in this phase of the trial, you must disregard all of the other instructions given to you at other phases of this trial.

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16. The trial court slightly modified the standard to instruction to identify whether a factor was aggravating or mitigation or could be either.

You must neither be influenced in your decision by bias or prejudice against the defendant nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, that you will follow the law as I now instruct you, that you will exercise your discretion conscientiously, and that you will reach a just verdict.

(34 RT 3898-3899; 29 RT 3044-3045; 18 CT 5068; CALJIC No. 8.84.1.)

The trial court additionally instructed pursuant to CALJIC No. 8.88, among other instructions, at the close of evidence. In doing so, the trial court reminded the jury of their obligation to decide between the two available penalties, stating:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed upon the defendant, William Alfred Jones Jr. After having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances about which you have been instructed.

(34 RT 3917; 18 CT 5081; CALJIC No. 8.88.)

The trial court, in turn, defined aggravating and mitigating circumstances follows:

An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.

A mitigating circumstance is any fact, condition, or event which, as such, does not constitute a justification or excuse for the crime in question but may be considered as an
extenuating circumstance in determining the appropriateness of the death penalty.

(34 RT 3917-3918; 18 CT 5081; CALJIC No. 8.88.)

The trial court also cautioned against a mechanical-type consideration of the circumstances, noting:

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

(34 RT 3918; 18 CT 5081; CALJIC No. 8.88.) Because the nature and extent of the jury's sentencing responsibility was adequately covered by the standard instructions, in a appropriately neutral manner, the trial court was under no obligation to provide Jones' special instructions on the same subject. (*Buchanan v. Weeks, supra*, 522 U.S. at p. 276; *People v. San Nicolas, supra*, 34 Cal.4th at p. 675; *People v. Brown, supra,* 31 Cal.4th at p. 569.) There was also no possibility of prejudice under either the state or federal harmless error standard under these circumstances. (*People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222.) Moreover, Jones' special instructions were also properly refused for other proper reasons.

B. The Trial Court Properly Refused Jones' Special Instructions

"The general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of the law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]" (*People v. Gurule, supra*, 28 Cal.4th at p. 659.) Here, each of

Jones' refused instructions suffered one or more of these defects and was therefore properly refused.

1. An Additional Instruction Advising The Jury Of Their Normative Role In Sentencing Was Not Warranted

Jones asserts the trial court erred in refusing Special Instruction No. 1, distinguishing the jury's responsibilities between the guilt and penalty phase, because "no other instruction addressed the jury's normative function" and other instructions over emphasized their fact-finding duties. (AOB 284-286.) Special Instruction No. 1 provided:

> You have heard all the evidence [and the arguments of the attorneys], and now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise.
>
> You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.
>
> Your duty in this phase of the case is different from your duty in the first part of the trial, where you were required to determine the facts and apply the law. Your responsibility in the penalty phase is not merely to find facts, but also – and most important – to render an individualized determination about the penalty appropriate for the particular defendant – that is, whether he should live or die.

(18 CT 4927.)

The trial court properly refused this instruction because the last paragraph was argumentative and the rest of the instruction was covered by CALJIC Nos. 8.84 and 8.84.1. (33 RT 3794.) Both instructions make clear the distinct nature and magnitude of the jury's decision at the penalty phase, and do so in a more neutral way than Jones' special instruction. CALJIC No. 8.84.1

also expressly directs the jury to exercise their individualized sentencing discretion "conscientiously," as in "governed by or conforming to the dictates of conscience." (See Merriam-Webster's Dic. (3d college ed. (1981), p. 311.) The jury's normative role in this regard was further reinforced by Special Instruction Nos. 24 and 41, which the trial court gave and that directed "each juror" to "make his or her own individual assessment of the weight to be given" mitigating evidence and that "the People and the defendant are entitled to the individual opinion of each juror." (18 CT 4951, 4971; 34 RT 3914-3916.)

The last paragraph of Jones' Special Instruction No. 1 is also an inaccurate statement of the law and confusing since it suggests the jury may not be required to follow the law in making their sentencing choice. The constitutional right to present and have considered any relevant mitigating evidence does not include a right to an instruction that the jury can disregard the law. (*Kansas v. Marsh, supra,* 126 S.Ct. at p. 2523.) It was properly refused on this basis as well. (*People v. Gurule, supra*, 28 Cal.4th at p. 689.)

Jones contends the language in the last paragraph of Special Instruction No. 1 was taken from this Court's opinion in *People v. Brown* (1988) 46 Cal.3d 432, 448, and represents a correct statement of the law. (AOB 283.) *Brown* has little to no bearing on the propriety of this proposed instruction. In assessing which harmless error standard to apply in cases of *Robertson*[17] error (failure to instruct on proof beyond a reasonable doubt for other crimes under factor (b)), this Court in *Brown* discussed the different, normative role of the jury in the penalty phase; the Court in no way suggested a right to the type of instruction advocated by Jones.

Similarly unavailing is Jones contention the trial court improperly refused the instruction because "no instruction informed the jurors they were free to vote for life based solely on mercy." (AOB 283.) Even though Jones

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17. *People v. Robertson* (1982) 33 Cal.3d 21.

is not entitled to a jury instruction to affirmatively consider mercy or sympathy (*People v. Duncan* (1991) 53 Cal.3d 955, 979), that sentiment was sufficiently covered by factor (k) in CALJIC No. 8.85 and no further instruction was warranted. (*People v. Ramirez, supra*, 39 Cal.4th 398, 470.)

2. Instructions Informing The Jury They Could Not Base A Decision To Sentence Jones To Death Solely On The Facts Used To Establish First Degree Murder Or Special Circumstances Were Not Warranted

Jones contends the trial court erred in refusing to Special Instruction Nos. 7, 8 and 9, precluding the jury from relying solely on the facts of the offense or special-circumstance finding in determining the appropriate penalty. Special Instruction No. 7 provided:

> You may not treat the verdict and finding of first degree murder committed under [a] special circumstance[s], in and of themselves, as constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by either death or life imprisonment without the possibility of parole. [¶] Thus, the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in the guilt and penalty phases of this trial to determine how the underlying facts of the crime bear on aggravation or mitigation.

(18 CT 4934.)

Special Instruction No. 8 provided:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Mr. Jones guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.

(18 CT 4935.)

And Special Instruction No. 9 would have provided:

> You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.

(18 CT 4936.)

The trial court properly refused to give these instructions finding that they were confusing and covered by CALJIC No. 8.85. (33 RT 3796.)

Jones's claim that it was error for the trial court to refuse to give his requested instructions (AOB 287-295) has been squarely rejected by this Court in *People v. Earp, supra*, 20 Cal.4th 826, and again, more recently, in *People v. Moon, supra*, 37 Cal.4th at pages 39-41, which involved instructions identical instruction to Jones' Special Instructions Nos. 8 and 9. As stated by this Court in *Earp*:

> "[S]ection 190.3, factor (a), specifically permits the jury to consider at the penalty phase '[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . .' As we have held, the trial court need not give a '"clarifying gloss"' on factor (a) '"to inform the jury that its penalty determination must not be based on facts that are 'common to all homicides.'"' The argument to the contrary reveals 'a "basic misunderstanding" of the statutory scheme since, in order to perform its moral evaluation of whether death was the appropriate penalty, the facts of the murder "cannot comprehensively be withdrawn from the jury's consideration . . . ."' In addition, there is no constitutional requirement that in considering the aggravating circumstances of a capital crime, the penalty phase jury must "factor out" those constituent parts common to all first degree premeditated or felony murders. . . . The same is true with regard to facts establishing the special circumstances.

(*People v. Earp, supra*, 20 Cal.4th at pp. 900-901, citations omitted; see also *People v. Moon, supra*, 37 Cal.4th at pp. 39-41; *Brown v. Sanders, supra,* 126

S.Ct at pp. 892-894.) The same is true in the instant case and therefore Jones' claim should be rejected.

In any event, as in *Earp*, the trial court here did, in fact, "factor out" the elements of the offense when considering it as an aggravating factor. The court specifically instructed the jury pursuant to CALJIC No. 8.88 that "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (18 CT 5081.) Therefore, as in *Earp*, Jones' requested instructions were also properly refused since they would have been duplicative of CALJIC No. 8.88. (*People v. Earp, supra*, 20 Cal.4th at p. 901.)

3. An Additional Instruction Prohibiting Mechanical Tallying Of Factors Was Unwarranted

Jones asserts the trial court erred in refusing to give Special Instruction No. 35 (AOB 292-295), which provided:

> In determining whether or not the aggravating circumstances outweigh the mitigating circumstances, you must not simply count up the number of circumstances and decide whether there are more of one than the other.
>
> The final test is in the relevant weight of the circumstances as determined by you, not the relative number. [¶] The existence of a single mitigating circumstance could be found by you to outweigh any number of aggravating circumstances.
>
> If you find that the existence of a mitigating circumstance alone outweighs any number of aggravating circumstances, you shall return a verdict of confinement in the state prison for life without the possibility of parole.

(18 CT 4965.) The trial court properly refused this instruction as covered by CALJIC No. 8.88. (33 RT 3799.)

Jones contends CALJIC No. 8.88 is constitutionally deficient because, unlike his proposed instruction, it: (1) fails to instruct that the jury must vote for life imprisonment if mitigating factors outweighed aggravating ones; (2) fails to instruct that the jury could vote for life imprisonment even if aggravating factors outweighed mitigating ones; and (3) uses the vague phrase "so substantial" for comparing aggravating factors with mitigating ones. (AOB 293-294, 298.) Jones claims of inadequacy on the part of CALJIC No. 8.88 have been repeatedly rejected by this Court and he presents no compelling reason for reconsidering these decisions. (*People v. Moon, supra*, 37 Cal.4th at p. 42; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Boyette* (2002) 29 Cal.4th 381, 465.)

Jones also maintains Special Instruction No. 35 was necessary because CALJIC No. 8.88 stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. (AOB 295.) To the contrary, the instruction as phrased makes it clear that absent that one particular set of circumstances, that each juror find the aggravating circumstances are so substantial in comparison with the mitigating circumstances, life imprisonment is the only option. Thus, the point is sufficiently covered in CALJIC No. 8.88. (*People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Bolin, supra*, 18 Cal.4th at p. 344.) For the same reasons CALJIC No. 8.88 is not "pro-prosecution" as urged by Jones. (AOB 295.)

4. Instructions Specifically Advising The Jury That One Mitigating Factor Alone Could Support A Life Sentence Were Unwarranted

Jones contends the trial court erred in refusing four requested instructions relating to the fact that one mitigating factor could serve as a basis for life without the possibility of parole, Special Instruction Nos. 11, 18, 34 and

35. (AOB 296-297.) Like Special Instruction No. 35, *supra*, Jones' Special Instruction No. 11, in pertinent part, provided that "[a]ny one mitigating factor, standing alone, may support a decision that death is not the appropriate punishment in this case." (18 CT 4941.) Jones' Special Instruction No. 18 provided: " Since you, as jurors, decide what weight is to be given the evidence in aggravation and the evidence in mitigation, you are instructed that any mitigating evidence standing alone may be the basis for deciding that life without the possibility of parole is the appropriate punishment." (18 CT 4948.) Likewise Jones' Special Instruction No. 34 provided, in pertinent part, that "[o]ne mitigating circumstance may be sufficient to support the decision that death is not appropriate punishment in this case." (18 CT 4964.)

The trial court properly refused all four instructions. (33 RT 3796-3797, 3799.) First, the point was covered by CALJIC No. 8.88, which properly conveyed to the jury that a mitigating circumstance was "any fact, condition or event" that may be considered as an extenuating circumstance and that the jury was free to assign whatever moral or sympathetic value it chose to any one factor. (*People v. Williams* (1988) 45 Cal.3d 1268, 1322.) Second, Jones' proposed instructions were argumentative. This Court has repeatedly found: "The trial court may properly refuse as argumentative an instruction that one mitigating factor may be sufficient for the jury to return a verdict of life imprisonment without possibility of parole." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1150.)

Arguing that the instructions given did not adequately advise the jury that a single mitigating factor could outweigh the aggravating evidence, Jones relies upon *People v. Sanders* (1995) 11 Cal.4th 475, 557. (AOB 297.) The jury in *Sanders*, however, was instructed pursuant to the pre-1989 revision of CALJIC No. 8.88. Under the current instruction, which was given below, Jones's concern that the jurors would misapprehend the nature of the penalty

determination process or the scope of their discretion to determine the penalty through the weighing process is unfounded. (See *People v. Smith* (2005) 35 Cal.4th 334, 371; *People v. Bolin, supra*, 18 Cal.4th at p. 343; *People v. Breaux* (1991) 1 Cal.4th 281, 316-317; *People v. Williams, supra*, 45 Cal.3d at p. 1322.)

5. An Instruction That Death Is The Most Severe Punishment Was Unwarranted

Jones asserts the trial court erred in refusing Special Instruction No. 3A which provided:

> Some of you expressed the view during jury selection that the punishment of life in prison without the possibility of parole was actually worse that the death penalty. [¶] You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without the possibility of parole. [¶] It would be a violation of your duty, as jurors, if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties.

(18 CT 4930.)

The trial court correctly found the instruction argumentative and not supported by the authorities cited by counsel, namely *People v. Hernandez* (1988) 47 Cal.3d 315, 362 and *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1027. The trial court explained that whether the death penalty is more severe is properly left to argument, not instruction. (33 RT 3795.) Contrary to Jones' contention (AOB 300), this Court's statements in *Murtishaw* and *Hernandez,* that death is qualitatively different and life imprisonment is "society's next most serious punishment" were not statements of law but observations, and neither case in any way suggests a defendant is entitled to instruction to that effect. Moreover, the burden of requiring aggravating circumstances to be substantial in comparison to mitigation effectively conveys death is the more serious

punishment. (See *People v. Harris* (2005) 37 Cal.4th 310, 361.) Accordingly, the trial court properly refused the instruction. In any event, there is no possibility of prejudice since the concern Jones' sought to address in the instruction, that some jurors believed life imprisonment was a more severe penalty, was not shared by any of his empaneled jurors as evidenced by their responses during voir dire. (6 CT 1597-1598, 1619-1625; 7 CT 1626-1629, 1642-1643, 1665-1666, 1688-1689, 1711-1712, 1733-1734, 1756-1757; 13 CT 3425-3426, 3469-3470, 3447-3448; 16 CT 4399-4400.)

6. The Trial Court Properly Refused Additional Instructions On The Scope Of Mitigating Evidence And Highlighting Defense Mitigation Evidence

Jones maintains the trial court erred in refusing six special instructions elaborating on the scope of mitigating evidence including one that identified examples of mitigating evidence. All were properly refused.

a. Special Instruction No. 10

Jones' Special Instruction No. 10 was a three and half page, single spaced instruction itemizing some 45 mitigating scenarios such as "you must consider the defendant's age only as a mitigating factor," "the defendant's psychological growth and development affected his adult psychology and personality," and "the defendant's sense of being the object of ridicule and abuse by his parents and the resultant creation of pain, humiliation, and shame." (18 CT 4937-4940.) The trial court properly refused the instruction, finding:

> It would encourage the jury to speculate in areas about which they have heard no evidence, including, for example, bottom of page 14, factor 28, the defendant's artistic potential, or 25, the defendant will assist prison staff in reducing tension and conflict within the prison, or that the defendant has a calming and guiding effect upon younger inmates under

factor 24. Because it's not supported by the evidence in its entirety, the instruction will be refused.

(33 RT 3796.)

Additionally, an instruction listing evidence Jones viewed as mitigating is patently argumentative. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159.) "Although instructions pinpointing the *theory* of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him." (*Ibid.*) Special Instruction No. 10 also incorrectly stated the law, among other instances, by precluding consideration of age as an aggravating circumstance. Age can be argued either way, depending on the evidence. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77-79.) Therefore, it was properly refused on this basis as well. (*People v. Ward* (2005) 36 Cal.4th 186, 220 [no duty to instruct with inaccurate statements of the law].) Lastly, CALJIC No. 8.85 adequately covered consideration of Jones' mitigating evidence under factor (k). The trial court also instructed the jury pursuant to Jones' Special Instruction No. 12 which, although similarly argumentative, pinpointed mitigating evidence consistent with Jones' defense theory as follows:

> With regard to Factor (k) in mitigation, evidence has been produced which may show the defendant's childhood experiences, including incidents of physical abuse; prior confinement in juvenile facilities or prison; the treatment or lack of treatment for identified problems concerning aggression or sexual misconduct, and the defendant's voluntary admissions to the police or expressions of remorse. Any or all of the above, if you should find it established by the evidence, may be considered by you as mitigating factor, under Factor (k).

(18 CT 5079; 34 RT 3914.)

Accordingly, the trial court did not err in refusing Jones' Special Instruction No. 10.

b. Special Instruction Nos. 11, 14 & 15

Jones claims it was error for the trial court to refuse to instruct the jury pursuant to Special Instruction Nos. 11, 14 and 15 to the extent these instructions explained the unlimited nature of mitigating evidence. (AOB 300.) The relevant portion of Jones' Special Instruction No. 11 advised the jury that the mitigating circumstances provided to the jury were examples and that mitigating evidence was not limited to those factors. (18 CT 4941.) Special Instruction No. 14 provided: "Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without the possibility of parole." (18 CT 4944.) Special Instruction No. 15 read: "Any aspect of the offense or of the defendant's character or background that you consider mitigating can be a basis for rejecting the death penalty even though it does not lessen legal culpability for the present crime." (18 CT 4945.) The trial court properly refused these instructions as covered by CALJIC No. 8.88. (33 RT 3796.)

This Court found in *People v. Hines* (1997) 15 Cal.4th 997, 1068-1069, that a proposed instruction indicating the jury should not limit its consideration of mitigating factors to those factors specifically listed by the trial court was duplicative of the instruction advising jurors to consider:

> 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 aspects 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 offense for which he is on trial.

(*Ibid.*) Just as in *Hines*, Jones' proposed instructions were duplicative of CALJIC No. 8.85, factor (k), and were properly refused.

c. Special Instruction Nos. 13, 16, 17 & 23

Jones argues the trial court erred in refusing to instruct the jury pursuant to Special Instruction Nos. 13, 16, 17 and 23 elaborating on the concept of sympathy, compassion and mercy, because each was a correct statement of law, even if already covered by CALJIC Nos. 8.85 and 8.88. (AOB 304-305, citing *People v. Castillo* (1997) 16 Cal.4th 1009, 1020-1021) [con. opn. of Brown, J.].) That is simply not the case. Jones is not entitled to a jury instruction to affirmatively consider mercy or sympathy. (*People v. Hinton* (2006) 37 Cal.4th 839; *People v. Duncan, supra*, 53 Cal.3d at p. 979.) Further, this Court has repeatedly found proper a trial court's refusal to instruct with a defendant's proposed instructions, pinpointing the theory of the defense or otherwise, where the instruction is duplicative of other, properly given instructions. (*People v. Gurule, supra.* 28 Cal.4th at p. 659.)

As correctly found by the trial court (33 RT 3796-3797), the concepts within each of these proposed instructions were adequately covered in CALJIC No. 8.85 and 8.88. (*People v. Ramirez, supra,* 39 Cal.4th at p. 470.)

Special Instruction No. 13 provided:

> A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense or about the defendant which, in fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence less than death, although it does not justify or excuse the offense.

(18 CT 4943.)

Special Instruction No. 16 read: "Mitigating factors are not necessarily limited to those adduced from specific evidence offered at the sentencing hearing such as character testimony. A juror might be disposed to grant mercy based on other factors, such as a humane perception of the defendant developed during trial." (18 CT 4946.) Special Instruction No. 17 stated: "If a mitigating circumstance or an aspect of the defendant's background or his character called

to the attention of the jury by the evidence or its observation of the defendant arouses mercy, sympathy, empathy, or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a sentence of life without the possibility of parole." (18 CT 4947.) And Special Instruction No. 23 stated:

> Sympathy is not itself a mitigating "factor" or "circumstance," but an emotion. [¶] Recognition that a jury's exercise of sentencing discretion in a capital case may be influenced by a sympathetic response to mitigating evidence is entirely consistent with that observation. The jury is permitted to consider mitigating evidence relating to the defendant's character and background, whether or not related to the offense for which he is on trial, precisely because that evidence may arouse "sympathy" or "compassion" for the defendant.

(18 CT 4953.)

Moreover, beyond already being adequately covered by standard instructions the special instructions are argumentative and confusing. Special Instruction No. 13 inaccurately defines mitigating circumstances and conflicts with factor (k). Similarly argumentative and confusing is Special Instruction No. 17 in that it suggests the jury should not weigh aggravating and mitigating circumstances. For these reasons as well the trial court properly refused Special Instruction Nos. 13, 16, 17, and 23.

7. Jones Has No Right To A Lingering Doubt Instruction

Jones contends the trial court erred in refusing his Special Instruction No. 27 regarding lingering doubt. The instruction provides:

> Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for imposition of the death penalty. The adjudication of guilt is not infallible, and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at

some time in the future, facts may come to light which have not been discovered.

(18 CT 4957.)

As recognized by Jones (AOB 308), this Court has consistently held that neither federal nor state constitutional law imposes an obligation to give a lingering doubt instruction. (*People v. Harris, supra*, 37 Cal.4th at p. 359; *People v. Gray, supra*, 37 Cal.4th at p. 231; *People v. Ward, supra,* 36 Cal.4th at p. 220.) He offers no new reasons to reconsider these decisions and this Court should decline to do so.

Indeed, the United States Supreme Court in *Oregon v. Guzek* (2006) __ U.S. __ [126 S.Ct. 1226, 163 L.Ed.2d 1112], recently confirmed yet again there was no recognized Eighth Amendment right to present evidence of lingering doubt. In that case the defendant sought to present testimony by his mother at his re-sentencing hearing which would support his alibi defense. The Supreme Court rejected the argument that its decisions in *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605 [98 S.Ct. 2954, 57 L.Ed.2d 973], and its progeny, supported a right to present such evidence, and held that the state's limitation barring such evidence did not violate the Constitution. (*Id.* at p. 1233.) The Court explained that the evidence at issue "in these cases was traditional sentence-related evidence, evidence that tended to show *how*, not *whether*, the defendant committed the crime. Nor was the evidence directly inconsistent with the jury's finding of guilt." (*Id.* at p. 1231.) The United States Supreme Court also confirmed that in *Franklin v. Lynaugh* (1988) 487 U.S. 164 [108 S.Ct. 2320, 101 L.Ed.2d 155], a plurality of the Justices clarified that previous decisions have not recognized an Eighth Amendment right to present evidence casting doubt on a capital defendant's guilt at the sentencing phase. (*Oregon v. Guzek, supra*, 126 S.Ct. at pp. 1231-1232.) "The *Franklin* plurality said it was 'quite doubtful' that any right existed." (*Ibid.*)

Moreover, the particular instruction was argumentative and speculative in that it invited the jury to consider the possibility evidence exists which exculpates Jones but was, for some reason, not presented. It would have been properly refused on this basis as well. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.) Accordingly, the trial court properly refused to give Jones' Special Instruction No. 27.

In sum, the trial court did not err in refusing any of Jones' special instructions and, given the trial court properly instructed pursuant to the standard penalty phase instructions any error was necessarily harmless.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: November 14, 2006

Respectfully submitted,

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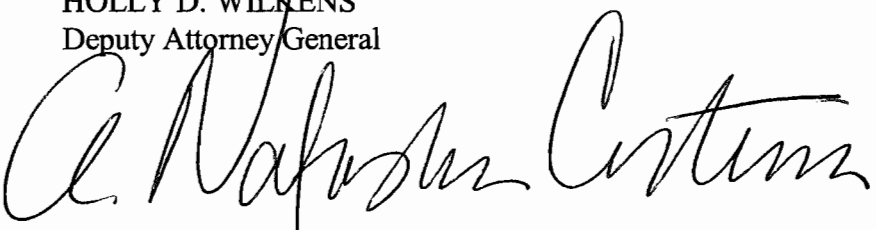

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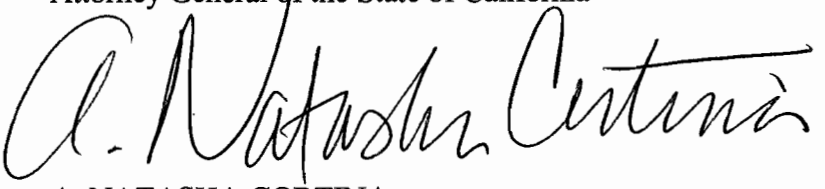
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 41,438 words.

Dated: November 14, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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Deputy Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL - CAPTIAL CASE

Case Name: **People v. William Alfred Jones, Jr.** Case No.: **S076721**

I declare:

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

On **November 14, 2006**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Grover Trask, District Attorney
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Riverside, CA 92501

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 **November 14, 2006**, at San Diego, California.

Connie Pasquali
Declarant

Connie Pasquali
Signature