In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DANIEL ANDREW LINTON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S080054

Riverside County Superior Court Case No. CR 60158
The Honorable Gordon R. Burkhart, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant Daniel Linton strangled to death his next door neighbor, twelve-year-old Melissa Middleton, during the course of a burglary, attempted rape, and lewd act by force on a child. About two months before the murder, Linton entered Melissa's home late at night and attempted to rape her while her parents slept in a nearby bedroom. On the day of the murder, Linton denied any wrongdoing, but agreed to speak with the police the following day. Shortly after the police picked Linton up the next morning, he tacitly admitted that he murdered Melissa. After he was advised of and waived his *Miranda*[1] rights, he provided more details about the murder and eventually admitted the prior attempted rape.

A jury convicted Linton of capital murder committed with special circumstances, to wit, murder committed during the commission of or attempted commission of a burglary, attempted rape, and forcible lewd act on a child. The jury also found Linton guilty of attempted rape, burglary, and lewd act by force on a child in connection with the prior incident. After the penalty phase, the jury returned a verdict of death. The trial court sentenced Linton to death for murder and to a determinate term of six years for the other offenses.

In this appeal, Linton challenges the admissibility of his confession to the prior attempted rape. He also challenges various rulings related to his statements, and contends the court erred in failing to instruct the jury to view unrecorded extrajudicial statements with caution. Additionally, he alleges juror misconduct during guilt and penalty phase deliberations, that the court erred in excluding lingering doubt evidence, and that the prosecutor committed misconduct during penalty phase arguments. He also

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 444 [86 S.Ct. 1602, 16 L.Ed.2d 694].

raises a series of penalty-phase instructional error claims and challenges to California's death penalty law that have been repeatedly rejected by this Court.

The judgment should be affirmed in its entirety. Linton forfeited some of his challenges to the admissibility of his statements, and the statements were properly admitted. The trial court properly exercised its discretion in its evidentiary rulings related to his statements, and Linton invited the non-prejudicial guilt-phase instructional error. There was no jury misconduct during the guilt or penalty phase and the court's inquiry into the alleged misconduct during the penalty phase was adequate. The court also properly excluded the proffered lingering doubt evidence, because it was either irrelevant, had minimal probative value, or was cumulative. Linton forfeited several of his prosecutorial misconduct claims by failing to object and request an admonition. In any event, the prosecutor did not commit misconduct. Finally, Linton provides no persuasive reason for this Court to reconsider its prior precedent rejecting the standard attacks on the penalty phase instructions and death penalty law that he raises here.

STATEMENT OF THE CASE

On June 14, 1995, the Riverside County District Attorney filed an information charging Linton with the murder of Melissa Middleton. (1 CT 20; Pen. Code, § 187.)[2] The information further alleged felony-murder special circumstances for committing the murder during the commission of or attempted commission of burglary, rape, and a lewd and lascivious act by force on a child under the age of 14 years. (1 CT 20-21; § 190.2, subds. (a)(17)(iii), (v), (vii).) The information also charged Linton with three offenses based on the prior incident with Melissa: residential burglary (§ 459; count 2); attempted rape (§ 664/261, subd. (a); count 3); and a lewd

[2] All future undesignated code references are to the Penal Code.

and lascivious act by force on a child under the age of 14 years (§ 288, subd. (b); count 4). (1 CT 21-22.)

On March 15, 1999, the jury found Linton guilty of the charged offenses and found the three special circumstance allegations to be true. (13 CT 3589-3595.) On March 30, 1999, the jury fixed the penalty as death. (13 CT 3670.)

On June 17, 1999, the court denied Linton's motion to modify the verdict, and sentenced Linton to death for the murder, six years for lewd act on a child by force, and a concurrent term of four years for attempted rape. The court stayed the sentence for burglary pursuant to section 654. (13 CT 3772, 3790.)

STATEMENT OF FACTS

In November of 1994, twenty-year-old Linton lived with his parents and eight-year-old sister Stacey at a house in San Jacinto. (17 RT 2534-2535, 2591, 2604; 34 RT 5283.) The victim, twelve-year-old Melissa Middleton, lived next door with her parents, Robert and Linda Middelton. (17 RT 2526-2528, 2535-2536.) The two families had been next door neighbors for about seven years. (17 RT 2534.) Melissa Middleton and Stacey Linton were like sisters and occasionally spent the night at each other's homes. (17 RT 2535, 2570.)

In the past, the Middletons hired Linton to take care of their pets while they were on vacation. (17 RT 2572.) After their last family vacation in April of 1994, the Middletons forgot to retrieve their keys from Linton. (17 RT 2572, 2596.) But they were not concerned: Linda Middleton trusted Linton, and Robert Middleton considered the Lintons friends. (17 RT 2580, 2596.)

Around 2 a.m. in late September or early October of 1994, Melissa came into her parents' bedroom screaming, "Mommy, Mommy, why didn't you come in? I was screaming for you." (17 RT 2564, 2467, 2588.)

Disturbed, agitated and crying, Melissa told her parents that a man had been on top of her in her bedroom, choking her with his hands. (17 RT 2564-2565, 2575, 2589.) Melissa did not know what the man looked like. (17 RT 2589.) Robert Middleton checked the house. The doors were locked and there were no signs of a break-in. (17 RT 2566, 2568, 2594.) Robert walked around the neighborhood, looking for anything unusual. (17 RT 2589.) He noticed a light on in a room at Linton's home and saw Linton's friend, Joseph Montero, working on a computer. Montero lived with the Linton family for about a month in the fall of 1994. (17 RT 2591-2592; 21 RT 3122-3124, 3146.) Robert asked Montero if had seen anyone and told him what Melissa said. (17 RT 2593; 21 RT 3125-3217.) Montero replied that he had not seen anyone. (17 RT 2593.) Linton was not home at this time. According to Montero, Linton returned home about fifteen to twenty minutes later, out of breath and "[k]ind of scared looking." (21 RT 3128, 3134.) Montero and Linton used marijuana and methamphetamine almost daily while Montero lived with the Lintons. (21 RT 3131, 3135.)[3] Montero believed that he and Linton had been using methamphetamine all day the day that Melissa had been attacked. (21 RT 3128.)

After the choking incident, Melissa slept in her parents' bedroom for the remainder of the night. (17 RT 2565.) The next morning Melissa told her mother that the man who choked her was naked. (17 RT 2578.) Her parents dismissed the incident as a nightmare. (17 RT 2568-2569, 2573-2578, 2605.) Melissa denied that this was so. (17 RT 2577.)

About two months later, on November 29, 1994, Melissa stayed home alone from school, because she was sick. (17 RT 2589.) Her father spoke

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[3] Montero's mother would not allow Montero to live in her home because he stole from her and used drugs. (21 RT 3155-3156.) Montero later joined the Army and received a bad conduct discharge for marijuana use. (21 RT 3177.)

to her before he left for work around 6:30 a.m. (17 RT 2585-2586.) Her mother also checked on her before she secured the house and left for work around 7:30 a.m. (17 RT 2529-3530, 2540-2542, 2563.)

Around noon, Linda telephoned Melissa to check on her. (17 RT 2543.) Nobody answered the telephone. This scared Linda, but she thought that Melissa was just sleeping and did not hear the telephone. (17 RT 2543.)

Around 3:25 p.m., Linda returned from work, unlocked the front door, and called for Melissa. (17 RT 2553-2554.) Nobody responded, and everything appeared to be normal inside the house. (17 RT 2554.) Linda looked for Melissa in Melissa's bedroom, but did not find her there. (17 RT 2554-2555.) She then went to the master bedroom where she found Melissa sitting on the ground at the foot of the bed with her legs crossed, "arms kind of out," and head lying to one side. (17 RT 2555.) Melissa was wearing shorts, one sock, and the same shirt that she had been wearing that morning. (17 RT 2558, 2560.) Linda called Melissa's name a couple of times, touched her, and realized that she was dead. (17 RT 2555.) After an unsuccessful resuscitation attempt, Linda ran to the home of a neighbor, asked for help, and called 911. (17 RT 2555-2556.) At the direction of the 911 operator, Linda laid Melissa on the ground, placed a pillow underneath her head, and covered her because she was cold. (17 RT 2556-2557.) Melissa's shorts were unbuttoned and unzipped. (17 RT 2557-2558; 12 CT 3340.)

Around 3:40 p.m., San Jacinto Police Detective Michael Lynn arrived at the Middleton home. (17 RT 2612.) Although there were no signs of a forced entry or a burglary, he declared the area a crime scene because of the condition of Melissa's body. (17 RT 2615, 2617.) Melissa had bruises on her neck area and a visible light red line leading from the middle of her throat up to behind her right ear lobe area. (17 RT 2614-2615, 2619-2620.)

Detective Lynn collected Melissa's father's headphones from the bed in the master bedroom because he thought the wire from them could have caused the red bruise line on Melissa's neck. (17 RT 2598, 2618-2619.) Detective Lynn also collected Melissa's white sock from the master bedroom floor, which appeared to match the one on her right foot, her Cameo ring, which was found underneath her body, and a rag on a stool across from her body. (17 RT 2562-2563, 2621-2622.)

Around 4:20 p.m., Detective Glenn Stotz arrived at the scene and canvassed the neighbors. (18 RT 2741-2743.) Linton answered the door at his house. (18 RT 2744.) Detective Stotz asked him if he had heard about what happened next door. (18 RT 2745.) Linton said he heard that Melissa had been killed. In response to further questions, Linton indicated he had not heard or seen anything out of the ordinary that day and did not know Melissa very well, although she was good friends with his sister. (18 RT 2745.) Linton asked how Melissa died. (18 RT 2745-2746.) Detective Stotz said that it appeared she had been choked to death, but did not provide any additional details. (18 RT 2746.)

After canvassing other residences, Detective Stotz returned to Linton's house with Detective Lynn. Linton and his sister Stacey answered the door. (17 RT 2628-2629, 2746-2747.) Detective Stotz asked Linton, "'Let me get this right, Daniel. You didn't know Melissa very well?'" (17 RT 2630; 18 RT 2747.) Linton responded, "'I hardly knew her.'" (18 RT 2748.) Stacey interjected, "'Uh-huh. You used to fight with her all the time.'" (17 RT 2630; 18 RT 2751.) Linton looked at Stacey and appeared to be shocked and appalled. (17 RT 2631; 18 RT 2752.) Detective Stotz then spoke with Linton alone. (18 RT 2752.)

Detective Stotz told Linton, falsely, that some evidence was found on Melissa's body. (19 RT 2814, 3037.) Linton maintained that he did not know Melissa that well and that she was friends with Stacey. (18 RT

2752.) Detective Stotz asked Linton about the earlier attack on Melissa. (19 RT 2752.) Linton initially denied knowledge of the attack. He later indicated that he thought he knew what Detective Stotz was referring to. Linton claimed that two to three weeks earlier, he woke up in his yard around midnight, wearing only his jeans and underwear. Linton believed that he sleepwalked sometimes. (19 RT 2753-2754.) Detective Stotz asked Linton to hold out his hands. (19 RT 2754-2755.) As Linton did so, his arms and hands shook. His palms were also extremely sweaty. Detective Stotz saw a scratch and a gouge mark on Linton's lower right forearm and asked about them. Linton said he believed he got scratched while playing with his cat earlier in the day. (18 RT 2755-2756.) Detective Stotz left at this point. (18 RT 2757.)

Shortly before 8 p.m. that day, Detective Stotz returned to Linton's house with the prosecutor. The two spoke with Linton in his bedroom. (18 RT 2756-2758.) Linton's parents were home, but not in his bedroom. (18 RT 2758.) At the start of the conversation, Detective Stotz told Linton that he was not under arrest and had no obligation to speak with them. (18 RT 2758.) Linton agreed to talk. He claimed he returned from a friend's house around 4 a.m. that day and stayed home for the rest of the day. (18 RT 2759-2760.) He said he did not see Melissa that day and had last seen her two to three weeks earlier. (18 RT 2759.) He claimed that he had not been to the Middletons' house since he last took care of their animals about three months earlier, and that he returned their keys at that time. (18 RT 2761-2763.) When asked if he had heard what happened to Melissa that day, Linton said that he heard she had been "strangled with a cord[,]" that there were some fingerprints present, and that she was found on the floor in her parents' bedroom. (18 RT 2764-2765.) Detective Stotz had not said anything to Linton about the cord or the location of Melissa's body. (18

RT 2765; 19 RT 2813-2819.) Linton agreed to speak with the police the next day.[4] (18 RT 2766-2767.)

At 7:30 a.m. the next day, Detective Stotz telephoned Linton, in accord with Linton's request that he be called after his parents left for work. Linton again agreed to speak with Detective Stotz. (18 RT 2767.) Around 9 a.m., Detectives Stotz and Lynn picked Linton up in an unmarked car. (17 RT 2631-2632; 18 RT 2767-2768.) The detectives sat in the front seat of the car and Linton sat in the back seat, without handcuffs. (17 RT 2632-2633.) During the car ride, Linton cried, shook and appeared remorseful. (17 RT 2654; 18 RT 2769.) He said "'I wasn't sure I could admit it,'" and "'I'm sorry I wasted your time, I wanted to turn myself in last night, but I couldn't do it in front of my parents[.]'" (17 RT 2633-2634, 2647; 18 RT 2769; 19 RT 2857.) Linton also agreed to go the police station and "'tell [the police] everything.'" (17 RT 2634; 18 RT 2769-2770.)

At about 9:45 a.m., Detective Stotz turned on the tape recorder and advised Linton of his *Miranda* rights. Linton indicated he understood his rights and agreed to answer questions. (12 CT 3287-3288; 18 RT 2271.) The jury heard an audiotape of the interview. (18 RT 2780.)

Linton initially stated that he went to the Middletons' house at about 10 or 11 a.m. on the day of the murder and noticed the front door was unlocked. (12 CT 3288-3289.) After he entered the house, he heard noise upstairs and thought Linda was home. He went upstairs and found Melissa instead. Melissa told Linton she was going to call the police. As Linton prepared to leave, Melissa started screaming. Linton grabbed her by the throat and she stopped screaming. (12 CT 3288-3289.) Linton claimed he

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[4] Although much of this interview was tape recorded, the tape was not played for the jury.

did not really notice "how far [he] had gone until it was, until it was too late." (12 CT 3289.)

During the questioning that followed, Linton provided additional details about the murder and prior attack. He initially said he did not know why he went to the Middletons' house on the day of the murder. (12 CT 3289-3290.) Later, he admitted that he went to the Middeltons' house for money. Linton said he was missing $100 and thought that someone may have taken it, but not Melissa. (12 CT 3320-3321, 3349-3350, 3352.) Linton maintained throughout the interview that he did not know Melissa was home and would not have gone inside her house if he had known she was there. (12 CT 3302, 3304, 3339, 3359-3360, 3365.)

Linton said that after he entered the house, he unsuccessfully searched the downstairs area for money. (12 CT 3320-3321, 3343-3344, 3351, 3360.) When he walked upstairs, he saw Melissa. (12 CT 3323, 3352.) Melissa told him to leave and threatened to call the police. Linton told her that he would leave if she were quiet and asked her not to call the police, but Melissa screamed. (12 CT 3324-3327, 3348, 3352, 3356-3357.) She then ran to her parents' bedroom with Linton on her heels. (12 CT 3327.) Linton pushed her onto her parents' bed so that she could not reach the telephone, grabbed her throat with both hands, and started choking her. (12 CT 3291-3294, 3330-3331, 3352-3354.) As Melissa struggled and gasped for air, Linton grabbed the headphones from the nightstand by the bed. (12 CT 3293-3295, 3334, 3354-3355.) He believed that he wrapped the headphone cord around her neck, crisscrossing it in front of her throat. He said the cord broke a few seconds after he had it taut. (12 CT 3296, 3334-3335, 3354.) Melissa was still fighting him at that time. (12 CT 3296.) Linton resumed choking her with his hands. (12 CT 3297, 3354.) After she fell off the foot of the bed, and was no longer "awake," he "sat her up right so she was like sitting down." (12 CT 3335-3336, 3356.) He did not

know why he did this. (12 CT 3335.) He then picked up a rag and wiped the doorknobs on the front door, the headphone cord, and the stair rail to "get rid of fingerprints," because he "was scared," "pretty sure" that Melissa was dead, and thought he would "get caught." (12 CT 3307-3308, 3328, 3333, 3357-3358.) The police did not find any fingerprints on the Middletons' front doorknobs or stair rail. (21 RT 3199-3203.)

Linton maintained throughout the interview that he did not intend to kill Melissa and was only "trying to knock her unconscious." (12 CT 3294, 3333, 3334, 3339-3340.) He denied involvement the previous day because his parents were home and he did not want to go the police station with his parents or have them see him go to the station. (12 CT 3302-3303.)

Linton denied he had any sexual interest in Melissa during much of the interview. (See e.g., 12 CT 3297-3298, 3309, 3337, 3340, 3359; 19 RT 3001.) He also initially claimed that he did not unzip Melissa's shorts and offered explanations for how they got unzipped. Eventually, he admitted he unzipped Melissa's shorts during the struggle to scare her. (12 CT 3298, 3338-3341, 3348, 3354.) He also said that he thought of having sex with Melissa "but it was due more . . . just to scare her so she wouldn't say anything . . . ." (12 CT 3339.) He later admitted the thought of raping Melissa crossed his mind "for a split second" but he "decided not to." (12 CT 3366.) Detective Stotz followed up, "Okay, how far into it?" Linton replied, "Just the zipper and I just, no." (12 CT 3366.) Linton claimed he "totally disdained the thought after." (12 CT 3368.)

Linton thought that Melissa may have screamed when she saw him on the day of the murder because of the prior incident in which he entered the Middletons' home after midnight and grabbed Melissa by the throat after she awoke and started to say she was going to wake her parents. (12 CT 3291-3293, 3301, 3311, 3313-3316, 3319, 3363.) Linton claimed that he went to the Middletons' house that night because he "needed some money,"

and did not want to hurt Melissa when he grabbed her by the throat and she gasped for air. (12 CT 3313, 3318, 3349.) He later admitted he "tried to rape"[5] Melissa but did not get "very far at all" with her. (12 CT 3365.) He said he was not fully awake at the time. He also said he was under the influence of "speed." (12 CT 3312, 3315, 3363.)

When asked if he would have raped Melissa on the day of the murder if she had not put up a fight, Linton responded, "I had a chance the first time, didn't I?" (12 CT 3368.) He said he was not under the influence of any substance during the murder and last snorted "speed" about a week earlier. (12 CT 3367.)

After the murder, Linton returned to his house, showered, changed clothes, and washed the clothes that he had been wearing. (12 CT 3344-3346.) He also threw the Middletons' keys, which he used to enter their house on both occasions without their permission, in the trash inside of his house. (12 CT 3317-3319; 17 RT 2600.) He threw the keys away to destroy evidence and because he never wanted to return to the Middeltons' home. (12 CT 3317-3319.) In response to a question about whether the trash had been taken out, Linton stated, "Everything's still at the house." (12 CT 3317.)

After Linton's arrest at 4 p.m., Detective Stotz searched Linton's home and found the Middletons' house keys, one of Melissa's rings, and a

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[5] Throughout the briefing, Linton suggests he "whispered" to the police that he attempted to "reap" Melissa. (E.g., AOB 53-54, 57, 61, 72, 85-86, 89, 98, 157, 167.) Linton's trial counsel also suggested this to the jury during opening statement (17 RT 2522-2533), and later asked Detective Stotz whether Linton said "reap" or "rape" on the tape (19 RT 2899-2900). Detective Stotz testified that he understood Linton to say "rape," and that, while he guessed it could sound like "reap," "due to the nature of the conversation, [he] understood it as 'rape.'" (19 RT 2899-2900; see also 5 RT 606.) The tape and transcript of it indicate Linton said "rape." (People's Exh. 15A; 12 CT 3365.)

pair of Melissa's soiled underwear in the trash can in Linton's kitchen. (17 RT 2561, 2563; 19 RT 2799-2806.) DNA testing linked Melissa to the stain in the crotch area of the underwear and Linton to sperm and semen detected on other parts of the underwear, but not the crotch. (21 RT 3261-3264, 3267-3271.) The probability of the DNA profile of the sperm and semen samples occurring in the general population was less than one in one billion people. (21 RT 3270-3271.) There was no semen on the clothes Melissa was wearing when the police found her, including her underwear. (21 RT 3235-3238.) Her shorts smelled of urine and had a stain consistent with it. (21 RT 3236-3238.)

Forensic pathologist Dr. Joseph Choi performed the autopsy two days after the murder. He determined that Melissa died of asphyxiation. The cause of death was strangulation. (18 RT 2682-2683, 2685-2686.) Melissa's body had signs of both ligature and manual strangulation. There were two linear abrasions on her neck. One extended from underneath the chin to behind the left ear in an upward direction. (19 RT 2709-2710.) The other extended from the front of the neck to behind the right ear. (19 RT 2709-2711.) The linear abrasion on Melissa's neck could have been caused by a cable, cord, or headphone wire. (18 RT 2665-2666.) Melissa's injuries were consistent with someone pulling on the ligature from behind. (19 RT 2700-2701.) Dr. Choi believed it was "not likely" that Melissa's injuries were caused by a cord wrapped around her neck. (19 RT 2700-2701.) He explained that if a cord were wrapped around a person's neck, there would be a mark around the circumference of the neck, unless there was hair in between the cord and neck. (18 RT 2699-2700.)

In addition to the linear abrasions, Dr. Choi found a large bruise on Melissa's neck that could have been caused by a thumb or finger. (18 RT 2666.) She also had petechial hemorrhages on her neck, eyes, eyelids, and eye area, behind her ears, on her forehead, and on her heart and lung

surfaces. (18 RT 2662-2663, 2667-2668, 2673, 2680, 2694.) The petechial hemorrhages were consistent with a longer struggle. (18 RT 2665.) Melissa also had burst blood vessels in her left eye that were consistent with strangulation, and hemorrhages around the hyoid bone and behind the thyroid cartilage, indicating pressure to the neck. (18 RT 2673, 2680.) She had no other injuries on her body. (18 RT 2678.) Swabs from Melissa's mouth, anus and vagina tested negative for sperm, and Dr. Choi found no injuries or abnormalities on her genitalia. (18 RT 2708-2709.)

The DNA profile found on two fragments of fingernail clippings from Melissa's left hand were consistent with Linton's profile. (21 RT 3276-3280.) One in 11,000 Caucasians, one in 25,000 Hispanics, and one in about 5,600 Blacks share this profile. (21 RT 3280.)

Defense

The defense conceded Linton killed Melissa, but asserted that the special circumstance allegations and other charges were not true, that Linton committed the murder during a panic attack, and that Linton's inculpatory statements were the false product of coercive, suggestive questioning of a shy, socially introverted individual with avoidant personality disorder. (30 RT 4642-4645, 4651-4652, 4689-4692, 4696, 4703, 4714-4718.)

Forensic pathologist Werner Spitz opined that Melissa's injuries may have been caused by Linton grabbing her loose-fitting, cotton V-neck shirt and twisting it tightly around her throat, with his knuckle going into part of her neck. (22 RT 3316-3319, 3364.) He believed that Melissa would have been "totally unconscious" in twenty to thirty seconds if the pressure on her neck were maintained. (22 RT 3322.) Dr. Spitz saw no evidence of manual strangulation. (22 RT 3356.) He did not believe, based on his review of the autopsy photographs, that the lineal mark on Melissa's neck was caused by a cord wrapped around her neck in the manner Linton

described to the police. (22 RT 3305, 3327.) On cross-examination, Dr. Spitz acknowledged that hair and hands between a ligature and the neck could account for the absence of a circumferential linear abrasion. (22 RT 3363.) He also acknowledged that interrupted or intermittent strangulation was supportable if one credited Linton's statements to the police. (22 RT 3381-3382.)

The defense also called clinical psychologist Craig Rath. Dr. Rath evaluated Linton's mental state between police interviews on November 30, 1994, at the prosecution's request. (23 RT 3475-3478, 3525.) Dr. Rath saw no signs of brain damage or a brain disorder, and no deficits in cognitive functioning. (23 RT 3541, 3555, 3563.) Nor did he find any indications of insanity or a personality disorder. (23 RT 3541, 3572.) Linton seemed alert and responded appropriately to questions, though his affect was flat. (23 RT 3507, 3556.)

Dr. Rath administered the Minnesota Multiphasic Personality Inventory Test (MMPI) during the evaluation. (23 RT 3485-3486.) Linton had elevated scores on the social introversion, depression, and psychopathic deviant scales, but did not meet the diagnostic criteria for a sociopath. Linton's responses also indicated he had hypomania, i.e., low energy. (23 RT 3489-3490, 3494, 3497-3498.)

The jury also heard the audiotape of Linton's interview with Dr. Rath. Linton reported that he did not think he had any history or periods of unconsciousness, blackouts, or seizures, but did get "[t]he breath . . . knocked out of" him when he was hit by a car while riding his bicycle at age 14. (12 CT 3408-3409.) Linton had suicidal thoughts between the ages of eight and fifteen or sixteen and once heard one of his parents' voices. (12 CT 3416, 3419.) He had had a couple of anxiety attacks in the past. His last period of anxiousness was about three months earlier. He did not know what set it off. (12 CT 3415-3416.) Linton last used marijuana a

month before the murder and last used "speed" a week earlier. (12 CT 3412-3413.)

Linton also described his father's method of discipline. He said his father punished him by hitting him "around the place and stuff," that his father "used to get pretty carried away," and that his father last hit him when he was 16 years old. (12 CT 3391-3394, 3399.) One of the worst injuries he sustained occurred when he was between the ages of ten and thirteen, when his father dragged him inside the house by his hair and he slipped on a sled and hit his head on the banister. His father refused to take him to the hospital. When his mother came home, she took him to the hospital where he received four or five stitches. (12 CT 3392.) When Dr. Rath asked Linton what was the worst thing that happened to him in childhood, Linton responded "a lot of things happened" and that he was not sure what the worst was. (12 CT 3394.) He then recalled an incident where he ripped off the pantry door when he tried to get a glass. When his father returned home and found the broken door, he was furious and "kicked" Linton "around the place." (12 CT 3394.) Linton repeatedly said he was sorry, but his father did not "let up." (12 CT 3394.) Later, his father said he would not have punished him if he had simply apologized. (12 CT 3394.) Linton reported that his father did not "use full force" when he punished him, and that he did not think his father ever grabbed him by the throat. (12 CT 3395.)

Linton also told Dr. Rath that he was in special education in the third grade and repeated that grade. (12 CT 3397-3398.) He was diagnosed with Attention Deficit Disorder in the fifth grade and prescribed Ritalin, but stopped taking the drug because it made his hands shake. (12 CT 3397; 23 RT 3500.) Dr. Rath did not see any signs of hyperactivity during the interview, which indicated Linton had likely outgrown much of the observable symptomology. (23 RT 3500.) Linton said he graduated from

high school in 1992, and had never lived away from home. (12 CT 3395-3396.) Living with his parents depressed him. (12 CT 3415.)

Linton spent his time before the murder reading fantasy novels and science fiction books, looking for a job, and watching Star Trek. (12 CT 3401-3402.) He said he had a friend named Joey Montero and another friend named Jerry Smith. Linton and Smith played Dungeons and Dragons weekly. (12 CT 3403-3404.) Linton wanted a girlfriend, but did not date. He described himself as sort of shy. (12 CT 3414-3415.) His typical fantasy was to go on a date with a girl. (12 CT 3430.)

Linton's statements about the murder and prior incident were essentially in accord with what he told the police except that he did not admit that he tried to rape Melissa during the first incident or thought about raping her during the murder. (12 CT 3422-3424, 3426-3428.) He told Dr. Rath that he found Melissa "very slightly" attractive. (12 CT 3421.) He later said that he did "not really" find her attractive, and indicated that even if he did find her attractive, he could not have done anything at the time of the murder because he was too scared. (12 CT 3430-3431.)

Dr. Rath opined that based on the character traits Linton displayed during the testing and interview, Linton returned to the Middletons' home on the day of the murder because of "[a] strong need." (23 RT 3583-3584.)

Dr. Cecil Whiting, a forensic and clinical psychologist, spent 15 hours with Linton during six meetings and administered a series of tests, including the MMPI and the Luria-Nebraska Neuropsychological Battery. Dr. Whiting also listened to Linton's interviews with Dr. Rath and the police, spoke to some of Linton's family members, and reviewed Linton's school and medical records. (25 RT 3743-3749, 3755-3762, 3767, 3789-3792, 3819, 3832, 3850, 3861; 26 RT 3875, 3945-3946.)

The MMPI revealed that the most prominent part of Linton's personality was self-isolation. (25 RT 3780.) Linton's responses also

indicated he was depressed, uninvolved, self-critical, and still suffering from psychomotor retardation. (25 RT 3786, 3788, 3790.) The results of the Luria-Nebraska test indicated that Linton had impairment in the occipital-parietal region of his brain, which affects memory and vision and is related to dyslexia and panic disorders, and impairment in the right temporal lobe, which affects spatial and sequential analyses. (25 RT 3832-3837.)

Based on the tests he administered and other materials he reviewed, Dr. Whiting diagnosed Linton as suffering from social phobia and panic disorder with panic attacks, avoidant personality disorder, featuring social phobia and panic attacks, and neuropsychological impairment featuring problems with the right occipital-parietal area and right temporal area of the cerebral cortex. (25 RT 3840.) Dr. Whiting opined Linton's statements during the police station interviews about his loss of perception of time and fear during the murder and his inability to recall events were consistent with him suffering a panic attack during the murder. (26 RT 3892-3893, 3911-3914.) Dr. Whiting further opined that Linton's ability to withstand the pressures of interrogation and his suggestibility were affected by his hypomania and social introversion. (27 RT 4121-4123.)

Dr. Whiting believed that Linton's frequent school changes as a child contributed to his social phobia, and noted that Linton's school records indicated he had emotional problems and was socially isolated from his peers in kindergarten and the third grade. (25 RT 3865-3868, 3876-3877, 3879, 3882-3884.) On cross-examination, Dr. Whiting acknowledged that by age eleven or twelve, a school psychologist reported a dramatic and positive change in Linton and noted the stable setting his parents had provided for him. (26 RT 3962-3967.) He also acknowledged a social services report from that same time period stated that Linton had "good peer relationships." (26 RT 3968.)

Melody Morris lived next door to Linton. She described his social awkwardness when he came to her house to borrow her bicycle pump. (24 RT 3686-3687, 3690-3691.) During the daytime in October and November of 1994, Morris occasionally smelled marijuana and heard Linton and his friends listening to loud music. She was happy that Linton had friends and had not seen him having a good time before this. (24 RT 3697-3701.)

Rebuttal

Linda Middleton testified that she bought the shorts Melissa was wearing when she was murdered and that the zipper worked the last time she saw the shorts. (28 RT 4216-4218.) Robert Middleton testified that the cord on his headphones had extensive damage, that it was not in that condition when he last used his headphones, and that he kept his headphones on the night stand or the table by the bed. (28 RT 4221-4223.)

PENALTY PHASE

The prosecutor presented evidence of the impact of Melissa's murder on her family, friends, and the community. Melissa's mother Linda testified that Melissa was a friendly, outgoing and generous girl who wanted to be a teacher when she grew up. (32 RT 4970-4971, 4975.) Melissa enjoyed participating in the Girl Scouts, camping, family vacations, visiting family, and horseback riding. (32 RT 4970, 4976.)

When Linda first found Melissa on the day of the murder, she blamed herself for her death because she thought that Melissa had overdosed on the cold medicine that she had left for her. (32 RT 4980.) The two hardest things she had to do after the murder were calling her husband and her parents. (32 RT 4981.) The Middletons kept the door to Melissa's room closed for four years after the murder. (32 RT 4982.) They no longer celebrated Thanksgiving or Christmas, which were part of the good times

they had with Melissa, who loved the holidays. (32 RT 4983-4984.) They usually visited Melissa's grave on her birthday. (32 RT 4983.)

Linda thought about Melissa almost every minute of the day, talked to her when she woke up in the morning, and said good night to her in the night. (32 RT 4982.) She missed everything about Melissa. (32 RT 4985.) She missed seeing her daily, telling her she loves her, and giving her a kiss. Linda also commented that she will never see Melissa graduate, marry, become a teacher, or the like. (32 RT 4982-4932.) She felt it would have been different or easier if Melissa had died in an accident or from some type of disease. She said the four years since the murder had been "a nightmare" "[w]ith no closure[,]" as she never had an opportunity to say good-bye to Melissa. (32 RT 4985.) The Middletons saw a psychiatrist for a year after the murder and tried different support groups until they found a group of parents of murdered children who welcomed them. (32 RT 4984-4985.)

Melissa's death was also difficult for Linda's parents, who were very close to Melissa, and for Melissa's brother, who told Linda, "'Mom, I'll never be able to come home, be able to live there again because she's not there.'" (32 RT 4977, 4984.)

Melissa's father Robert testified about the close relationship he had with Melissa, the sweetest person he ever knew. (32 RT 4986, 4989.) Robert recalled Melissa had a contagious laugh and "lit up" a room. He characterized her as generous, loving, enthusiastic, smart and musically inclined. (32 RT 4986.) Robert taught Melissa to play the clarinet and saxophone and the two played music together. They also enjoyed long bicycle rides. (32 RT 4987-4989.) Robert was very close to Melissa. (32 RT 4989.)

When Linda called Robert about the murder, he fell off his chair and had to be helped to the parking lot and driven home. (32 RT 4990.) The

two toughest things he had to do after the murder were calling his parents and making the funeral arrangements. (32 RT 4994.)

Like his wife, Robert still talked to Melissa. (32 RT 4993.) He missed walking hand-in-hand with Melissa, riding behind her on his bicycle, "[j]ust little things like that." (32 RT 4996-4997.) Robert no longer played the saxophone, which he had played for thirty years, and did not go the movies or Disneyland or do other things closely associated with Melissa. (32 RT 4987, 4993.) When he went to weddings, graduations, or other happy events, he felt cheated. (32 RT 4993.)

Robert said that losing Melissa was the worst thing, but he also had to deal with images of what Linton put her through. (32 RT 4991.) He felt guilty about not protecting Melissa and the biggest mistake of his life – thinking the prior incident was a nightmare. (32 RT 4992.) Robert said he has had panic attacks, felt total despair, and had suicidal thoughts. (32 RT 4991.) His emotional turmoil had diminished over time but the void and sadness had not gone away. (32 RT 4991, 4997-4998.) He did not see some of his friends any more because they did not know what to say to him. (32 RT 4997.) His parents can hardly talk about the murder. (32 RT 4993.)

School officials dedicated the Christmas parade after Melissa's murder to Melissa. (32 RT 4996.) They also recognized her with a memorial plaque beneath the school flagpole and an empty chair at graduation, which students put flowers on. (32 RT 5004.)

Jessica Holmes, a close friend, neighbor, and classmate of Melissa, described Melissa as a really "loving" person who could not hurt anyone or any creature. (32 RT 5003, 5005.) Holmes recalled that Melissa even kept hurt wasps that she found until the wasps "were better so they could fly away." (32 RT 5005-5006.) Holmes and Melissa rode bicycles together, walked and skateboarded with Melissa's dog, and were in the process of building a clubhouse when Melissa died. (32 RT 5003.) Before the

murder, Holmes felt invincible. Afterward, she was afraid to be home alone. (32 RT 5005.) She tried to forget about Melissa's murder, but it was always in the back of her mind. Holmes still missed Melissa. (32 RT 5006.) She said that Melissa's death was hard for everyone at school because it was an unprecedented, "scary experience." (32 RT 5004-5005.)

Another close friend and classmate, Lindsay Bryan, described Melissa as a "very cheerful" person who always tried to make others feel better. (32 RT 5008-5009.) Bryan enjoyed drawing and coloring with Melissa and listening to Melissa play her clarinet. (32 RT 5009.) Melissa told Bryan she wanted to be a mother when she grew up. (32 RT 5009.) Bryan was shocked when she heard about Melissa's murder, cried a lot, and could not concentrate. (32 RT 5011.) She isolated herself after the murder and became fearful of making new friends and losing them. (32 RT 5010.) She still missed Melissa. (32 RT 5010.)

During the testimony of Melissa's parents and Holmes, the prosecutor presented a total of twenty-five still photographs that showed Melissa at various stages of her life, the memorial plaque at the flagpole at her school, and the empty chair at school graduation. (32 RT 4969, 4972-4979, 4994-4996, 5004.)

Defense Penalty Phase Evidence

The defense presented evidence of Linton's emotional problems and physical abuse and neglect. Randall Knack, a school psychologist who evaluated Linton in 1980 in Virginia, when Linton was five years old and in kindergarten, concluded that Linton's academic functioning was lower than expected given his intellectual ability, potential, and academic training. (33 RT 5108-5118.) Dr. Knack found "there were significant emotional problems that were interfering with [Linton's] ability to concentrate, to comprehend information, and to express his thoughts, and that it was affecting his mood." (33 RT 5118.) Dr. Knack recommended that Linton

be considered for a special education program for the emotionally disturbed and that Linton's pediatrician review his case for a possible neurological evaluation. (33 RT 5123-5124.) Dr. Knack reported that Linton's parents were supportive and eager to receive his recommendations. (33 RT 5133.)

Susan McKenzie was Linton's special education teacher in Virginia for a little over a year, in second and third grades. McKenzie recalled that Linton had imaginary fights with his fingers and pencils. (33 RT 5146-5149.) He was bright, but withdrawn; he did not socialize with other children. (33 RT 5150-5151, 5153.) McKenzie testified that she notified officials when Linton came to school with stitches on his head, because Linton reported that his father said that Linton had hit his head on his sled; Linton could not understand how this happened because his sled was round. (33 RT 5154.) McKenzie ranked Linton in the top five of the severely disturbed children that she had seen in her career. (33 RT 5156.) She acknowledged on cross-examination that, after Linton left her class and was placed in a regular classroom in a private parochial school, he functioned at an average to above average level academically. (33 RT 5168.)

School psychologist Becky Ott evaluated Linton in Virginia in 1983. (33 RT 5172.) Ott recalled Linton tolerated frustration poorly, talked to himself, and swatted imaginary flies on the table top. (33 RT 5175.) On the Wechsler Intelligence Quotient Test, Linton "scored within the average to high average range with some indications of even higher intellectual ability." (33 RT 5178.) Ott believed Linton's intelligence was probably above average. (33 RT 5194.) But she noted that Linton seemed to experience stress and have difficulty with unstructured tests. (33 RT 5178.) When asked to draw his family, Linton said he could not do so, but that he could draw a person. Linton then drew an armed robot that would kill anyone who crossed his path. (33 RT 5178, 5180.) Ott believed Linton's inability to draw his family, the robot drawing, and his responses on one

test that she administered indicated a strong likelihood of family violence. (33 RT 5180, 5192-5193.) Ott concluded from her tests and observations that Linton was "significantly, emotionally disturbed." (33 RT 5179.) She ranked him as one of the more emotionally disturbed children that she had tested. (33 RT 5184.) For testing purposes, Ott defined emotionally disturbed as unable to function in the academic environment. (33 RT 5190-5191.) Ott acknowledged that it appeared that Linton was functioning in an academic environment in the fifth grade, and that she had not seen any records beyond the fifth grade. (33 RT 5191-5192.)

The Linton family attended family counseling at the recommendation of Knack and Ott, and Linton attended individual counseling. (33 RT 5521.)

Jack McLaughlin, Linton's teacher from a continuation high school in California, testified that Linton transferred to his school because he had not done the school work required at his traditional high school. (34 RT 5341, 5349-5351.) At the continuation school, which had easier classes, Linton did the bare minimum credits, often chose to do what he wanted to do, regardless of what was required of him, and mumbled when confronted by the staff. (34 RT 5364, 5372, 5387, 5393, 5409.) McLaughlin felt Linton was lazy at that time, but changed his mind after he learned of Linton's academic history. (34 RT 5386, 5404, 5411.) Linton's father had indicated on Linton's enrollment form that Linton had never been in a special education class and never received counseling. (34 RT 5356-5358.) McLaughlin was also not aware of Linton's Attention Deficit Disorder diagnosis. (34 RT 5404-5407.) McLaughlin testified that, after Linton's parents received a letter informing them that Linton was behind in his credits, Linton's father responded that the school was violating the terms of the contract they had agreed to when Linton transferred, and that he was prepared to take necessary legal or political action. (34 RT 5368-5369.)

Robert Osborne, a retired Air Force staff sergeant, played Dungeons and Dragons with Linton at a weekly game from 1989 until the time of the murder. (35 RT 5418-5420.) Dungeons and Dragons, a role playing game, requires players to plan moves in advance and anticipate the reactions of other players. (35 RT 5446.) Osborne recalled that Linton was a math whiz; he could rattle answers to questions off the top of his head and was always the first to add up the dice they used to play the game. (35 RT 5447-5448.) Osborne characterized Linton as an overly shy, nice, loyal person who was respectful of authority and a follower. (35 RT 5421-5423, 5437, 5442-5443, 5447.) He said other players could easily persuade Linton to do things that he did not want to do during games. (35 RT 5242.) Linton gained confidence in gaming over time, but could not handle pressure well. (35 RT 5437, 5422.) Osborne had played Dungeon and Dragons with Linton through the mail since Linton's incarceration. (35 RT 5457.)

Linton's father Carl testified that he and his wife physically disciplined Linton by hitting him with a wooden spoon when Linton was an infant and toddler, in accord with the teachings of the church they attended at that time. Carl continued to physically discipline Linton until he was 17 or 18 years old. At times, he lost his temper and went beyond corporal punishment. (33 RT 5196-5203, 5246, 5250-5251.) He testified about two specific incidents when this occurred. The first was the sled incident that Linton described to Dr. Rath. (33 RT 5204-5206.) The second incident occurred when Linton was 15 or 16 years old. After witnessing Linton grab Stacey by the throat, Carl grabbed Linton by the throat, lifted him up, and asked him how it felt. Linton "freaked out[,]" babbled incoherently, fled, and stayed out all night in a rain storm. (33 RT 5206-5207.) After Carl lost his temper with Linton, he would hug Linton, apologize and tell him that he loved him. (34 RT 5275; 35 RT 5478-5479.)

Carl also testified about his love for Linton, Linton's learning and communication difficulties, and how Linton seemed sharper since his incarceration and separation from him. (33 RT 5205-5203, 5208-5212, 5214-5215.) Carl said that before the murder, Linton played video games, watched television, slept, and had no responsibilities apart from taking care of Stacey and light housekeeping. But Carl did not think that Linton was lazy. (33 RT 5244-5245.) Carl acknowledged that Linton had sufficient confidence to play in the band, be a teacher's aide and take Tae Kwon Do classes. (33 RT 5248-5249.) Linton earned a purple belt in Tae Kwon Do. (12 CT 2762.)

Linton's uncle corroborated Carl's testimony about the use of the spoon for discipline in Linton's early years and how Carl lost his temper with Linton. (34 RT 5256-5261, 5284, 5288-5289.) The uncle also recalled an incident in which Carl and Linton's mother left then two-year-old Linton home alone in his crib while they went to a movie. Linton was crying when they returned. (34 RT 5652, 5285.) The uncle testified that Carl locked Linton in his room for misbehaving. (34 RT 5266, 5269.) The uncle did not witness any child abuse, but did witness two beatings in 1993, just before Linton's 19th birthday. (34 RT 5277-5278, 5290.) The uncle said that after Linton's first few years, there were few signs of physical abuse. (34 RT 5294.) The uncle, who loved Linton "very much," thought Linton was "very lazy" before the murder and had grown up and become his own person since his incarceration. (34 RT 5280-5281, 5291.)

Linton's aunt, who was estranged from her brother Carl, felt Linton was neglected by his parents during infancy, was delayed in his language comprehension, and was passive, quiet and withdrawn. (34 RT 5301-5310, 5316.) She also felt that Stacey was the center of Linton's parents' universe. (34 RT 5312.) The aunt believed that, since his incarceration, Linton had appeared confident and to have a personality. (34 RT 5316.)

The aunt had no contact with Linton between 1992 and 1994. (34 RT 5318.)

Linton's grandmother corroborated the testimony of other family members about Linton's early neglect and abuse, his language delays, Carl's temper, and the disparate treatment of Stacey and Linton. (35 RT 5473-5486.) The grandmother saw Carl abuse Linton with the spoon on many occasions. After she saw bruises on Linton's body, she threatened to report Carl and Linton's mother to child protective services if she saw another bruise. (35 RT 5478.) The grandmother characterized Linton as a shy, withdrawn, loyal person who lacked confidence but was a "very good" kid. (35 RT 5487, 5490.) She believed Linton had gained confidence since his incarceration and was able to cope in the structure of prison life. (35 RT 5491-5492.) The grandmother said that Linton indicated he felt dreadful about the murder. (35 RT 5493.)

An official from the sheriff's department testified that Linton had received only one disciplinary marker in jail. The marker was for possessing dice in his cell. (35 RT 5464-5468.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED THE STATEMENTS LINTON MADE IN HIS BEDROOM AND HIS ATTEMPTED RAPE CONFESSION, PROPERLY PRECLUDED HIM FROM CALLING AS WITNESSES AN EXPERT ON COERCED CONFESSIONS AND DDA WILLIAM MITCHELL, AND PROPERLY SUSTAINED THE PROSECUTOR'S OBJECTIONS DURING CROSS-EXAMINATION OF DETECTIVE STOTZ

In his first argument, Linton raises six claims: (1) the statements he made in his bedroom were inadmissible because he was in custody at that time and had not been advised of his *Miranda* rights; (2) his subsequent waiver of his *Miranda* rights was not voluntary, knowing and intelligent, because the prosecutor, DDA William Mitchell, and Detective Stotz falsely promised him during the bedroom interview that he would not be punished for any prior sex crimes that he may have committed against Melissa some time before the murder; (3) his confession to the prior attempted rape of Melissa was coerced by promises of leniency and other coercive interrogation techniques; (4) the trial court erred in denying his request to call an expert on coerced confessions; (5) the trial court erred in refusing to allow him to call DDA Mitchell as a witness; and (6) the trial court erred in restricting his cross-examination of Detective Stotz.

Linton forfeited the custody and *Miranda* waiver claims by failing to object on these grounds below. These claims also fail on the merits, because Linton was not in custody during the bedroom interview and because he knowingly and voluntarily waived his *Miranda* rights. Linton's due process voluntariness claim fails because law enforcement did not coerce a confession through a promise of leniency or any other tactics. And even if a promise of leniency had been made, it was not the motivating factor for any confession. Thus, the trial court did not violate Linton's state

and federal constitutional rights to due process and against self-incrimination by admitting his extrajudicial statements.

The trial court also properly precluded the defense from calling an expert on coerced confessions and DDA Mitchell. The expert testimony would have had little, if any, probative value and would have resulted in an undue consumption of time. DDA Mitchell's testimony would have been cumulative to other evidence regarding the circumstances of the interviews and interrogation. Finally, the trial court properly sustained the prosecutor's objections during the cross-examination of Detective Stotz, because the defense questions were either improper or called for marginally relevant evidence, at best. Accordingly, the trial court's rulings did not violate Linton's state or federal constitutional rights to due process and confrontation.

A. The Suppression Motions and Hearings

Linton unsuccessfully moved to suppress his taped confession at the preliminary hearing on the ground it was coerced by a promise of leniency. (1 SCT 37, 62, 84-91.) He later renewed his suppression motion. (1 SCT 37, 91; 1 CT 162-172.) After a partial hearing on the renewed motion, the court ruled that the motion should be heard at trial. (2 RT 186.) At the subsequent hearing, the parties stipulated the trial court could consider the testimony from the preliminary hearing and partial suppression hearing. (5 RT 538-539.) The court also considered the written filings, the audiotapes and transcripts of the interviews, and the testimony of five witnesses called by the defense – Detectives Stotz and Lynn, DDA John Chessell, Sergeant Rodriguez and Dr. Rath. (2 CT 498-502; 3 CT 773-779, 811-820, 825-834; 10 RT 1343.) The evidence established the following:

Detective Stotz first spoke with Linton around 4:45 p.m. on the day of the murder for about ten minutes at Linton's front door. (1 SCT 10, 40.) About forty minutes later, Detective Stotz returned to Linton's home with

Detective Lynn. By this time, Detective Stotz had learned that Melissa had confided in a 13-year-old neighbor that, two to three weeks before the murder, Linton entered the Middletons' house around midnight and tried to rape and choke her. (1 SCT 13-15.) Detective Stotz asked Linton about the prior attack. Linton initially denied knowledge of it, but later said that he thought he knew what Detective Stotz was referring to. Linton then explained that, two to three weeks earlier, he woke up in his yard around midnight, wearing only his jeans and underwear. Linton thought he may have been sleepwalking. (1 SCT 15-16.) The second conversation also took place at Linton's front door and lasted about fifteen minutes. (1 SCT 41.)

Around 8:15 p.m., Detective Stotz returned to Linton's home with DDA Mitchell and interviewed Linton in his bedroom for thirty to forty-five minutes. (1 SCT 44.) At the start of the interview, Detective Stotz advised Linton that he was not under arrest and did not have to talk to them. (5 SCT 67.) At one point, Detective Stotz asked Linton if he ever kissed Melissa. After Linton said "[n]o, I never" Detective Stotz interjected, "or made out . . . you're not gonna get in trouble for that, y'know, we just wanna know (that)." (5 SCT 81, alterations in original.) Linton responded, "(I know) why would I get – why wouldn't I get in trouble for that?" (5 SCT 81, alterations in original.) Stotz replied, "Well, because, frankly, because she's no longer living, y'know. Nothing would happen to you if – if you had kissed her or grabbed her or touched her or even had sex with her. Y'know, at this point she's – she's no longer the victim wouldn't be her [sic]. She's no longer with us. So nothing would happen to you. We just need to know because – okay." (5 SCT 81.) Linton responded, "Okay. Of course you know I'm not confessing to that." (5 SCT 81.)

Later in the interview, DDA Mitchell advised Linton that they were going to ask people in the neighborhood who were home at the time of the

murder to take a polygraph test. (5 SCT 85.) After Linton expressed reluctance to do so, DDA Mitchell stated:

> Like, if – if you and Melissa had had some problems sexually in the past and you're trying to hide that, that might set it off, so you'd have to tell us about that ahead of time. What we're interested in, the murder, of course, we don't care about anything else that happened, if you and Melissa, she stopped coming over here, 'kay, that's something that's water under the bridge now. We're looking for only the murderer, if you didn't do that, take a polygraph and prove it with your background, with her as long as there isn't something you're hiding, worried about whether or not they're gonna ask questions about this one area, if you actually didn't do the murder but you're trying to hide this other information or problems that you've had with her, that could kind'a skew the results one way or the other.

(5 SCT 86.)

Linton eventually agreed to take a polygraph test, but asked that his parents not be told about it and that he not be telephoned the next day until after his parents left the house. (1 SCT 49-50.) Linton made no inculpatory statements during the interview. (5 SCT 67-88.) Detective Stotz and DDA Mitchell left after the interview. (1 SCT 67-68.)

The next morning, Detective Stotz called Linton, and Linton agreed to meet with him. (1 SCT 50, 69.) Around 8:45 that morning, Detectives Stotz and Lynn picked Linton up at his home in an unmarked car. (1 SCT 39, 69-70.) During the drive, Linton told the detectives that there was no need for a polygraph test, that the detectives knew last night, and that he was not sure that he could admit it. (1 SCT 22, 51, 67-68.) Linton also said he wanted to tell Detective Stotz the previous night, but did not want to confess in front of his parents. He apologized for wasting their time. (1 SCT 54.)

The detectives and Linton arrived at the police station around 9 a.m. and went to Detective Lynn's office. (1 SCT 52.) At the station, Linton sat with Detective Lynn in his office for about forty-five minutes, while

Detective Stotz prepared for the interview. (1 SCT 52; 5 RT 550-552, 10 RT 1066-1067 .) During this time, Linton asked Detective Lynn why he was laughing at him. Detective Lynn twice denied doing so. (10 RT 1068.) When Detective Stotz returned to Detective Lynn's office, he explained to Linton what would occur and advised him that he would be reading him his rights. (6 RT 735-739.) During that conversation, Linton asked Detective Stotz if he would be getting the death penalty. Detective Stotz told him that he only made recommendations to the District Attorney's Office, that the District Attorney's Office actually decided what charges to file and penalties to seek, and that the court determined penalty. (1 SCT 55, 71, 80-82; 5 RT 549, 658-659; 6 RT 736.) Linton also brought up the topic of forensics. (1 SCT 55; 6 RT 736.)

About 9:45 a.m., Detective Stotz advised Linton of his *Miranda* rights. (5 SCT 145-146; 1 SCT 39.) After Linton waived his rights, he described how he entered the Middletons' home, how Melissa screamed when she first saw him, and how he strangled her to death. (5 SCT 146-149.) Detective Stotz asked Linton if Melissa screamed because she was afraid of him, and if she was afraid of him because of what happened two weeks earlier. (5 SCT 149.) After Linton answered both questions affirmatively, the following exchange ensued:

STOTZ: You and I talked about it.

LINTON: Yeah, you know about that, yeah, you don't need to record that do you?

STOTZ: Well, I need to know a little bit of background on what happened.

LINTON: Why do you need to record it?

STOTZ: About what happened?

LINTON: There's no evidence on that.

STOTZ: About what happened a couple of weeks ago?

LINTON: Yeah.

STOTZ: Well, I just need to know because last night we talked and you didn't, you said nothing happened.

LINTON: That's because my parents were home.

STOTZ: Okay, I understand that but his [sic] is just part of the interview and like I said, you're not going to get in trouble for what happened two weeks ago, okay?

LINTON: Why not?

STOTZ: Well because like I told you last night, that's water under the bridge.

LINTON: That's until today.

STOTZ: No, that's got nothing to do with it, I just need to know why she would see you and why she would run away from you screaming like that and it's kind of odd for a neighbor who lived there for six years. For instance, if my neighbor walked into my house that I've known for six years, I wouldn't just run away screaming and I'm sure you . . . .

(5 SCT 149-151, ellipsis in original.)

Detective Stotz testified at the suppression hearing that he believed that Linton would not be charged for any prior crimes because of his murder confession. (5 RT 556-557.) But he did not further convey this belief to Linton. After Detective Stotz made the above-quoted "that's got nothing to do with it," Linton responded, "She was, she was barely screaming, she just ran to her parent's room." (5 SCT 151.) Detective Stotz then proceeded to question Linton about the murder, the prior attack, and the murder again, until 10:05 a.m. (5 SCT 151-162.)

The interview resumed at 10:40 a.m., after a thirty-five minute break, with Detective Stotz and DDA Chessell. (5 SCT 162.) During this segment, Linton admitted that he went to the Middletons' house to steal on the day of the murder and that he thought about having sex with Melissa that day. But he continued to deny that he sexually assaulted Melissa then or two weeks earlier. (5 SCT 162-217.) He also declined to take a polygraph test. (5 SCT 199-200.) This segment of the interview ended at 11:20 a.m., with Detective Stotz offering Linton a soda and DDA Chessell offering him something to eat. (5 SCT 216-217.)

About an hour and 25 minutes later, around 12:45 p.m., Dr. Rath began his one-on-one interview with Linton in an interview room at the police station. (5 SCT 90; 2 RT 148.) At the start of the interview, Dr. Rath made it clear to Linton that whatever Linton said would not be confidential. (2 RT 155-156.) He also told Linton he did not have to answer questions and something to the effect that he was working for the District Attorney's office. (8 RT 1029-1030, 1035-1036.) During the interview, Linton denied committing any sex crimes or having any sexual interest in Melissa. (4 RT 1000; 5 SCT 90-125.) Dr. Rath only directly questioned Linton about the murder and prior incident for nine pages of the thirty-six page transcript. (5 SCT 90-125.) The interview ended at 1:50 p.m., at which time Linton started the MMPI. Linton finished the MMPI at 3:15 p.m. (5 SCT 125.)

Around 3:40 p.m., after about a twenty-five minute break, Detective Stotz resumed his interview with Linton in Detective Lynn's office. (5 RT 655; 5 SCT 217.) Sergeant Rodriguez joined the interview at 3:45 p.m. (5 SCT 220.) Toward the end of the interview, Detective Stotz told Linton, "The sooner you tell me the truth], the sooner I'll turn this machine off and the sooner we'll all be on our way." (5 SCT 232.) Sergeant Rodriguez added that Linton was not telling the entire truth and that he would feel

better if he did so. (5 SCT 232.) After declining a glass of water and indicating that he was not hungry, Linton asked, "So I have to say it.?" (5 SCT 232.) Detective Stotz responded, "I want [you] to tell me the truth." (5 SCT 233.) Linton asked, "Why with the tape on?" Detective Stotz explained that he did not take notes well. Linton replied, "So I have to say it out loud?" Stotz answered "Yes, you do." Linton then admitted, "I tried to rape her." (5 SCT 233.) Linton said this happened the first time he entered the Middletons' house, "like two months ago whatever whenever it was." (5 SCT 233.) Linton maintained that he did not do anything though and that he was under the influence of "speed." (5 SCT 231, 233-234.) He also admitted that the thought of raping Melissa crossed his mind when he unzipped her pants on the day of the murder, but he disdained the thought afterward. (5 SCT 234-237.)

Just before the interview ended at 4 p.m., Linton acknowledged that he had not been threatened or coerced to speak with the police. (5 SCT 238.) He also said, "I didn't want to, I didn't want to, I thought I should report myself." (5 SCT 238.)

At the close of the hearing, defense counsel argued that Linton's confession that he attempted to rape Melissa some time before the murder was involuntary because it was the product of overbearing, coercive police tactics that included express promises of leniency, softening up, and relentless questioning about Linton's sexual interest in Melissa. Defense counsel also argued that the examiners failed to honor his invocation of his *Miranda* rights and that Dr. Rath failed to re-*Mirandize* him. (10 RT 1214-1296.)

The prosecutor argued Linton validly waived his *Miranda* rights, that there was no need for Dr. Rath to re-admonish him, and that Linton did not invoke his right to remain silent during the interviews. (10 RT 1299-1311.) The prosecutor also argued Linton's confession was not coerced. The

prosecutor noted Linton was placed in a detective's office without handcuffs, was provided refreshments, and was questioned by the police for a total of one hour and ten minutes and by Dr. Rath for one hour and five minutes. The interviews were low key; neither the tone nor the nature of the questioning was coercive. (10 RT 1304-1305, 1312, 1324.) The prosecutor further argued that Linton's personal characteristics did not render the confession involuntary. Linton was a twenty-year-old man who appeared to be of normal intelligence to Detective Stotz. (10 RT 1324.) Linton demonstrated through his lies and other responses that he was not intimidated, not simply providing answers suggested by the officers, and understood the value of forensic evidence. (10 RT 1325-1326, 1333-1334, 1336.)

With respect to the alleged promises of leniency, the prosecutor asserted that the "water under the bridge" comment in the bedroom was not a promise regarding potential charges, but instead an assurance that, if Linton were not the murderer, he would not be liable for any past crimes against Melissa. (10 RT 1319.) Linton demonstrated that he understood this was so the next day with his "'That's until today,'" response to Detective Stotz's "water under the bridge comment." (10 RT 1321-1322, 1329.) The prosecutor argued Deputy Stotz's response – "'No, that's got nothing to do with it. I just need to know why she would see you and why she would run away from you screaming like that'" – was not a promise of leniency, but instead an explanation of why Detective Stotz needed to know about the prior incident. (10 RT 1329.) The prosecutor further argued that even if the comment were a promise of leniency, it was not the motivating factor. (10 RT 1329.) Linton confessed to the murder on November 30 rather than November 29 because he did not want to confess in the presence of his parents, and he confessed to the prior attempted rape, not because of any promise of leniency, but because of the officers persistent but

permissible questioning on the subject. (10 RT 1329, 1335-1341.) The prosecutor asserted Linton's hesitancy to discuss the prior incident had to do with his desire to not have his statements on this subject recorded, not any concern over whether or not he would be punished for it. (10 RT 1330-1331, 1341.)

The trial court agreed with the prosecutor's reasons, for the most part, and denied the defense suppression motion, finding the statements were freely and voluntarily made and that Linton's will was not overborne. (10 RT 1343.)

During the prosecution's case-in-chief, the court denied Linton's motion for reconsideration. (4 CT 908-915; 18 RT 2773-2774.) The court also denied his new trial motion, which included a claim that his statements were wrongly admitted. (37 RT 5776; 14 CT 3752.)

B. Linton Forfeited the Issue of Whether He Was in Custody During the Interview in His Bedroom; In Any Event, He Was Not in Custody and Any Error Was Harmless Beyond a Reasonable Doubt

Miranda warnings are required before a custodial interrogation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 732, quoting *Miranda,* 384 U.S. at p. 444.) Linton argues the statements he made in his bedroom should have been excluded because he was in custody and had not been advised of his *Miranda* warnings. (AOB 61-67.) Linton did not challenge the admissibility of the statements he made in his bedroom on this ground below. Indeed, when the trial court noted that Linton was in his bedroom during the interview on the evening of November 29, Linton's counsel responded, "Right. He wasn't in custody. We are not saying he was in custody on 11-29." (9 RT 1182.) Accordingly, Linton forfeited this claim. (*People v. Combs* (2004) 34 Cal.4th 821, 845.)

In any event, the evidence adduced regarding the bedroom interview established that Linton was not in custody at that time. "An interrogation is

custodial when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400, quoting *Miranda v. Arizona, supra,* 384 U.S. at p. 444.) The question of custody is resolved under an objective standard. "[T]he pertinent inquiry is whether there was '"'a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'"'" (*Id.* at p. 1400, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 401; accord *Yarborough v. Alvarado* (2004) 541 U.S. 652 [124 S.Ct. 2140, 2149, 158 L.Ed.2d 938].) Where no formal arrest has occurred, the question is whether, under the totality of circumstances surrounding the interrogation, "'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave.'" (*People v. Leonard, supra,* 40 Cal.4th at p. 1400, alteration in original, quoting *People v. Ochoa, supra,* 19 Cal.4th at p. 402.)

Here, after twice speaking with Linton briefly at Linton's front door, Detective Stotz returned to Linton's home around 8:15 p.m. with DDA Mitchell. (1 SCT 10, 40-43.) DDA Mitchell was wearing a suit and tie and identified himself as a deputy district attorney. (1 SCT 45; 5 RT 659.) Detective Stotz had identified himself to Linton when he first met him that day and had shown Linton his identification, because he had been working narcotics and did not look like a police officer. (1 SCT 41.)

Linton invited Detective Stotz and DDA Mitchell into his home and "allowed" them to "take him back and talk" in his bedroom. (1 SCT 44.) Linton's parents and his sister Stacey were home at the time, and Linton's father was aware that Detective Stotz, DDA Mitchell and Linton were going into Linton's bedroom to talk. (1 SCT 65-66.) Linton wanted to speak to Detective Stotz and DDA Mitchell away from his parents. (1 SCT 66.)

Linton's bedroom was approximately 12 feet by 12 feet with a bed in it. During the interview, Detective Stotz and DDA Mitchell were seated in chairs next to each other and Linton was seated in a chair facing them, four to five feet away. (5 RT 617.) At the start of the interview, Detective Stotz advised Linton that he was not under arrest and did not have to talk to them. (1 SCT 67.) Detective Stotz and DDA Mitchell then proceeded to question Linton about his whereabouts that day, how well he knew Melissa, his scratches, and whether he still had the Middletons' house keys. They also asked Linton about the prior attack on Melissa, whether he killed Melissa, and whether he would be willing to take a polygraph examination. (1 SCT 67-88.) After some initial hesitancy, Linton agreed to take a polygraph test the following morning. (1 SCT 49-50.) The tone of the interview was low key. (Recusal Motion, Def. Exh. C [tape]; 3 RT 348.) Linton did not make any incriminating statements during the thirty- to forty-five minute interview. (1 SCT 44.)

After the interview, Detective Stotz and DDA Mitchell left Linton at his home. Linton was not handcuffed, arrested or threatened with arrest at any time. No armed guards or squad cars were posted at his door afterward, and Linton was not told to stay home or threatened with any police action if he fled the house. (1 SCT 66-68; 5 RT 46.)

A reasonable person in these circumstances would have felt he was "at liberty to terminate the interrogation and leave." *Thompson v. Keohane* (1995) 516 U.S. 99, 112 [116 S.Ct. 457, 133 L.Ed.2d 383]. Accordingly, because Linton was not in custody during the interview in his bedroom, *Miranda* warnings were not required. (See e.g., *Beckwith v. United States* (1976) 425 U.S. 341, 347-348 [96 S.Ct. 1612, 48 L.Ed.2d 1] [*Miranda* warnings not required where two special agents questioned defendant in private home and no sufficiently coercive elements were present]; *People v. Storm* (2002) 28 Cal.4th 1007, 1037 [defendant was not in custody during

interview at his home]; *People v. Breault* (1990) 223 Cal.App.3d 125, 135 [same].)

In arguing to the contrary, Linton relies upon the Ninth Circuit's decision in *United States v. Craighead* (2008) 539 F.3d 1073, 1078. (AOB 62-66.) This Court is not bound by federal circuit court decisions. (*People v. Leonard, supra*, 40 Cal.4th at p. 1416.) In any event, *Craighead* is distinguishable.

In *Craighead*, FBI agents obtained a warrant to search the defendant's home for child pornography. (*United States v. Craighead, supra,* 539 F.3d at p. 1078.) Eight law enforcement officers from three different agencies participated in the subsequent search. All of the officers were armed, some wore protective gear, and some unholstered their guns in Craighead's presence. (*Id.* at pp. 1078, 1085.) Two of the officers "directed" Craighead to a cluttered, unfurnished storage room in the back of his home for a private conversation. (*Id.* at p. 1078.) One of the officers, who was dressed in a flack jacket and was visibly armed, appeared to be leaning against the closed storage room door in such a manner as to block Craighead's exit from the room. The officers did not read Craighead his *Miranda* rights. The officer who questioned Craighead informed him that he was not being arrested, and that he was free to leave at anytime. (*Id.* at pp. 1078-1079.) Notwithstanding these assurances, Craighead testified that he did not feel free to leave because of the officer by the door. Craighead was also unaware that his work supervisor had been invited to accompany the officers to provide emotional support to him. (*Id.* at p. 1079.) The Ninth Circuit concluded that Craighead was in custody, because a reasonable person in his shoes would not have felt free to leave. (*Id.* at p. 1089.)

Here, unlike *Craighead,* only two individuals came to Linton's house, Detective Stotz and DDA Mitchell, and they only came to interview Linton, not to execute a search warrant. Linton invited Stotz and Mitchell into his

home. (1 SCT 44.) There is no indication in the record that either Detective Stotz or DDA Mitchell displayed any weapons or wore visible protective gear. The interview took place in Linton's bedroom, allowing him "to take comfort in the familiar surrounding of the home and decrease the sensation of being isolated in a police-dominated atmosphere." (*United States v. Craighead, supra,* 539 F.3d 1073.) Linton knew his parents were home as he did not want to speak to Detective Stotz and DDA Mitchell in front of them. (1 SCT 66.) In light of these distinctions, *Craighead* does not advance Linton's position.

Even assuming Linton had been in custody during the bedroom interview and had preserved this claim for review, no prejudice ensued from the admission of the statements he made there. As defense counsel acknowledged below, Linton made no incriminating statements during the bedroom interview. (9 RT 1183.) And Linton confessed to the murder and the earlier attempted rape the following day. Thus, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 31 [111 S.Ct. 1246, 1265, 113 L.Ed.2d 302] [applying harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705], in determining effect of erroneous admission of involuntary confession]; see *People v. Davis* (2009) 46 Cal.4th 539, 588 [any *Miranda* violation was harmless under *Chapman*, where defendant made only non-inculpatory statements during interview]; *People v. Cunningham* (2001) 25 Cal.4th 926, 994 [assumed *Miranda* violation was harmless under *Chapman* where jury could consider same evidence through more detailed testimony of other witnesses and defendant's inconsistent statements revealed only his lack of veracity].)

Linton, however, argues his comments during the interview were "extremely prejudicial because they provided the context and foundation of the prosecution's theory of the case, to wit, that he had attacked and

attempted to sexually assault Melissa several weeks [or months] earlier." (AOB 64, alteration in original.) Linton argues that it was only after he was promised by Detective Stotz and DDA Mitchell that he would not be held accountable for any prior attacks on Melissa that he admitted that he woke up late one night outside his home, wearing only jeans and underwear. (AOB 66-67.) Apart from the fact that this statement is not inculpatory, Linton's argument overlooks that he had already made a similar statement to Detective Stotz earlier that day, during the second interview at Linton's front door. (19 RT 2753-2756.) Accordingly, any error was not prejudicial.

C. Linton Voluntarily, Knowingly, and Intelligently Waived His *Miranda* Rights

Linton contends that the alleged false promises of leniency that Detective Stotz and DDA Mitchell made to him in his bedroom regarding the prior crimes rendered his subsequent waiver of his *Miranda* rights invalid. (AOB 68-69.) At trial, Linton argued that his wavier was invalid because it was the product of police "softening up" (2 CT 498-502), and that his confession was involuntary because it was coerced by, among other things, false promises of leniency (10 RT 1214-1296). Linton did not, however, argue that the alleged false promises of leniency rendered his *Miranda* waiver invalid. Accordingly, he has forfeited this claim on appeal. (See e.g., *People v. Cruz* (2008) 44 Cal.4th 636, 669 [defendant forfeited claim that his statement was involuntary where only objection below was based on *Miranda*]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1094, overruled in part on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 151 [defendant forfeited *Miranda* claim by failing to object on that basis below, but preserved issue of whether his statements were voluntary].)

Linton's claim also fails on the merits. "[A] suspect's waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently." (*Colorado v. Spring* (1987) 479 U.S. 564, 566 [107 S.Ct. 851, 93 L.Ed.2d 954].) A valid waiver has two components. First, the waiver "of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*Id.* at p. 573.) Second, the waiver must have been executed with full awareness of both the nature of the relinquished right and consequences of the decision to relinquish it. "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Ibid,* citations omitted.) The prosecution bears the burden of demonstrating the validity of a waiver. (*Fare v. Michael C.* (1979) 442 U.S. 707, 724 [99 S.Ct. 2560, 61 L.Ed.2d 197]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169.)

Here, the totality of the circumstances establishes that Linton made an uncoerced choice to waive his *Miranda* rights with the requisite level of comprehension. After Linton tacitly confessed to the murder in the car, Detective Stotz fully advised him of his *Miranda* rights. (5 SCT 145-146.) Linton stated he understood his rights and was willing to talk to the police about the murder. (5 SCT 146.) Linton then described how he strangled Melissa to death and how Melissa screamed when she first saw him. (5 SCT 146-149.) When Detective Stotz broached the subject about what happened two weeks earlier and Linton expressed some reluctance to talk about it on tape, Detective Stotz told Linton, "you're not going to get in trouble for what happened two weeks ago." (5 SCT 150.) Linton asked, "Why not?" Detective Stotz replied, "Well because like I told you last

night, that's water under the bridge." (5 SCT 150.) Linton responded, "That's until today." (5 SCT 150.)

Linton's "That's until today" response demonstrates that he interpreted the statements made by Detective Stotz and DDA Mitchell the night before as indicating that he would only be immune from liability for any prior attacks on Melissa if he were not the murderer. Linton's interpretation is consistent with the words and context of Detective Stotz's and DDA Mitchell's prior statements. Specifically, after Linton indicated during the bedroom interview that he had not seen Melissa on the day of the murder, Detective Stotz asked him if he had ever kissed or made out with Melissa and advised him that he would not get in trouble for having done so. (5 SCT 67, 81.) When Linton asked why this was so, Detective Stotz replied, "Well, because, frankly, because she's no longer living, y'know." (5 SCT 81.) And when Linton later expressed concern that his nervousness would "set . . . off" a polygraph test, DDA Mitchell responded, "if you and Melissa had some problems sexually in the past and you're trying to hide that, that might set it off, so you'd have to tell us about that ahead of time. What we're interested in, the murder of course, we don't care about anything else that happened, if you and Melissa, she stopped coming over here, 'kay, that's something that's water under the bridge now. We're looking for only the murderer, if you didn't do that, take a polygraph and prove it . . . ." (5 SCT 86.) Thus, at the time Linton waived his *Miranda* rights, he was not laboring under the misimpression that he would not be subject to punishment for the prior attack if he were the murderer. That Detective Stotz responded to Linton's "That's until today" statement by saying, "No, that's got nothing to do with it," could not alter Linton's understanding of the alleged promises at the time of his earlier *Miranda* waiver. Accordingly, Linton validly waived his *Miranda* rights.

D. Linton Voluntarily Confessed to the Prior Attempted Rape

Linton contends that false promises of leniency, the length and nature of the interrogation, and his personal characteristics rendered his confession to the prior attempted rape involuntary and, thus, inadmissible. (AOB 69-92.) The record supports the trial court's contrary determination.

Both the state and federal Constitutions bar the admission of involuntary confessions. (*People v. Holloway* (2004) 33 Cal.4th 96, 114.) "The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made." (*People v. Carrington* (2009) 47 Cal.4th 145, 169.) "Whether [a] confession was voluntary depends upon the totality of the circumstances." (*Ibid.*) Factors relevant to the determination include: "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.'" (*People v. Williams* (1997) 16 Cal.4th 635, 660, alterations in original, quoting *Withrow v. Williams* (1993) 507 U.S. 680, 693-694 [113 S.Ct. 1745, 1754, 123 L.Ed.2d 407].)[6]

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[6] In his brief, Linton argues that "[a]ll roads in this case lead back to the same core issue about which the Supreme Court in *Corley* [*v. United States* (2009) 129 S.Ct. 1558, 173 L.Ed.2d 443] was so concerned: Whether the police and the district attorney violated [Linton's] *Miranda* rights and coerced a confession from him about a prior crime in which he was alleged to have entered the Middleton house late at night and tried to rape Melissa." (AOB 53.) The issue in *Corley* was "whether Congress intended [18 U.S.C.] § 3501(a) to sweep *McNabb-Mallory's* exclusionary rule aside entirely, or merely meant § 3501(c) to provide immunization to voluntary confessions given within six hours of a suspect's arrest." (*Corley v. United States, supra,* at p. 1564.) The *Corley* Court ultimately held "that § 3501 modified *McNabb-Mallory* without supplanting it." (*Id.* at p. 1570.) Thus, *Corley* does not support Linton's claim that his confession to the prior

(continued...)

"The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." (*People v. McWhorter* (2009) 47 Cal.4th 318, 347.) Although coercive police conduct is required to establish that a confession was involuntary, such conduct does not require a finding of involuntariness. "The statement and the inducement must be causally linked." (*Id.* at p. 347.) Thus, "'[w]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law.'" (*People v. Williams, supra,* 16 Cal.4th at p. 660, quoting *People v. Boyde* (1988) 46 Cal.3d 212, 238.) Conversely, where a promise of leniency is not the motivating cause of the confession, suppression is not required. (*People v. Williams,* at p. 661.)

"On appeal, the trial court's findings as to the circumstances surrounding [a] confession are upheld if supported by substantial evidence[.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.) A "trial court's finding as to the voluntariness of the confession is subject to independent review." (*Ibid.*)

As discussed, during the bedroom interview, neither DDA Mitchell nor Detective Stotz promised Linton immunity for prior sex crimes if he were the murderer. Linton indicated that he understood this was so the next day when, after Detective Stotz informed him "you're not going to get in trouble for what happened two weeks ago" and "like I told you last night,

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(...continued)
attempted rape should have been suppressed because it was obtained in violation of *Miranda* or was involuntary.

that's water under the bridge," Linton responded, "That's until today." (5 SCT 150.)

Detective Stotz replied:

> No, that's got nothing to do with it, I just need to know why she would see you and why she would run away from you screaming like that and it's kind of odd for a neighbor who lived there for six years. For instance, if my neighbor walked into my house that I've known for six years, I wouldn't just run away screaming and I'm sure you . . . .

(5 SCT 150-151.)

Linton responded, "She was, she was barely screaming, she just ran to her parent's room." (5 SCT 151.) Detective Stotz then asked Linton several questions about the murder. (5 SCT 151-157.)

By the time Detective Stotz made the above-quoted comments to Linton, Linton had already implicitly and expressly confessed to entering the Middleton's house without permission and strangling Melissa to death. Detective Stotz had also already advised Linton, in response to his question about whether he would receive the death penalty, that he only made recommendations to the district attorney's office and that the district attorney's office decided the charges and penalties to seek. (1 SCT 71, 74, 80, 82; 5 SCT 146-149; 5 RT 548-549, 654-655, 658-659.) Thus, rather than promising leniency, Detective Stotz's statements informed Linton why he needed to know about what happened two weeks earlier and that Linton would not be getting into any more trouble for any prior crimes than he was already in for murdering Melissa. It appears that Linton recognized that Detective Stotz's comments near the start of the interrogation were not a promise of leniency, because after the interrogation ended, he asked Detective Stotz something to the effect of "What now? Am I going to be sentenced to death?" (1 SCT 82.) Thus, none of the challenged statements were promises of leniency.

This Court's recent decision in *People v. Davis, supra,* undermines Linton's contrary position. In *Davis*, after the defendant confessed to murdering the victim, the officer encouraged him to "get it all out in the open" and "get it off [his] chest," and to admit any illegal sexual conduct because "[i]t ain't going to make a difference to anything that happen." (*People v. Davis, supra,* 46 Cal.4th at p. 600, alterations in original.) In an interview two days later, the officer again encouraged the defendant to say whether he sexually assaulted the victim, because "[i]t ain't gonna make a hill of beans as far as what goes on if you go to trial." (*Ibid*, alteration in original.) This Court rejected the claim that the officer's comments were promises of benefit or leniency, noting the officer "'said nothing beyond the obvious' [citation], in that defendant's crimes, involving the kidnap and murder of a child, made him eligible for the death penalty." (*Ibid.*) This Court further noted that the officer correctly implied that evidence, or a lack of evidence, of sexual assault would not have changed that circumstance, and that the "[d]efendant himself acknowledged that he knew he faced the death penalty and even admitted he 'deserved' it." (*Ibid.*) Thus *Davis* supports the trial court's ruling here.

Moreover, even if one or more of the challenged comments here were construed as promises of leniency or benefit, they did not motivate Linton to confess to the prior attempted rape. The bedroom interview took place around 8:15 p.m. on the day of the murder and lasted thirty to forty-five minutes. Detective Stotz told Linton that he would not get in trouble for what happened two weeks earlier and made the "water under the bridge" and "No, that's got nothing to do with it" statements around 9:50 a.m. the next day, just over five minutes into the interrogation. (People's Exh. 1 in Support of Suppression Motion; 1 SCT 39; 5 SCT 150.) As discussed, by this time, Linton had already confessed to strangling Melissa both in the police car and at the station, and had been advised that the District

Attorney's Office, not Detective Stotz, decided what charges to file and penalties to seek. (1 SCT 71, 74, 80, 82; 5 SCT 146-149; 5 RT 548-549, 654-655, 658-659.) After Detective Stotz made the above-referenced comments, Linton continued to deny any sexual interest in or sexual assaults on Melissa. (5 SCT 79-83, 86, 155-159, 167, 177, 197, 199, 201, 203-205, 213, 214, 226-227, 229-230.) It was not until about 3:56 p.m., more than six hours after Detective Stotz's "water under the bridge" comment, that Linton admitted that he attempted to rape Melissa two months before the murder. (5 SCT 233; People's Exh. 1 in Support of Suppression Motion.) And Linton's concern at that time appeared to be having this confession memorialized on tape, not whether he would be subjected to additional punishment for the offense beyond what he would receive for the murder. (5 SCT 233.) Indeed, Linton expressed the same concern before Detective Stotz even made the post-*Miranda* comments about whether Linton would get in trouble for any prior sex crimes. (5 SCT 149-150.)

Additionally, Linton stated at the end of the interview that he had not been threatened or coerced and explained why he spoke to the police – "I thought I should report myself." (5 SCT 238.) And, as noted earlier, after the interview ended, Linton asked Detective Stotz if he would be sentenced to death (1 SCT 82), indicating he understood that he would not be getting more lenient treatment as a benefit for having confessed to the prior attempted rape. Thus, the record shows that Linton's confession to the prior attempted rape was not prompted by any implied promises of leniency made during the first segment of the interview. (See e.g., *People v. Carrington, supra*, 47 Cal.4th at pp. 170-171 [defendant's confession to murder and burglary in Palo Alto was not prompted by officer's comments about a burglary in Los Altos where comments were made an hour before the confession and confession was apparently motivated by officer's

confrontation of defendant with incriminating evidence found at her home and other evidence linking her to Palo Alto murder]; see also *People v. Rundle, supra,* 43 Cal.4th at pp. 118-120, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [taped confession to third murder was not the product of allegedly coercive representation about beneficial psychiatric treatment where defendant admitted third murder before taped interview, never believed he would receive "benefits" mentioned, and admitted his desire to confess was based on his belief that a person should cooperate with law enforcement and tell what he or she knows about the crime]; compare *People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17 [finding confession involuntary where defendant testified that he confessed because of the officer's comments].)

Linton's arguments that the length of the interrogation and other circumstances rendered his confession involuntary fare no better. "A police interrogation that is prolonged may be coercive under some circumstances." (*People v. Carrington, supra*, 47 Cal.4th at p. 175.) Here, the interrogation was not prolonged, and the circumstances were not coercive.

On the afternoon of the murder, Detective Stotz questioned Linton at his front door for about 10 minutes alone and about 15 minutes when he returned with Detective Lynn. Later that evening, around 8:15 p.m, Detective Stotz and DDA Mitchell questioned Linton in his bedroom for about 30 to 45 minutes. (1 SCT 10, 13-14, 41, 44; 5 SCT 67-88; 7 RT 771.) The next day, in accord with Linton's request that he not be contacted until after his parents left for work, Detective Stotz called Linton after 7:30 a.m. Around 8:45 a.m., Detectives Stotz and Lynn picked Linton up at his home in an unmarked police car. (1 SCT 39, 49-50; 5 RT 549-550.) They arrived at the police station about 9 a.m. (5 RT 550.) In route, Linton spontaneously and almost immediately confessed to killing Melissa

and apologized for wasting the officers' time, explaining that he did not want to confess in front of his parents. (1 SCT 22, 52, 54, 69-70; 5 RT 654-655.)

About 9:45 a.m., Detective Stotz advised Linton of his *Miranda* rights, which he waived, and questioned him for 20 minutes in a detective's office. (1 SCT 35, 37, 39; 1 RT 166; 5 RT 655; 5 SCT 162.) After a 35-minute break, Detective Stotz and DDA Chessell interviewed Linton for 30 minutes in the detective's office. (5 SCT 162, 216-217; 5 RT 655.) After a one hour and twenty-five-minute break, Dr. Rath interviewed Linton about the murder, the prior attack, and other subjects for one hour and five minutes in an interview room. (5 SCT 90; 2 RT 148; 5 RT 592, 655.) Linton then spent one hour and twenty-five minutes taking the MMPI test. (5 SCT 125.) After a twenty-five-minute break, Detective Stotz and Sergeant Rodriguez interviewed Linton for twenty minutes in the detective's office. (5 RT 655; 5 SCT 217.) Thus, although Linton arrived at the police station at 9 a.m. and was not arrested until 4 p.m., his post-*Miranda* questioning by law enforcement officers lasted only 70 minutes and Dr. Rath only questioned him about the crimes and other subjects for 65 minutes.

The questioning during the interviews was low key, not aggressive. (People's Exhs. 1 & 2 in Support of Suppression Motion.) As set forth above, the interviews took place during normal waking hours and there were breaks, some lengthy, in between segments. While Linton suggests he was fatigued during the interview (AOB 92), when DDA Chessell asked Linton during the 10:40 a.m. segment of the interview if he was getting tired, Linton responded, "I just don't like questions of course." (5 SCT 187.) And Dr. Rath said he saw no signs of fatigue during his evaluation of Linton that afternoon. (9 RT 973.) Linton also appeared to be lucid throughout the interviews and evaluation. (9 RT 978; 5 SCT 145-238.)

While Linton stated he was tired of being questioned (5 SCT 187) and being asked the same questions over and over again (5 SCT 216), he never asked to terminate the interview. (See *People v. Stitely* (2005) 35 Cal.4th 514, 535 [suspect must unambiguously invoke his right to remain silent].)

Additionally, there is no indication that Linton, who already tacitly confessed to murder before the post-*Miranda* interrogation began, was induced by fear to confess to the attempted rape. Indeed, when Linton first arrived at the police station, he accused Detective Lynn of laughing at him, and when Detective Lynn denied doing so, Linton responded, "Yes you are." (9 RT 1068.) His responses to some of the questions during the interviews similarly showed that Linton was not intimidated by the interviewers. For example, when Detective Stotz asked Linton if he raped Melissa on the day of the murder, Linton denied doing so and asked, "Don't wouldn't you have found something in there?" (5 SCT 156.) When Detective Stotz responded that the coroner's office would likely check Melissa's body the next day, Linton replied, "I think you would have found it out by now." (5 SCT 156.) And when Detective Stotz disagreed, Linton commented, "You didn't plant something." (5 SCT 156.) Similarly, when Detective Stotz asked Linton if he was a thief, Linton replied, "Do I look like I have, if I was a thief, I'd probably be a lot better off, I'd have a car." (5 SCT 160.) During the final segment of the interview, after Linton confessed to the prior attempted rape, Detective Stotz asked him if he would have raped Melissa on the day of the murder if he had had the chance. Linton replied, "No, I don't think I would have. I had the chance the first time, didn't I?" (5 SCT 237.)

The police also provided Linton basic amenities at the station. Detective Stotz believed that he provided Linton a cup of coffee, a candy bar and some sodas during the day. (1 SCT 53; 5 RT 580.) The interview transcript reflects that around 11:20 a.m., Detective Stotz offered Linton a

soda and DDA Chessell asked him, "Want something to eat probably? You look hungry." (5 SCT 216-217.) During the 3:40 p.m. interview segment, Linton declined a glass of water and indicated he was not hungry. (5 SCT 232.) Linton was also given bathroom breaks during the day, with an escort. (5 RT 594, 655.)

As Linton points out (AOB 90), during the course of the two days, the interviewers asked him more than fifty questions about his sexual interest in Melissa and any sex acts or attempted sex acts he may have committed on her. (5 SCT 79-83, 86, 155-159, 167, 177, 197, 199, 201, 203-205, 213, 214, 226-227, 229-230.) But they also questioned Linton on other subjects during these interviews. (5 SCT 67-87, 90-125, 145-238.) Furthermore, Linton lied several times about having the Middleton's house keys before admitting that he twice used them to enter the Middeltons' home and threw them in his trash can after the murder. (5 SCT 148, 164, 174-175.) Thus, that Linton did not readily admit the prior attempted rape does not mean that the police coerced a false confession through repeated questioning.

Linton also claims that Detective Stotz and Sergeant Rodriguez engaged in the "good cop, bad cop" routine during the final segment of the interview to induce him to confess to the prior attempted rape. (AOB 90.) "[T]he use of the 'good cop, bad cop' interview technique in itself" is not "a basis for exclusion of a confession." (*Pierce v. State* (Ind. 2002) 761 N.E.2d 821, 824.) But the routine may render a confession involuntary in some circumstances. (See *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1483-1487 [finding confession involuntary where officers using a variation of the classic "'Mutt and Jeff'" routine of police interrogation, questioned murder defendant for eight hours (including a pre-*Miranda* interrogation) using lies, accusations, exhaustion, isolation, and appeals to defendant's manhood and religious beliefs].)

Here, Detective Stotz and Sergeant Rodriguez did not employ the "good cop, bad cop" routine. (5 SCT 217-238.) Detective Stotz's tone became more aggressive during the final segment of the interview than it had been earlier. (6 RT 776; People's Exh. 1 in Support of Suppression Motion.) But Detective Stotz could hardly be characterized as playing the role of the "bad cop" to Sergeant Rodriguez's "good cop." Detective Stotz told Linton that he thought he either had sex with Melissa or masturbated after he killed her and that he tried to rape Melissa a few weeks or months earlier. (5 SCT 226-227, 229.) Detective Stotz advised Linton that the sooner he told the truth, the sooner he would turn the tape recorder off and they would be on their way. (5 SCT 323.) Sergeant Rodriguez did not contradict these statements. Instead, he explained to Linton that they were asking him question about what he did to Melissa because they knew he was not telling the entire truth and that he would feel better if he did so. (5 SCT 232.) Moreover, even if the two officers had engaged in the "good cop, bad cop" tactic, the interview here was not comparable to the one in *Esqueda* because, among other things, the interviewers did not appeal to Linton's manhood or religious beliefs and the pre- and post-*Miranda* questioning totaled less than three and a half hours.

Furthermore, although Detective Stotz told Linton during the final interview segment, "The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way" (5 SCT 232), this did not render Linton's subsequent confession to the prior attempted rape involuntary (Contra AOB 85-89). This is because Detective Stotz's comment merely informed Linton of a benefit that would naturally flow from telling the truth, and did not indicate that the interview would continue until Linton confessed to some type of sex crime.

Linton further suggests Dr. Rath contributed to the coercive atmosphere by "softening [him] up" to confess about the prior incident and

his sexual intent, by questioning him about his sexual motivation, and because he was a mental health care professional. (AOB 81-82.) Contrary to Linton's assertion, Dr. Rath was not "brought in" to try to get Linton to admit a sexual interest in Melissa or that he raped or attempted to rape her. (AOB 90.) He was hired by the prosecution to perform a psychological evaluation. (2 RT 144, 153.) At the start of the evaluation, Dr. Rath informed Linton that he was a psychologist, that he would be evaluating him, that he was not there to treat him, and that anything Linton told him would not be confidential. (2 RT 153-156.) Dr. Rath also told Linton he did not have to talk to him and could end the evaluation at any time. (2 RT 157-158; 9 RT 1027-1029; 5 SCT 90.) Linton appeared to understand what Dr. Rath told him. (2 RT 156-158.) Thus, any misapprehension Linton may have had about Dr. Rath's role as a mental health care provider was dispelled at the start of the interview. (See e.g., *People v. Rundle, supra,* 43 Cal.4th at p. 122.)

As for Linton's "softening up" argument, Linton forfeited this claim by failing to raise it in this context below. (*People v. Gurule* (2002) 28 Cal.4th 557, 602.) Moreover, while this Court has found a *Miranda* waiver invalid based on "*a clever softening-up* of a defendant through disparagement of the victim and *ingratiating conversation*" (*People v. Honeycutt* (1977) 20 Cal.3d 150, 160, italics in original), Linton cites no authority that "softening-up" invalidates a confession after a valid *Miranda* waiver. In any event, in contrast to *Honeycutt,* Dr. Rath neither disparaged Melissa nor engaged in ingratiating conversation with Linton. Instead, Dr. Rath asked Linton about his medical and social history and then questioned him about the crimes and his mental state at those times. (5 SCT 90-125.)

After a defendant has waived his or her *Miranda* rights, police may properly exchange information, summarize evidence, outline theories of the crime, confront with contradictory evidence, and debate with the suspect.

(*People v. Holloway, supra,* 33 Cal.4th at p. 115.) They may also advise a suspect that he would feel better if he tells the truth and of other benefits that will naturally flow from doing so. (*People v. Jackson* (1980) 28 Cal.3d 264, 299, disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) That is all that interviewers did here. (5 SCT 90-125, 145-238.) Consequently, neither the length of the interrogation nor the circumstances rendered Linton's confessions involuntary. (See e.g., *People v. Carrington, supra,* 47 Cal.4th at p. 175 [questioning over course of eight hours did not appear to overbear defendant's will to resist where questioning was neither aggressive nor accusatory, there were no indications the statement was fear-induced, defendant appeared lucid throughout interrogation, spoke with confidence, gave coherent answers, and never asked to terminate interview, and police repeatedly offered food and beverages, provided four breaks and allowed defendant to meet privately with her partner]; *People v. Hill* (1992) 3 Cal.4th 959, 981-982, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [rejecting claim length of interrogation rendered statements involuntary and inadmissible where actual interrogation was only eight hours, which was divided in five sessions, defendant was given breaks between sessions, sessions took place during normal waking hours, defendant was provided food, beverages and restroom breaks upon request, final session lasted only three hours and defendant was not subjected to abusive or improper interrogation techniques]; compare *Ashcraft v. Tennessee* (1944) 322 U.S. 143, 153-154 [64 S.Ct. 921, 88 L.Ed. 1192] [confession compelled where defendant was questioned by relays of officers for 36 hours without any opportunity for sleep].)

Linton also points to his personal characteristics and physical and mental conditions as additional circumstances that rendered his confession involuntary. (AOB 89-91.) A suspect's age, education, degree of literacy,

familiarity with the criminal justice system, maturity, physical condition and mental health are considered in determining the voluntariness of a confession. (*People v. Boyette* (2002) 29 Cal.4th 381, 412; *People v. Williams, supra,* 16 Cal.4th at p. 660.) But because coercive conduct on the part of the state is required to establish a due process violation, a statement cannot be deemed involuntary based solely on a suspect's condition. (*People v. Weaver* (2001) 26 Cal.4th 876, 921.)

As discussed above, there was no coercive police conduct. Moreover, Linton's personal characteristics did not render him particularly susceptible to custodial interrogation. Linton was 20 years old at the time of the interview and a high school graduate. He appeared to Detective Stotz to have a normal IQ and did not appear to be mentally immature, although he looked like he was 15 or 16 years old. (1 SCT 51-52, 78, 95.) Linton said he last used a controlled substance – "speed" – a week before the interview. (5 SCT 235.) Linton had no prior experience with the criminal justice system. But he demonstrated some understanding of the system when he asked about the death penalty both before and after the interview, and asked about forensic evidence before and during the interview. (1 SCT 74; 5 RT 654, 661, 667; 6 RT 683-684, 703.) Linton's responses also indicated he understood the proceedings and the questions posed to him, and that he was not suffering from any mental defect or condition. (5 SCT 145-238.) And, as discussed earlier, his lies about the Middleton's keys and cocky responses to some questions indicated that he was not particularly vulnerable to police pressure despite his relative youth, lack of experience with the criminal justice system, and lack of general life experience.

As Linton notes, he told Dr. Rath during the evaluation that he was depressed and had a headache. (5 SCT 112-113.) But Dr. Rath found that Linton was not cognitively impaired during the evaluation and that his

memory was not affected by his depression.[7] (8 RT 978.) And there is no indication that the interviewers exploited these conditions.

Linton also told Dr. Rath he was in special education in third grade, had been diagnosed with Attention Deficit Disorder in the fifth grade, and had been physically disciplined by his father until age 16. (5 SCT 96-97.) It does not appear from the record that any of these circumstances affected Linton during the interrogation, that anyone other that Dr. Rath knew of them at that time, or that any of the interviewers exploited them.

As for his emotional state, Linton sobbed and shed a couple of tears in the police car. But he did not cry at the station, although he appeared to be on the verge of tears before he admitted the attempted rape. (1 SCT 73; 5 RT 604-605; compare AOB 92.) While Linton may have felt vulnerable, there are no indications of police coercion.

Accordingly, substantial evidence supports the trial court's determination that Linton's personal characteristics and mental condition did not render his confession involuntary. (See e.g., *People v. Dykes* (2009) 46 Cal.4th 731, 753 [rejecting claim that defendant's youth and lack of experience with criminal justice system rendered his confession involuntary where there was no indication officer exploited these circumstances and defendant stated he was freely and voluntarily speaking]; *People v. Richardson* (2008) 43 Cal.4th 959, 993 [rejecting due process

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[7] In discussing his mental condition, Linton cites Dr. Rath's testimony as support for the proposition that "[h]e may have had a dissociative disorder." (AOB 92.) Defense counsel asked Dr. Rath what Linton's statements that he woke up in front of the refrigerator and in the front yard said about him. (8 RT 983.) Dr. Rath responded, "It could say any number of things. That he has a seizure disorder. It could say that he is lying. It could say that he was afraid and was trying to get out of trouble. It could say that he has a dissociative disorder. I could probably list a dozen things it could say." (8 RT 983.)

claim where officers had no reason to know of defendant's lower IQ and defendant's responses to interrogation questions did not indicate a mental defect]; *People v. Boyette, supra,* 29 Cal.4th at p. 412 [substantial evidence supported trial court's determination that defendant's statements were voluntary despite his age, limited education and maturity]; compare *Reck v. Pate* (1961) 367 U.S. 433, 441-442 [81 S.Ct. 1541, 1546-1547, 6 L.Ed.2d 948] [holding confession coerced where 19-year-old suspect with subnormal intelligence and no prior experience with police was held incommunicado for almost eight days, was interrogated each day for six or seven hours by groups of officers, was provided inadequate food, was hospitalized twice, and was interrogated at one point until he vomited blood].)

In arguing to the contrary, Linton relies upon expert opinion testimony quoted in an unpublished district court opinion for the proposition that his confession was a stress-compliant false confession, a well-recognized type of false confession that arises "'when persons who are exceptionally vulnerable to interpersonal pressure and are unable to cope with the intensity of even a non-coercive interrogation are put in a position from which it appears to them that the only way to end the intolerable pressure they are experiencing is to comply with the interrogator's demand for a confession.'" (AOB 58, citing *Lunbery v. Hornbeak* (E.D. Cal. 2008, case no. CIV S-07-1279 GGH (P) 2008 WL 4851858, 10.)[8] Linton's reliance on *Lunbery* is misplaced, because the evidence before the trial court was that Linton was not exceptionally vulnerable to interpersonal pressure and was not unable to cope with the intensity of even a non-

[8] As discussed *post,* Linton unsuccessfully sought to introduce the testimony of the expert who testified in *Lunbery*, sociology professor Dr. Richard Ofshe.

coercive interrogation. Indeed, Dr. Rath testified that Linton's MMPI profile did not indicate that he was unable to withstand the pressure of an in-custody interrogation. (8 RT 974.) He also testified that Linton was generally cooperative during his interview, but not totally submissive. (8 RT 936.) And while Dr. Rath acknowledged that someone with Linton's MMPI profile would perceive an interrogation as stressful and the possibility of the death penalty would increase the stress, he opined an interrogation would be stressful for anyone. (8 RT 946-952.) Again, Linton's responses, particularly his repeated lies, indicated he was not particularly vulnerable to interpersonal pressure or simply complying with the interviewers' demands.

In summary, after Linton spontaneously confessed to killing Melissa, and after he was advised of and waived his *Miranda* rights, he was interviewed for a total of less than two and one half hours during normal waking hours. He was given breaks between interview segments, including one lengthy one. He was afforded food, beverages, and bathroom breaks, and was not restrained at any time until his subsequent arrest. The interviews were conducted in a detective's office and an interview room. The questioning was low-key, not aggressive or loud, and involved no more than two interrogators at any given time. Linton was a high-school graduate who appeared to be of normal intelligence and not mentally immature. He was not under the influence of any controlled substances during the interrogation and not cognitively impaired. In light of the totality of these circumstances, Linton's statements were voluntary and their admission did not violate due process.

E. Any Error in Admitting the Attempted Rape Confession Would Not Require a Reversal of the Murder Conviction, the Burglary-Murder Special Circumstance, and the Forcible Lewd Act Special Circumstance

Even assuming the trial court erred in admitting Linton's attempted rape confession, it would not require a reversal of the murder conviction, the burglary-murder special circumstance, and the forcible lewd act-murder special circumstance. Linton confessed to killing Melissa in the police car and just after he was advised of and waived his *Miranda* rights. Linton does not appear to challenge the admissibility of these confessions. In addition to these confessions, the jury heard evidence that Melissa's shorts were unzipped when the police found her. The day after the murder, the police found the Middletons' house keys, Melissa's ring, and a pair of Melissa's soiled underwear in Linton's trashcan. This underwear had Linton's semen on them, but not in the crotch area, and Linton's DNA was found on Melissa's fingernail clippings. The Middletons' house was not disturbed on the day of the murder and Richard and Linda Middleton indicated they neglected to get their keys back from Linton after the last time he took care of their pets. In light of this evidence, any error in admitting Linton's confession to the prior attempted rape was harmless beyond a reasonable doubt as to the murder and the burglary-murder and lewd-act-murder special circumstances. (Cf. *People v. Davis* (2005) 36 Cal.4th 510, 555 [error in admitting brief statement harmless beyond a reasonable doubt in light defendant's many other damaging admissions made on tape recording].)

In arguing to the contrary, Linton points to the length of the jury deliberations as an indicator that this was a close case. (AOB 99-103.) The parties gave their opening statements on February 9, 1999. (12 CT 3283.) The jury began deliberating a month later, at 12:35 on March 9, 1999. (12

CT 3439.) The jury returned its verdict after two more days of deliberation. (12 CT 3440-3441.) Given the length of the case and the complexity of the issues, deliberations of two and a half days do not suggest this was a close case. (*People v. Cooper* (1991) 53 Cal.3d 771, 837 [jury deliberations of 27 hours over the course of seven days in capital case that lasted more than three months "demonstrates nothing more than that the jury was conscientious in its performance of high civic duty"]; *People v. Tamborrino* (1989) 215 Cal.App.3d 575, 587 [declining to speculate based on record before it that jury's request for readback of defendant's testimony "implied the jury believed it was a close case or it had some question about whom to believe"].)

As Linton notes (AOB 100), jury questions can indicate a case is a close one. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.) Given the relatively short deliberation period, that inference should not be drawn from the questions the jury asked in three notes, which stated: (1) "What is the definition of 'cross admissibility.'" "Is it, cross admissibility, applicable both ways, 10/1/94 for 11/29/94 and 11/29/94 for 10/1/94?" (13 CT 3606); (2) "Is it to far to speculate whether Melissa let [Linton] into the house?" "Please clarify if speculation can be used in determining innocence in this case?" "What is the definition of speculation?" "A juror believes the entire interview is a lie and is interjecting speculation, where do we go from here?" (13 CT 3608); and (3) "When does the waiver of your *Miranda* rights take place? Is it after they are read to you and you respond in the affirmative? Or is it after you sign the form? If there has to be a sign[ed] document to waive your rights, then is the taped interview still considered evidence when your rights are waived at the end of the interview?" (13 CT 3610.) Moreover, and contrary to Linton's suggestion (AOB 100), that one juror believed "the entire interview [was] a lie" (13 CT 3608), does not suggest that the error in admitting the attempted rape

confession was prejudicial. If anything, the statement suggests that one juror may have determined there was sufficient evidence to convict without the prior attempted rape confession.[9] As discussed earlier, this is true with respect to the murder and the burglary-murder and lewd-act-murder special circumstances.

Accordingly, any error does not warrant a reversal of the murder conviction, the burglary-murder and lewd-act murder special circumstances, and the death judgment.

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[9] In his harmless error analysis, Linton discusses what he believes is the origin and progression of the prior crimes evidence. He essentially argues that Melissa's parents' report of her nightmare was the genesis, that law enforcement officials assumed that the nightmare and sleepwalking incidents were one in the same, and that they spent November 30th trying to persuade him "to admit a sexual motivation for one, the other, or both." (AOB 96-98.) Elsewhere, Linton similarly argues that "[t]his case encompasses a compelling record that law enforcement authorities, led by DDA Mitchell, made an assumption that [Linton's] strangulation of Melissa was sexually motivated and then worked backwards to create evidence to fit their theory[,]" and that "the prior incident may have been created or embellished as a result of improper police techniques . . . ." (AOB 241.) Linton's arguments overlook Detective Stotz's testimony at the suppression hearing that he returned to Linton's house a second time on the day of the murder because of what he heard from one of Melissa's neighbors. Specifically, a 13-year-old neighbor told Detective Stotz that Melissa had confided in her that Linton attempted to rape and choke her two to three weeks before the murder. (1 SCT 13-14; 5 RT 613.) While this hearsay testimony was only admitted at the suppression hearing to explain Detective Stotz's actions (1 SCT 13; 5 RT 613), and was not offered at trial (4 RT 490, 526-527), it refutes Linton's assertion that there was "no evidence that at the point the authorities interrogated [him] on November 29, they had additional information about a prior incident" (AOB 97); his argument that law enforcement officials simply wanted to create evidence to fit their theory of the case is speculation.

F. The Trial Court Properly Exercised Its Discretion in Excluding the Proffered Expert Testimony on Coerced Confessions

Prior to trial, Linton filed a motion to introduce the testimony of Dr. Richard Ofshe regarding coercive interrogation techniques and false confessions. (3 CT 544-701 [motion with attach., Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U.L.Rev. 979, 1117 (1997)].) At trial, Linton sought to introduce testimony on the same subject through Dr. Leo. According to Dr. Leo's declaration, his trial testimony would address "the following *general* topics: the use of influence, persuasion and coercion during interrogation; how certain police interrogation techniques affect the decision-making of custodial suspects; why certain psychological techniques are coercive and their likely effects; how and why contemporary police interrogation techniques can lead guilty suspects to make the decision to confess; how and why contemporary police interrogation techniques can lead the innocent to make the decision to confess; and how to apply generally accepted principles to evaluate the reliability of confessions [and] statements." (5 SCT 262.)

The prosecutor opposed the defense motion, arguing there was no foundation for such testimony, because Linton had not recanted his confession. The prosecutor also argued the defense had failed to show that the subject mater was a valid, accepted area of expertise, or that such testimony would assist the jury. (22 RT 3423-3426, 3428; 23 RT 3589-3590; 24 RT 3618-3621; 25 RT 3737-3739.) The defense countered that a recantation was unnecessary and that the testimony of both pathologists established that Linton had falsely confessed to wrapping the headphone cord around Melissa's neck in the manner he described. The defense also

countered the prosecutor's remaining objections. (22 RT 3426; 23 RT 3591, 3603-3606, 3613; 24 RT 3615-3617; 25 RT 3734-3736, 3739-3740.)

The court determined the pathologists' testimony was not inherently inconsistent with Linton's testimony regarding how he choked Melissa with the cord. In this regard, the court noted that both pathologists had acknowledged that the presence of hair between the skin and ligature can account for the absence of a circumferential lineal abrasion. (25 RT 3604-3605, 3608, 3613; see 18 RT 2699-2700 [Dr. Choi's testimony regarding hair]; 22 RT 3363 [Dr. Spitz's testimony on same].) The court ultimately excluded Dr. Leo's testimony under Evidence Code section 352, because the "very questionable probative value" of his proposed testimony was substantially outweighed by the danger of undue time consumption. (25 RT 3740.) The court explained that the evidence was "extremely speculative," because of the absence of "any basis or foundation to indicate" that Linton's confession was not true. (25 RT 3741; see also 23 RT 3592-3598, 3612; 24 RT 3624.)

Linton subsequently challenged this ruling in his new trial motion. (14 CT 3753.) The court denied the motion, noting it had reviewed its ruling and determined it was correct. (37 RT 5776.)

1. The trial court properly excluded Dr. Leo's testimony under Evidence Code section 352

Claims alleging the erroneous exclusion of expert testimony are reviewed under the deferential abuse of discretion standard. (*People v. Curl* (2009) 46 Cal.4th 339, 359.) Under this "standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

The trial court did not abuse its discretion here. Dr. Leo's declaration indicates that he would not have testified that Linton's confession was false. Instead, he would have testified about interrogation techniques that lead both guilty and innocent people to make the decision to confess. (5 SCT 262.) This is consistent with Dr. Leo and Dr. Ofshe's article, which recognizes that police interrogation techniques, including promises of leniency, can coerce true and false confessions. (3 CT 561-562, 569, 572, 656.) As the trial court observed, Linton did not present any competent evidence that his confession was false. Consequently Dr. Leo's testimony would have had minimal, if any, probative value on the issue of the veracity of Linton's confession and would have resulted in an undue consumption of time. Accordingly, the court properly excluded it under Evidence Code section 352. (See, e.g., *People v. Son* (2000) 79 Cal.App.4th 224, 241 [upholding exclusion of Dr. Ofshe's expert testimony because it was irrelevant given the absence of evidence "that police engaged in tactics wearing down Son into making false admissions," and because a layperson without expertise could easily understand "Son's testimonial admission that his confession to [the officer] was false and made only because [the officer] assertedly promised that Son would serve no more than one year in custody"]; cf. *People v. Curl, supra*, 46 Cal.4th at pp. 357-359 [excluding expert testimony on how inmate informants concoct confessions through information flow where there was no evidence informant was a repeat inmate informant and no evidence contradicting the informant's testimony that defendant was the source of his information].)

2. The exclusion of Dr. Leo's testimony did not violate Linton's constitutional right to present a defense

"A defendant has the general right to offer a defense through the testimony of his or her witnesses (*Washington v. Texas* (1967) 388 U.S. 14,

19 [87 S.Ct. 1920, 18 L.Ed.2d 1019]), but a state court's application of ordinary rules of evidence-including the rule stated in Evidence Code section 352--generally does not infringe upon this right." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; accord *Holmes v. South Carolina* (2006) 547 U.S. 319, 326 [126 S.Ct. 1727, 164 L.Ed.2d 503].) While "the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right." (*People v. Cunningham, supra,* 25 Cal.4th at p. 999.)

The seminal case on the exclusion of defense evidence regarding the circumstances of an interrogation is *Crane v. Kentucky* (1986) 476 U.S. 683 [106 S.Ct. 2142, 90 L.Ed.2d 636]. There, the trial court excluded all evidence of the circumstances of the petitioner's protracted interrogation, because it found that such evidence was relevant only to the issue of voluntariness, which was not before the jury. (*Id.* at pp. 685, 690.) The Supreme Court reversed, holding "the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." (*Id.* at p. 690.) The Court observed that the constitutional right to present a complete defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." (*Id.* at p. 691.)

Unlike the trial court in *Crane,* the trial court here did not make a blanket exclusion of all evidence relating to the circumstances of Linton's confession. Indeed, the jurors heard the audiotapes of Linton's post-*Miranda* interviews with law enforcement and Dr. Rath. (18 RT 2779-2780; 28 RT 4227.) They also heard testimony from Detectives Stotz and

Lynn, Dr. Rath, and DDA Chessell about the circumstances of the recorded and unrecorded interviews. (17 RT 2626-2637, 2645-1647, 2649-2650; 18 RT 2744-2771; 19 RT 2796, 2798, 2857-2861, 2870-2873, 2881, 2937, 2978-2979, 2985, 2995; 20 RT 3036-3038, 3040, 3050-3053, 3040, 3050-3053, 3077, 3080, 3107, 3116-3118; 22 RT 3479-3480; 23 RT 3542, 3545-3546, 3547; 24 RT 3637, 3668-3669, 3676, 3683-3684.) Additionally, the defense presented Dr. Rath's and Dr. Whiting's testimony about Linton's mental condition at the time of the interrogation and his ability to withstand an interrogation. (23 RT 3500, 3502-3503, 3507, 3512, 3541, 3555-3556, 3561, 3572; 24 RT 3767; 26 RT 3892-3894, 3911-3912, 3931-3934; 27 RT 4121.) Thus, unlike the situation in *Crane*, Linton was permitted to and did attack the reliability of his confession with evidence regarding the manner and environment in which it was obtained. (See e.g., *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1204-1207 [exclusion of Dr. Leo's testimony did not violate *Crane* where defense counsel extensively cross-examined the interviewing officer about the techniques he used in interrogating defendant and other witnesses, defense had called other witnesses who testified that the same officer had threatened them and attempted to coerce statements from them and the defendant, and jury was aware of the circumstances of the interrogation based on the videotape].)

Linton, however, argues that "[b]ased on Dr. Ofshe's research, at the very least, the jury should have been informed that 'some suspects will [knowingly] give a coerced-compliant false confession' in response to 'classically coercive interrogation techniques such as . . . promises of leniency.'" (AOB 110, quoting 3 CT 574 [Ofshe & Leo article], ellipsis in AOB .) As discussed, there were no promises of leniency. Moreover, because there was no evidence Lintons' confession was false, testimony that a promise of leniency can produce true and false confessions would have had minimal if any probative value. (See 3 CT 655-656 [Drs. Ofshe

and Leo's observation in article that promises of lesser punishment to a suspect who believes there is sufficient evidence for an arrest and conviction will coerce confessions from the guilty and false confessions from the innocent].) Finally, even if there had been evidence of a promise of leniency and a false confession, the jury would not have needed Dr. Leo's testimony to understand that a promise of leniency can coerce a false confession. (See e.g., *People v. Son, supra*, 79 Cal.App.4th at p. 241.)

In arguing to the contrary, Linton relies primarily relies on *United States v. Hall* (7th Cir. 1996) 93 F.3d 1337 and *People v. Page* (1991) 2 Cal.App.4th 161. (AOB 108-113.) Neither case supports his position.

In *Hall,* the district court excluded Dr. Ofshe's testimony, in part, because it "would add nothing to what the jury would know from common experience." (*United States v. Hall, supra,* 93 F.3d at p. 1341.) The Seventh Circuit disagreed: "Dr. Ofshe's testimony, assuming its scientific validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." (*Id.* at p. 1345.) The court continued, "It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision." (*Ibid.*) The *Hall* court concluded the trial court prejudicially erred in failing to conduct a full inquiry into Dr. Ofshe's scientific knowledge and whether his testimony would assist the jury. (*Ibid*, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469].)

Hall is not binding (*People v. Leonard, supra*, 40 Cal.4th at p. 1416), and is distinguishable. The trial court here did not exclude Dr. Leo's testimony because it believed that it concerned subject matter that was within the jury's knowledge. Indeed, the trial court stated it had reviewed

Evidence Code section 801,[10] which governs the admissibility of expert opinion testimony, and was not certain if it agreed with the prosecutor's argument that Dr. Leo's testimony was inadmissible under this section. The court did agree, however, with the prosecutor's argument that the evidence "was highly speculative, that its probative value, if any, is substantially outweighed by its undue consumption of time[.]" (25 RT 3740.) It was for this reason that the trial court ultimately excluded the proffered testimony. (25 RT 3740-3741.) Thus, *Hall* does not advance Linton's position.

Page does not either. In *Page,* the defendant confessed to a murder, recanted his confession shortly thereafter, and testified at trial about the circumstances of the interrogation that led him to falsely confess and the recantation. The trial court permitted a defense expert on police interrogations to testify generally about factors that might lead to a false confession, but did not permit him to relate those factors to the defendant's statement or to render an opinion concerning the statement's reliability. (*People v. Page, supra*, 2 Cal.App.4th at pp. 175-183.) The appellate court

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[10] Evidence Code section 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

upheld the trial court's restriction on the expert's testimony, noting the jurors were qualified to determine if the factors identified by the expert played a role in the defendant's confession and whether, in light of those factors, the defendant's confession was false. (*People v. Page, supra*, 2 Cal.App.4th at p. 189.)

Page is readily distinguishable because the foundation for the expert testimony that the court determined was missing in this case – some evidence that Linton's confession was false – was present in *Page* as Page recanted his confession before trial and testified at trial about why he confessed to something that he did not do. Accordingly, the exclusion of Dr. Leo's testimony did not violate Linton's right to present a defense.

3. Any error in excluding Dr. Leo's testimony was harmless

Even assuming the trial court erred in excluding Dr. Leo's testimony, the error was not prejudicial. As discussed above, the exclusion of Dr. Leo's testimony did not violate the federal constitution. Consequently, "the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 [*Watson*] . . . and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension" set forth in *Chapman.* (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [error in excluding defense evidence on minor or subsidiary point is reviewed under *Watson*]; accord *People v. Prieto* (2003) 30 Cal.4th 226, 247 [error in admission of expert testimony warrants reversal only when the error is prejudicial under *Watson*].) Under *Watson*, a reversal is required only when "it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Watson*, at p. 836.)

As discussed, the jury was fully informed of the circumstances of the interrogation and Linton's mental condition at that time. There was no evidence that Linton's confession was false. Under these circumstances, it

is not reasonably probable that presentation of the generalized information that Dr. Leo outlined in his declaration would have materially affected the jurors' assessment of the credibility of Linton's confession to the prior attempted rape. Accordingly, a reversal is not required. For these same reasons, a reversal would not be warranted even if *Chapman* were the applicable harmless error standard.

G. The Trial Court Properly Denied Linton's Request to Call DDA Mitchell as a Witness

On April 21, 1998, Linton filed a notice of intent to call DDA Mitchell as a witness. (1 CT 214-225.) In the notice, Linton asked the court to consider the propriety of DDA Mitchell continuing as the trial prosecutor given his participation in the interview in Linton's bedroom and retention of Dr. Rath. (1 CT 214-221.) On May 26, 1998, the prosecution filed an opposition to what it deemed a recusal motion. (2 CT 305-309.) Linton filed replies on June 17, 1998, and August 6, 1998. (2 CT 345-362, 408-411.)

At the subsequent recusal hearing, DDA Mitchell testified that he was the "on-call" deputy during the week of Melissa's murder. As such, he was responsible for assisting law enforcement. It was in this capacity that DDA Mitchell visited the crime scene with an investigator from his office and interviewed Linton in his bedroom with Detective Stotz. (3 RT 256-257, 327-328.) DDA Mitchell explained that his office's preference was to assign a case to an on-call deputy who has responded to a crime scene. (3 RT 328.) The decision to charge a murder as a capital offense is staffed and ultimately made by the District Attorney. (3 RT 329.)

DDA Mitchell recalled telling Detective Stotz before the bedroom interview to keep the questioning low key. (3 RT 256-257.) He testified that the gist of the statements that he and Detective Stotz made during the bedroom interview about liability for prior offenses was that if Linton were

not the murderer, as Linton then contended, he would not get in trouble for anything that happened between him and Melissa in the past. (3 RT 295, 300-301.) Linton was not expressly advised that if he were the murderer, he would get into trouble for prior crimes against Melissa.[11] (3 RT 301.)

DDA Mitchell was not present at any other interview. (3 RT 327.) He was in telephone contact with the police at various times throughout the next day. (3 RT 303-304.) He was apprised of "what was being done" and made suggestions as to what to do next and some things to ask about. (3 RT 304, 327.) He also arranged to have Dr. Rath assist in the investigation and specifically instructed Dr. Rath to evaluate Linton. (3 RT 304-306, 325.) The extent of Linton's admissions or motivation for the murder played no part in DDA Mitchell's decision to hire Dr. Rath. (3 RT 323-324.) DDA Mitchell did not believe that he arranged to have DDA Chessell participate. (3 RT 306.) He denied directing the officers and DDA Chessell to focus their interrogation on whether or not Linton had problems sexually with Melissa. (3 RT 324.) He also denied discussing with the officers, DDA Chessell, and Dr. Rath, the difficulty in establishing corpus for the prior incident. (3 RT 324-325.)

DDA Mitchell did not direct his investigator to delete from the audiotape of the bedroom interview the part in which Detective Stotz told Linton he would not get in trouble if he had kissed, grabbed, touched, or had sex with Melissa in the past.[12] (3 RT 309-310.) DDA Mitchell was not

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[11] Linton writes that at one point during the defense examination of DDA Mitchell, DDA Mitchell "stepped out of his role as witness and back into his role as advocate, and objected to the question." (AOB 129, citing 3 RT 301.) The record indicates then DDA Michelle Levine objected, not DDA Mitchell. (3 RT 301.)

[12] Linton mentions the gap in the tape several times in his brief. (AOB 5, 117, fn. 16, 128, 137.) Before trial, Linton filed motions alleging that the prosecution failed to disclose exculpatory evidence and

(continued...)

aware that anything was missing from the defense copy of the audiotape of that interview. (3 RT 310.)

In a minute order dated August 19, 1998, the court denied the defense motion to recuse DDA Mitchell. (2 CT 447-448.) The court found that DDA Mitchell had not engaged in any misconduct or unethical behavior. The court further stated that, if the defense chose to call DDA Mitchell as a witness, a second DDA could function as the prosecutor in that part of the case.[13] (2 CT 447-448.)

Toward the end of the guilt-phase, defense counsel advised the court that she intended to call DDA Mitchell as a witness, because he was a percipient witness to the bedroom interview and because he was a far better witness then Detective Stotz, whom she had impeached on cross

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(...continued)
intentionally or negligently destroyed or lost exculpatory evidence. The motions were based on the fact that the defense copy of the bedroom interview tape had a 28-second gap on it. During that 28-second period, Detective Stotz made the above-referenced statement that Linton would not get in trouble for prior sex crimes with Melissa. (1 CT 189-192, 282-289; see also 1 CT 216-219.)

At a subsequent hearing, the court heard the testimony of a defense expert on audio recordings and the investigator from the District Attorney's Office who provided a copy of the tape to the defense. (3 RT 360-425.) The court found there was no credible evidence that the police or prosecution had engaged in misconduct or were grossly negligent in providing the defective tape to the defense. In this regard, the court noted a copy of a tape with the same defect had apparently been provided to the prosecution. The court further noted that the gap in the tape was clearly apparent to the defense as early as June of 1997, that it was not uncommon for copies of original tape recordings to be defective or lack the quality of the original tape recording, and that defense counsel could have asked to examine the original tape at any time. Thus, the court found the defense suffered no prejudice from receipt of the defective tape and denied the defense motion to exclude the evidence. (2 CT 466.)

[13] On October 1, 1998, the Court of Appeal summarily denied Linton's petition for writ of mandate challenging this ruling. (3 CT 797.)

examination. (27 RT 4177, 4179-4180, 4183.) Defense counsel further argued that DDA Mitchell's testimony was relevant because he made suggestions to the interrogators throughout the day and that, without his participation in the interrogation process, the case would not have been a special circumstance murder, because the police would not have hired Dr. Rath and would not have directed questions toward felony murder. (27 RT 4182-4186.) Defense counsel argued the exclusion of DDA Mitchell's testimony would violate Linton's constitutional rights to present a complete defense and to a reliable verdict in a capital case. (27 RT 4186.)

DDA Mitchell responded that the defense's proffer was fraught with unfounded speculation and misstatements of the evidence, and that his testimony regarding the bedroom interview would have been cumulative to the audiotape and Detective Stotz's testimony on this subject. (27 RT 4185.) DDA Mitchell further argued that his suggestions to the interviewer were not relevant: what was important was what happened during the interview on November 30, which he was not present at. (27 RT 4185.)

The court denied the defense request to call DDA Mitchell as a witness. (27 RT 4186.) Neither party introduced the audiotape of the bedroom interview into evidence at trial.

1. The trial court properly exercised its discretion in excluding DDA Mitchell's testimony

A trial court's decision to exclude a witness's testimony is reviewed for an abuse of discretion. (*People v. Griffin* (2004) 33 Cal.4th 536, 574.) The trial court properly exercised its discretion here.

"Only in extraordinary circumstances should an attorney in an action be called as a witness, and before the attorney is called, defendant has an obligation to demonstrate that there is no other source for the evidence he seeks." (*People v. Garcia* (2000) 84 Cal.App.4th 316, 332; accord *People v. Guerrero* (1975) 47 Cal.App.3d 441, 445 ["the practice of a prosecuting

attorney's testifying in a case he is prosecuting - should generally not be approved except under extraordinary circumstances"].) In *Garcia*, the prosecutor conducted a taped interview of a police officer in the presence of an investigator. Neither party called the officer who was the subject of the interview as a witness. The court of appeal held "that defendant's request to call the prosecutor as a witness was supported neither by extraordinary circumstances nor by an inability to obtain the same information from another source," namely the investigator who was present during the interview. (*People v. Garcia,* at p. 332.)

Like *Garcia*, DDA Mitchell conducted an interview of Linton in the presence of another individual, Detective Stotz. Much of the interview was taped and a copy of the tape was provided to the defense. Thus, any testimony by DDA Mitchell about the bedroom interview would have been cumulative to the tape, which neither party introduced at trial, and the trial testimony of Detective Stotz. And any testimony from DDA Mitchell regarding his reasons for participating in the case and his activities behind the scenes had no bearing on the veracity of the confession: only the actual circumstances that Linton experienced did. (See *Crane v. Kentucky, supra*, 476 U.S. at pp. 690-691; cf. *Stansbury v. California* (1994) 511 U.S. 318, 326 [114 S.Ct. 1526, 128 L.Ed.2d 293] [any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*]; *Whren v. United States* (1996) 517 U.S. 806, 813 [116 S.Ct. 1769, 135 L.Ed.2d 89] ["Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"].) Linton, therefore, has failed to show that his request to call DDA Mitchell as a witness was supported by either extraordinary circumstances or the inability to obtain relevant information from another source. Accordingly,

the trial court properly exercised its discretion in precluding Linton from calling DDA Mitchell as a witness.

2. The exclusion of DDA Mitchell's testimony did not violate Linton's constitutional rights

Linton contends the trial court's ruling violated his federal constitutional rights to confrontation and to present a defense. (AOB 124-130.) No confrontation clause violation occurred because DDA Mitchell was not a witness against Linton. And the trial court's ruling did not violate Linton's right to present a defense or to compel witnesses, because DDA Mitchell's testimony would have been cumulative and had only marginal relevance at best. (*People v. Cornwell, supra,* 37 Cal.4th at p. 82.)

Linton principally relies upon *United States v. Edwards* (9th Cir. 1998) 154 F.3d 915 (*Edwards*) to support his claim of error. (AOB 124-127.) *Edwards* is not binding (*People v. Leonard, supra*, 40 Cal.4th at p. 1416), and is distinguishable.

In *Edwards*, police found crack cocaine in a black bag inside the trunk of a car that the defendant had been driving when the police arrived in the area. The car was registered to another person. (*Edwards, supra,* 154 F.3d at pp. 917-918.) The main evidence linking the defendant to the bag, apart from disputed hearsay, was his presence in the car. (*Id.* at p. 918.) On the evening of the first day of trial, the prosecutor examined the bag in the presence of two officers and found a bail bond receipt with the defendant's name on it under a cardboard support at the bottom of the bag. (*Id.* at pp. 918-919.) The defendant objected to the admission of the receipt. (*Id.* at p. 919.) The trial court overruled the objection, and the prosecutor examined the two percipient witnesses about the discovery, eliciting testimony that, among other things, the receipt was not planted. (*Id.* at pp. 919-920.) During closing argument, the prosecutor characterized the receipt as close

to a "smoking gun," and the defense responded that the discovery of the receipt was suspicious. (*Edwards, supra,* 154 F.3d at pp. 920-921.)

On appeal, the defendant argued the prosecutor's continued representation constituted improper vouching. (*Edwards, supra*, 154 F.3d at p. 921.) The Ninth Circuit agreed: "when a prosecutor is personally involved in the discovery of a critical piece of evidence, when that fact is made evident to the jury, and when the reliability of the circumstances surrounding the discovery of the evidence is at issue, the prosecutor's participation in the trial of the defendant constitutes a form of improper vouching." (*Id.* at p. 923.)

Unlike the prosecutor in *Edwards*, DDA Mitchell was not personally involved in the discovery of a critical piece of evidence. DDA Mitchell participated in a taped interview of Linton along with Deputy Stotz at which Linton made no incriminatory statements. Thus, *Edwards* is inapposite.

In an attempt to bring this case within the ambit of *Edwards*, Linton characterizes DDA Mitchell as the "architect of the promise-induced confession" and the orchestrator of the interrogation the day after the murder. (AOB 116, 128, 130.) Linton's characterization of DDA Mitchell's role in the investigation is refuted by DDA Mitchell's testimony at the hearing on the recusal motion, where he explained his duties as the on-call investigator and the extent of his involvement in the interrogation the next day, and the testimony of the other interviewers throughout the proceedings. (See e.g., 3 RT 304-306, 324-327; 5 RT 551-553, 580-581; 6 RT 785-786; 7 RT 903; 9 RT 1015; 10 RT 1056-1058; 18 RT 2757, 2770-2771; 19 RT 2861-2863; 23 RT 3476-3477, 3525; 24 RT 3638.) Furthermore, even if DDA Mitchell had been the "architect" and orchestrator, as discussed, it is what happened in Linton's presence during the interviews and interrogations, and not behind the scenes, that is relevant

to the credibility of his confession. Again, DDA Mitchell only participated in the bedroom interview and his testimony regarding this interview would have been cumulative to the audiotape and Detective Stotz's testimony.

Linton also speculates that the reason DDA Mitchell failed to clarify with him that he would be liable for prior crimes against Melissa if he were the murderer was that DDA Mitchell and Detective Stotz did not expect "the promise of leniency to be picked up by the tape." (AOB 129.) If the defense had wanted to make the point that the challenged statements during the bedroom interview were fainter than other recorded statements, they could have done so by introducing the audiotape into evidence at trial. (Recusal Motion, Def. Exh. C [tape]; 3 RT 348.) While the defense advised the court that they were not presenting the tape because of its poor quality (19 RT 2841), Linton's argument suggests it was of sufficient quality to determine that certain statements were less audible than others. Additionally, there was no dispute at trial that the challenged statements were made during the bedroom interview and that they were not accompanied by any clarifying comments. (19 RT 2852-2853, 2877-2878; 20 RT 3098-3099.) Furthermore, while Linton's appellate counsel posits, "it is difficult to understand why an experienced prosecutor would not be careful to clarify that the 'gist' was that appellant only would get leniency if he were not the murderer" (AOB 129), Linton's "That's until today" comment (5 SCT 150) establishes that Linton himself understood the gist of the challenged statements notwithstanding the lack of clarifying comments (5 SCT 150).

In sum, the trial court properly exercised its discretion, and did not violate Linton's constitutional rights, by precluding him from calling DDA Mitchell as a witness.

3. Any error in excluding DDA Mitchell's testimony was harmless

Even assuming the trial court erred in excluding DDA Mitchell's testimony at trial, no prejudice ensued. The *Watson* standard should apply because this was, at most, a misapplication of Evidence Code section 352. (*People v. Cudjo* (1993) 6 Cal.4th 585, 612.) But a reversal would not be required even if *Chapman* were applicable. DDA Mitchell was a percipient witness to only one event that had any bearing on the issue of the veracity of Linton's attempted rape confession – the bedroom interview. Linton made no inculpatory statements during the bedroom interview. And DDA Mitchell's testimony about the circumstances of this interview, including Linton's apparent mental state, would have been cumulative to the testimony of Detective Stotz, which the jury heard, and the audiotape, which the defense chose not to introduce at trial. Accordingly, the trial court's rejection of the defense request to call DDA Mitchell as a witness does not provide a basis for a reversal.

H. The Trial Court Properly Exercised Its Discretion When It Sustained the Prosecutor's Objections During Linton's Cross-Examination of Detective Stotz

Linton contends the trial court abused its discretion and violated his constitutional right to confront and cross-examine an adverse witness when it sustained the prosecutor's objections to numerous questions during his cross-examination of Detective Stotz. Linton asserts his questions properly sought to test Detective Stotz's credibility and the reliability of the interrogation process. (AOB 131-157.) There was no error.

"[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation." (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on another ground by *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Trial courts retain wide latitude under

the Confrontation Clause and California law to restrict "cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance." (*People v. Frye, supra,* 18 Cal.4th at p. 946.) Unless a "defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' ([*Delaware v.*] *Van Arsdall* [(1986)] 475 U.S. [673], 680 [106 S.Ct. [1431] 1436[, 89 L.Ed.2d 674]]), the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment." (*Ibid,* first alteration in original.)

The trial court did not abuse its broad discretion in sustaining the challenged objections here. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070 [trial court rulings on objections are reviewed for an abuse of discretion].) As discussed, the circumstances of the actual interrogation are relevant to the credibility of a confession; what occurs outside the suspect's presence and any uncommunicated thoughts, beliefs, and motives of the interrogators are not. (See *Crane v. Kentucky, supra,* 476 U.S. at pp. 690-691; cf. *Stansbury v. California, supra,* 511 U.S. at p. 326; *Whren v. United States, supra,* 517 U.S. at p. 813.) Thus, "a police officer's opinion regarding the truthfulness of a suspect's confession is generally deemed inadmissible." (*People v. Anderson* (1990) 52 Cal.3d 453, 478.)

In light of the foregoing authority, the trial court properly sustained the prosecutor's relevancy and other objections to Linton's questions about the following subjects: (1) what type of training Detective Stotz received on interrogating suspects at the academy, whether he received additional training on the job, and whether he received any training on avoiding and recognizing false confessions (19 RT 2823-2824); (2) conversations Detective Stotz had with DDA Mitchell outside Linton's presence (19 RT 2862-2863, 2881, 2904; 20 RT 3084-3085); (3) whether Detective Stotz was being honest when he made the "water under the bridge" comment and

whether he believed Linton's story that he went to the Middletons' house to look for money (19 RT 2881; 20 RT 3091); (4) whether Sergeant Rodriguez was actually concerned that Linton would feel better if he confessed (19 RT 2887); (5) why Detective Stotz asked some questions or made some statements and did not make others (19 RT 2900-2901, 2905, 2908-2909; 20 RT 3091); (6) Detective Stotz's concerns and beliefs about the veracity of Linton's statements and Linton's motives (19 RT 2906, 2909; 20 RT 3082); (7) whether certain interrogation techniques were "time-honored" or "part of the process of catching a criminal" (19 RT 2886-2887); (8) the process the police use to validate a confession (19 RT 2905); and (9) whether Detective Stotz was tying to coerce a confession (20 RT 3092).

At best, testimony on these subjects would have had only marginal relevance to the credibility of Linton's confession and Detective Stotz. (*People v. Hines* (1997) 15 Cal.4th 997, 1047 [rejecting claim that court unduly restricted cross-examination where court sustained objections to questions on issues that had, at best, only marginal relevance]; see also *People v. Zapien* (1993) 4 Cal.4th 929, 976 [legally correct evidentiary ruling will be upheld even if ruling was based on an incorrect reason].) Linton relies upon inapposite cases to support his argument that the trial court erred because it was necessary and proper for him to lay a foundation as to Detective Stotz's experience and training in interrogation techniques to challenge a confession as being false. (AOB 132-133.) Specifically, Linton relies upon cases that addressed challenges to the admissibility of a confession, not an attack on the credibility of a confession deemed admissible. (AOB 132-133, citing *Missouri v. Seibert* (2004) 542 U.S. 600, 604, 617 [124 S.Ct. 2601, 159 L.Ed.2d 643] [holding post-*Miranda* confession inadmissible where police employed question-first tactic]; *Miller v. Fenton* (1985) 474 U.S. 104, 109 [106 S.Ct. 445, 88 L.Ed.2d 405]

[holding voluntariness is a question of law, and recognizing the Court has long held that confessions obtained through the use of certain interrogation techniques violate Due Process]; *Arizona v. Mauro* (1987) 481 U.S. 520, 530, fn.1 [107 S.Ct. 1931, 95 L.Ed.2d 458] [J. Stevens, dissenting] [disputing majority's determination of no interrogation and quoting testimony of officer regarding whether a certain interrogation technique was employed]; *Orozco v. Texas* (1969) 394 U.S. 324, 328 [89 S.Ct. 1095, 1098, 22 L.Ed.2d 311] [J. White, dissenting] [disagreeing with majority opinion that *Miranda* warnings were required where suspect was under arrest when he was interviewed in his bedroom, noting that *Miranda* was concerned about the danger that "the confidence of the prisoner could be eroded by techniques such as successive interrogations by police acting out friendly or unfriendly roles" during incommunicado interrogation in a police-dominated setting].)

The trial court also properly sustained the prosecutor's objections to questions about what was and was not said during the recorded post-*Miranda* interviews because any such testimony would have been cumulative to the audiotape that the jury had already heard. (19 RT 2882, 2908, 2980, 3082, 3084-3085, 3090-3093.) Additionally, the trial court properly sustained the prosecutor's objections to questions that called for Detective Stotz to speculate about: (1) whether it was clear to Linton that the alleged promises of leniency made during the bedroom interview were still in effect the next day (19 RT 2880-2881); (2) whether between November 29 and November 30 (a period of time which also included Dr. Rath's interview) Linton denied having any sexual interest in Melissa more than forty times (19 RT 2883); (3) whether Linton was about to crack or give up at one point during the interview (19 RT 2886, 2909); (4) whether he could tell from the tone of Linton's voice at 3:40 p.m. that he was tired (19 RT 2892); (5) whether Linton answered some specific questions

robotically (19 RT 2892); (6) whether Linton was "giving up" at the end of the interview (19 RT 2909); and (7) whether Linton was referring to something that happened two months before the murder when, in response to Detective Stotz's question "Well, how far did you get?", Linton replied, "Not very far at all, no where" (20 RT 3081).

Likewise, the trial court properly exercised its discretion in sustaining the prosecutor's vagueness objections to questions about Detective Stotz's former testimony where defense counsel failed to indicate in her question what former testimony she was referring to. (19 RT 2869-2870.) When defense counsel subsequently clarified her questions, Detective Stotz answered them, without objection. (19 RT 2870.) The trial court also properly sustained the prosecutor's vagueness objection to Linton's question, "Well, you believe that it must have crossed Daniel's mind about raping Melissa on the 29th. Right?" (19 RT 2909.) Detective Stotz's actual belief was also irrelevant. (Evid. Code, § 210.)

The trial court also properly sustained the prosecutor's objection to the following questions on the ground they were argumentative: "Well, did you tell Daniel we're gathering evidence here and one day it's going to be played in public and people are going to hear it?" (19 RT 2882); "When you saw Melissa, did you think because she was a pretty cute gal – did the thought cross your mind of some sexual interest in her?" (19 RT 2908); "You were trying to threaten Daniel when you told him that you would not stop the interrogation until he told you what you wanted to hear; isn't that right?" (20 RT 3085); and "You gave Daniel Linton a choice earlier in the interview between telling you that he went into [sic] steal and he went in there to try to have sex with Melissa; isn't that right?" (20 RT 3092). Similarly, the court properly sustained objections to the following questions because they were both argumentative and, as discussed *post* and *ante,* called for irrelevant evidence: "You told Daniel at a certain point at the end

of the interrogation, 3:40 to 4 o'clock, 'I don't buy this story about you going over there to look for money.' Was that a lie or is that the truth?" (20 RT 3090-3091); "You were trying to coerce a confession, were you not, Officer?" (20 RT 3091-3092); and "Were you attempting to leave the impression that you were the person who was doing – conducting the interview of Daniel, the principal interviewer [during the bedroom interview]?" (21 RT 3112.)

Additionally, the trial court properly sustained the prosecutor's objections to several other questions on the ground that they had been asked and answered. (Compare 20 RT 3082, 3085-3087, 3090-3093 with 19 RT 2814, 2816, 2873-2875, 2882, 2907; 20 RT 3000, 3008, 3037, 3081, 3089.)

Finally, the trial court properly sustained a series of objections to questions about whether Detective Stotz included the alleged promises of leniency made during the bedroom interview in his police reports, the number of questions asked by DDA Mitchell and Detective Stotz during the bedroom interview, whether Detective Stotz was trying to portray himself to the jury as the lead interviewer, and whether the prosecutor in fact took the lead during the bedroom interview. (20 RT 3097; 21 RT 3111-3112.) That Detective Stotz and DDA Mitchell made statements during the bedroom interview about liability for prior offenses against Melissa was not disputed at trial. (19 RT 2852-2853, 2877-2878; 20 RT 3098.) Thus, the omission of these statements from Detective Stotz's police report would have had little, if any, impeachment value. Similarly, that Detective Stotz and DDA Mitchell both participated in the interview was not in dispute. (18 RT 2757-2766; 19 RT 2808, 2848, 2850-2851, 2856.) Whether DDA Mitchell asked 227 questions and Detective Stotz asked 129 questions had little, if any, probative value on the issue of the veracity of Linton's confessions the following day, or Detective Stotz's credibility.

Accordingly, the trial court did not abuse its discretion in sustaining the prosecutor's objections.

But even assuming the trial court erred in one or more of its rulings under state law, no constitutional violation ensued. The jury heard the audiotapes of the post-*Miranda* interviews. The jury also heard the testimony of Detectives Stotz and Lynn, Dr. Rath, and DDA Chessell, who collectively described the circumstances of the interviews at Linton's front door and in his bedroom on the day of the murder, the car ride to the police station the following morning, and the interviews at the police station that day. Additionally, the jury heard testimony about Linton's mental and physical condition at the time of the interviews from these individuals and Dr. Whiting. Thus, there was ample evidence before the jury about "the reliability of the interrogation process itself. . . ." (AOB 132.)

Defense counsel also extensively cross-examined Detective Stotz. (19 RT 2807-2838, 2843-2947; 20 RT 2977-3101; 21 RT 3106-3116, 3118-3121.) During this examination, defense counsel elicited testimony that Linton appeared to be upset and shaken during the final interview segment, but not tired, and that he appeared to be giving up when he said the thought of raping Melissa crossed his mind. (19 RT 2891, 2909-2910.) Defense counsel also elicited testimony that Linton denied a sexual interest in Melissa about forty times between November 29 and November 30, and that Detective Stotz made it clear to Linton during the bedroom interview that he would not get in any trouble for any prior sex crimes, and that Detective Stotz honestly believed this was so. (19 RT 2876-2877; 2909-2910.) Additionally, defense counsel impeached Detective Stotz with, among other things, his prior inconsistent statements, misstatements, and inferences that he had drawn from Linton's statements but attributed to Linton in his police report. (See e.g., 19 RT 2813-2819, 2829-2833, 2910-2919; 20 RT 2997-2998, 3013-3014.)

In light of the evidence before the jury and cross-examination of Detective Stotz that was permitted, the trial court's evidentiary rulings did not violate Linton's right to present a defense that his confession to the prior attempted rape was not credible. Nor did the trial court's rulings violate Linton's Confrontation Clause rights, as Linton has not established that answers to the challenged questions would have produced a significantly different impression of Detective's Stotz's credibility.

Finally, even if one or more of the trial court's rulings had been erroneous, given the evidence discussed above, the extensive cross-examination of Detective Stotz, and the strength of the prosecution's case, any constitutional violation was harmless beyond a reasonable doubt (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 1438, 89 L.Ed.2d 674] [confrontation clause violations are subject to review under *Chapman*]; *People v. Farley* (2009) 46 Cal.4th 1053, 1104 [applying *Chapman* to assumed violation of right to present a defense]), and any state law error was harmless under *Watson.*

II. THE TRIAL COURT PROPERLY DECLINED TO DISMISS JUROR NO. 1 BECAUSE SHE DID NOT COMMIT MISCONDUCT; ANY MISCONDUCT DOES NOT WARRANT A REVERSAL

Linton asserts Juror No. 1 committed misconduct by discussing the case with her husband and prejudging it, and that the trial court's failure to remove her violated the Sixth and Fourteenth Amendments of the federal Constitution, and Article I, sections 7 and 16 of the California Constitution. (AOB 158-165.) The trial court properly determined that Juror No. 1's monologue did not constitute misconduct. Even if there had been misconduct, Juror No. 1's statements rebutted the presumption of prejudice.

During guilt-phase deliberations, the foreperson sent a note to the trial court stating: "As foreman I feel I should report that one of the jurors during our discussion said they [sic] had discuss [sic] a specific aspect of

the case with her husband." (13 CT 3609.) Later that day, the court met with counsel, Linton, and the foreperson. (31 RT 4820.) The foreperson said that while they were discussing the evidence that Melissa screamed when she saw Linton at the top of the stairs, and whether or not Melissa would have responded in that manner, Juror No. 1 sated that she had discussed the issue with her husband and how she would not have responded like Melissa did. (31 RT 4820-4821.) According to the foreperson, Juror No. 1 told the other jurors, "'I'm the first to admit that I discussed this with my husband and we were talking about the case.'" (31 RT 4821.) Juror No. 1 did not indicate whether her husband provided any feedback, because the other jurors "basically said we didn't want to go there. . . ." (31 RT 4821.) No further discussions about Juror No. 1's conversations with her husband ensued. The foreperson did not tell the other jurors about his note to the court regarding Juror No. 1. (31 RT 4822.)

After the foreperson left the courtroom, defense counsel expressed concern about Juror No. 1's cavalier attitude toward the court's instructions, that Juror No. 1 may have discussed other aspects of the case with her husband, and that they had no way of knowing if Juror No. 1 was going to rely on her husband's opinions in making determinations about the case. (31 RT 4824.) The trial court shared some of defense counsel's concerns and instructed the bailiff to contact Juror No. 1. (31 RT 4825-4828.)

During the questioning that followed, Juror No. 1 stated that, after she was selected as a juror, she told her husband that she might need to vent about the case and that, if she did so, he was not to ask her questions or let her continue. He was just to "kind of sit there and say, 'Okay. Enough.'" (31 RT 4829-4830, 4832-4833.) Juror No. 1 did this because she had a

feeling she "might explode at one point just because of the facts of the case[,]" and her nature. (31 RT 4830.)

When Juror No. 1 heard during the first week of trial that Melissa screamed when she saw Linton at the top of the stairs on the day of the murder, she was disturbed because she would not have "freaked out" like that if her neighbor walked in. (31 RT 4831, 4834.) This was before Juror No. 1 heard about the rest of the case. (31 RT 4831.) Juror No. 1 told her husband, "'I can't believe the way that this happened.'. . . 'Something the defendant did and this person reacted this way. I would not have done that. I'm just a little' – 'I'm confused. I just don't understand.'" (31 RT 4831-4832; see also 31 RT 4829.) Juror No. 1 did not give her husband any sense of the facts of the case. (31 RT 4829, 4831.) Her husband just "sat there" and did not respond. (31 RT 4829-4830, 4832.) He gave no verbal feedback. (31 RT 4833.) Juror No. 1 said that if anyone had been standing in the room, her statements to her husband "would have made no sense at all." (31 RT 4830.) Juror No. 1 did not vent to her husband again during the remainder of trial. (31 RT 4833-4834.) Nor did the two ever discuss the case. (31 RT 4833.)

After both counsel indicated they had no questions for Juror No. 1, the court admonished Juror No. 1 to refrain from discussing the case or venting with third parties. (31 RT 4834-4835.) The court also asked Juror No. 1, "You feel there's anything that's happened here, or even the fact that we called you in, that would affect your ability to either now be a fair and impartial juror or, two, be able to deliberate rationally with the other jurors?" (31 RT 4836.) Juror No. 1 responded, "No. Not at all." (31 RT 4836.) The court then instructed Juror No. 1 to continue deliberating. (31 RT 4836.)

Defense counsel argued that Juror No. 1's claims that she just vented to her husband and that her husband provided no feedback were

disingenuous, if not an outright lie. Defense counsel asserted that Juror No. 1 wanted to share with the jury important information that she had obtained, namely her husband's opinion, and that the foreperson's comments indicated that Juror No. 1 told her fellow jurors that she discussed the case with her husband, including the facts surrounding the screaming incident. (31 RT 4836-4840.) The defense asked that Juror No. 1 be excused, because she was "clearly" trying to "bring her husband's opinion into deliberations," and that there was a real danger that Juror No. 1 was being influenced by her husband's opinions. (31 RT 4841-4842.) The prosecutor countered that the defense argument was speculative and that Juror No. 1 was credible. (31 RT 4840-4841.)

The court found Juror No. 1's statements were credible and not inconsistent with those of the foreperson. (31 RT 4842.) The court further found there was no indication that Juror No. 1's husband provided any input to Juror No. 1 or any other juror, and that, while Juror No. 1's conduct was "perhaps" "on the edge of propriety[,]" no misconduct occurred. (31 RT 4842-4843.) The court also noted it had admonished Juror No. 1 to refrain from such conduct in the future. (31 RT 4843.) Consequently, the court denied the defense motion to dismiss Juror No. 1. (31 RT 4843.) The court did not err in so ruling.

It is misconduct for a juror to discuss a case with a nonjuror during the course of a trial. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1309.) "'In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant. [Citations.]'" (*Id.*, quoting *Remmer v. United States*

(1954) 347 U.S. 227, 229 [74 S.Ct. 450, 98 L.Ed. 654], alteration in original.)

The presumption of prejudice is rebutted, and the verdict will not be set aside, "if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton* (1999) 20 Cal.4th 273, 296, italics in original.) In emphasizing that the required showing is a substantial likelihood of actual bias, this Court has recognized that requiring perfection from jurors would render the criminal justice system impotent. (*People v. Danks* (2004) 32 Cal.4th 269, 304.) "Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic." (*Ibid,* quoting *In re Carpenter* (1995) 9 Cal.4th 634, 654-655.)

In deciding if juror misconduct occurred, a reviewing court accepts the trial court's credibility determinations and findings of historical facts if supported by substantial evidence. (*People v. Schmeck* (2005) 37 Cal.4th 240, 294.) "Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

In accord with Penal Code section 1122, the trial court here admonished the jury at the beginning of the trial, "You must not converse . . . with anyone else on any subject connected with this trial . . . ." (17 RT 2501.) This admonition is "directed at precluding the jurors from being exposed and influenced by outside sources or extrinsic evidence during the

trial as well as from deciding the case before it is submitted to them." (*People v. Smith* (2008) 168 Cal.App.4th 7, 15.)

The trial court's factual findings that Juror No. 1 did not violate its admonition and did not receive information about the case from her husband are supported by substantial evidence. Juror No. 1 stated that, after she was selected as a juror, she told her husband that if she vented, he was to provide no feedback and to tell her to stop. When Juror No. 1 subsequently expressed her feelings and how she would have responded differently than some unspecified person in some unspecified context, her husband just sat there and did not say anything to her. Thus, Juror No. 1 did not commit misconduct by "discussing" the case with her husband and did not receive information about the case from her husband. (*Cf. People v. Danks, supra,* 32 Cal.4th at p. 304 [holding there was no misconduct where juror "did not discuss the case or deliberations with her husband, but only the stress she was feeling in making the decision"].)

But even if Juror No. 1's monologue constituted misconduct, the information obtained through the trial court's inquiry of Juror No. 1 rebutted the presumption of prejudice. Juror No. 1 stated that she did not provide any sense of the facts to her husband when she vented and that he provided no feedback. Juror No. 1 also confirmed that neither her venting nor the trial court's inquiry into it would affect her ability to be fair and impartial. "Courts may properly rely on such statements to determine whether a juror can maintain his or her impartiality after an incident raising a suspicion of prejudice." (*People v. Harris* (2008) 43 Cal.4th 1269, 1304.) The trial court's inquiry and Juror No. 1's responses establish that Juror No. 1's venting to her husband "'is not, judged objectively, "inherently and substantially likely to have influenced the juror." [Citation.] Nor does it objectively demonstrate a substantial likelihood, or even a reasonable possibility, of actual bias. [Citations.]' (*People v. Loker* (2008) 44 Cal.4th

691, 754-755.)" (*People v. Lewis, supra,* 46 Cal.4th at p. 1309, alterations in original, parallel citations omitted.) Accordingly, the trial court did not violate Linton's state and federal constitutional rights by denying his request to dismiss Juror No. 1. (See *Ibid* [finding presumption of prejudice, which arose from juror's discussion during deliberations with her District Attorney investigator husband about the manner the foreperson was picked and the foreperson's refusal to reveal results of first poll, was rebutted where juror confirmed she revealed only these details to her husband and nothing substantive and juror confirmed that neither the incident nor the court's inquiry into it would affect her ability to be fair and impartial].)

To the extent Linton is also claiming that Juror No. 1 prejudged the case (AOB 162), his claim lacks merit. It is improper for a juror to prejudge a case (*People v. Leonard, supra,* 40 Cal.4th at p. 1412). But Juror No. 1's venting to her husband does not establish that she prejudged the case. Instead, her statements established that she had a concern about one aspect of the case at the beginning of trial, before she had heard all the evidence. That a juror entertained various concerns about a case during trial does not establish that the juror prejudged the case. (See *People v. Wilson* (2008) 44 Cal.4th 758, 841.)

Finally, Linton argues that Juror No. 1's alleged misconduct is structural error. (AOB 163.) "[E]mpanelling one or more jurors who are actually biased against the defense" constitutes structural error. (*People v. Carter* (2005) 36 Cal.4th 1114, 1176.) As discussed, however, the record does not establish that Juror No. 1 was actually biased, or even that there was a substantial likelihood that she was biased. Accordingly, Linton's claim of structural error necessarily fails.

III. THE INVITED ERROR DOCTRINE BARS REVIEW OF LINTON'S CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT UNRECORDED ORAL ADMISSIONS SHOULD BE VIEWED WITH CAUTION; ANY INSTRUCTIONAL ERROR WAS HARMLESS

Linton contends the trial court deprived him of his state and federal constitutional rights to due process, a fair trial, and a jury determination when it failed to instruct the jury with CALJIC No. 2.70 that unrecorded oral admissions should be viewed with caution. (AOB 166-175.) Any error was invited. Alternatively, any error was harmless.

A trial court has a sua sponte duty to instruct the jury to view extrajudicial admissions and confessions with caution. (*People v. Williams* (2008) 43 Cal.4th 584, 639; *People v. Mayfield, supra,* 14 Cal.4th at p. 776.) But such an instruction should not be given when a defendant's admissions or confessions are tape recorded and the tape recording is played for the jury. (*Ibid.*)

In this case, both sides requested the jury be instructed on confessions and admissions with CALJIC No. 2.70. (29 RT 4460.) The defense also submitted five modified versions of the instruction. (28 RT 4306; 13 CT 3466, 3560-3567.) After the court rejected the first four versions, the prosecutor argued the following sentence in the fifth defense instruction was unnecessary – "'Oral statements of a defendant should be viewed with caution'" – because Linton's statements were recorded. (29 RT 4462-4471, 4479.) Defense counsel countered that the two interviews at Linton's front door were not recorded and there was "evidence of statements made off tape in this case." (29 RT 4479.) The following exchange shortly ensued:

> THE COURT: "Evidence of an oral confession or oral admission of the defendant not made in court should be viewed with caution." How about if we added in there "not made in court" or "not" –

[THE PROSECUTOR]:	"And not tape-recorded."
THE COURT:	"And not tape-recorded"?
[THE PROSECUTOR]:	Correct--.
[DEFENSE COUNSEL]:	Well, I think that then tells the jury to not view critically --
[THE COURT]:	-- the rest of it with caution?
[DEFENSE COUNSEL]:	-- the rest of it. [¶] So if that's the alternative, better to do away with it entirely.

(29 RT 4479-4480.)

Defense counsel acknowledged that cases have held that an admonition to view an extrajudicial statement with caution is important when the statement is not recorded. (29 RT 4481.) But counsel argued that the CALJIC committee had not addressed confession evidence with the same degree of scrutiny that it had addressed eyewitness identifications. Defense counsel reasoned that, as with eyewitness identifications, the public relies upon confession evidence without awareness of the factors that can influence the reliability of the evidence. (29 RT 4480-4481.) Consequently, defense counsel maintained that "the jury should be instructed to view confession evidence with caution, whether or not its recorded," and requested "that [the proposed language] stay in." (29 RT 4480-4481.)

The court disagreed, stating that it was "going to insert something about not made in court or not taped or exclude the whole thing or take the whole thing out, one or the other." (29 RT 4481.) Defense counsel replied, "Well, then, in light of that, take the whole thing out." (29 RT 4481.) The court then confirmed that defense counsel wanted to omit the cautionary language. Defense counsel indicated this was correct, but asked that the defense objection be noted for the record. (29 RT 4481.)

The court subsequently instructed the jury pursuant to CALJIC No. 2.70 as follows:

> A confession is a statement made by a defendant in which he has acknowledged his guilt for the crimes for which he is on trial. In order to constitute a confession, a statement must acknowledge participation in the crimes as well as [the] required criminal intent.
>
> An admission is different. An admission is a statement made by the defendant which does not by itself acknowledge his guilt for the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant has made an admission or confession, and if so, whether the statement is true in whole or in part.
>
> You should consider evidence about the manner in which defendant's admission was made in determining the probative weight of the admission.

(30 RT 4566; 13 CT 3466.)

Linton's claim that the trial court erred in failing to instruct his jury to view his unrecorded oral admissions with caution is barred under the invited error doctrine because, as the above summary shows, defense counsel opted to forgo any such admonition for a tactical reason: she believed the jurors would not critically examine the reliability of the recorded portions of the statement if such language were included in the instruction. (29 RT 4479-4481; cf. *People v. Lewis* (2001) 25 Cal.4th 610, 667 [invited error doctrine barred complaint of asserted instructional deficiency that resulted from defense counsel's suggested revision] .)

Even if Linton's claim were not barred, any error was harmless. Linton asserts that the error is one of federal constitutional magnitude and therefore the *Chapman* standard applies. (AOB 172-175.) The failure to give an instruction admonishing jurors to view oral admissions with caution

is reviewed under *Watson*, because the failure to give such an instruction does not render a trial fundamentally unfair. (*People v. Wilson* (2008) 43 Cal.4th 1, 19; *People v. Dickey* (2005) 35 Cal.4th 884, 905; but see *People v. Mungia* (2008) 44 Cal.4th 1101, 1134 [declining to decide whether the state or federal standard applies].) But regardless of whether this Court applies the state or federal harmless error standard, any error does not warrant a reversal.

The purpose of the cautionary instruction on unrecorded oral admissions is to help jurors decide whether a statement attributed to the defendant was in fact made. Consequently, "'courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately.' [Citation.]" (*People v. Wilson, supra,* 43 Cal.4th at p. 19.)

As noted, Linton's two conversations with Detective Stotz at Linton's front door were not recorded. (See e.g., 17 RT 2630-3631; 18 RT 2745-2756.) Most of the bedroom interview was recorded, but the tape was not played for the jury. Linton made unrecorded statements in the police car the next day and made additional statements before the tape was turned on at the police station and when the tape was being flipped over. (17 RT 2633-2634, 2647; 18 RT 2769-2770; 19 RT 2835, 2857, 2872-2873; 20 RT 3038-3043, 3048-3060; 24 RT 3676, 3683-3684.) Linton cites to no conflicts in the evidence about the words attributed to him during these time periods. At trial, defense counsel focused on what Detective Stotz told Linton during the unrecorded discussions and why Detectives Stotz and Lynn did not include some of Linton's unrecorded statements in their reports. (See e.g., 17 RT 2630-2631, 2634, 2636, 2640, 2644, 2647-2647, 2651-2652 [cross-examination of Detective Lynn]; 19 RT 2835-2838,

2845-2853, 2870-2873, 2877-2878; 20 RT 3036-3069, 3072-3073, 3094-3095, 3098[cross-examination of Detective Stotz].)

Additionally, as discussed in the Statement of Facts, *ante*, Linton denied any wrongdoing until his tacit confession in the police car. After that he confessed on tape to entering the Linton's home on both occasions for money, to murdering Melissa, and to attempting to rape her on the prior occasion. These recorded confessions were played for the jury. Linton's counsel also extensively argued to the jury that Detective Stotz was not credible and that, during the unrecorded interviews, Detective Stotz made more statements to Linton that he admitted at trial. (See e.g., 30 RT 4653, 4655-3657, 4663, 4669-4673, 4679, 4681, 4696-4698.) Thus, any failure to instruct the jury that Linton's unrecorded extrajudicial statements should be viewed with caution was harmless under any standard.

In his prejudice argument, Linton focuses on the statement he made at his front door that he had woken up in his yard around midnight two to three weeks before the murder, wearing only jeans and underwear. (AOB 166-170, quoting 18 RT 2752-2754.) Linton asserts his "unrecorded admission about the prior incident formed the basis for questioning by the authorities as to whether what [he] recalled as sleepwalking was actually the sexual assault described by Melissa to her parents several weeks or months before her death. Had the jury been told to view [his] unrecorded statements with caution, it is likely it would have been wary of Detective Stotz's testimony." (AOB 174.) But there was no conflict regarding this unrecorded admission. Indeed, defense counsel cross-examined Detective Stotz with quotations from the transcript of the bedroom interview. During that interview Linton confirmed much of his earlier statement about waking up in his jeans and underwear two to three weeks earlier. (20 RT 3067-3068; see 5 SCT 52-53.) Finally, the portions of Detective Stotz's testimony that Linton points to in his prejudice argument concerned his

impeachment of Detective Stotz with Linton's recorded confession, not his unrecorded oral admissions. (AOB 174-175, citing 19 RT 2911-2915.) Accordingly, any error does not warrant a reversal.

IV. LINTON RECEIVED A FAIR GUILT TRIAL

Linton contends the cumulative effect of the errors alleged in arguments I-III, *ante,* violated his right to due process and warrant reversal. (AOB 176-179.) As discussed, the only error here – the failure to instruct the jury to view unrecorded oral admissions and confessions with caution – was invited and not prejudicial. Thus, there are no errors to cumulate. (*People v. Thornton* (2007) 41 Cal.4th 391, 453.)

V. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OFFERED TO ESTABLISH A LINGERING DOUBT DEFENSE

Linton contends the trial court deprived him of his state and federal constitutional rights to due process, a fair trial, and to present a defense when it precluded him from presenting evidence that authorities coerced him into making a false confession. Specifically, Linton complains about the trial court's rulings preventing him from calling Dr. Leo and DDA Mitchell as witnesses, and from eliciting opinion testimony from Dr. Whiting based upon his interview with Linton. Linton asserts this evidence would have established a lingering doubt about the attempted rape and forcible lewd act special circumstances. (AOB 180-194.) The trial court properly exercised its discretion in excluding this evidence. Alternatively, there is no reasonable possibility that Linton would have received a more favorable penalty determination had this evidence been admitted.

A. The Trial Court Properly Precluded Linton from Calling Dr. Leo and DDA Mitchell as Witnesses

Prior to the start of the penalty phase, the defense renewed its request to call Dr. Leo and DDA Mitchell as witnesses. The defense argued their testimony was relevant to a lingering doubt defense and that excluding it

would violate Linton's Fifth, Sixth, and Eighth Amendment rights. (31 RT 4902-4913, 4923-4926.) DDA Mitchell countered that Dr. Leo's testimony had minimal relevance and would be unduly time-consuming and that his own testimony would be cumulative to the testimony of Detectives Stotz and Lynn. DDA Mitchell also noted the defense could present a transcript of the bedroom interview if they wanted to establish the words that were actually spoken at that time. (31 RT 4904-4905.)

The trial court again excluded Dr. Leo's testimony, because there was no foundation Linton's confession was false. (31 RT 4914.) In so doing, the trial court expressly stated that Linton would not have to testify in order for Dr. Leo's testimony to become admissible; there just needed to be some evidence that the confession was false, which the court had not yet heard. (31 RT 4906-4907, 4910-4914; contra AOB 181.) The court further ruled that the defense could not call DDA Mitchell as a witness. (31 RT 4926.) The trial court properly exercised its discretion in so ruling.

"A capital defendant has no federal constitutional right to have the jury consider lingering doubt in choosing the appropriate penalty." (*People v. Stitely, supra*, 35 Cal.4th at p. 566.) But evidence regarding "the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is admissible . . . as a factor in mitigation under section 190.3." (*People v. Hamilton* (2009) 45 Cal.4th 863, 912.) This provision does not, however, afford a defendant a right to present "evidence not otherwise admissible at the penalty phase for the purpose of creating a doubt as to his or her guilt." (*Ibid.*) The standard for determining admissibility of such evidence is whether it relates to the circumstances of the crime or aggravating or mitigating factors, not whether it tends to prove the defendant did not commit the crimes. (*Ibid.*) Such evidence cannot be "unreliable [citations], incompetent, irrelevant, lack

probative value, or solely attack the legality of the prior adjudication [citations]." (*Ibid.*)

For the reasons set forth in detail in Argument I, sections F and G, *ante,* Dr. Leo's proffered testimony and any testimony by DDA Mitchell bore little probative value to the defense of lingering doubt. Accordingly, the trial court properly exercised its discretion in excluding it.

Moreover, even if the trial court had erred, a reversal of the death judgment would not be warranted. "Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict." (*People v. Gay* (2008) 42 Cal.4th 1195, 1223.) The "'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test . . . are the same in substance and effect." (*People v. Prince* (2007) 40 Cal.4th 1179, 1299.) For the reasons set forth in Argument I, there is no reasonable possibility that the exclusion of the testimony of Dr. Leo and DDA Mitchell affected the verdict.

In arguing to the contrary, Linton asserts the penalty phase decision was close. Linton relies on the length of the deliberations, a jury note, and two E-mails two separate jurors sent the foreperson as support for his argument. The jury began deliberations at 2 p.m. on March 25, 1999. (13 CT 3662-3663.) The jury continued deliberating at 9:15 a.m. on March 29, 1999. (13 CT 3664.) At 3:11 p.m. the jury sent the court a note indicating it could not reach a verdict. (13 CT 3664, 3675.) The court responded to the note by directing the jury to continue deliberations. (13 CT 3675.) The jurors resumed deliberations at 9 a.m. the next day, and indicated at 10:52 a.m. that they had reached a verdict. (13 CT 3677.) Given eleven witnesses testified at the penalty phase and the serious nature of the question the jury was asked to decide, the length of the deliberations here, which totaled less than two full court days, do not indicate the case was a close one. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 422,

superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.)

Nor do the two E-mails two different jurors sent to the foreperson indicate the case was close. As discussed in more detail in Argument XI, *post*, the notes simply reflected that two jurors got their feelings hurt by comments made by other jurors in the deliberation room. (13 CT 3673.) Thus, any evidentiary errors do not warrant a reversal of the death verdict.

B. The Trial Court Properly Precluded Dr. Whiting from Offering Opinion Testimony Based on Linton's Statements to Him

The defense sought to introduce testimony from Dr. Whiting, based on his interview with Linton, regarding Linton's ability to form the requisite specific intent for the special circumstances. (31 RT 4914-4916.) The prosecutor objected, arguing that permitting such testimony would result in the admission of incompetent, self-serving hearsay. The prosecutor noted that he had not been given discovery on Linton's statements and only knew about the statements that Dr. Whiting included in his reports, many of which were shown to be erroneous on cross-examination. (31 RT 4916.) Consequently, if the proffered opinion testimony were admitted, the prosecution would not be able to test the basis or reliability of the information on cross-examination. (31 RT 4916-4918.)

The defense countered that they were simply trying to support Dr. Whiting's opinion that Linton had a panic attack. Defense counsel suggested that if Dr. Rath had been looking for evidence of Linton's actual intent, "he might have obtained from Daniel Linton the additional information that he had heart palpitations or shortness of breath or whatever it was, narrowing of vision, all those things that might contribute or assist Dr. Whiting and might assist [Linton] at this stage in showing that he was suffering a panic attack." (31 RT 4920.)

The prosecutor responded that after Dr. Rath described the symptoms of a panic attack, he specifically asked Linton when the last time he suffered anything like that was. Linton replied that it was three months earlier. (31 RT 4920.)

The court ruled that Dr. Whiting could testify with the same limitations that it had imposed in the guilt phase, that is, Dr. Whiting had to support his opinions with evidence already in the record and could not testify or offer opinions based upon what Linton told him, because Linton's statements were self-serving hearsay. (31 RT 4920-4921; see 25 RT 3711-3733; 3797-3806 [prior discussions].) The defense did not recall Dr. Whiting during the penalty phase. Linton raised the limitations on Dr. Whiting's testimony in his new trial motion, which the court denied. (14 CT 5733-5755; 37 RT 5776.)

Trial courts have broad discretion in ruling on the admissibility of expert opinion testimony. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172.) "Although an expert may base an opinion on hearsay, the trial court may exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'" (*Ibid.*) "[E]vidence proffered on the issue of lingering doubt may be excluded because the evidence in question is otherwise inadmissible as hearsay or is unreliable." (*People v. Blair* (2005) 36 Cal.4th 686, 750; accord *People v. Whitt* (1990) 51 Cal.3d 620, 644.)

Here, the trial court did not abuse its discretion in excluding Dr. Whiting's opinions based on his interviews with Linton. During the guilt phase, the jury heard the recorded statements Linton made to law enforcement and Dr. Rath the day after the murder about his mental state and physical condition at the time of the crimes, including his lack of perception of time, his lack of recall, his fear, his headache, and his intent. (E.g., 12 CT 3289, 3297, 3304-3306, 3308, 3333, 3337, 3339-3340, 3350,

3352, 3355, 3357-3359, 3365-3367, 3420, 3424, 3426-3427; 23 RT 3516, 3510-3520, 3531-3533, 3564.) In particular, the jury heard Dr. Rath ask Linton if he had suffered any panic attacks, which Dr. Rath described as "where you feel like you can't breath and your heart starts pounding, you may break into a sweat. Just comes over you and then goes away after a while?" (12 CT 3415.) Linton responded, "Previously, I had a couple of those. But not as hard, not that bad." (12 CT 3415.) Dr. Rath followed up, "Okay. So you've had periods of being anxious? When was the last time something like that happened?" (12 CT 3415.) Linton responded, "I don't know, I guess about three months." (12 CT 3415.) Linton said he did not know of anything that set it off. (12 CT 3415.)

Additionally, Dr. Whiting testified during the guilt phase that neuropsychological tests indicated Linton had damage to his occipital parietal area of the brain and that research showed there is a relationship between that area and panic disorders. (25 RT 3832-3834.) Dr. Whiting further diagnosed Linton as suffering from, among other things, a panic disorder with panic attacks. (25 RT 3840.) He testified that Linton's statements to the police and Dr. Rath regarding his lack of perception of time during the crimes and lack of memory were consistent with a panic attack. (25 RT 3848-3849; 26 RT 3892-3894, 3911-3913; 27 RT 4158, 4169.)

Thus, through the evidence presented and the questions posed to Dr. Whiting, the trial court allowed the defense to put before the jury in both the guilt and penalty phases the theory that Linton may have been suffering a panic attack or panicked at the time of the murder. (30 RT 4660, 4668, 4692-4693, 4701-4702, 4716; 35 RT 5583; 36 RT 5668.)

If the trial court had also permitted Dr. Whiting to testify in the penalty phase about Linton's statements to him, which were made more than two and a half years after the murder (26 RT 3944-3946), it would

have enabled Linton to present his potentially self-serving and unreliable hearsay to the jury without ever having to testify and be subject to cross-examination. Given the testimony the court did permit regarding the defense panic attack theory, the trial court did not abuse its discretion or violate Linton's constitutional rights in precluding Dr. Whiting from offering opinion testimony based on Linton's statements to him. (See *People v. Pollock, supra*, 32 Cal.4th at p. 1172 [trial court properly exercised its discretion in precluding expert in guilt phase from offering an opinion on whether defendant's conduct before, during and just after crime was consistent with binge pattern of cocaine use where opinion would necessarily have been based in large part on defendant's hearsay statements to expert four years after crime, and where defense was permitted to and did pose hypothetical question to expert that enabled defense to present theory the defendant killed the victim while he was in the "tweaking" phase of his cocaine binge]; cf. *People v. Whitt, supra,* 51 Cal.3d at p. 644 [trial court properly excluded from penalty phase defendant's extrajudicial "'Death Row' assurances of reform," because they were not inherently reliable and their admission "would effectively permit defendant to address the jury without subjecting himself to cross-examination"].)

Even assuming the trial court erred in limiting Dr. Whiting's testimony, given the jury heard Linton's more contemporaneous, recorded statement that he last suffered a panic attack about three months before the murder, there is no reasonably possibility the exclusion of Dr. Whiting's testimony affected the death verdict.

VI. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT, IN THE MIDDLE OF THE NIGHT ABOUT THREE YEARS BEFORE LINTON ATTEMPTED TO RAPE MELISSA, ANOTHER NEIGHBOR FOUND A MALE INTRUDER WEARING ONLY UNDERWEAR IN HER HOME

Linton contends the trial court violated his rights to due process, a fair trial, and to present a defense when it excluded evidence that late in the middle of the night some three years before the murder, a neighbor encountered an underwear-clad male in her home who was not Linton. (AOB 195-201.) The trial court properly exercised its discretion and did not violate Linton's constitutional rights in excluding the evidence because it was irrelevant.

A. The Proffered Evidence and the Trial Court's Ruling

During the penalty phase, Linton sought to introduce evidence that, late one night about three years before the murder, his neighbor, Bettie Mercado, encountered an underwear-clad male between 25 and 30 years old in her hallway. (34 RT 5319-5322, 5334.) The prosecutor objected to the proffered testimony as irrelevant. (34 RT 5322.) The court expressed doubt about the relevance of Mercado's testimony, but agreed to hear her testimony outside the jury's presence. (34 RT 5323.)

Mercado testified that she lived around the corner from Linton, and that around 2:15 a.m. in late 1991, she heard her five- and eight-year old children chatting. (34 RT 5325-5326.) When she walked down the hallway to confront them, she met a male intruder. Mercado knew Linton and testified that he was not the intruder. (RT 5326-5326.) The intruder ran back to Mercado's son's room and grabbed his clothes. Mercado's husband chased the intruder from their home. (RT 5327.)

The prosecutor objected to the admission of Mercado's testimony on the ground it was irrelevant. (RT 5321, 5334.) Defense counsel countered that the evidence raised a reasonable doubt about whether Linton was the

person Melissa saw in her bedroom some time before the murder. (RT 5334-5335.) The court excluded the testimony, finding it had no relevance "whatsover." (RT 5335.)

B. The Trial Court Properly Exercised Its Discretion in Excluding Mercado's Testimony

Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Hamilton, supra,* 45 Cal.4th at p. 913.) Trial courts have broad discretion in relevancy determinations, but lack "discretion to admit irrelevant evidence." (*Ibid.*)

Third party culpability evidence, like other types of exculpatory evidence, is admissible only if it is relevant, and its probative value is not substantially outweighed by the dangers of undue prejudice, delay or confusion of the issues. (*People v. Hamilton, supra,* 45 Cal.4th 863, 913.) Thus, courts are not required to admit any evidence, regardless of remoteness, to show a third person's possible culpability. (*People v. Prince, supra,* 40 Cal.4th at p. 1242.) Instead, to be admissible, third party culpability evidence must "be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall* (1986) 41 Cal.3d 826, 833-834; see also *Holmes v. South Carolina, supra,* 547 U.S. at p. 327, fn. * [citing *People v. Hall, supra,* as an example of a widely accepted third party culpability evidence rule].) Evidence of another person's motive or opportunity to commit a crime, without more, is insufficient to raise a reasonable doubt about a defendant's guilt. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Id.* at p. 833.)

In this case, not only did Mercado's testimony fail to link the unidentified intruder who entered her home to the man who attacked Melissa, it did not even provide a motive or an opportunity for the man to attack Melissa. As Linton points out, both men entered homes in the same neighborhood in the middle of the night. Mercado found the intruder in her home in his underwear. Melissa said the man who choked her was naked. (AOB 200; see 17 RT 2578.) But the two incidents were about three years apart. As the trial court observed, if the intrusion at Mercado's home were "relevant, then why not bring in everyone in the neighborhood who's ever been sexually assaulted within a few-mile radius, something like that, and say it's not him?" (34 RT 5323.) Accordingly, the trial court properly exercised its discretion in excluding Mercado's testimony, because it was inadmissible as third party culpability evidence and irrelevant to the issue of lingering doubt. (See e.g., *People v. Hamilton, supra,* 45 Cal.4th at p. 913 [trial court properly excluded proffered third party culpability evidence in penalty phase where evidence did nothing to connect third party to crime in any manner]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-1137 [trial court properly excluded evidence that "Pablo or some other third party involved in drug trafficking had a motive or possible opportunity" to commit the murder]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018 [trial court properly excluded evidence victim associated with Hell's Angels members and drug dealers, because the evidence failed to identify a possible suspect apart from defendant, did not link any third party to the commission of the crime, and did not establish an actual motive for murder, only a potential one].) Because there was no state law error, Linton's constitutional claims also fail. (*People v. Prince, supra,* 40 Cal.4th at p. 1243; *People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31.)

Even if the trial court had erred in excluding Mercado's testimony, the error was harmless. Given the absence of evidence linking the intruder that

entered Mercado's home to the one that tried to rape Melissa about three years later, and given Linton's confession to having done so, there is no reasonable possibility that Linton would have received a more favorable penalty phase determination but for the exclusion of Mercado's testimony.

VII. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT TESTIMONY AND PHOTOGRAPHS DURING THE PENALTY PHASE

Linton contends the trial court erred in admitting the victim impact testimony of Melissa's parents and friends and the photographs of Melissa and memorial tributes to her. (AOB 202-214.) The trial court properly admitted this evidence because it was relevant to the circumstances of the crime and Melissa's character and was not cumulative or unduly prejudicial.

Prior to trial, the defense moved for a ruling on the admissibility of the prosecution's victim-impact evidence, namely the testimony of Melissa's parents and two or three of her friends and a seven- or eight-minute videotape that contained 53 still photographs accompanied by instrumental music. (4 CT 917-1030.) The prosecutor filed a points and authorities in support of the admission of the evidence. (7 CT 1863-1868.) The court watched the videotape, heard argument about it and the proposed testimony, and overruled Linton's objections to the videotape and testimony. (13 RT 1728-1758.)

At the penalty phase, the prosecutor presented the testimony of Melissa's parents, and her friends, Jessica Holmes and Lindsay Bryan, about Melissa's life and character, and the impact that her murder had on them, Melissa's other family members, and the community. The prosecutor did not show the videotape. Instead, the prosecutor elicited testimony from Melissa's parents and Holmes about a total of 25 photographs that had been included in the videotape. (32 RT 4969, 4972-4979, 4987, 4994-4996; 32

RT 5004-5005.) Twenty-three of the photographs depicted Melissa at various points and events in her life, from infancy up until shortly before the murder. (32 RT 4969, 4972-4979, 4995-4996.) Another photograph showed the flowers on the empty chair set up in memory of Melissa at her school's graduation (32 RT 5004), and another showed the memorial plaque underneath the school's flag pole (32 RT 5004).

During examination of Melissa's father, Linton tendered a continuing objection to the victim impact evidence under *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720]. (32 RT 4991, 4994.) After Melissa's father finished his testimony, the defense complained that during the earlier testimony of Melissa's mother, two jurors cried, two other jurors wiped their eyes, and another juror was visibly upset. (32 RT 4998-4999.) The defense argued the testimony went "far beyond the bounds of the brief glimpse of victim impact evidence." (32 RT 4999.) The court overruled the objection as well as defense counsel's subsequent request to strike the testimony of Melissa's parents. (32 RT 5001, 5013.)

The prosecutor later moved to admit 13 of the 25 photographs he had shown the witnesses. (35 RT 5511.) The photographs showed: (1) Melissa's school picture taken in September or October of 1994, when Melissa was 12 years old (32 RT 4969; Exh. 1); (2) Melissa's father holding her when she was around one year old and Melissa's brother (32 RT 4972; Exh. 2); (3) Melissa sleeping at around age three (32 RT 4973; Exh. 5); (4) Melissa riding a bike at age two or three (32 RT 4973; Exh. 6); (5) Melissa in her Girl Scout vest at age ten or eleven (32 RT 4974; Exh. 8); (6) Melissa dressed as a Christmas package for a Christmas parade with the Girl Scouts (32 RT 4975; Exh. 10); (7) Melissa with her grandparents at Sea World (32 RT 4977; Exh. 14); (8) Melissa dressed for a dance recital (32 RT 4995; Exh. 17); (9) Melissa at age twelve on a horse in Canada during a summer vacation with her mother (32 RT 4978-4979; Exh. 18);

(10) Melissa at a Girl Scout father-daughter dance shortly before her death (32 RT 4995; Exh. 20); (11) Melissa with her clarinet (32 RT 4987; Exh. 21); (12) the memorial plaque for Melissa beneath the flagpole at her school (32 RT 5004; Exh. 26); and (13) Melissa at the wheel of a cruise ship during a family vacation (32 RT 4994; Exh. 27).

The defense objected to the photographs of Melissa during her infancy and early years as irrelevant because she was considerably younger than twelve in the photographs. The defense also objected to the photograph of the memorial plaque as irrelevant. (32 RT 5512.) Defense counsel additionally objected to the number of photographs being submitted and their cumulative nature. Defense counsel argued the jurors were supposed to be making a reasoned, rational decision and the photographs would evoke the same emotions that the earlier testimony did. Consequently, the defense asserted the admission of the photographs would deny Linton his rights to due process, a fair trial, an impartial jury, and a reliable death verdict. (35 RT 5513-5514.) The court overruled the objections and admitted the photographs. (35 RT 5514.) The court rulings were proper.

In *Payne v. Tennessee,* the Supreme Court recognized that the specific harm caused by a defendant's criminal act is a relevant consideration at sentencing, and that, in order to understand this harm, states may permit the introduction of victim impact evidence that shows the uniqueness of the victim as a human being. (*People v. Dykes, supra,* 46 Cal.4th at p. 781.) "The high court determined that the state should not be prevented from 'offering a "quick glimpse of the life" which a defendant "chose to extinguish," [citation], or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.'" (*Id.* at p. 781, quoting *Payne v. Tennessee, supra,* 501 U.S. at p. 822, alteration in original.) Thus, states "'may legitimately conclude that evidence about the

victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.'" (*People v. Dykes, supra,* 46 Cal.4th at p. 781, citing *Payne v. Tennessee, supra,* 501 U.S. at p. 827.) Victim impact evidence is barred under the federal Constitution "only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*Tennessee,* at p. 825.)

In California, victim-impact impact evidence and related "victim character" evidence is admissible as a circumstance of the crime under section 190.3, factor (a). (*People v. Robinson* (2005) 37 Cal.4th 592, 560.) Such evidence is inadmissible, however, if it "invites a purely irrational response from the jury. . . ." (*People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057.) Victim impact evidence may be provided by the victim's family members and friends. (*People v. Benavides* (2005) 35 Cal.4th 69, 107.)

The trial court properly admitted the victim impact testimony of Melissa's parents, Holmes, and Bryan under section 190.3, factor (a). Their testimony provided a brief glimpse in the life of Melissa. The jurors heard that Melissa was part of a tight-knit family. She loved animals, danced, played the clarinet and saxophone, went on long bike rides with her father, was a Girl Scout, and enjoyed vacations with her immediate and extended family members. The testimony also described Melissa's character, namely that she was a kind, affectionate, talented, and loving person. Additionally, the witnesses informed the jury of the profound and lasting impact Melissa's murder had on them and Melissa's brother and grandparents. The testimony further established that Melissa's classmates and the community also mourned her murder by placing flowers on an empty chair at her high school's graduation, with a memorial plaque underneath the school flag pole, and by dedicating the Christmas parade to her. This "testimony, though emotional at times, fell far short of anything that might implicate the Eighth Amendment." (*People v. Huggins* (2006) 38 Cal.4th

175, 238-239.) Instead, the testimony "is what one would expect in any case involving the murder of a child." (*People v. Smith* (2005) 35 Cal.4th 334, 365 [admissible victim-impact evidence included mother's testimony concerning the loss of her child: """I don't think the pain will ever go away . . . I think the worst part of it is . . . what goes on in my mind what happened to him. What he went though is . . . just very difficult"""]; see also *People v. Dykes, supra,* 46 Cal.4th at p. 782 [testimony of victim's grandmother and sister about feeling of loss of child victim and testimony of grandmother regarding victim's plan to use his allowance to buy a toy for his brother on the day of the murder properly admitted as circumstances of the crime].)

And, contrary to Linton's position, the testimony was not too extensive. This Court has "rejected the claim that the evidence must be confined to a single witness." (*People v. Dykes, supra,* 46 Cal.4th at p. 783.) Here, the prosecutor's questioning of the four victim-impact witnesses was relatively brief – eighteen pages of transcript in the case of Mrs. Middleton, twelve pages of transcript in the case of Mr. Middleton, six pages of transcript in the case of Jessica Holmes, and four pages of transcript in the case of Lindsay Bryan. Accordingly, there was no error. (*Id.* at p. 782 [rejecting similar claim].)

Linton's challenge to the photographs fares no better. The photographs and accompanying testimony properly humanized Melissa, which is what victim-impact evidence is designed to do. (*People v. Kelly* (2007) 42 Cal.4th 763, 797.) The photographs provided a factual chronology of Melissa's life and thereby helped the jury understand the loss to her family and society that ensued from the murder. The jurors knew Melissa better after seeing the photographs and hearing the accompanying testimony, and neither the photographs nor the descriptive testimony expressed outrage. Moreover, the photographs did not emphasize any

particular period of Melissa's brief life; they covered her whole life. Thus, the photographs and accompanying testimony were relevant to the circumstances of the crime and were not unduly prejudicial. Consequently, the trial court properly exercised its discretion in admitting them. (See e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 366, disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22 [no error in admitting 14-minute videotape depicting victims' life history where narrating witness was objective and refrained from inappropriate comments that might arouse emotion, and videotape properly humanized victims, helped the jury understand the loss to the family and society with the factual chronology of their lives, and enabled the jury to know the victims better without emphasizing any particular period of their lives]; *People v. Kelly, supra,* 42 Cal.4th at p. 797 [holding no error in admission of 20-minute videotape containing a montage of still photographs and video clips of victim's life from infancy until shortly before she was killed at age 19 and ended with a view of victim's grave marker, where victim's mother calmly and unemotionally narrated the tape, because the tape was relevant and not unduly emotional].)

This Court has cautioned that "'[c]ourts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. . . . [They] must strictly analyze evidence of this type and, if such evidence is admitted, [they] must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion.'" (*People v. Zamudio, supra,* 43 Cal.4th at p. 367, quoting *People v. Prince, supra*, 40 Cal.4th at p. 1289, alterations in original.) Here, the court watched the videotape that contained the twenty-five still photographs prior to trial. As Linton points out, some of the jurors apparently wept or wiped their eyes during Melissa's mother's testimony. But this did not render her

testimony, the testimony of the other victim impact witnesses, or the photographs inadmissible. "[E]vidence concerning the impact of the death of a child on his or her family and friends is particularly poignant, but within the meaning of *Payne, supra*, 501 U.S. 808, such evidence remains relevant to the jury's understanding of the harm caused by the crime." (*People v. Dykes, supra*, 46 Cal.4th at pp. 781-782 [parallel citations omitted].) Because the victim impact evidence did not inject the proceedings with a legally impermissible level of emotion, there was no error.

Even assuming the trial court erred in not limiting the victim impact evidence, no prejudice ensued. Even without the victim impact testimony, the circumstances of the murder itself – a twelve-year-old girl was strangled to death by her trusted, next door neighbor during the course of an attempted rape, midday in a suburban neighborhood – left little doubt about the impact of the crime on Melissa's parents, her friends, and the community. (Cf. *People v. Davis, supra,* 46 Cal.4th at p. 618 ["Even without the victim impact testimony, the evidence of the prior crimes themselves left little doubt about the impact of those crimes on defendant's victims."].) Similarly, "no reasonable possibility of prejudice arose from the admission of [the] quite ordinary family photographs." (*People v. Martinez* (2003) 31 Cal.4th 673, 693.) Accordingly, any error does not warrant a reversal of the death judgment.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.85

The trial court instructed the jury with CALJIC No. 8.85 on the factors in aggravation and mitigation enumerated in Penal Code section 190.3, subdivisions (a) through (k). (35 RT 5525-5527; 13 CT 3656-3657.) Linton contends the trial court violated federal constitutional rights to due process, a fair trial and a reliable penalty determination by including, over

his objection, six mitigating factors that he contends were not supported by the evidence, namely factors (d), (e), (f), (g), (h) and (j). (AOB 215-222; see 13 CT 3621-3622; 32 RT 5023-5027.) He further contends the trial court violated his constitutional rights by including, over his objection, the word "extreme" in describing the mental or emotional disturbance in factor (d). (AOB 218, 221-222; see 13 CT 3632-3633; 32 RT 5040-41.)

As Linton acknowledges (AOB 218-220), this Court has repeatedly rejected both of his claims in past decisions. (E.g., *People v. McWhorter*, *supra*, 47 Cal.4th at p. 378 [claim inclusion of inapplicable factors violates the Constitution has been previously rejected by this Court, and inclusion of "extreme" in factor (d) does not serve as an improper barrier of consideration of mitigating evidence]; *People v. Lindberg* (2008) 45 Cal.4th 1, 51 [noting Court had previously rejected challenges to use of the modifier "extreme" and declining to reconsider prior decisions]; *People v. Harris, supra,* 43 Cal.4th at pp. 1320-1321 [claim trial court violated constitutional rights by failing to delete inapplicable factors has been repeatedly rejected by this Court].) Because Linton provides no persuasive reason why this Court should reconsider its prior precedent, his instructional error claims fail.

IX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

Linton contends the trial deprived him of his rights to due process, a fair trial, and a reliable penalty determination when it instructed the jury with CALJIC No. 8.88. (AOB 223-232.) Linton's four attacks on CALJIC No. 8.88 have already been considered and rejected by this Court in prior cases. This Court should do likewise here.

The jury was instructed with CALJIC No. 8.88, in part, that "[t]o return a verdict of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the

mitigating circumstances that it warrants the death penalty instead of life without parole." (35 RT 5528.)

Linton first claims that the instruction was flawed because it failed to inform the jurors that if they determined the mitigating factors outweighed the aggravating ones, they must impose a sentence of life without the possibility of parole. (AOB 226-228.) This Court has repeatedly and consistently rejected this claim. (E.g., *People v. Watson* (2008) 43 Cal.4th 652, 702; *People v. Zamudio, supra,* 43 Cal.4th at p. 372; *People v. Carter* (2003) 30 Cal.4th 1166, 1226; *People v. Duncan* (1991) 53 Cal.3d 955, 978 (*Duncan*).) Linton, however, takes issue with this Court's decision in *Duncan.* There, this Court held that "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*Duncan,* at p. 978.) This Court further concluded that "[t]here was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (*Ibid.*) Linton challenges the latter conclusion. Specifically, after noting that this Court did not cite any supporting authority, Linton argues that the conclusion conflicts with opinions that have disapproved instructions that emphasize the prosecution's theory and ignore or minimize the defense theory. (AOB 227, citing *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Santana* (2000) 80 Cal.App.4th 1194, 1209.) "Contrary to [Linton's] characterization of the instruction, CALJIC 8.88 highlights the significant burden that must be satisfied before a verdict of death may be returned, and thereby conveys that life in prison without the possibility of parole is the appropriate punishment if this burden is not met." (*People v. Page* (2008) 44 Cal.4th 1, 57.)

Linton's second contention is that the trial court erred when it denied the defense request to supplement CALJIC No. 8.88 with an instruction that the jury did not need to find mitigation in order to impose a sentence of life without the possibility of parole. (AOB 228-229; see 32 RT 5055-5056.) "[U]nder CALJIC No. 8.88, which was given here, '[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no mitigating circumstances were found to exist.'" (*People v. Geier* (2007) 41 Cal.4th 555, 616, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 52; see *People v. Lindberg, supra,* 45 Cal.4th at p. 52 [rejecting claim CALJIC No. 8.88 is unconstitutional because it fails "to inform the jury that it may return a sentence of life without the possibility of parole even in the absence of mitigating evidence"]; *People v. Lewis* (2008) 43 Cal.4th 415, 533 [trial court was not required to tell jury it had discretion to impose sentence of life without the possibility of parole even if there were no mitigating circumstances].)

Third, Linton argues CALJIC No. 8.88's "so substantial" standard for evaluating mitigating and aggravating circumstances is "vague, directionless and impossible to quantify." (AOB 230.) This Court has consistently rejected this argument. (E.g., *People v. Carrington* (2009) 47 Cal.4th 145, 199 [not vague]; *People v. Lewis, supra,* 43 Cal.4th 415, 533 [same]; *People v. Geier, supra,* 41 Cal.4th at p. 619 [same]; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316 [not vague, directionless or impossible to quantify]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 591 [same].)

In arguing to the contrary, Linton notes that the Georgia Supreme Court ruled that the word "substantial" rendered a Georgia capital instruction impermissibly vague. (AOB 230, citing *Arnold v. State* (1976) 236 Ga. 534, 224 S.E.2d 386 (*Arnold*).) Linton's reliance on *Arnold* is misplaced because the difference between the use of the word "substantial"

in the instruction in *Arnold* and CALJIC No. 8.88 are "obvious." (*People v. Breaux, supra,* 1 Cal.4th at p. 316, fn. 14.) The *Arnold* jurors were asked to determine, "in isolation and without further guidance, whether a defendant's prior criminal record was 'substantial[.]'" (*People v. Page, supra*, 44 Cal.4th at p. 56.) In contrast, here the jurors "were instructed extensively with respect to the manner of performing their task and were called upon to compare the totality of the aggravating circumstances with the totality of the mitigating circumstances." (*Ibid;* see 35 RT 5535-5528.) The instructions "adequately explained that the jurors 'could return a death verdict only if aggravating circumstances predominated and death is the appropriate verdict.'" (*People v. Page,* at p. 56, quoting *Breaux, supra*, at p. 316.; see 32 RT 5527-5528) Accordingly, Linton's attack on the "so substantial" standard should be rejected.

Fourth and finally, Linton asserts that CALJIC No. 8.88 failed to inform the jury that the central decision at the penalty phase is the determination of appropriate punishment, not whether death is warranted. (AOB 231.) Again, this Court has repeatedly and consistently rejected this argument. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Lewis, supra*, 43 Cal.4th at p. 533; *People v. Breaux, supra,* 1 Cal.4th at pp. 315-316.) Linton provides no persuasive reason to reconsider this precedent. Accordingly, as with his other attacks on CALJIC No. 8.88, this claim should be rejected.

X. LINTON FORFEITED SEVERAL OF HIS PROSECUTORIAL MISCONDUCT CLAIMS; ALL OF HIS CLAIMS LACK MERIT

Linton contends the prosecutor committed misconduct on numerous occasions during his penalty phase closing argument, violating his constitutional rights to due process and a fair trial. (AOB 233-256.) Linton forfeited many of his claims by failing to object. In any event, the

prosecutor did not commit misconduct, and even if he had, no prejudice ensued.

Improper prosecutorial argument violates the "federal Constitution when it '"so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."'" (*People v. Cash* (2002) 28 Cal.4th 703, 733, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 18 [106 S.Ct. 2464, 2471, 91 L.Ed.2d 144].) Improper argument violates state law "when it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*Ibid*, quoting *People v. Earp* (1999) 20 Cal.4th 826, 858.) Penalty phase misconduct requires a reversal only if there is a reasonable possibility the jury would have rendered a more favorable verdict absent the error. (*People v. Dykes, supra*, 46 Cal.4th at p. 786, citation omitted.) To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection and request an admonition, unless an admonition would not have cured the harm. (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

Linton recognizes that he failed to object to many of the parts of the prosecutor's arguments that he now claims were improper. He asserts that this Court should nonetheless consider the merits of his claims because: (1) an admonition would not have cured the harm; (2) an objection would have been futile; (3) the errors individually and collectively deprived him of "certain fundamental constitutional rights"; (4) the trial court had some responsibility to intervene on its own initiative; and (5) counsel was ineffective in failing to object. (AOB 233-236.)

As the below discussion of the unobjected to claims of alleged misconduct shows, a timely objection and admonition would have cured any harm. The record refutes Linton's claim that a proper objection would have been futile or that defense counsel believed this was so as defense counsel continued to object and the court sustained defense counsel's

meritorious objection. (E.g., 36 RT 5612, 5618, 5620; see *People v. Friend, supra*, 47 Cal.4th at p. 30.) Linton's fundamental rights argument does not provide a basis for avoiding the forfeiture rule. (*People v. Burney* (2009) 47 Cal.4th 203, 266.) Nor does his assertion that the trial court had "some responsibility" to intervene on Linton's behalf. (See *People v. Daniels* (1991) 52 Cal.3d 815, 891 [rejecting argument court has a duty during penalty phase "to protect against the danger that a verdict is the product of improper argument whether or not defendant objects"].) Finally, because the prosecutor did not commit prejudicial misconduct, defense counsel was not ineffective in failing to object. (*People v. Boyette, supra,* 29 Cal.4th at p. 433.)

A. The Prosecutor Properly Attacked the Defense Argument and Case

Linton argues the prosecutor improperly demonized defense counsel at several points during his final argument. (AOB 238-241.) Linton forfeited his claims by failing to object to any of the comments discussed below. In any event, there was no misconduct.

A "prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) But a prosecutor may not "cast aspersions on defense counsel or suggest that counsel has fabricated a defense." (*People v. Mendoza* (2007) 42 Cal.4th 686, 701.) The question on appeal when a defendant claims a prosecutor improperly impugned the integrity of defense counsel during argument is "'whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Cash, supra,* 28 Cal.4th at p. 733.)

Linton first contends the prosecutor improperly argued, "Defense counsel will belittle the facts, accuse me of speculation. I didn't create this evidence." (36 RT 5606.) But in so arguing the prosecutor did not engage

in the forbidden tactics of falsely accusing defense counsel of fabricating a defense or deceiving the jury in another manner. (*People v. Huggins, supra,* 38 Cal.4th at p. 207.) Instead, the prosecutor "attacked the defense case and argument." (*People v. Smith* (2003) 30 Cal.4th 581, 635.) Just before the prosecutor made the above-quoted statements, he asserted that Linton masturbated in Melissa's underwear after he killed her. Defense counsel interjected, "Your Honor, objection. There's absolutely no evidence of that whatsoever." (36 RT 5606.) The court overruled the objection, finding the argument came "within the reasonable range of the evidence." (36 RT 5606.) And during closing argument the previous day, co-defense counsel attempted to minimize the facts of the crimes and asserted that the prosecutor had speculated during his opening argument. (35 RT 5571-5580.) Attacking an opponent's case and argument is not only proper, it is "the essence of advocacy." (*Id.* at p. 635.) Consequently, it is not reasonably likely the jury construed the challenged comment as a personal attack on defense counsel's integrity. (*People v. Huggins,* at p. 207 [rejecting claim prosecutor improperly attacked integrity of defense counsel by arguing, "Now, [defense counsel] has a tough job, and he tried to smoke one past us," and that counsel "will admit only what he has to admit and no more. He will come in at the lowest price possible."]; *People v. Cole* (2004) 33 Cal.4th 1158, 1203 ["it is not reasonably likely that the jury understood the prosecutor's references to defense counsel as 'deceiv[ing],' 'unfair,' 'misleading,' or 'tricky' to be personal attacks on counsel's integrity"].)

Linton's remaining claims are likewise without merit. As Linton points out, the prosecutor argued:

> "The defense in this case has been designed to desensitize you to the crimes that the defendant committed. I want you to recognize, if you have not already, the language of manipulation. Her murder is referred to as a tragedy. It's

> not a tragedy, it's a murder. It's repeatedly said that Melissa died. Melissa didn't die, she was killed. [She was strangled to death. The defendant was abusing controlled substance. He was self-medicating. You have repeated use of the defendant – defendant's first name referring to his as Daniel and as a boy.] The defense has attempted to present evidence of his entire childhood to you, especially at the ages of five and eight, to attempt to humanize him, to divert attention away from the crime he committed and the reason why he's here.
>
> "And perhaps the most glaring example of a technique used to divert attention away from the defendant, who is the focus of these proceedings, is to paint other people, other persons, as the bad guy, as the bad guy. It's been the big bad D.A. in this case who's overfilled it, who's overcharged it, who's made or tried to make it look, according to the defense, as if the defendant did more than he actually did, committed more crimes than he actually did.
>
> "And Mr. Ebert gets up here and tries to analogize the charges in this case to a disciplinary marker [he got in jail for possession of dice written by a correctional officer]."

(AOB 239, citing 36 RT 5609-5610 [bracketed language in transcript].)

This was a proper attack on defense counsel's earlier argument and the defense case. Defense counsel referred to Melissa's murder as a "tragedy" in opening statement and closing argument. (33 RT 5097, 5105; 35 RT 5571, 5593.) Defense counsel also stated during closing argument that "Melissa died." (35 RT 5572, 5581, 5591). And, as the summary of the defense penalty phase evidence shows, Linton presented evidence of his entire childhood, focusing on evaluations that occurred when he was five and eight years old. Defense counsel emphasized this evidence during argument. (35 RT 5583-5584.) Furthermore, defense counsel argued that Linton did not have any criminal problems until he started associating with Montero, and that the prosecutor overcharged the case. (35 RT 5593, 5579-5580.) The defense also argued that the "real tragedy" was that instead of

admitting and addressing Linton's problems, his father swept them "under the rug." (35 RT 5589.) Finally, defense counsel analogized what he suggested was the overcharging in Linton's criminal case to the disciplinary marker that Linton received for possessing dice. (35 RT 5580-5581.) Thus, there was no misconduct. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 207; *People v. Cole, supra,* 33 Cal.4th at p. 1203.)

The prosecutor also argued, "The defense will belittle the charges, they belittle the evidence, they belittle the crime, all for the goal of diverting attention away from Daniel Linton." (36 RT 5610-5611.) Again, this was an attack on the defense case, not counsel's integrity. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 207; *People v. Cole, supra,* 33 Cal.4th at p. 1203.) During closing argument, defense counsel minimized the crimes and evidence and argued the prosecutor overcharged the case. (35 RT 5574-5581.)

The prosecutor further argued:

> And they know they only need one of you. They only need one of you to fall for their diversion. They want you to believe the defendant is not that bad. It's his first time committing a crime. It's his first time, so he deserves the more lenient sentence. Think about that argument for what it is.

(36 RT 5613.)

Defense counsel earlier emphasized that Linton had never been in trouble for anything before and had mental and emotional problems for which he did not receive adequate treatment. (35 RT 5582-5594.) Consequently, there is no reasonable likelihood the jury viewed the prosecutor's argument as an attack on defense counsel's integrity rather than the defense argument. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 207; *People v. Cole, supra,* 33 Cal.4th at p. 1203.)

The prosecutor argued:

> Particularly appalling is the audacity of defense counsel in calling or evoking Melissa Middleton's name in an attempt to make a plea for the lesser sentence in this case. Not only appalling, it was offensive.

(36 RT 5618.)

Defense counsel argued that Melissa would not want Linton to be sentenced to death given that she was the "kind of person that brought a wasp home . . . ." (35 RT 5590-5591.) The prosecutor's comment attacked this argument, not defense counsel's integrity. Thus, there was no misconduct. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 207; *People v. Cole, supra,* 33 Cal.4th at p. 1203.)

As Linton notes, the prosecutor further argued, "'[t]he defense, in the People's position, has exaggerated the abuse the defendant has suffered in his childhood.'" (36 RT 5608.) During penalty phase arguments, prosecutors may express their beliefs if they "are based on the evidence presented." (*People v. Cook* (2006) 39 Cal.4th 566, 613.) Here, there was a disparity in the childhood abuse described by Linton's family members and what Linton himself reported to Dr. Rath. (Compare 12 CT 3391-3395, 3399 with 33 RT 5196-5208, 5246, 5250-5251; 34 RT 5258-5261, 5269, 5277, 5305; 35 RT 5475, 5478.) This disparity "was a legitimate subject of prosecutorial comment." (See e.g., *Id.* at p. 613 [disparity between evidence and its characterization at trial as a kidnapping was a legitimate subject of prosecutorial comment].) Moreover, there is no reasonable likelihood that the jury construed the prosecutor's exaggeration comment as an attack on the integrity of defense counsel. Finally, the prosecutor followed the above-quoted sentence by stating, "Undue emphasis has been placed, I would suggest, on his personality flaws and social inadequacies. They do not mitigate the crime." (36 RT 5608.) The totality of this portion of the argument was a proper response to defense

counsel's discussion of Linton's emotional problems and "[m]ental handicaps[,]" and how Linton "never really had a chance[.]" (35 RT 5582-5590 [defense counsel's argument].) Accordingly, the prosecutor did not commit misconduct.

Even if the jury could have construed one or more of the above-quoted comments as an attack on defense counsel's integrity, no prejudice ensued. Except for one, the challenged comments were relatively brief. And all were in response to the defense arguments and case. Additionally, the trial court instructed the jurors that they were to decide penalty based on the evidence presented throughout the case and that they were to be guided by the statutory factors set forth in section 190.3. (35 RT 5525-5527; 13 CT 3655-3657.) The jurors were also instructed that the statements of counsel were not evidence. (17 RT 2500; 30 RT 4557; 13 CT 3447; see also 36 RT 5572 [defense counsel reminding jurors that the statements of counsel are not evidence].) The jury is presumed to have followed these instructions. (*People v. Smith* (2007) 40 Cal.4th 483, 517.)

Finally, the circumstances in aggravation were overwhelming. Linton used the keys that Mr. and Mrs. Middleton entrusted to him to enter their home and attempt to rape twelve-year-old Melissa while they were sleeping in the nearby bedroom. (12 CT 3313, 3319, 3365; 17 RT 2564, 2567, 2588.) When Melissa awoke and started to say she was going to wake her parents, Linton grabbed her by the throat and left as she gasped for air. (12 CT 3313.) Undeterred by the possibility of getting caught, Linton returned to the Middletons' home during broad daylight about two months later, again used the their keys to enter their home, and then strangled Melissa to death while he molested and attempted to rape her. (12 CT 3307, 3318, 3328, 3354, 3366, 3368.) Afterward, he wiped nearby surfaces to remove his fingerprints, returned to his house, showered, laundered his clothes, and threw the Middleton's keys, Melissa's semen-stained underwear, and

Melissa's ring in the trash. (12 CT 3344-3345, 3357-3358; 19 RT 2801-2806.) In view of these circumstances, there is no reasonable possibility that Linton would have received a more favorable verdict had the prosecutor not made one or more of the above-quoted statements. (See *People v. Young* (2005) 34 Cal.4th 1149, 1193 [no prejudice ensued from prosecutor's characterization of defense counsel as liars during guilt-phase argument].)

B. The Prosecutor Did Not Improperly Vouch for His Team or His Case

Linton contends that the prosecutor also improperly vouched for key prosecution witnesses in the following portion of his argument, which, as noted above, he also contended was an improper attack on defense counsel's integrity. Respondent has set forth the challenged portion of the argument again here for convenience.

> And perhaps the most glaring example of a technique used to divert attention away from the defendant, who is the focus of these proceedings, is to paint other people, other persons, as the bad guy, as the bad guy. It's been the big bad D.A. in this case who's overfiled it, who's overcharged it, who's made or tried to make it look, according to the defense, as if the defendant did more than he actually did, committed more crimes than he actually did.

(AOB 242, quoting 36 RT 5609-5610.)

Linton forfeited this claim by failing to object. In any event, there was no improper vouching. It is misconduct for prosecutors to bolster their case "'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 336, quoting *People v. Huggins, supra,* 38 Cal.4th at pp. 206-207.) It is also misconduct for a prosecutor "'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.'" (*Id.,* quoting *People v.*

Cook, supra, 39 Cal.4th at p. 593.) The problem with such comments is that jurors may construe them as permitting them "'to avoid independently assessing witness credibility and to rely on the government's view of the evidence.'" (*People v. Bonilla, supra,* 41 Cal.4th at p. 336.)

Linton contends the prosecutor's argument was "problematic because it implies that the district attorney is the 'good guy' who has evidence that the jury does not know about and that the jury should trust him, as the public prosecutor, to be doing the right thing." (AOB 242.) But rather than vouching for his case or any of the witnesses, the prosecutor was simply commenting on a defense tactic, namely, that the defense was trying to divert attention from Linton's culpability by painting others, including the prosecutor, as the bad guys. "It is not misconduct for a prosecutor to argue that the defense is attempting to confuse the jury." (*People v. Kennedy* (2005) 36 Cal.4th 595, 626.) Moreover, given the content of the statement, there is no reasonable likelihood that the jury would have viewed it as invoking the personal prestige of the District Attorney's Office or as suggesting that the prosecutor had evidence that corroborated the prosecution's theory that had not been made available to the jury. Accordingly, there was no misconduct. (See e.g., *Id.* [rejecting claim that prosecutor improperly vouched for his case when he argued to the jury that defense counsel's "'idea of blowin' smoke and roiling up the waters to try to confuse you is you put everybody else on trial'"].)

Even if there had been misconduct, there is no reasonable possibility Linton would have received a more favorable verdict without the comment given its brevity and the context in which it was made, the court's instructions that the arguments of counsel were not evidence, and the strength of the aggravating circumstances. (See *People v. Loker, supra,* 44 Cal.4th at p. 740 [improper vouching was harmless under any standard where court promptly admonished the jury about prosecutor's personal

views and reminded jurors on other occasions that the arguments of counsel were not evidence and where prosecutor emphasized his opinion was not determinative].)

C. The Prosecutor Argued Reasonable Inferences Based on the Evidence

"'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial.'" (*People v. Smith, supra,* 30 Cal.4th at p. 617, quoting *People v. Dennis* (1998) 17 Cal.4th 468, 522.) The reasonableness of such inferences is a question for the jury to determine. (*Ibid.*) It is misconduct, however, "for the prosecutor to state facts not in evidence or to imply the existence of evidence known to the prosecutor but not to the jury." (*Ibid.*)

1. The prosecutor properly argued that Linton masturbated in Melissa's underwear after the murder

Linton challenges the prosecutor's argument about his post-murder masturbation. (AOB 243-245.) The prosecutor argued, "The defendant masturbated after he killed Melissa Middleton. It's a disgusting thought, I know." (35 RT 5559.) Linton's counsel interjected, "Your Honor, there's no evidence of that." (35 RT 5559.) The prosecutor continued, "The evidence shows that[,]" and the court interjected, "[the prosecutor] is discussing reasonable interpretations. It's up to the jurors to determine whether or not that's reasonable." (35 RT 5559.) The prosecutor continued,

> Why else does he destroy or attempt to destroy and conceal that underwear after the commission of the murder? He had had that underwear for months before. Why doesn't he just throw it away after it's found in his room or in – he does the laundry or something? He's got possession of it. [¶] Does it make sense that he's just going to have this stuff? Why does – why does he use it to masturbate? Melissa's dirty underwear. Think about it. [¶] The reasonable

> inference from all of this evidence, ladies and gentlemen, is – it's overwhelmingly clear. He stole it after he murdered her because he's killed her.

(35 RT 5559.)

During final argument, the prosecutor asserted:

> And the most glaring, unremorseful and disgusting fact of this case is that with Melissa's face, dead face, fresh in his mind, the defendant, Daniel Linton, his sexual urges unrequited, had to satisfy himself using Melissa's underwear.

(36 RT 5605-5606.)

Defense counsel objected, "There's absolutely no evidence of that whatsoever." The court ruled, "Again, it's something that the jurors can determine for themselves, if it comes within the reasonable range of the evidence." (36 RT 5606.) After defense counsel indicated she was also objecting under the federal Constitution, the prosecutor continued:

> Defense counsel will belittle facts, accuse me of speculation. I didn't create the evidence. I didn't have Melissa's underwear in my possession and put them in the trash can with the keys, with her ring. The defendant did. And it's that proximity in time and place in his possession that leads to rational inferences. They didn't just happen to fall into the trash at the same time by somebody else putting them there other than the defendant. [¶] With the face of death fresh in his mind, he had to – and excuse me for being blunt – get himself off, which shows you his true intent and his obsession with Melissa Middleton.

(36 RT 5606.)

As the above-quoted portions of argument show, the prosecutor did not argue a fact not in evidence or imply he knew of evidence that the jury did not know about. Instead, the prosecutor properly asked the jury to draw an inference from the evidence presented at trial that Linton masturbated in a pair of Melissa's underwear after he killed her. The evidence adduced at trial amply supported the prosecutor's argument. Melissa's shorts were

unzipped when her mother found her dead body. (17 RT 2555, 2558.) Although there was no semen on Melissa's shorts or the underwear she had on underneath her shorts, Linton admitted to the police that the thought of raping Melissa crossed his mind when he unzipped her shorts. (12 CT 3366; 21 RT 3235-3238.) Linton also admitted that he attempted to rape Melissa about two months before the murder. (12 CT 3364.) Linton said he used the Middleton's keys to enter the Middleton's home on the day of the murder, and returned to his home afterward. (12 CT 3318.) He also indicated that the Middleton's keys were in the trash inside his home. (12 CT 3319.) The police found the Middleton's keys along with Melissa's ring and semen-stained, soiled underwear in Linton's kitchen trash. (19 RT 2800-2806; 21 RT 3261-3264.) DNA analysis established that Linton was the source of the semen that was on parts of Melissa's underwear, but not the crotch area. (21 RT 3261, 3265-3271.) As the prosecutor argued to the jury, if Linton had just found the ring and dirty underwear at his house, how would he have known that they belonged to Melissa? Moreover, if he had found the underwear at his home and knew they were Melissa's, why would he care or masturbate in them? (35 RT 5559.) While Linton complains that the prosecutor's argument was speculative and without foundation, the reasonableness of the prosecutor's inference, which the court and prosecutor clearly informed the jury was an inference, was a question for the jury. Accordingly, there was no misconduct. (See e.g., *People v. Boyette, supra,* 29 Cal.4th at p. 436 [rejecting misconduct claim where prosecutor's argument was a reasonable inference from the evidence and unobjectionable rhetoric].)

Even if the prosecutor had erred, no prejudice ensued. Again, the prosecutor and the court made it clear to the jury that the prosecutor was drawing an inference from the evidence that Linton masturbated in Melissa's underwear after the murder. The prosecutor also identified the

evidence that he believed supported the inference. (35 RT 5558-5561.) Additionally, the jury was instructed that it was to "determine what the facts are from the evidence received during the entire trial, unless you are specifically instructed otherwise." (35 RT 5525; 13 CT 3655.) The jury was also instructed that the statements of counsel were not evidence. (17 RT 2500; 30 RT 4557; 13 CT 3447; see also 36 RT 5572.) Furthermore, defense counsel argued to the jury that the prosecutor's suggestion that Linton masturbated over Melissa's body was a "vile fantasy," as there was no fresh semen on the underwear in his trash, no semen on the clothes Linton wore at the time of the murder, and no evidence as to when Linton masturbated in Melissa's underwear. (36 RT 5669.) Consequently, it is not reasonably possible that, but for the challenged comments, Linton would have received a more favorable result. (*People v. Valdez* (2004) 32 Cal.4th 73, 134 [any possible prejudice from prosecutor's misstatement of evidence was mitigated by the court's instruction that counsels' statements were not evidence].)

2. The prosecutor properly inferred from the evidence that Linton did not show remorse on the day of the murder

Linton complains that the prosecutor improperly argued that he expressed no remorse on the day of the murder because there was no evidence to support this argument. He also appears to be asserting that the prosecutor violated his right to confrontation in so arguing. (AOB 245-246.)

Before quoting the portion of the argument Linton challenges, it is useful to place the prosecutor's comments in context. The prosecutor began his discussion on Linton's lack of remorse by noting that Linton left Melissa propped up at the foot of her mother's bed for her mother to find. Linton did not call 911, which the prosecutor asserted is what a normal

person who had panicked and accidentally killed someone would have done. (36 RT 5604-5605.) The prosecutor noted Linton instead "covered up his tracks[,]" stole one of Melissa's rings and a pair of her soiled underwear, and masturbated in the stolen underwear. (36 RT 5605-5606.) The prosecutor continued:

> Nothing Daniel Linton did the next day, November 30th, 1994, when the officer came to pick him up at his house to talk to him some more, nothing he did that day can erase or mitigate what he had done to Melissa and to her family the prior day. When you're looking for any sign of remorse that is important as a mitigating factor in this case, look at his actions on the day that it counts, on the day that it matters, on the day when one would be revolted.

(36 RT 5606-5607.)

At this point, defense counsel objected: "Your Honor, Sixth Amendment right to confrontation. We had no opportunity to cross-examine this witness." After the court overruled the objection, the prosecutor argued:

> The day where one would be revolted by one's conduct if one had in him that human feeling, natural emotion, and not the mentality of a killer. That's when it counts. Not after police suspicion has focused on you, not after they have been asking probing questions about a prior incident, not after they've noticed scratches on your arm, and not after they've asked you to come down to the police station to talk further about the case. It wasn't until the next day that Mr. Linton ever expresses any sorrow or grief.

(36 RT 5607.) Defense counsel renewed her Sixth Amendment objection and the court again overruled it. (36 RT 5607.) The prosecutor then questioned whether Linton would have turned himself in but for Detective Stotz's observations of his nervousness, the scratches on his arm, and the inconsistencies in his statements at the door. (36 RT 5607.)

Linton contends the objected-to portions of the prosecutor's argument were improper. The prosecutor's argument did not violate Linton's right to confrontation because the prosecutor did not inject his own unsworn testimony concerning his observations of Linton during the interview in Linton's bedroom. Instead, the prosecutor's comments were based on the evidence that was presented to the jury through the testimony of Detectives Stotz and Lynn about the questioning of Linton at his front door and the testimony of Detective Stotz about what Linton said during the bedroom interview. (17 RT 2628-2631; 18 RT 2744-2766.) Thus, the prosecutor did not commit misconduct in this regard. (See e.g., *People v. Johnson* (1992) 3 Cal.4th 1183, 1224-1226 [rejecting claim prosecutor injected his unsworn testimony in closing argument where argument was sufficiently supported by the testimony of two witnesses].)

Linton forfeited his claim that the prosecutor's argument assumed a fact not in evidence by failing to object on this ground below. Even if he did not, the claim lacks merit because the prosecutor was properly inviting the jury to draw an inference that Linton lacked remorse from the evidence that he failed to call 911, tried to cover "his tracks" (12 CT 3344-3345, 3357-3358; 19 RT 2801-2806), masturbated in Melissa's underwear after the murder (12 CT 3318-3319, 3364, 3366; 19 RT 2800-2806; 21 RT 3261-3271), and did not confess until the next day, after the police suspicion had focused on him (17 RT 2628-2631; 18 RT 2744-2766, 2768-2769; 12 CT 3288). In arguing to the contrary, Linton urges that the prosecutor's characterization of him as lacking in remorse was inaccurate. He notes that he confessed the following morning soon after he was picked up and explained to the police that he did not confess the night before because he did not want to do so in front of his parents. (AOB 246.) But the reasonableness of the prosecutor's inference was a question for the jury to decide. Because the prosecutor did not rely on facts not in evidence and

instead simply invited the jury to draw a particular inference from the evidence, there was no misconduct. (See *People v. Wharton* (1991) 53 Cal.3d 522, 593.)

But even if the prosecutor's argument had been improper, a reversal would not be warranted. Defense counsel countered the prosecutor's argument by noting that Linton did express remorse in the police car the day after the murder when he admitted he killed Melissa. (36 RT 5677.) The court also instructed the jury that the statements of counsel were not evidence. (17 RT 2500; 30 RT 4557; 13 CT 3447; see also 36 RT 5572.) Under these circumstances, there is no reasonable possibility Linton would have received a more favorable verdict but for the prosecutor's remorse argument. (*People v. Valdez, supra,* 32 Cal.4th at p. 134.)

3. The prosecutor properly argued that a sentence of life in prison without the possibility of parole was not sufficient

The prosecutor argued that life without the possibility of parole was not an appropriate punishment in this case:

> I suggest to you it's not enough in this case. The defendant will have a life, if you let him have life without parole. He will have a community of people that he deals with. He will have his friends. He will have money to buy things. He will have television. He will have books. He will have visits from his family.

(36 RT 5563.) Defense counsel objected on the ground there was no evidence that Linton would have a television or books or anything like that. (36 RT 5563.) The court overruled the objection. The prosecutor then continued his discussion on this subject by noting that Linton would have telephone calls and visits and be able to keep up with the lives of his family members, things that Melissa and her family would never have. (36 RT 5563.)

The evidence adduced at trial supported the prosecutor's argument, in part. The jury heard testimony from Linton's family members of their post-incarceration interactions with Linton in letters, in person, and on the telephone, how Linton had matured and gained confidence during this time-frame, how his parents and grandmother sent him money, and how he had purchased things for his fellow inmates with that money. (33 RT 5224; 34 RT 5281, 5316; 35 RT 5488-5491, 5495.) The jury also heard testimony that Osborne continued to play Dungeons and Dragons with Linton through the mail. (35 RT 5457.) Although the testimony concerned interactions with Linton in jail and not prison, and there was no evidence that Linton would have books and television in prison, the point of the prosecutor's argument was that a sentence of life without the possibility of parole would enable Linton and his family to continue to enjoy benefits that Melissa and her family could not enjoy, and therefore life without the possibility of parole was not an appropriate sentence. Consequently, the prosecutor's argument was proper. (Cf. *People v. Sanchez* (1995) 12 Cal.4th 1, 73, disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn.22 [no misconduct where reasonable jury would interpret brief statement that life without the possibility of parole meant being alive "as an attempt to contrast 'victim impact' evidence against the penalty the prosecution believed defendant deserved"]; but see *People v. Hill* (1998) 17 Cal.4th 800, 838 [prosecutor improperly described conditions of life in prison where no evidence in record regarding conditions, but brief and mild comment was not prejudicial standing alone].)

Even if the prosecutor erred in making the challenged remarks, there is no reasonable possibility that these brief and mild comments were prejudicial. While Linton speculates that "a juror unversed with the ways of the criminal justice system might conclude [from the prosecutor's] argument that [he] would be living the cushy life at a 'Club-Fed' type

facility" (AOB 247), the prosecutor dispelled any such notion by prefacing the above-quoted remarks with an acknowledgement that life in prison without the possibility of parole is a "severe, severe punishment," "a hard and severe punishment" (36 RT 5562-5563). Defense counsel also argued to the jury that a sentence of life without possibility of parole is not leniency but "one of the two most terrible punishments that our society imposes." (36 RT 5628.) The defense also responded to the prosecutor's argument in her rhetorical question to the jury: "And do you think it's lenient to spend the rest of your natural life with no hope of release, no hope of freedom, behind concrete walls, encased in a room the size of a bathroom, where you have no privacy, where you have no freedom, no hope of freedom? Is that leniency?" (36 RT 5673.) And, as repeatedly noted above, the jury was instructed that the statements of counsel are not evidence. (17 RT 2500; 30 RT 4557; 13 CT 3447; see also 36 RT 5572.) Under these circumstances, any impropriety in the prosecutor's argument was not prejudicial. (*People v. Valdez, supra,* 32 Cal.4th at p. 134.)

D. The Prosecutor Properly Urged the Jury to Affirm Community Values by Returning a Death Verdict

Linton contends the prosecutor improperly appealed to public passion and sentiment in arguing:

> I'd suggest to you that a death verdict, ladies and gentlemen, is the ultimate validation of what we hold and value most dear in our community and as individuals: Our life, our children, and the sanctity of our home. And if you were to find that death is the appropriate sentence for Mr. Linton, you are doing no more than affirming in the loudest voice possible those values in our community.

(36 RT 5619-5620.)

The defense objected that "public community and public sentiment is improper argument, and there's a reference to that, the sanctity of our homes." (36 RT 5620.) The prosecutor countered, "I'm commenting on

the circumstances of this crime warranting – or how they warrant the more appropriate sentence here is death. He violated the sanctity of a home in our community when he killed a child who was to be safe in that home." (36 RT 5620.) The court sustained the defense objection. (36 RT 5620.)

The prosecutor then argued, "A death verdict is the ultimate validation of our community values. Let the punishment fit the crime. A death verdict says we will not tolerate this type of crime." Defense counsel objected that the prosecutor was again appealing to public sentiment; the court disagreed. (36 RT 5620.)

Linton forfeited his claim as to the first portion of the prosecutor's argument by failing to request an admonition. His claims also fail on the merits because the prosecutor's argument was proper.

Linton argues that "the emphasis by the prosecutor on community values and the implication that any juror who voted against the death penalty would not be upholding those values, was misconduct." (AOB 249.) The prosecutor's argument did not seek to invoke the untethered passions of the jury. Nor did the prosecutor invite jurors to forgo their personal, individual responsibility to determine the appropriate punishment and simply vote for death in order to uphold community values. Instead, the prosecutor briefly and accurately argued that "the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes." (*People v. Zambrano* (2007) 41 Cal.4th 1084, 1178-1179, disapproved on another ground by *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22 [rejecting claim that similar, lengthier argument constituted misconduct].) The prosecutor indicated this crime warranted the death penalty because Linton used the keys that had been entrusted to him by Melissa's parents to enter their home and murder Melissa, their beloved twelve-year-old daughter. Accordingly, there was no misconduct.

Even if there had been, no prejudice ensued. The prosecutor's comments were brief. The court instructed the jurors that they were not to "be influenced by bias or prejudice against the defendant, nor be swayed by public opinion or public feeling" and that they had to individually determine the appropriate penalty. (35 RT 5525; 13 CT 3655.) The defense reinforced both principles in argument and stressed that the question of whether to impose the death penalty was not about what the public wants. Defense counsel also argued that "there's nothing about justice in the concept of vengeance" and that she certainly hoped "that our community values put some value upon life." (See e.g., 36 RT 5623-5627, 5632, 5650, 5652, 5671.) In light of the arguments of counsel and the court's instruction, any misconduct was not prejudicial.

Finally, to the extent that Linton is arguing the cumulative effect of the prosecutor's misconduct requires a reversal (AOB 249), his argument is unavailing. "Without a single instance of prosecutorial misconduct, [this Court] cannot conclude there was cumulative prejudicial impact depriving [Linton] of a fair trial and due process." (*People v. Valdez, supra,* 32 Cal.4th at p. 136.) And even if one or more of Linton's prosecutorial misconduct claims had merit, they would not provide a basis for reversal because the cumulative effect of any misconduct was not prejudicial for the reasons set forth *ante*.

XI. THE TRIAL COURT ADEQUATELY INQUIRED INTO THE ALLEGED JUROR MISCONDUCT DURING THE PENALTY PHASE DELIBERATIONS

Linton contends the trial court abused its discretion and violated his rights to due process, a fair trial, and a jury trial by failing to hold an evidentiary hearing regarding alleged juror misconduct during the penalty phase deliberations. (AOB 250-256.) The trial court's inquiry was sufficient and established that no misconduct occurred.

On day three of the penalty phase deliberations, the foreperson sent the trial court a note, stating:

> I, Juror #9, received at my Email address two Emails from individuals on the jury regarding the conduct of other jurors. (1) One juror was upset at another for saying they did not have compassion. (2) One juror was upset at another for saying they were having too much fun in the deliberation room, and not taking this case serious. Is this appropriate[?] Is this a problem[?]

(13 CT 3673.)

The trial court discussed the note with the parties. The prosecutor suggested that either the court or foreperson advise the jurors that any concerns or issues regarding the deliberations should be raised in the presence of other jurors and that the foreperson should not be approached individually. (36 RT 5697.) The defense argued two jurors were not following the court's admonition and that the court should speak to those two jurors individually. (36 RT 5698.) At this point, the court received a note from the jury indicating it had reached a verdict. The court questioned whether this note rendered the earlier note moot. (36 RT 5699.) The defense argued the court should still inquire because the earlier note indicated jury misconduct had occurred. (36 RT 5699.) The court agreed to question the foreperson. (36 RT 5700.)

The foreperson stated that the E-mails came to him and that he did not "see any cc's in the headers." (36 RT 5701.) Thus, to his knowledge the E-mails were only sent to him. (36 RT 5701.) The foreperson said the first E-mail basically said, "they were taken back and they were offended by the fact that a juror had accused them of not having compassion in this matter." (36 RT 5701.) The court asked the parties if they believed the court should inquire about the identity of the juror. (36 RT 5701.) The prosecutor said he did not think it was necessary; defense counsel disagreed. (36 RT 5702.)

The court also asked the foreperson about the second E-mail. The foreperson said, "In their E-mail they were offended by the fact that one juror said that they were having too much fun in this – in the deliberations." (36 RT 5702.) Both of the statements referenced in the E-mails were made in the jury deliberation room. (36 RT 5702.) The foreperson agreed with the trial court that the jurors were just venting because they had been accused of something. (36 RT 5702.)

The foreperson did not respond to either E-mail; he deleted them "because in the header they weren't signed. They didn't say, you know, who they were." (36 RT 5701-5703.) Thus, the foreperson did not know who sent the E-mails. But he did know who they were complaining about "because both people had made these statements in the deliberation room. The people that sent the E-mails, for whatever reason, didn't want to confront them at the time these statements were made in the deliberation room." (36 RT 5703.) The foreperson continued, "So they just sent me the E-mail. And the statements in the deliberation room were made to all the jurors. It wasn't made to an individual." (36 RT 5703.)

The foreperson told the other jurors exactly what he had told the court about the E-mails. Nobody said anything. One juror then suggested that the E-mails were inappropriate and that they should let the court decide whether they were improper. There was no follow-up about the content of the E-mails. (36 RT 5704.) The foreperson reiterated that "everybody knew who made the statement [referenced in the E-mails] because they were made in the jury room. Just nobody stood up and said, 'Well, I sent the E-mail.'" (36 RT 5705.)

Defense counsel argued the two E-mailing jurors violated the court's express instructions to not deliberate outside the jury room, and that the court should identify those jurors. Defense counsel added that they did not know what other notes and messages the juror had sent among themselves

and that it appeared there was "an attempt made outside the jury room to – to still a voice of a particular juror they don't regard as a person whose voice should be heard." (36 RT 5706.) The prosecutor countered there was no evidence of misconduct shown, and even if the E-mails had been improper, the contents had been discussed during deliberations so the deliberations were not tainted. (36 RT 5706.)

The court ruled there was no misconduct, because there had been no deliberations or discussions about the case outside the jury room; the two jurors were instead just "venting that apparently their feelings might have been hurt or something of that effect." (36 RT 5707.) The court further ruled that it would be inappropriate to call the jurors in and inquire if they had violated the court's admonitions because they had to assume that the jurors abided by the court's admonitions unless informed otherwise. If the law were to the contrary, the court noted, "we would get into a situation in every trial where at some point during deliberations we would have to call each individual in and say, 'Have you kept the admonitions?' 'Have your communicated with anybody?' 'Have you looked in a dictionary?' 'Have you done any additional research?' or 'Have you visited the scene?'" (36 RT 5707.)

The trial court properly exercised its discretion in declining to conduct any further inquiries. "When a trial court is aware of possible juror misconduct, it must make whatever inquiry is reasonably necessary[.]" (*People v. Carter, supra,* 30 Cal.4th at pp. 1215-1218.) Trial courts have discretion to conduct evidentiary hearings to determine the veracity of jury misconduct allegations and to permit parties to call jurors to testify at any such hearings. (*People v. Davis, supra,* 46 Cal.4th at p. 624.) Defendants do not, however, have a right to such hearings. (*Ibid.*) Evidentiary hearings "should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward

with evidence demonstrating a strong possibility that prejudicial misconduct has occurred." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) And even when the defense makes such a showing, an evidentiary hearing would "generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Id.* at p. 419.)

Here, after receiving the note from the foreperson describing the E-mails that he had received, the court questioned the foreperson about the content of the E-mails, whether he responded to them, whether other jurors received them and whether they were discussed in the jury room. The trial court also provided the parties an opportunity to further question the foreperson. The foreperson's uncontradicted statements indicated that no juror misconduct occurred.

The E-mails concerned two jurors' feelings about comments made about them during deliberations. The foreperson did not reply to the E-mails outside of the deliberations. Instead, he mentioned them to the other jurors during the deliberations. Thus, there were no "exchange" of E-mails or discussions about the case outside of the deliberations and, hence, no misconduct. (Contra AOB 255.) Moreover, to the extent it was improper for these jurors to send the E-mails to the foreperson, the content of the E-mails did not suggest that there was a substantial likelihood that the jurors were actually biased. Instead, they merely reflected "the type of heated discussion common to jury deliberations" occurred in this case. (*People v. Bell* (2007) 40 Cal.4th 582, 619.)

Accordingly, because there was no evidence of a strong possibility that prejudicial misconduct occurred, and because there were no disputed, material issues of fact, the trial court properly declined to inquire further. (See *People v. Avila* (2006) 38 Cal.4th 491, 605 [court did not abuse its discretion in declining request for evidentiary hearing, because even

assuming "Juror No. 6 did make statements disparaging defense counsel, the trial court, and the criminal justice system, in violation of the court's admonition not to discuss any subject connected with the trial, whether Juror No. 6 made such statements was not a material issue in the case, for the statements had no bearing on the matter pending before the jury, that is, defendant's guilt or innocence," and thus "did not create a strong possibility of prejudicial misconduct"]; *People v. Carter*, *supra*, 30 Cal.4th at p. 1217 [evidentiary hearing properly denied where sworn statements of juror who had gone to dinner with another juror "(1) generally denied the occurrence of any misconduct, and (2) specifically denied that he had discussed the case with any other juror or jurors when the entire jury was not present"].)

XII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION

In a series of familiar arguments, Linton contends California's death penalty scheme violates the Constitution. None of his claims have merit.

Contrary to Linton's assertion (AOB 259-260), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley, supra,* 46 Cal.4th at p. 1133.) "Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington, supra*, 47 Cal.4th at p. 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401, alteration in original; contra AOB 261-263.)

Contrary to Linton's argument (AOB 264-274), no constitutional violations ensued from the absence of instructions that the jurors had to find

any aggravating factor true beyond a reasonable doubt, that they had to unanimously agree on the presence of an aggravating factor, and that they had to find beyond a reasonable doubt that the aggravating factors outweighed mitigating factors. (*People v. Bunyard* (2009) 45 Cal.4th 836, 858 [rejecting argument that *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] support a claim of constitutional error]; *People v. Romero* (2008) 44 Cal.4th 386, 429.) Furthermore, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) In fact, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." (*Ibid*; contra AOB 274-277.)

Also contrary to Linton's position (AOB 277-279), "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Dunkle* (2005) 36 Cal.4th 861, 939, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Nor does the absence of such findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2009) 46 Cal.4th 680, 724).

"The absence of intercase proportionality review does not violate state or federal constitutional principles." (*People v. Martinez* (2009) 47 Cal.4th 399, 455; contra AOB 279-281.) And Linton has failed "to support his assertion that this court has categorically forbidden such review; in the only case to which he refers, [this Court] considered the showing of alleged disproportionality and found it insufficient. (*People v. Marshall* (1990) 50 Cal.3d 907, 947, 269.)" (*People v. Harris, supra,* 43 Cal.4th at p. 1323, parallel citations omitted; see AOB 281.)

Although the prosecutor did not rely on unadjudicated criminal activity as an aggravating circumstance under section 190.3, factor (b), Linton nonetheless contends that it is constitutionally impermissible to do so, and that even if it were permissible, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. (AOB 281.) To the extent a positive resolution of this claim could provide any benefit to Linton, this Court has already determined that "[s]ection 190.3, factor (b) does not violate the federal Constitution by permitting the use of unadjudicated criminal activity as an aggravating factor, nor must such factors be found true beyond a reasonable doubt by a unanimous jury." (*People v. Harris, supra*, 43 Cal.4th at p. 1323; accord *People v. Smith, supra,* 35 Cal.4th at p. 374.)

As discussed in part in Argument VIII, *ante,* use of the modifiers "extreme" in factors (d) and (g) and "substantial" in factor (g) do not "act as a barrier to the consideration of mitigating evidence or violate the Fifth, Sixth, Eighth, or Fourteenth Amendments." (*People v. Farley, supra,* 46 Cal.4th at p. 1134; contra AOB 282.)

Finally, and contrary to Linton's position (AOB 282-284), "[t]he trial court was not constitutionally required to inform the jury that certain sentencing factors are relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors

were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.) Linton acknowledges that this Court has repeatedly rejected his contrary claim and quotes the rationale given by this Court in *People v. Morrison* (2004) 34 Cal.4th 698 (*Morrison*), i.e., "'no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.'" (AOB 283, italics omitted, quoting *Morrison, supra,* 34 Cal.4th at p. 730.) Linton argues this reasoning is undermined by *Morrison* itself and *Carpenter, supra,* 15 Cal.4th at p 424, because in both of those cases the trial courts erroneously relied upon mitigating factors as aggravating circumstances at the hearings on the motions to modify the verdicts. (AOB 283.) He also cites *People v. Montiel* (1993) 5 Cal.4th 877, 944-945 (*Montiel*), as an example where the prosecutor was "misled in the same way." (AOB 283.) The trial courts in *Morrison* and *Carpenter* did not consider mitigating circumstances as aggravating ones. Instead, the courts considered the objective circumstances of the underlying crime, which they could properly do under factor (a), under the wrong statutory factor. (*Morrison,* at pp. 727-729; *Carpenter,*at p. 424.) In *Montiel,* the prosecutor argued the absence of mitigating circumstances was a factor in aggravation. (*Montiel,* at p. 936.) But this Court found the prosecutor's improper argument was harmless, and further found that "the mitigating nature of these factors is clear even in the face of contrary argument." (*Id.* at p. 944.) Thus, *Morrison, Carpenter*, and *Montiel* do not support Linton's assertion that reasonable jurors could be misled by the language of section 190.3. Accordingly, his claim should be rejected.

XIII. CALIFORNIA'S CAPITAL SENTENCING SCHEME DOES NOT VIOLATE EQUAL PROTECTION

Linton contends California's capital sentencing scheme violates equal protection, because capital defendants are afforded fewer procedural protections than non-capital defendants. (AOB 285-287.) To prevail on an equal protection claim, a defendant must establish the "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Smith, supra,* 40 Cal.4th at p. 527, quotations and citations omitted.) Linton has not met his burden. "[B]y definition, a defendant in a non-capital case is not similarly situated to his capital case counterpart for the obvious reason that the former's life is not on the line." (*Id.* at p. 527, alteration in original, quotation and citation omitted). Thus, California's death penalty law does not violate equal protection because it does not require juror unanimity on aggravating circumstances, impose a burden of proof on the prosecution, or require a statement of reasons for a death sentence. (*People v. Carey* (2007) 41 Cal.4th 109, 136-137; *People v. Smith,* at p. 527; *People v. Davis, supra,* 36 Cal.4th at p. 571; see also *People v. Zamudio, supra,* 43 Cal.4th at p. 373 [death penalty law does not violate equal protection because sentencing procedures for capital and noncapital defendants are different].)

XIV. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION

Linton contends that the use of the death penalty as a regular punishment for a substantial number of crimes is contrary to international norms of human decency and that, consequently, the death penalty violates international law and the Eighth and Fourteenth Amendments of the federal Constitution. (AOB 287-289.) International law does not require California to eliminate capital punishment. (*People v. Doolin, supra,* 45

Cal.4th at p. 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*People v. Doolin, supra*, 45 Cal.4th at p. 456.) Instead, "[]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)" (*People v. Doolin, supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.) Thus, California's death penalty law does not violate international law or the federal Constitution.

XV. LINTON RECEIVED A FAIR PENALTY PHASE TRIAL

Linton contends the cumulative effect of the evidentiary and instructional errors and prosecutorial and juror misconduct warrant a reversal. (AOB 290-294.) As discussed, there were no such penalty phase errors. Moreover, any errors that may have occurred during Linton's penalty trial were harmless under any standard, whether considered alone or in the aggregate. Consequently, Linton's cumulative error claim necessarily fails. (*People v. Farley, supra,* 46 Cal.4th at pp. 1134-1135.)

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: March 19, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 47,130 words.

Dated: March 19, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Linton** Case No.: **S080054**

I declare:

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

On March 19, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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

C. Pasquali
Declarant

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