IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **GLEN ROGERS,** Defendant and Appellant.	S080840 **CAPITAL CASE**

Los Angeles County Superior Court No. BA109525
The Honorable Jacqueline A. Connor, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

JOHN R. GOREY
Deputy Attorney General

G. TRACEY LETTEAU
Deputy Attorney General
State Bar No. 183491

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2366
Fax: (213) 897-6496
Email: Tracey.Letteau@doj.ca.gov

Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **GLEN ROGERS,** Defendant and Appellant.	S080840 **CAPITAL CASE**

STATEMENT OF THE CASE

Appellant was charged by an indictment of the Grand Jury of Los Angeles County with: the first degree murder of Sandra Gallagher (Pen. Code § 187, subd. (a); count 1); and arson of property (Pen. Code, § 451, subd. (d); count 2). It was further alleged that appellant was previously convicted of first-degree murder (Pen. Code, § 190.2, subd. (a)(2); count 1), and that both offenses were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c). (1CT 214-215, 217.) Appellant pleaded not guilty and denied the special allegations. (1CT 221-222.)

Following a guilt-phase jury trial (see 7CT 1527, 1553-1570), appellant was convicted of first degree murder and arson. The jury further found true the special circumstance that appellant was previously convicted of first degree murder in Florida. (7CT 1605-1607.) Following a penalty-phase (see 7CT 1612-1613, 1617-1626, 1628-1629), the jury fixed the penalty at death (7CT 1644-1645).

Appellant's motions for a new trial and modification of the verdict were denied. (7CT 1660-1665.) Appellant was sentenced to death for the murder of Sandra Gallagher in count 1, plus a mid-term of two years for the arson in count 2, "to be deemed served when the sentence in count 1 is imposed." (7CT 1667-1688.)

This appeal from the judgment of death is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Evidence

1. The Murder Of Sandra Gallagher

a. General Information

In September, 1995, Sandra[1] and Stephen Gallagher had been married for eight years and were living in Santa Monica.[2] (9RT 630-631.) Gallagher's nickname was "Sam" or "Sammy." (9RT 644; see also 9RT 647-648.) Prior to 1994, they had lived in North Hollywood for two years. (9RT 631.) When they lived in North Hollywood, Gallagher frequented a bar called McRed's. (9RT 632.) Gallagher drove a black and silver Ford F150 King Cab truck with Colorado license plates which she had purchased from her father who lived in Colorado. (9RT 633-634.)

b. Sandra Gallagher Wins The Lottery And Goes To North Hollywood To Fill Out A Claim Form

On September 28, 1995, Stephen Gallagher had lunch with his wife at an In-N-Out restaurant in West Los Angeles. (9RT 634.) Gallagher was happy as she had won approximately $1,200 in the state lottery. Gallagher showed her husband the lottery ticket claim form at the restaurant, and Gallagher informed her husband that she was going to the lottery office in Van Nuys to submit the claim form. (9RT 635-636, 653.) When they met at the In-N-Out Restaurant, Gallagher was wearing earrings that she had purchased from a Ross department store. (9RT 638-640.)

The afternoon of September 28, 1995, Judy Steinke was working at the

---

1. Herinafter, respondent refers to Sandra Gallagher as "Gallagher," and her husband as "Stephen Gallagher."

2. They had briefly separated, but were living together in September, 1995. (9RT 634.) Stephen described their relationship as "on-again, off-again," and indicated he was seeing other women at the time. (9RT 644-645.)

California State Lottery office located at 16525 Sherman Way in Van Nuys. (9RT 674-675.) Steinke, who assisted lottery winners with filling out claim forms (9RT 675-676), met Gallagher when Gallagher came into the office. (9RT 677-678.) Steinke asked Gallagher what she had won, and explained to Gallagher what she needed to do to claim her winnings.[3] (9RT 678-679.) Gallagher had a lottery ticket worth $1259.00. (9RT 679.) Gallagher filled out the claim form, submitted the form, and then left. (9RT 680-681.)

c. Sandra Gallagher Goes To McRed's Bar

During the afternoon of September 28, 1995, Mamdouh Saliman, was the owner of McRed's bar, located at 13235 Victory Boulevard in Van Nuys. (9RT 687-692.) McRed's was a "full bar with cocktails." (9RT 687.) Saliman owned another bar called CJ's, that was located one block west at Victory and Fulton. CJ's only served beer and wine. (9RT 688-689.) Saliman went to McRed's during the afternoon of September 28, 1995. (9RT 687-692.) When he parked his car, he noticed a vehicle with Colorado license plates parked in the parking lot. (9RT 693.) Saliman entered the bar. While he was there, at approximately 3:00 or 4:00 p.m., Gallagher walked into McRed's and said, "Michael, Hi."[4] Gallagher also asked Saliman, "Don't you remember me?" Saliman, who remembered Gallagher because she used to host at one of his other bars, said, "I remember your face, but I don't recall your name." (9RT 692, 696, 723.) Gallagher told Saliman that her name was "Sam," and Saliman gave her a hug and kissed her. (9RT 692.) Gallagher told Saliman that she won the lottery, and when Saliman asked where she had been, Gallagher replied that she had moved to Colorado after she left her employment with Saliman. (9RT 693.)

Rein Keener worked as a bartender at McRed's bar in Van Nuys in September,

---

3. Winnings above $600 would be submitted via a claim form to the Sacramento office, and then a winner would receive a check in approximately three to six weeks. (9RT 676-677.)

4. People referred to Saliman as Michael. (9RT 692.)

1995. (9RT 735; see also 9RT 691.) At approximately 5:30 to 6:00 p.m., Keener arrived at work and parked outside the back door. Gallagher's truck, with Colorado license plates, was parked in the lot. (9RT 740-741; see also 9RT 735.) Keener walked into the bar and saw Gallagher standing next to Saliman. Saliman called Keener over and introduced her to Gallagher. (9RT 742.) Saliman told Keener that Gallagher used to live in the neighborhood and that she was a "really nice gal" and asked Keener to look after her and "steer[] Gallagher away from the loser leeches" at the bar. (9RT 742-743.) Saliman left the bar (9RT 697) and Keener ate dinner and "went about her business" while Gallagher played pool (9RT 743). At one point, Keener and Gallagher spoke and Gallagher told Keener that she had just "gotten back from Colorado" and that her father had passed away. (9RT 743.) Gallagher told Keener that she had just won the lottery and that she was "really excited," as she was planning to go to Sacramento the following day to see her three sons. (9RT 744.)

d. Appellant Goes To McRed's Bar

At approximately 7:00 to 7:30 p.m., appellant arrived at McRed's. (9RT 744.) Appellant was a frequent customer at McRed's, going to the bar approximately two to three times a week during the latter-part of September in 1995. (9RT 694; see also 9RT 738.) The first time appellant went to McRed's, he approached the bartender, Rein Keener, and after talking to her, asked for her phone number. (9RT 738.) Keener told appellant that she did not "go out with people she didn't know." (9RT 738-739.) Appellant went to the bar during each of Keener's shifts for the next three weeks. (9RT 738.) Appellant would "hit" on Keener and unsuccessfully asked for her phone number. During one conversation with appellant, Kenner told him that she was in law school and wanted to be a prosecutor. Appellant responded that he thought women made "lousy prosecutors," and he then pulled out a laminated badge and told her that he worked for the government and traveled from state to state "looking for people." (9RT 739.) Keener did not believe that appellant was a government agent, but thought he was just "trying to impress her." Appellant tried to impress Keener by buying her

roses. (9RT 740.) He also tried to impress her by "continuously" pulling out wads of hundred dollar bills and buying rounds of drinks for the entire bar. (9RT 740; see also 9RT 694-695.)

When appellant arrived at McRed's on September 28, he was wearing cowboy boots, blue jeans, and a brown leather belt with "a fancy cowboy-style buckle." His hair was long and feathered, and he had a neatly-trimmed beard and moustache. (9RT 745; see also 9RT 719-720.) At that time, appellant approached Sandra, but she "brushed him off" and continued to play pool. (9RT 745, 751.) Appellant then left. (9RT 751.) At approximately 8:00 or 8:30 p.m., Gallagher called her husband and told him that she was at McRed's bar. (9RT 636, 654.) Gallagher told her husband that she was thinking of staying and singing with the band. (9RT 637.)

e. Appellant Meets Up With Cristina Walker And Michael Flynn And Returns To McRed's Bar

On September 28, 1995, Cristina Walker[5] and her boyfriend, Michael Flynn were staying at appellant's apartment, located at 6645 Woodman. Walker and Flynn had moved into appellant's apartment the day or two before, after appellant offered to rent out his spare bedroom to them. (9RT 788-791, 793; 10RT 881-885, 942-945.) September 28, 1995 was Flynn's birthday, and Walker, Flynn, and appellant had made plans to meet that evening to celebrate. (10RT 886.) Walker and Flynn drove[6] to CJ's bar and subsequently met appellant in front of the bar. (10RT 888.) Appellant offered to buy Walker and Flynn dinner, and they went inside CJ's bar and sat down inside a booth. (10RT 889-890.) They stayed at CJ's for approximately one and one-half to two hours, and then left. (10RT 890.) While at CJ's, Walker had two beers, and appellant and Flynn had approximately four beers each. (10RT 890; see also 10RT

---

5. At the time, Cristina went by her maiden name, Cristina Gilmore. (9RT 788.)

6. Walker was driving a 1967 Chevy Malibu, and her dogs were in the back-seat of the car. (See 10RT 889.)

962-963.) When Walker indicated that she liked "mixed drinks," appellant told her that he knew a "bar up the street" where they could drink "regular drinks." Walker responded that she was not twenty-one years of age, and appellant told her not to "worry about it." (10RT 891.) Walker was nervous about her age and asked appellant how she could drink there. Appellant responded that he planned to tell the barmaid that Walker was his sister, and he told Walker that he knew the barmaid "real well." (10RT 892.) Appellant told Walker he had spent prior weekends with the bartender, and that he was planning on spending the upcoming weekend with her.[7] (10RT 896-897.) Walker drove herself, appellant, and Flynn up the street to McRed's. (10RT 891.) They arrived at McRed's at approximately 8:00 p.m. to 8:30 p.m. (10RT 892.)

When they arrived, the bar was crowded. (10RT 893.) Appellant, Walker, and Flynn went up to the bar and Keener gave appellant an "irritated look." (10RT 892.) Appellant told Keener that Walker was his sister. Walker ordered a "Seven and Seven," and Flynn ordered a beer. (10RT 893.) Appellant ordered a beer. (9RT 751-752.) Appellant ordered some shots and complained to Keener that the shots were "weak." (9RT 753.)

At one point, appellant asked Keener for a ride home. Appellant told Keener that he worked for the government and that he "couldn't get caught with a DUI." (9RT 755.) Keener originally told appellant that she would give him a ride, but she then changed her mind when she was asked to work the entire shift, and because she did not feel comfortable giving appellant a ride home. (9RT 755-757.) Shortly afterwards, appellant approached Keener, "pinned" her up against the door to the storage room, and put his arm around the small of her back. According to Keener, appellant was "trying to be kissy and huggy" with her. (9RT 754, 778.) Appellant told Keener, "I

---

7. According to Keener, appellant had asked her out on a few occasions and Keener and told appellant "no." (9RT 660.) However, on one occasion Keener responded, "Well, maybe sometime if all my friends are going out, you can meet us there." (9RT 770.)

always get what I want." Keener ducked out of appellant's reach and went back to work. (9RT 754-755.)

At some point in the evening, as appellant was sitting with Walker and Flynn, appellant leaned over to Walker, pointed at Gallagher, and said that she was "cool" and "pretty." Appellant asked Walker for her opinion about Gallagher and Walker said, "Oh, yeah, she's cute." (10RT 894, 897.) Appellant then said that he was going to approach Gallagher and ask to buy her a drink, and Walker said, "Go ahead and do it." (10RT 895, 897.) Appellant stood up and walked over towards Gallagher. (10RT 898.) Gallagher looked up at appellant and had a "big smile" on her face. She then turned around to Walker and Flynn and invited them to join her and appellant at her table in front of the band. (10RT 898-899.) Gallagher introduced herself and appellant began ordering drinks for everyone at the table. (10RT 899.) Gallagher joined the group "off and on," playing pool at the pool table and then returning to the group whenever appellant ordered more drinks. (9RT 795; see also 9RT 699, 752-753.)

At approximately 10:30 to 11:00 p.m., Gallagher sat down with appellant, Walker, and Flynn, and remained with the group for the rest of the evening. (9RT 697-699.) Gallagher was drinking vodka and grapefruit juice. (9RT 759, 796.) Appellant had approximately six to eight beers, and Keener served Flynn approximately three to four Bud Lights. (9RT 780, 795.) Walker had approximately three to four drinks, and she was drinking Jack Daniels or Seagram Seven. (9RT 782, 783, 968.) Keener did not believe that Walker or Flynn were drunk. (9RT 781-782, 784.) They all were laughing at Keener, as they believed she was watering down their drinks.[8] (10RT 899.) Appellant and Gallagher were leaning towards each other talking. (10RT 900.) Appellant and Gallagher danced, and towards the end of the evening they were back

---

8. Keener stated that after three rounds, she began diluting Gallagher's drinks because she was "watching out" for Gallagher. (9RT 749.) At around 10:00 to 11:00 p.m., Keener "cut [Gallagher] off." (9RT 767.)

by the pool table. (10RT 900; see also 9RT 699, 760, 797.) Appellant and Gallagher were "being playful," with Gallagher kissing appellant on the cheek once, and sitting in his lap on one occasion. (10RT 901; see also 9RT 715.) According to Keener, appellant tried to pull Gallagher on his lap and he tried to nuzzle the back of her neck. However, Gallagher "playfully" got up and went back to the pool table. (9RT 759.)

Towards the end of the evening, Walker and Gallagher went to the bathroom together. There, Gallagher told Walker, "I really like your brother." Gallagher indicated that appellant had asked her to go home with them, and she asked Walker if she should go home with appellant. Walker responded that it would "be okay," and they walked back out towards the bar. (10RT 902.) At approximately 1:20 a.m. to 1:40 a.m., appellant, Gallagher, Walker, and Flynn left McRed's. (10RT 901, 904, 973; see also 9RT 699, 716, 760.)

f. Appellant, Gallagher, Walker, And Flynn Leave McRed's Bar

The group intended to go back to CJ's, and then to 7-11 to buy some beer, and then back to appellant's apartment. (10RT 904.) Appellant and Gallagher left together and both got into Gallagher's truck. (9RT 700, 717.) Walker and Flynn got into Walker's car. (10RT 904-906.) They all went to CJ's, and went inside the bar. (10RT 906.) They stayed at CJ's a short while, and then went back out to their cars. (9RT 906-907.) Appellant and Gallagher got back inside Gallagher's truck, and Walker and Flynn went inside Walker's car. Gallagher and Walker were driving their respective vehicles. (10RT 908.) They then went to the 7-11 store. Walker pulled alongside Gallagher's truck, and appellant and Flynn went inside the store.[9] (10RT 908, 956,

---

9. Flynn testified on direct examination that he, appellant, Walker, and Gallagher all drove to CJ's in Gallagher's car, and then they went back to McRed's at approximately 1:45 a.m., tried to get another drink there, and then they all went to the store in Gallagher's truck and returned to McRed's. (9RT 799-806.) However, he later explained that he had "mixed up" the bars, and that he, Walker, and appellant went to CJ's bar first, and that they then went to McRed's. (10RT 827-828.)

961.) Appellant and Flynn came out of the store with cigarettes and beer. (10RT 909.) Walker and Flynn drove back to appellant's apartment and Gallagher drove appellant in her truck. (9RT 807.) When Flynn and Walker arrived back at appellant's apartment, they were unable to find a parking space, and Walker "double-parked" the car on Woodman. (9RT 806; see also 10RT 837.) Flynn told Walker that he would park and clean out the car,[10] and that he would then go up to the apartment. (10RT 909-910; see also 9RT 807.) Walker went up to the apartment as she was not feeling well.[11] (9RT 909-910.)

g. Flynn Is Arrested But Sees A Struggle Between Appellant And Gallagher

Appellant and Gallagher, who were also "double-parked" on Woodman in front of the apartment building, stayed inside Gallagher's truck talking. (9RT 807.) Flynn, who had been outside waiting for Walker to return, saw an empty parking spot across the street and got inside Walker's car, intending to park the car. (9RT 807-808; 10RT 834-835.) Flynn put the car in drive, signaled he was turning, and turned the car around. (9RT 808-809; 10 RT 835-836.) At that time, approximately 2:00 a.m., Los Angeles Police Department Officer David Hovey saw Flynn make an illegal "u-turn," and activated the siren and lights for his patrol vehicle. (10RT 858-862, 874-875; 13RT 1565; see also 9RT 808-809; 10 RT 835-836.) It appeared that Flynn was "extremely drunk."[12] (10RT 863-864, 869-870.) Flynn was eventually arrested for

---

10. Walker's dogs had made a mess inside Walker's car. (See 9RT 805-806; 10 RT 976.)

11. During the course of the evening, Walker had approximately six to ten mixed drinks, while Flynn had approximately 15 beers. (10RT 828, 833.)

12. Officer Hovey conducted no field sobriety tests, as, he did not want Flynn to fall down and hurt himself. (10RT 870-872.)

driving while under the influence and he was placed in the back of the police vehicle.[13] (9RT 809; 10RT 837; 865.) As the police car drove away, Flynn looked back towards Gallagher's truck and saw silhouettes that looked like appellant and Gallagher were fighting and that someone was holding someone else's neck. (9RT 809; 10RT 839.) Specifically, Flynn described seeing the silhouettes of two people where one person was raising their arms with open palms as if they were encircling something. (10RT 854-855.) Flynn told the arresting officer that "something weird" was going on, and pointed at Gallagher's truck. However, the officer ignored him.[14] (9RT 809; 10 RT 842.)

h. Appellant Tells Walker That He Has "Bigger Problems" And That Gallagher Is Dead

At some point in the middle of the night, Walker woke up in her room inside appellant's apartment. (10RT 911.) She saw appellant lying on the carpet next to her and he was wearing blue jeans with no shirt and his pants were unbuttoned. (10RT 911-912.) Appellant was awake and looking at Walker. Walker asked appellant, "What the hell are you doing?" (10RT 912.) Appellant replied, asking Walker, "Where is your boyfriend?" Walker jumped up and said, "What do you mean, where is my boyfriend? What time is it?" (10RT 913.) Appellant told Walker that it was 5:00 a.m., and Walker ran to the window and looked for her car.[15] (10RT 913, 939, 978.) Walker did not see her car, and she then asked appellant what he was doing in her room. (10RT 913.) Appellant told Walker that he went in her room to "check" on her, and he continued to ask, "Where is your boyfriend?" (10RT 913-914.) Walker,

---

13. The vehicle that Flynn was driving was also impounded. (13RT 1565-1568.)

14. According to Officer Hovey, he did not recall Flynn trying to draw his attention to anything. (10RT 867.)

15. Walker retrieved her car from Keystone Towing later that day. (10RT 939-941.)

believing that Flynn had taken her car, began to shout profanities about her boyfriend. Appellant then responded, "Oh, don't worry, honey, he went to jail." Walker asked appellant what he was talking about and began to cry. Appellant told her that her car had been impounded by the police. (10RT 914.)

Walker, who was confused and did not know why appellant was inside her bedroom, walked back towards her bed and sat down on the bed. Appellant sat down on the carpet. Walker then asked appellant to tell her what had happened. Appellant told Walker that Flynn was "a real idiot" and had made a "u-turn" "in front of a cop." Appellant also told Walker that Flynn had been handcuffed and placed in a police car, and that her car had been impounded. Referring to Gallagher, Walker asked appellant, "[W]here is that girl?" Appellant had a "blank look on his face" and responded, "I got bigger problems than you, honey, I got bigger problems." (10RT 915.) When Walker asked what appellant meant by "bigger problems," appellant repeated two to three more times that he had "bigger problems." (10RT 915-916.) Walker asked appellant what he meant and appellant stated, "I am just going to have to call some people in, I am going to have to do it." Walker again asked, "What do you mean? Where is Sam? Where is that girl at?" Appellant then looked at Walker and responded, "She's dead." Appellant repeated two more times, "She's dead." (10RT 916.)

Walker, who had been crying, stopped crying because appellant "had this look in his eye." Walker asked appellant, "[W]hat did she [Gallagher] do to you, what is going on?" and tried "to make it seem like" she was "on [appellant's] side." Appellant stared at Walker and sat there. Walker "just acted normal." Walker and appellant stood up and Walker changed the subject, stating that she was unsure how to get Flynn out of jail. (10RT 917.) Appellant put his arm around Walker and leaned forward to kiss her, but Walker told appellant "no" and that she loved Flynn. Appellant apologized and told Walker that he loved her like a "sister." (10RT 918.) Appellant then stated that he was going to try to get Flynn out of jail, and he left the room. (10RT 918, 980.)

Walker laid on her bed and dozed off to sleep before it became light. (10RT 918.) At some point, when it was light outside, she woke up and looked for her car from the window of the apartment. (10RT 918-919.) When she did not see her car, she quietly put on her clothes and shoes "as fast as [she] could," and put leashes on the dogs and opened the door into the main living area of the apartment. (10RT 919.) Walker poked her head out of the door and saw appellant lying on the living room floor in his underwear with his head on his arm. Appellant appeared "to be out cold." (10RT 919-920.) Walker saw Gallagher's purse[16] on the other side of the kitchen by the stove, and Gallagher's cigarettes and keys were on the side of the bar of the kitchen. (10RT 920-921.) Walker walked outside the front door of the apartment with her dogs and left. (10RT 922.)

i. Walker Sees Appellant "Riffling" Through Gallagher's Purse

At approximately 8:00 a.m., Walker ran to the 7-11 store and called her grandmother's house because she was "scared." (10RT 922, 981.) Walker asked to speak to her mother and was told her mother was sleeping. Walker's mother's boyfriend came to the phone and asked Walker what was the matter. Walker asked her mother's boyfriend to come get her "right now," and she told him that she was at the corner of Vanowen and Whitsett. Walker's mother's boyfriend came 15 minutes later and Walker got in his truck with her dogs. She then asked him to help get her "stuff" out of appellant's apartment, and explained that Flynn was in jail. Walker also told him that she thought appellant "killed [a] girl last night." (10RT 923.)

Walker and her mother's boyfriend went back to appellant's apartment. (10RT 923-924.) Walker asked her mother's boyfriend to wait in the hallway, and she went inside the apartment. Appellant was still sleeping on the floor and Walker said, "Glen, Glen, wake up." Appellant did not wake up, and Walker touched appellant's shoulder.

---

16. Walker had seen Gallagher carrying the purse the night before. (10RT 920.)

Appellant "came to his feet quickly" and seemed embarrassed his pants were off. Appellant put on his pants. Walker told appellant that her grandmother was sick in the hospital and that she needed to go home immediately to babysit her sisters. She told appellant that her mother's boyfriend was outside and that she needed to get her stuff out of the apartment. (10RT 924-925.) Appellant told Walker that she did not need to leave, as he was going to Las Vegas and she could have the apartment to herself. She refused but Walker told appellant that she would come back and check on the apartment while he was gone. She walked off. (10RT 925.)

Walker's mother's boyfriend assisted Walker in collecting Walker's and Flynn's belongings and putting them in his truck. (10RT 925.) When Walker told her mother's boyfriend that she thought appellant killed Gallagher, he told her that it was "crazy" and that appellant was "bullshitting" her. (10RT 926.) However, as Walker still wanted to remove her belongings from appellant's apartment as soon as possible, she went down the street where her friend, Cindy Keller,[17] lived. Walker explained the situation to Keller and asked for Keller to help her move the rest of her belongings out of appellant's apartment. Walker and Keller went back to appellant's apartment. Walker introduced Keller to appellant. Walker and Keller continued to take Walker's belongings out of the apartment as appellant stood in the hallway near the apartment door watching them. (10RT 927.) At one point, when Keller was in the hallway and appellant was in the kitchen, Walker asked appellant "what happened to that girl last night." Appellant told Walker, "she ran off with some Mexican last night and some Mexican walked up and she walked away with him." (10RT 928.)

At one point, Walker saw appellant in the living room going through Gallagher's purse. Walker saw appellant pull a wallet and checkbook out of the purse. (10RT 928, 934-935.) Walker also asked appellant for some money and he told

---

17. Walker wanted to expedite moving out of appellant's apartment by using Walker's truck, rather than spending time unloading her mother's boyfriend's truck. (10926-927.)

Walker that he had no change. Appellant told her he would go get some change, and he left the room. (10RT 929-930.) At that time, Walker looked inside Gallagher's purse and she saw Gallagher's earring on the floor. (10RT 929-930, 937-938; Peo. Exh. 3 [earring].) Walker also saw Gallagher's car keys on the counter. (10RT 992-995.) When appellant returned with the money, Walker moved away from the purse. (10RT 929-930.)

j. Gallagher's Burning Truck Is Discovered And Her Body Is Found Inside

On September 29, 1995, at approximately 6:30 to 6:35 a.m., Hoora Kushan drove into the rear parking lot of the Laurel Wood Convalescent Hospital, located at 13000 Victory Boulevard in North Hollywood. Kushan worked as a nurse at the hospital and was going to work that morning. (10RT 997-999, 1020.) When Kushan entered the parking lot, she saw a pickup truck in the driveway facing some trash cans. The truck was parked and the driver's side door was partially open. (10RT 999-1000.) Kushan saw the arm, elbow and part of a leg of a man. The man's elbow was sticking out the door and the man's body was leaning towards the passenger side into the truck, as if he was getting something from the dashboard. (10RT 1001, 1005, 1036, 1038.) The man had long light "blondish" hair and was wearing blue jeans and a short-sleeve shirt. (10RT 1001, 1005, 1036-1037.) The man's hair resembled appellant's. (10RT 1013-1014.) Kushan parked and exited her car. When she exited her vehicle, she looked at the pickup truck again. (10RT 1001-1002.) Kushan saw the same long blond hair leaning towards the passenger side, but slumped. As Kushan looked more closely, she saw smoke coming from the dashboard on the passenger side. (10RT 1002.) Kushan observed that the pickup truck had Colorado license plates. (10RT 1002-1003.)

Kushan went inside the hospital and asked the nurses if they knew to whom the truck belonged. Kushan also explained that she saw smoke coming from the dashboard of the truck. One of the nurses suggested that they go back outside and

obtain the license plate number so they could announce it on the hospital's public address system. (10RT 1003.) However, when Kushan went back outside, she saw flames coming from the hood of the truck. (10RT 1004, 1021-1022.) Another employee tried to put out the fire using a fire extinguisher. Kushan ran back inside the hospital and told some of the other nurses to move their cars and asked someone to call 911. (10RT 1004.)

At approximately 6:40 a.m., the fire department arrived and extinguished the fire. (10RT 1006, 1051-1052.) Los Angeles Fire Department arson investigator Tim Hamson arrived at the scene of the fire at approximately 7:20 a.m. (11RT 1046-1049.) Hamson was informed by firefighters at that time that there was a body in the cab of the pickup truck and he later noted the presence of a body inside the cab of the truck. (11RT 1050-1051, 1063-1068.)

k. Forensic Evidence

When Hamson arrived at the scene of the burning truck, he noted that the truck was a 1977 Ford half-ton extra cab and had Colorado license plates. (11RT 1054.) Hamson examined the scene and concluded that the fire originated in the passenger area as the result of a flammable liquid being distributed in the interior and ignited by an open flame. (11RT 1055-1056.) Hamson detected the odor of gasoline during his investigation and determined that gasoline was distributed throughout the cab. (11RT 1056-1058, 10-60-1061.) The lower extremities of the body found inside the truck were "heavily charred" but the floor carpet was mainly intact and was indicative of the presence of a flammable liquid. (11RT 1058.) In Hamson's opinion, the fire was intentionally set, and Hamson believed that the fire was set in order to conceal a homicide. (11RT 1059.) Hamson reached this conclusion based on the fact that the gasoline appeared to have been distributed to cause a lot of damage and was present in areas where one "could not get unless it was distributed." (11RT 1060-1061.) Hamson concluded that the fire did not originate in the engine because the only things damaged in the engine were rubber grommets between the firewall and the engine

compartment, and there was no damage to the underside of the vehicle. (11RT 1062-1063.)

Los Angeles Police Department Officer Randy Hoffmaster also responded to the fire and arrived during the "clean-up"stages of the vehicular fire. (13RT 1577-1579.) Officer Hoffmaster, who was the first police officer at the scene, looked inside the pickup truck and observed a victim inside the vehicle. (13RT 1579.) Officer Hoffmaster secured the crime scene and waited for additional units to arrive. (13RT 1580-1581.) At approximately 7:10 a.m., Los Angeles Police Department Detective Michael Coblentz received a call to respond to the parking lot behind the convalescent hospital. (13RT 1602-1603.) Detective Coblentz went to the location and saw that fire department personnel had recently extinguished a fire in the area of a pickup truck. (13RT 1603-1604.) Detective Coblentz observed a galvanized metal compartment on the back of the pickup truck that was secured with a combination padlock. (13RT 1605.) This compartment was forced open with cutters and Detective Coblentz continued his investigation. (13RT 1606.) A purse containing documents and photographs were found inside the truck, as well as a marriage certificate. (13RT 1616-1617.) At some point, Detective Coblentz became aware that the victim in the truck was Sandra Gallagher. (13RT 1606.)

On October 1, 1995, Los Angeles County Coroner's Office Forensic Pathologist Dr. Frisby performed an autopsy on the body found in the truck, identified as Sandra Gallagher. Dr. Frisby was supervised by Dr. James Ribe. (11RT 1093-1099.) Dr. Ribe performed most of the dissection of the neck and Dr. Frisby dissected most of the other parts of the body. (11RT 11.) Dr. Frisby prepared the autopsy report and Dr. Ribe reviewed the report. (11RT 1000.) Gallagher's back was "severely charred" down to the muscle and the front portion of her body was "less charred." Gallagher's right lower leg was severely burned down to the muscle and bone. (11RT 1111-1112.)

Doctors Frisby and Ribe concluded that Gallagher died from asphyxia due to

manual strangulation. (11RT 1101, 1112.) This conclusion was based on the presence of red bruising or bleeding on the right and left sternohyoid muscles, a hemorrhage on the right-hand side of the lower part of the voice box and on the left side of the voice box, bruising to the thyroid gland, broken cartilages on the left-side of the throat, and multiple hemorrhages inside Gallagher's tongue. (11RT 1102-1108.) Drs. Frisby and Ribe also concluded that Gallagher was already dead at the time her body was burned, as determined from the lack of carbon monoxide in her bloodstream and the absence of black material in her windpipe. (11RT 1112-1115.)

The absence of any petechia in Gallagher's eyes suggested that there was no shifting of the position of the hand at the time of strangulation. (11RT 1118, 1123.) Dr. Ribe opined that it would take "about a minute of continuous compression" to die of strangulation, and that the victim would lose consciousness within six to ten seconds of complete neck compression. (11RT 1109.) Altogether, Dr. Ribe estimated that it would take at least 30 seconds and less than six minutes to strangle someone. (11RT 1120.) Therefore, the killer would have needed to continue to strangle the victim after the victim lost consciousness. (11RT 1109.) Gallagher had .10 volume percent of alcohol in her bloodstream, and there was no indication of drugs in her bloodstream. (11RT 1116, 1124.)

On October 5, 1995, at 10:30 a.m., Detective Coblentz served a search warrant on appellant's apartment, apartment number 1121 at 6645 Woodman Avenue. (13RT 1607-1608.) Detective Coblentz knocked on the door of the apartment and, after there was no answer, had the apartment manager open the door. (13RT 1609.) Detective Coblentz found no one inside the apartment and the apartment had very little furniture. (13RT 1609-1620.) A yellow metal-hooped earring belonging to Gallagher was recovered from the kitchen floor. (13RT 1611-1612; Peo. Exh. 3 [gold hooped earring].) This earring had been purchased by Gallagher at a Ross department store in the presence of her husband, and it was the earring that he saw her wearing when he met her for lunch the day before her murder. (9RT 638, 668-672; 13 RT 1613-1615;

see also Peo. Exhs. 4 & 6 [receipt from Ross Department store for earring].) A yellow package of cigarettes was also found on the kitchen counter. (13RT 1612-1613; see also 9RT 813 [Flynn's testimony that the cigarettes "look[ed] like" the type of cigarettes that Gallagher was smoking]; 10RT 909 [Walker's testimony that the cigarettes found in the apartment looked like the cigarettes Gallagher had been smoking].)

2. Appellant's Cross-Country Flight And Ultimate Apprehension

a. Appellant Flees Louisiana And Meets Andy Lou Sutton

In early November, 1995, Theresa Whiteside lived in a one-bedroom apartment at the Port Au Prince apartment complex in Bossier City, Louisiana.[18] (12RT 1366-1367, 1370.) Whiteside lived in the apartment with her friend, Andy Lou Sutton. (12RT 1370-1371.) Sutton, who was five feet, seven inches tall, weighed 125 pounds, and had red hair, was a "very beautiful girl" with an "outgoing personality." (12RT 1371.)

On November 2, 1995, Whiteside and Sutton went to the "It'll Do Lounge" in Bossier City. (12RT 1372-1373.) Whiteside and Sutton were sitting at the bar when appellant walked in. (12RT 1376.) Appellant was wearing blue jeans, a striped dress shirt, and he had long "bleached" blond hair. (12RT 1377-1378.) Sutton told Whiteside, "I like that." (12RT 1376.) Whiteside then went to Mr. Bill's Lounge, where she worked as a bartender. (12RT 1371, 1378.) Later that evening, Sutton called Whiteside and told Whiteside that she had "someone staying over that night" and that Whiteside's pillow and blanket would be on the couch. (12RT 1378-1379.) Whiteside returned to her apartment at approximately 3:00 a.m. on November 3, 1995. At that time, Sutton introduced appellant to Whiteside. (12RT 1379.)

At approximately 10:00 a.m. on November 3, 1995, appellant, Sutton, and

---

18. Bossier City was across the river from Shreveport, Louisiana. (12RT 1366.)

Whiteside woke up and they "sat around" and talked. Appellant told Whiteside and Sutton that he was a truck driver and that he drove "18 wheelers." (12RT 1380-1381.) Later that day, Sutton told Whiteside that appellant "had to go" to Jackson, Mississippi to retrieve his "18 wheeler" truck, and asked if appellant's existing red truck would be "all right" in the parking lot. (12RT 1381-1382.) Whiteside told Sutton, "yes," and she subsequently drove appellant to the Greyhound bus station in Shreveport, Louisiana with Sutton. (12RT 1382-1383.) Appellant told Whiteside and Sutton that we would return that Sunday, and he got out of the car and gave Sutton a kiss. (12RT 1383.) Sutton gave appellant her telephone number and appellant asked Whiteside to "take care" of Sutton. (12RT 1383-1384.)

b. Appellant Murders Tina Cribbs In Florida

1. Appellant Checks Into The Tampa 8 Inn

On Saturday, November 4, 1995, Mildred Kelly was working as the night clerk at the Tampa 8 Inn located at 4530 East Columbus in Tampa, Florida. (11RT 1134-1135.) The motel had two floors consisting of approximately 48 rooms, and the front office was located near the road. (11RT 1135-1136.) That afternoon, appellant checked into the motel. (11RT 1136-1139; see also Peo. Exh. 27 [registration form].) Appellant arrived by a taxi cab, entered the office, and asked if there were any rooms available. Kelly told appellant that rooms were available and appellant went back outside to the cab, paid the taxi driver, and went back inside the office to rent a room. (11RT 1139-1140.) Appellant had long blondish-tan hair and he had "gorgeous blue eyes." (11RT 1139.) Appellant filled out a registration form, writing that his name was Glen Rogers and listing an address in Jackson, Mississippi. (11RT 1150.) Appellant also provided a Mississippi driver's license number. (11RT 1140-1141.) Appellant asked for a room for two days, and Kelly indicated on the registration that appellant agreed to rent a room for November 4 and 5, for a total of $62.50. (11RT 1142-1143.) Appellant paid Kelly for the room in cash. As appellant was filling out the registration form, he told Kelly that his truck was broken down and that it would

take two days to have it fixed. Appellant also told Kelly that he was very tired and would "probably sleep the first day." (11RT 1144.) He indicated that he did not want to pay an optional surcharge to open a telephone line in his room, as he did not intend to make any phone calls. (11RT 1145.) Appellant also told Kelly he was "from up North." (11RT 1145.) Kelly gave appellant the key to room 119. (11RT 1141,1145.)

2. Appellant Meets Tina Cribbs In Gibsonton

On the morning of November 5, 1995, Donald Daughtry was working as a cab driver in Tampa, Florida. (11RT 1159.) During the early morning hours that Sunday, Daughtry went to the Tampa 8 Inn to pick up a fare. (11RT 1159-1162.) When Daughtry arrived, appellant came out of a room on the first floor of the motel, got into the cab, and stated that he wanted to go to the Showtown Bar in Gibsonton, Florida.[19] (11RT 1160-1163.) When they arrived at Gibsonton, appellant asked Daughtry to let him off at the edge of the highway, approximately 60 to 80 feet from the Showtown Bar. (11RT 1166-1167, 1171.) Appellant paid his fare and exited the cab. (11RT 1168.)

At a little before 1:00 p.m., appellant went inside the Showtown Bar. (11RT 1179, 1185.) At that time, Lynn Jones was working as a bartender. (11RT 1176.) Appellant, who had long blond hair and "beautiful blue eyes" stayed in the bar for approximately four to five hours that day.[20] (11RT 1179-1182.) During that time, appellant and Jones "banter[ed]." (11RT 1180-1181.) Appellant told Jones that his name was "Glen." (11RT 1189.) Jones asked appellant if he was "with it,"[21] but appellant did not know what she was talking about. (11RT 1183.) Appellant

---

19. Gibsonton was a community, approximately 15 to 20 minutes from the Tampa 8 Motel, where carnival workers lived during the off-season. (11RT 1163, 1176-1177.)

20. Jones also described appellant as having a beard. (11RT 1182.)

21. In Gibsonton, if someone asked, "Are you with it?" they would be asking if you work with the carnival. (11RT 1178.)

responded, "With what?" and Jones asked, "You're not with the carnival?" Appellant then told Jones that he drove trucks for the carnival. (11RT 1183.) Appellant ordered a beer when he first entered, but did not order any food. (11RT 1184.)

At approximately 2:00 to 2:30 p.m.,[22] Tina Cribbs and her friends, Cindy Torgerson, Jeannie Fuller, and Ruth Negret[23] went to the Showtown Bar.[24] (11RT 1184, 1202-1204; 12RT 1271.) Cribbs was 34 years old with auburn hair and was missing a front tooth. (11RT 1218.) Cribbs drove to the bar in her car, a white '93 or '94 Ford Festiva that her mother had purchased for her earlier that year. (11RT 1203, 1219; 13RT 1509; see also 11RT 1179.) When they arrived, Cribbs and her friends sat at a table and ordered some drinks while appellant sat at the bar. (11RT 1185, 1204-1206.) Appellant sent over a round of drinks to the women. (11RT 1208.) Fuller went to the jukebox and appellant approached her and asked if she was married or single. (12RT 1272-1273; see also 11RT 1208, 1185-1186.) Fuller told appellant that she had a boyfriend and appellant told her that he did not date married women or girls with boyfriends. (12RT 1272.) Fuller returned to the table with her friends and appellant purchased another round of drinks for the women. (11RT 1186-1187, 1208; 12RT 1272.) Fuller left the bar, as she needed to go home to her son. (12RT 1274.) Cribbs and her remaining friends then went up to appellant, introduced themselves, and thanked him for the drinks. (11RT 1208.) Negret told appellant that she had a boyfriend. (11RT 1209-1210.) At one point, Torgerson told appellant that she was married and appellant said, "I don't go after girls that are married and have boyfriends." (11RT 1211.) Appellant told the women that his name was "Randy."

---

22. Jones stated that Cribbs and her friends arrived around 4:00 to 5:00 p.m. (11RT 1185.)

23. According to Fuller, the group consisted of Cribbs, Torgerson, and herself. (12RT 1272.)

24. Cribbs, Torgerson, and Fuller all worked at Ramada Inn in Apollo Beach as housekeepers. (11RT 1201-1202, 1219; 12RT 1271.)

(11RT 1208; see also 11RT 1190.) Torgerson left the bar to go home and get some more money. (11RT 1209.) Fuller, and Negret also left, leaving Cribbs alone at the bar with appellant. (11RT 1187.)

Cribbs and appellant spoke for approximately 45 minutes to an hour. (11RT 1188.) During that time, Torgerson returned and sat down with Cribbs and appellant. (11RT 1209, 1211.) Appellant asked Cribbs if she could give him a ride and Cribbs agreed. (11RT 1211.) Torgerson then left the bar, at approximately 6:45 p.m., to pick up her husband. Before Torgerson left, she told Cribbs to remember to go to work the following day. Torgerson also told Cribbs to "[b]e careful." Cribbs responded to Torgerson, "I will give you details tomorrow." (11RT 1212.)

3. Appellant And Cribbs Leave The Showtown Bar Together

At approximately 6:30 to 7:00 p.m., Cribbs got up and told the bartender, Lynn Jones, that she was going to give appellant a ride. Cribbs also asked Jones to tell her mother that she would be back in 20 minutes, as they were expecting Cribbs's mother to come to the bar. (11RT 1188, 1191.) Appellant and Cribbs walked out the door. (11RT 1192.) Cribbs's mother, Mary Dicke, walked inside the Showtown Bar approximately 20 to 30 minutes after Cribbs had left.[25] (11RT 1192-1193.) Dicke saw her daughter's drink at the table where they usually sat. She picked up the beer and it was "plumb full and ice cold." (11RT 1222-1223.) Dicke, who thought her daughter was in the bathroom, sat down and waited approximately five to seven minutes. She then went and checked the ladies' room and, not finding her daughter there, asked the bartender if she knew where Cribbs was. (11RT 1223.) Jones told Dicke that Cribbs had given someone a ride and that she would "be right back." (11RT 1193, 1223-1224.) Dicke then waited another 30 to 45 minutes, and then called Cribbs's pager at

---

25. According to Dicke, she had plans to meet Cribbs at 3:00 p.m., but did not arrive at the Showtown Bar until 4:00 or 5:00 p.m. (11RT 1220)

approximately 7:00 to 8:00 p.m.[26] (11RT 1224-1226.) Dicke received no response and immediately paged Cribbs again. (11RT 1226.) Dicke began to worry about Cribbs. (11RT 1227.) Dicke and Cribbs had a system where if there was an emergency, she would input the number "69." (11RT 1226.) Over the course of the evening, Dicke paged Cribbs with their emergency code approximately 33 times. (11RT 1226.) Dicke eventually returned home, but called the police because she knew Cribbs was in "trouble." (11RT 1227.)

4. Appellant Hangs A "Do Not Disturb" Sign On His Motel Room Door And Leaves The Tampa 8 Inn The Next Morning

During the evening of November 5, 1995, at approximately 9:00 to 9:30 p.m., Chenden Patel, the owner of the Tampa 8 Inn, noticed appellant near room 119. (11RT 1230-1233.) Patel saw appellant bending into a small white car. (11RT 1233.) Patel then walked past room 119 and saw appellant standing at the door with two suitcases. (11RT 1234.) The white car was parked in front of room 119. (11RT 1235.) Patel returned to the front office and, a short while later, appellant went to the office. Appellant told Patel that he wanted to pay for another day. (11RT 1236.) Patel told appellant that if he wanted to stay for any additional time, he would need to pay before 11:00 the following morning. (11RT 1236-1237.) Appellant paid Patel for an additional day, extending his rent until Tuesday morning. (11RT 1237.) Patel also advised appellant to not leave his luggage in his car overnight. (11RT 1236, 1238-1239.) Appellant asked Patel for a "do no disturb" sign, and Patel told appellant that she did not have one. (11RT 1236, 1239.) Appellant also told Patel that he did not want any maid service or anyone to go in his room. (11RT 1239-1240.) Patel made a notation for the cleaning maids not to go into appellant's room the following day. (11RT 1240-1241, 1254; 12RT 1283.)

---

26. Dicke had given Cribbs a pager because Dicke took care of Cribbs's two sons when Cribbs was at work. (11RT 1225.)

The following morning, on Monday at approximately 9:00 a.m., Patel saw appellant drive away in the white car. (11RT 1241-1242, 1248.) Later that morning, after 11:00 a.m., she noticed a handwritten note on the door to room 119. (11RT 1241-1242.) The sign said "do not disturb." (11RT 1242-1244; see also 11RT 1252-1255 [Chariton's observation of the "do not disturb sign"].)

5. Cribbs's Purse Is Found In A Trash Can At A Rest Stop Just East Of Tallahassee

On Monday, November 6, 1995, Michael Pitts was working for the Association of Retarded Citizens for Madison and Jefferson Counties. (13RT 1521-1522.) Pitts was employed as a rest area attendant on a mobile janitorial crew, and was sent out to do maintenance and janitorial tasks at rest stops. (13RT 1522-1523, 1556.) At approximately 9:00 a.m., Pitts arrived at the rest stop, just east of Tallahassee[27] on Interstate 10. (13RT 1525, 1530, 1540, 1542, 1557.) At approximately 10:30 a.m., Pitts emptied the trash can near the front parking area on the westbound side of the rest stop and found a purse on top of the trash can. (13RT 1542-1543, 1556-1557, 1547.) At that time, John Maslar, the Quality Assurance Coordinator for the "Respect for Florida" program, pulled into the rest area. (13RT 1538, 1542-1543.) Maslar, who contracted with Pitts' employer, Ernest Bruton, was going to the rest area for a meeting with Bruton. (13RT 1539; see also 13RT 1524-1526) When Maslar pulled up to the rest stop, he saw Pitts pull a clutch purse out of the trash can. (13RT 1544, 1553.) Pitts handed the purse to Maslar. (13RT 1552.) Maslar opened the purse to look for identification, and saw identification for Tina Cribbs. (13RT 1544.) Maslar waited approximately 10 minutes until Bruton arrived, and they conducted their meeting. During this meeting, Maslar gave Bruton the purse. (13RT 1545-1546, 1553; see also

---

27. According to Tampa Police Department Detective Julie Massucci, it would take approximately four to five hours to drive from the Tampa 8 Inn to Tallahassee. (13RT 1349.) To get from Tampa to Tallahassee, a person would take Highway 75 to Interstate 10, and then take Interstate 10 to Interstate 12. (13RT 1559-1562.)

13RT 1526-1527.) Bruton took the purse back to his office and unsuccessfully tried to call the telephone number listed on the identification. (13RT 1527-1528.) Bruton also called a facility listed on a check stub found in the purse, but was told that Cribbs had not been there. (13RT 1527-1528.)

6. A Body Is Discovered In Room 119 At The Tampa 8 Inn

On Tuesday, November 7, at approximately 10:00 a.m., Erica Chariton, the housekeeper for the Tampa 8 Inn, arrived at the motel. While in the office, she observed that room 119 was due to checkout and that she would need to clean the room. (11RT 1256.) Chariton went to the room and saw that the "do not disturb" sign was still there. (11RT 1256-1257.) Chariton knocked on the door and nobody answered. (11RT 1257.) Chariton then entered the room. The bed looked like someone had slept on it. She pulled the sheet halfway out of the bed and then went inside the bathroom to get the towels. (11RT 1256-1257.) Chariton pushed open the bathroom door and saw bloody shoes, pants, and towels on the ground. (11RT 1257-1258.) The shower curtain was closed, but Chariton saw the top of a woman's head in the bathtub. (11RT 1258-1259.) Chariton knew that something was "terribly wrong" and ran out of the room screaming. (11RT 1258.)

Meanwhile, Hillsborough County Sheriff's Department Deputy Donald Morris was working in full uniform in an unmarked police car in the parking lot of the Tampa 8 Inn. Deputy Morris would habitually drive through motel parking lots in the area looking for stolen vehicles. (12RT 1276-1279.) As Deputy Morris was parked in the lot, Chariton ran out of the room yelling, "bathtub, body." (12RT 1279, 1282, 1290.) Deputy Morris went to the room and went inside. (11RT 1258, 1280.) As Deputy Morris made his way through the room, he started to see blood. The bed was unmade, the television was on, and there was a "little blood on the floor of the vanity area" to the left of the bed. (12RT 1280.) Deputy Morris went inside the bathroom and saw a pile of wet clothes and tennis shoes in front of the toilet. It looked like there was blood on the clothes. (12RT 1280, 1288-1289.) The shower curtain was drawn almost

completely closed, but Deputy Morris could see the top of a person's head. (12RT 1280-1281, 1289.) Using his baton, Deputy Morris moved the shower curtain back and saw a white female laying in the bathtub. He then radioed for other police units, after realizing that he had not checked under the bed or in the closet and was concerned for his own safety. (12RT 1281; see also Peo. Exhs. 31-33 [photos of bathroom and body in bathtub].) Tampa Police Department Officer Robert Baxter responded to the radio call and arrived at the Tampa 8 Motel at 10:50 a.m. (12RT 1295-1297.) Officer Baxter walked into the room, and then into the bathroom area, and observed a body of a white female inside the bathtub. (12RT 1296.) Officer Baxter noted that there was lividity, or pooling of blood, on the left side of the body, indicating that the woman had been dead for "some time." (12RT 1296-1297.)

The room was secured and cordoned off with police tape. (12RT 1281, 1283, 1297-1298; see also 12RT 1331.) Officer Morris and other officers then waited for the Tampa Police Department homicide detectives to respond. (12RT 1293.) Deputy Morris also went to the front office to try to determine who had rented the room. (12RT 1292.) Deputy Morris recovered a registration slip with appellant's name, which be later provided to the homicide detectives. (12RT 1292-1294, 1339-1340.)

Tampa Police Department Detective Julie Massucci arrived at the Tampa 8 Inn at approximately 11:00 a.m. (12RT 1323, 1330-1331.) Massucci went to room 119 and saw a handmade "do not disturb" sign hanging on the door. (12RT 1332, 1340.) In conducting her investigation, Detective Massucci entered the room. There was a bed with two end tables. There were some crumpled pieces of paper on the floor and some paper in a garbage can. (12RT 1333.) The television was on. (12RT 1334.) As Mussucci walked towards the rear of the room, she saw some smeared blood on a counter top in the foyer area. (12RT 1334, 1336.) There was also blood on the floor of the foyer. (12RT 1339.)

To the right of the foyer area was a bathroom with a toilet and a bathtub. There was a pile of clothing and a pair of shoes on the floor next to the toilet, and the clothing

appeared to be saturated with blood. (12RT 1334-1335, 1338.) Included in this pile was a pair of black jeans, and the jeans had a tearing. (12RT 1338.) Blood was smeared all over the shower stall of the bathroom and was dripping down the bathtub and off the toilet. (12RT 1334-1335, 1338.) There was also some blood and some balled-up toilet paper inside the toilet. (12RT 1334-1335.) A white female was lying in the bathtub, with her head at the end opposite the faucet. (12RT 1335.) The body was face-up, and there were some articles of clothing in between her legs. (12RT 1335, 1338.) There was a wash cloth in the sink area covering the sink stopper, and there was blood dripping down from the bathroom sink counter area. (12RT 1337, 1339.) Several cigarette butts and a small gold bracelet were found in the sink drain. (12RT 1339.)

Detective Massucci examined the body found in the bathtub and noted numerous stab wounds, including a "very significant stab wound to the right buttocks area," a "large stab wound under the left breast," and smaller nicks on the chest area. There was also a long scratch "defensive" wound on the wrist area, as well as numerous bruisings to the arms and back. (12RT 1343.) The stab wounds on the body corresponded to tears found in the jeans and shirt found on the bathroom floor. (12RT 1344-1345.) Based on this finding, Detective Massucci believed that the victim was clothed at the time of death. It appeared that the homicide happened "some time" prior to the discovery of the body, as the body showed lividity indicating that the victim's body had been in the bath for more than a few hours. (12RT 1346-1347.) Detective Massucci estimated that the victim's body had been in the bathtub for a minimum of five hours, and possibly longer than 10 or 12 hours. (12RT 1347.)

7. The Body Is Identified As Tina Cribbs

On Tuesday, Mary Dicke was watching a television news program and learned that a "Jane Doe" had been found murdered in a motel. The news report gave a description of the victim. Dicke "knew" the victim was Cribbs based on the description and called the police. (11RT 1227-1228.) Ernest Bruton, who had taken

Cribbs's purse home, was also alerted to the television news by his wife. The news program listed Cribbs's name, and Bruton believed that the name given on the television matched that of the identification found in the purse. The next day Bruton checked the purse and then contacted the Sheriff's Department. Bruton subsequently took the purse to the Sheriff's Department and turned it over to them. (13RT 1528-1529.)

c. Appellant Returns To Florida And Murders Andy Lou Sutton

The day before appellant was expected to return to Louisiana, he called Andy Sutton and told her that he would be delayed because his truck "wasn't ready yet." (12RT 1384-1385.) He also told Sutton that he had purchased a car for her, as Sutton did not have a vehicle. (12RT 1386-1387; see also 12RT 1372.)

On the morning of November 8, 1995, Theresa Whiteside woke up and Sutton brought her a cup of coffee. (12RT 1384-1385.) At that time, Sutton told her that appellant was outside in the parking lot "cleaning up" the car he had purchased for Sutton. Sutton also told Whiteside that appellant needed to borrow some tools to fix a headlight "or something." (12RT 1385.) At that same time, neighbor Sterling Fontenont saw appellant walking back and forth to a white Ford Festiva three-door hatchback from a red truck. It appeared that appellant was trying to fix a taillight on the Ford Festiva. (12RT 1423-1427, 1432-1433, 1437.)

Appellant eventually went back inside the apartment and Whiteside asked appellant what kind of car he had purchased. Appellant told Whiteside that it was "some kind of Ford" and he told her it was a "some '90 model." (12RT 1386.) Appellant also stated that he got the car from a friend and that he paid his friend $400 and would pay the rest of the money for the car later. (12RT 1386-1387.) Appellant also asked for the location of the Department of Motor Vehicles, as he indicated that he intended to change the registration on the car to Sutton's name. Whiteside made arrangements to meet appellant and Sutton later that day at the "It'll Do Lounge," and

Whiteside left the apartment. (12RT 1387.)

At approximately 3:00 to 3:30 p.m., Whiteside went to the "It'll Do Lounge," and saw appellant and Sutton there. When she arrived, Whiteside saw appellant's red truck outside the bar. After she arrived, appellant approached Whiteside, put his arm around her, and told the bartender to get Whiteside "whatever [she] wanted." (12RT 1388.) Whiteside, who felt uncomfortable with appellant's arm around her, ordered a beer and then extricated herself from appellant and walked towards Sutton. (12RT 1388-1389.) Whiteside sat down with Sutton and drank her beer while appellant remained at the end of the bar. (12RT 1389-1390.) Whiteside told Sutton that she did not want appellant to stay at the apartment anymore and that appellant "needed to go." Sutton responded that she would "take care of that." Then, appellant, Sutton, and Whiteside decided to go to the "Touch of Class" bar. (12RT 1390.)

Appellant and Sutton stopped and got some cigarettes at a food market across the street from the "It'll Do Lounge," and then they went to the "Touch of Class" Lounge, meeting Whiteside there at approximately 4:00 p.m. (12RT 1390-1391.) The three sat down at the bar of the "Touch of Class" Lounge and Whiteside ordered appellant and Sutton a beer. As they were sitting, appellant began playing with the back of Whiteside's hair. Whiteside motioned that she did not want appellant to touch her, and she told Sutton, "He doesn't know we don't go there." Whiteside also told appellant, "If you can't hang, you don't need to be hanging around us." By this she meant that appellant could go away if he could not handle his alcohol. (12RT 1391.) As appellant "seemed kind of drunk," Sutton asked if she could take appellant back to the apartment and let him "sleep it off." Whiteside told Sutton that would be "fine" and that she would call her later on. (12RT 1392.) At approximately 4:30 p.m., appellant and Sutton walked out of the "Touch of Class" Lounge and Whiteside went to work. (12RT 1392-1393.)

Between approximately 10:30 and 11:00 p.m., Sterling Fontenont arrived at his apartment at the Port Au Prince complex. (12RT 1428.) At that time, Fontenont saw

appellant and Sutton park their vehicle in the parking lot, get out of their car, and walk towards Sutton's apartment. (12RT 1428-1429, 1435.)

At approximately 11:00 p.m., Whiteside called Sutton, but the phone just "rang, rang, rang." The phone rang approximately 10 to 12 times and the answering machine did not answer. (12RT 1394.) Despite appellant's earlier indications that he and Sutton planned to go to the bar where Whiteside worked later that evening, appellant and Sutton never showed up at Whiteside's place of employment. (12RT 1394-1395.) Whiteside arrived home at approximately 3:00 to 3:30 a.m. on Thursday morning. (12RT 1395-1396.) When Whiteside got out of her car, she noticed appellant's red truck in the apartment complex's parking lot. (12RT 1396.) Whiteside went to the apartment door and unlocked the door. However, the deadbolt for the door was locked, and Whiteside was forced to unlock the deadbolt using a key.[28/] (12RT 1396-1397.) Whiteside walked inside the apartment. (12RT 1396-1397.) As she did so, she heard another door shut. The lights were on in the living room, dining room, kitchen, and bathroom, but it appeared that no one was inside the apartment. Whiteside hollered for Sutton, but nobody answered. (12RT 1397.) The bedroom door was shut, but there was no blanket or pillow set out for Whiteside.[29/] (12RT 1398.) Whiteside sat down and ate her food. She then went to the bathroom and put on a black t-shirt. She went back out to the living room, put on the television, laid down, and eventually fell asleep.[30/] (12RT 1398-1399.)

At approximately 8:00 or 9:00 a.m., Whiteside opened her eyes because the television volume was turned at "maximum capacity." Whiteside grabbed the remote control from the coffee table, turned off the television, and went back to sleep. (12RT

---

28. Sutton had never locked the deadbolt previously. (12RT 1396.)

29. This was Sutton's habit whenever Sutton had a male guest staying at the apartment. (12RT 1398.)

30. When she went to sleep, the television volume was not very loud. (12RT 1400.)

1399-1400.) At approximately 10:00 a.m., Whiteside heard a knock at the door. She got up and went to the door, and realized that Sutton's ex-boyfriend, Thomas Bryant, was at the door.[31] (12RT 1401, 1417.) Bryant had unsuccessfully called the apartment a couple of times that morning, only to receive a recording the phone was out of service. (12RT 1417-1418.) When Bryant arrived, Whiteside asked him to "hold on a minute," and she went to the bedroom door and knocked. When there was no answer, she knocked again, and then opened the door. (12RT 1501-1402, 1418.)

Whiteside saw the "covers all wrapped up tightly like a present." (12RT 1402, 1404-1405.) Whiteside walked over towards the bed, stepping in water as she did so. Whiteside said, "Andy," and touched the covers. She then pulled the covers off and saw a pillow over a head and "a lot of blood from the chest area." Whiteside, who was unable to tell if the body was a man or a woman, pulled the covers down further and saw vaginal hairs. She called Sutton's name, and then pulled the pillow off the head. (12RT 1402, 1405.) Whiteside saw "the most horrible agonizing facial features that she had ever seen." Sutton's arm was back behind her head and there were cut marks to her right wrist. Whiteside touched Sutton and said her name. (12RT 1402.) She then ran to the door and told Bryant, "There is something wrong with Andy." (12RT 1403, 1418-1419.) Bryant ran back to the bedroom. (12RT 1403, 1419.) Bryant tried to turn on the bedroom light, but was unable to do so. (12RT 1419, 1421.) He then walked over to the bed, sat down on the edge of the bed, and touched Sutton's arm. Sutton was "stone cold," and he knew she was dead. (12RT 1419.) Bryant touched Sutton's neck and the back of her head. He then turned to Whiteside and told her they needed to call 911. (12RT 1419; see also 12RT 1403.) Bryant noticed the phone lying on the floor and he put the phone back on the receiver. (12RT 1419.)

---

31. Bryant had lived with Sutton for six months from February until August 1995. (12RT 1415.) They remained friends and had talked about getting back together. (12RT 1416-1417.)

Whiteside tried to call "911" from the telephone in the living room, but was unable to get a "dial tone."[32] (12RT 1403, 1420.) Whiteside and Bryant then knocked on a neighbor's door in order to use the telephone. When there was no answer, Bryant suggested that they go to his truck and use his cellular telephone. (12RT 1403, 420.) Bryant and Whiteside went out to his car and Bryant called "911." (12RT 1421.) When they went out to the parking lot, appellant's red truck was parked in the lot. (12RT 1406.)

Bossier City Police Department authorities went to the murder scene, located at 400 Preston Boulevard in Bossier City, in apartment number 93.[33] (12RT 1439-1440, 1447-1448.) Inside the kitchen area of the apartment were three butcher blocks containing knives. However, the butcher blocks were not full and were missing knives. (12RT 1450-1451; see also 12RT 1442.) A knife was found in the bedroom under a pile of clothing, and was the same type of knife as those found in the butcher blocks. (12RT 1452-1453.) Inside the bedroom, the carpet was stained with water[34] and blood. (12RT 1451-1452.)

An autopsy was performed on Sutton's body and 14 stab wounds were discovered, including four defensive wounds on her fingers and wrist. (12RT 1453-1256.) One of the defensive wounds on her right hand went through the muscles of her hand. (12RT 1455.) There were also stab wounds to Sutton's abdomen, upper body, back, shoulders, and torso. (12RT 1456.) It was determined that Sutton died from multiple stab wounds. (12RT 1456, 1459.) Some of the wounds were at deep at 6.5 inches, and one of the officers described the wounds as "a hacking deal." (12RT

---

32. It was later discovered that the phone cords had been pulled out from the walls. Additionally, the light bulbs in the bedroom had ben unscrewed. (12RT 1457-1458, 1461.)

33. The crime scene was videotaped. (12RT 1440-1441.)

34. Bossier City Police Department Officer Kenny Hamm testified that the water came from the waterbed, as some of the stab wounds found on Sutton's body went through her body and into the waterbed. (12RT 1460.)

1460.)

Bossier City Police Department Officer Kenny Hamm ran a vehicle registration check on the red truck found in the parking lot, and learned that the vehicle was registered to appellant. (12RT 1449.) The truck was subsequently impounded. (12RT 1449.) Officer Hamm also obtained a warrant for appellant's arrest and put out a nationwide broadcast for appellant's apprehension and arrest. (12RT 1450.)

d. Appellant Flees To Tennessee And Kentucky, And Is Ultimately Apprehended In Kentucky

On November 13, 1995, Kentucky State Police Trooper Robert Stephens had set up a surveillance in the town of Ravenna in Estill County, Kentucky. Trooper Stephens was in an unmarked police vehicle and not in uniform, on state Highway 52 near Lee County in Kentucky. (12RT 1470, 1472, 1474-1476, 1489.) Earlier that day, Trooper Stephens had been advised that appellant was wanted for a crime, and that appellant had visited an aunt's house in Lee County. Trooper Stephens had been given the description of a white Ford, and he had seen a photograph of appellant. (12RT 1472-1473, 1475-1476.) Trooper Stephens set up surveillance on a road that intersected with the road on which appellant was traveling. (12RT 1475.)

At approximately 2:30 p.m., Trooper Stephens saw the white Ford drive by and he began following the car. (12RT 1472-1476.) The car had Tennessee license plates and Trooper Stephens "ran" the license plate number. The plates "came back" as stolen from Tennessee. (12RT 1475.) Trooper Stephens pulled alongside the Ford Festiva and observed appellant driving the car. (12RT 1476.) Trooper Stephens then "fell back," and followed appellant for "a little while." (12RT 1476-1477.) Appellant began drinking beers, and he rolled down his window and threw approximately four to five half-full beer cans out of the window at Trooper Stephens' vehicle. (12RT 1477, 1482-1483.) According to Trooper Stephens, it seemed that appellant was "intentional[ly]" throwing the beer cans at him, as his unmarked police car was readily

identifiable as a police vehicle.[35] (12RT 1477.)

Trooper Stephens radioed to other officers for assistance. Another Kentucky State Police Trooper pulled behind Trooper Stephens with his lights activated. (12RT 1478.) Appellant pulled to the side of the road as if he intended to stop, and Trooper Stephens pulled aside as well. (12RT 1478-1479.) At that point, appellant sped off. Appellant ran a red light, went through a small town, and crossed a bridge while on the wrong side of the road. Trooper Stephens activated his lights and siren and followed appellant. (12RT 1478.) Appellant, pursued by the two officers, sped past another Kentucky State Police trooper who was positioned in the middle of the road. This third officer joined the pursuit, falling in behind the other officers. Appellant was pursued by the officers into Madison County. (12RT 1479.) Trooper Stephens was then advised that a roadblock was being set up. However, the state police did not have enough time to block the road completely and appellant, followed by the three pursuing officers, traveled past the roadblock. (12RT 1479-1480, 13RT 1491-1492.) After appellant went past the roadblock, three additional officers joined the pursuit. (13RT 1492-1493.)

Appellant drove down the highway for another two miles, driving down the wrong side of the road. As appellant was posing a danger to other vehicles on the road, Trooper Stephens was directed to "ram" appellant's car. Trooper Stephens pulled alongside appellant, but then appellant "cut off" Trooper Stephens such that Trooper Stephens was forced into a grassy area at the side of the road. (12RT 1480.) Kentucky State Police Sergeant Barnes pulled alongside appellant and rammed appellant's car over to the side. Appellant's vehicle spun around. (12RT 1481.) The pursuit concluded approximately 30 to 40 minutes after it had first commenced, and involved driving through four small towns covering approximately 50 miles. (12RT 1474, 1481.) Appellant was taken out of the car, frisked, handcuffed, and transported to the

---

35. The unmarked police vehicle was a Ford Crown Victoria and had antennas and lights in the grill. (12RT 1477.)

police station. (12RT 1482, 1484; 13RT 1493.)

Kentucky State Police Trooper Nolan Benton conducted an inventory search of the white Ford. (13RT 1495.) Inside the car, in the backseat, was a big igloo ice chest packed full of food, including peanut butter, "rice-a-roni," and some spices. A child's comforter was also in the backseat of the car. These items were subsequently identified by Whiteside as belonging to her. (13RT 1496-1498; see also 12RT 1367-1369.) A black leather billfold containing appellant's driver's license, as well as Social Security cards for Whiteside's two sons and United States currency, was found in the car. (12RT 1368-1370; 13RT 1498.) A Florida license plate was recovered from the rear hatchback area of the car. (13RT 1500.) $66.09 was found inside the vehicle. (13RT 1503-1504.) An unopened package of GPC brand cigarettes with a Kentucky tax stamp, a partial pack of GPC cigarettes with a Kentucky tax stamp, an empty pack of GPC cigarettes with a Kentucky stamp, a pack of Doral cigarettes with a Louisiana tax stamp, and a pack of Marlboro cigarettes with a Louisiana tax stamp, were also found inside the car, along with numerous cigarette butts.[36] (13RT 1504-1507.)

The white Ford was subsequently identified as belonging to Tina Cribbs. (13RT 1509-1511.) Property belonging to Cribbs found inside the vehicle included: an umbrella; a Jimmy Buffett cassette tape; a pair of red sunglasses; notes in Cribbs's mother's handwriting regarding flight information; a cap Cribbs had obtained from a concert; a cigarette lighter with the name of Cribbs's son; a plastic cup; a letter addressed to Cribbs; Cribbs's hairbrush; a red bow tie that was part of Cribbs's uniform; a Hank Williams cassette tape; a "Little Texas" cassette tape; a receipt from the "U Save" store; a card for Cribbs's youngest son; a stuffed toy that Cribbs had placed on the car's console; a Florida State t-shirt that belonged to one of Cribbs's

---

36. Cribbs's mother smoked Doral cigarettes and Dicke was "sure" the cigarette pack belonged to her. (13RT 1516.) Cribbs smoked Marlboro Lights cigarettes, like the kind found in her vehicle. (13RT 1517.) According to appellant's testimony during the defense case, he smoked "Marlboros," as well as generic cigarettes. (14RT 1740.)

sons; and a Ramada Inn pen. (13RT 1511-1520.)

e. Appellant Was Convicted Of Murder In Florida

Following a jury trial, appellant was convicted of the murder of Tina Cribbs in Florida, on May 7, 1997. (12RT 1325-1327.)

B. Defense Evidence

1. Appellant's Testimony That Gallagher Left His Apartment With "Steve Kele"

On September 28, 1995, appellant was living at 6645 Woodman Avenue in Los Angeles. (13RT 1630.) Appellant worked as a maintenance man in the building,[37] and Christina Walker and Michael Flynn were staying in his apartment. (13RT 1630, 1665; 14RT 1712.) At approximately 11:00 a.m. that morning, appellant went by himself to CJ's Lounge to have a couple of beers. (13RT 1630-1631.) When appellant arrived at CJ's, he called his friend, Steve Kele.[38] (13RT 1631-1632.) Kele met appellant at CJ's at approximately 11:30 a.m., and they went to a bank in Sherman Oaks. (13RT 1632.) Kele gave appellant $1,000.00, and took appellant back to CJ's Lounge. (13RT 1632, 1664.) Appellant then went back to his apartment, changed clothes, and went back to CJ's and had a few more beers. (13RT 1632.) At approximately 5:30 p.m., appellant went outside CJ's to use the public pay phone. (13RT 1631-1632.) While talking on the phone, Walker and Flynn pulled up, and they then parked in the back parking lot. (12RT 1632.) Appellant, Walker, and Flynn went inside CJ's together and ordered four to five beers and had a pizza. (13RT 1632-1633.) They stayed at CJ's Lounge for approximately two and a half hours, and then left. (13RT 1633.)

---

37. Appellant also worked as a contractor for a home improvement center. (13RT 1665-1666.)

38. On cross-examination during the prosecution case, Walker testified that appellant had offered her $10,000 to go to Europe with him and Kele and "drain bank accounts." (See 10RT 952.)

Appellant, Walker, and Flynn got into Walker's car and they drove to McRed's and parked in the back parking lot. (13RT 1633.) They arrived at McRed's approximately 7:00 to 7:30 p.m. (13RT 1635.) The three went inside, sat at the bar, and ordered drinks.[39] Approximately a half-hour later, appellant, Walker, and Flynn sat down at a booth near the dance floor. As the bar was "packed," appellant approached Gallagher and asked if he, Walker, and Flynn could sit at her booth. (13RT 1633-1634; see also 13RT 1655.) Gallagher invited them to sit down, and appellant and Gallagher talked. Gallagher introduced herself as "Sam," and appellant purchased approximately six to eight rounds of drinks. (13RT 1634.) Appellant and Gallagher danced and Gallagher kissed appellant and sat on his lap. (13RT 1663, 1666-1667; 14RT 1702.) While he was at McRed's, appellant called Steve Kele every hour, as he had planned to meet Kele at McRed's. (13RT 1635.)

Appellant, Walker, Flynn, and Gallagher left McRed's at approximately 1:20 a.m. (13RT 1636.) They planned to go to back to CJ's, and appellant intended for Kele to meet with him there. (13RT 1637.) When appellant went to enter Walker's car, he noticed that her dogs had made a mess in the backseat. Appellant refused to go in Walker's car, and he went with Gallagher in her truck to CJ's. (13RT 1636-1637, 1667-1668, 1670-1671-1674.) Appellant, Walker, Flynn, and Gallagher went inside CJ's, and appellant ordered a round of drinks. No one else, except the bartender, was inside the bar. (13RT 1638.) Appellant, Walker, Flynn, and Gallagher then left and went to a 7-11 store across the street from CJ's Lounge. (13RT 1638, 1640; 14RT 1739.)

While Gallagher stayed in her truck and Walker stayed in her car, appellant and

---

39. Appellant stated he initially had plans that evening with Keener. (13RT 1657-1658.) Appellant denied telling Keener that he was a government agent, and he denied "pinning" Keener against the wall. (13RT 1657-1658, 1661.) Appellant characterized Keener as "falling" for him, but testified that Keener did not want customers to know that she was becoming involved with him. (13RT 1658-1660.)

Flynn went inside the convenience store and purchased some beer. They then went back to the vehicles. Walker and Flynn sped away towards appellant's apartment. As appellant and Gallagher were at the parking lot for the 7-11 and just about to leave to go back to his apartment, Kele pulled up in front of CJ's Lounge and appeared to be looking for appellant. (13RT 1640.) Appellant got Kele's attention and Kele pulled into the parking lot behind Gallagher's truck. Appellant told Kele, "Follow us. We're going to the apartment." Kele agreed, and both cars pulled out onto Woodman. As Gallagher and appellant approached appellant's apartment building, appellant saw lights and sirens going off in front of his apartment building. (13RT 1641.) Gallagher told appellant that she had a warrant out for her arrest as she had failed to appear in court. Gallagher also told appellant that she did not want to be arrested and have her truck impounded. (13RT 1641-1642.) Gallagher drove down the street to a strip mall and parked her truck in order to watch "what was going on." Kele followed, pulling his Lincoln into the parking spot next to Gallagher's truck. Appellant and Gallagher got out of the truck and spoke to Kele, and then they both got into Kele's car. Kele drove down Woodman and parked in the underground garage for appellant's apartment complex. (13RT 1642.)

Appellant, Kele, and Gallagher went up to appellant's apartment. Walker was lying on her bed in a man's shirt, and her bedroom door was open. Appellant closed the door, and Kele and Gallagher entered the apartment. (13RT 1643, 1674.) The three then went out to the balcony and talked. At one point, Gallagher indicated that she wanted to go down to her truck and change her clothes. (13RT 1644.) Kele took Gallagher back to her truck. (13RT 1644-1645.) Appellant stayed in the apartment, drank a couple more beers, and then passed out. After Kele left with Gallagher, appellant never saw Gallagher again. (13RT 1645.)

Appellant woke up at approximately 6:00 a.m. When he awoke, neither Kele nor Gallagher were there. (13RT 1645.) At approximately 6:20 to 6:30 a.m., appellant spoke to Walker and told her that he had "bigger problems" than her problem of Flynn

being arrested for drunk driving. Appellant also told Walker that Gallagher was dead. (13RT 1676-1680, 14RT 1699.) However, appellant did not call the police because he did not know "for sure" if Gallagher was dead. (13RT 1683-1684.) When Walker asked appellant what had happened, appellant said that Gallagher had left. (13RT 1680.) Walker "passed right back out" and went to sleep. (13RT 1683.)

Appellant left his apartment and walked down to a public phone and called Kele. (13RT 1645.) At approximately 11:00 a.m., Kele went to appellant's building and picked up appellant. (13RT 1646-1647.) Appellant spent the day with Kele. (13RT 1689; 14RT 1709.)

Appellant had planned to leave town before Gallagher's murder, as he needed to renew his truck driver's license for Mississippi. A day after the murder, appellant purchased a bus ticket, intending to go to Jackson, Mississippi, then then go back to his hometown of Hamilton, Ohio. (13RT 1684-1693; 14RT 1708.) Appellant had no plans to return to California after he reached Ohio. (14RT 1715-1716.) Two days after the murder, appellant left on a bus, stopping in Las Vegas. Appellant gambled in Las Vegas, and then took a bus to Jackson, Mississippi. (13RT 1685-1693; 14RT 1726-1727.) Two weeks after appellant went to Mississippi, he drove his red truck[40] to Ohio. (14RT 1718, 1722-1724, 1727-1728.) Appellant stayed in Ohio for a "week or two" and then returned to Mississippi. (14RT 1725.)

Appellant claimed that he did not kill Gallagher. (13RT 1655.) Appellant was convicted of first degree murder in Florida in 1997, and forgery in Ohio in 1987. (13RT 1653-1654.) According to appellant, Kele was convicted of murder in Florida. (14RT 1699.)

---

40. Appellant had purchased this truck in Mississippi, and the truck was registered in the state under the name of "Glen Rogers." (14RT 1733-1734.)

2. Testimony Attempting To Refute Evidence Rendered By Prosecution Witnesses

Los Angeles Police Department Detective Michael Coblentz spoke to Flynn on October 18, 1995. (13RT 1625, 1627.) At that time, Flynn did not tell Detective Coblentz that when he was arrested on the morning of September 29, 1995, he saw a struggle between appellant and Gallagher. (13RT 1625-1626.) However, Flynn told Detective Coblentz that he told the police officers who arrested him for driving under the influence about the people in the truck. (13RT 1627.)

On September 29, 1995, Vladimir Pustilnikov lived behind the Laurel Wood Convalescent Hospital. (12RT 1301, 1317-1318.) That morning, at approximately 5:45 a.m., Pustilnikov arrived back at his house from work. (12RT 1301-1302.) When he arrived, he saw smoke and walked over to the parking lot adjacent to his property. (12RT 1320.-1321.) At that time, Pustilnikov saw a fire inside a truck. (12RT 1321.)

II. PENALTY PHASE

A. Prosecution Evidence

1. Testimony Regarding The October 1995 Murder Of Linda Price In Jackson, Mississippi

On October 1995,[41] Carolyn Wingate lived in Jackson, Mississippi. (16RT 2071-2073.) Wingate had three daughters who also lived in Jackson. (16RT 2073; see also 16RT 2000-2001, 2053.) Wingate's oldest daughter was Debbie, her second-oldest was Cathy Carroll, and her youngest daughter was Linda Price. (16RT 2071-2072.) Price was 34 years old, and was slim with long red hair. (16RT 2002, 2072.) Price lived with Wingate. (16RT 2057, 2073.)

On October 9, 1995, Price went to the state fair with her sister, Kathy Carroll, and Carroll's husband and son. They arrived at approximately 6:30 to 7:30 p.m.

---

41. This incident was subsequent to the murder of Sandra Gallagher, but occurred prior to the murders of Cribbs and Sutton. (See 12RT 1323, 1330-1331, 1439-1448; 13RT 1602-1606.)

(16RT 2001-2002.) When they arrived, they went to the beer tent and sat at a table and listened to the band. (16RT 2002-2004.) Approximately an hour or two after they arrived, Carroll saw appellant standing approximately 42 feet away. (16RT 2004-2005.) Appellant had long blond hair and blue eyes. (16RT 2013.) Carroll and her husband got up from their table and danced. When they returned, appellant was sitting at the table with Price. (16RT 2005.) Price introduced appellant to Carroll and her husband, and they all talked for a few minutes. (16RT 2005-2006.) Price asked Carroll "over and over," "Ain't he [appellant] real good looking?" (16RT 2008-2009.) Carroll and her husband "went on with their business," while appellant and Price drank beer, danced, and talked. (16RT 2006-2008.) Approximately an hour or two after they met appellant, Carroll and her husband left. (16RT 2006, 2008.)

On October 12, Price called her mother and asked, "Mother, would you come and get me?" (16RT 2073, 2091.) Price further indicated, "We are at the Sun-N-Sand Hotel," and asked if her mother would take her "somewhere." (16RT 2074.) Wingate went to the hotel in downtown Jackson, and went to the room specified by Price. (16RT 2074-2075, 2091.) When Wingate arrived, Price ran down the stairs and said, "Mother, I have someone I want you to meet." Price also said, "You will just love him to death. He is precious. I found the love of my life." Appellant went down the stairs and Price introduced appellant to Wingate as "Glen Rogers." (16RT 2076.) Appellant, Price, and Wingate went in Wingate's car, and appellant told Wingate that his truck had been stolen from the state fair. (16RT 2077, 2091.) Appellant asked Wingate to take him to "the place where they take the stolen vehicles." (16RT 2077.) Wingate drove appellant and Price to the impound lot and appellant asked the attendant if he could "look around." While Wingate waited in her car, appellant and Price looked around the impound lot and found appellant's truck. (16RT 2077, 2093.) They then went to the police station and obtained a receipt to retrieve appellant's truck. Wingate

drove appellant and Price back to the impound lot and they recovered the truck.[42] (16RT 2078.)

Over the next few weeks, Wingate saw appellant and Price together often. Price drove appellant's truck while appellant worked for a construction company. (16RT 2079, 2093-2094.) Appellant purchased a Ford Mustang for Price that was not running, intending to fix the car for her. (16RT 2094.) Price and appellant went to Wingate's house "quite often." On one occasion, appellant told Wingate that he wanted to take Price to a cabin he had in Kentucky. (16RT 2081.)

On October 12, 1995, Price's sister, Marilyn Reel, went to Wingate's house in Jackson, Mississippi. (16RT 2053-2054.) Reel saw appellant and Price there. When Reel met appellant, Price pulled her aside and asked, "What you think about him? Ain't he cute?" Reel told Price that appellant was a "nice looking guy." (16RT 2055-2056.)

October 16 or 17 was the next time Carroll saw Price and appellant. Price and appellant pulled into the driveway of Carroll's house in Jackson, Mississippi. (16RT 2009.) Appellant and Price were inside appellant's "little orange truck."[43] (16RT 2009-2011.) Price's daughter and Carroll's daughter, who were both at Carroll's house, went out and talked to Price. (16RT 2009-2010.)

On October 16, 1995, appellant and Price rented a two-bedroom apartment in Jackson, Mississippi. (16RT 2011-2012, 2080.) Carroll visited her sister at the apartment approximately five to six times, and on each occasion Carroll saw appellant's truck parked in the parking lot. (16RT 2012.) On one occasion when Carroll was at the apartment on a Saturday evening, appellant became angry when a water heater broke and water leaked into the apartment. (16RT 2014-2015.) Appellant

---

42. Appellant testified during the guilt phase defense case that his truck was stolen in Mississippi. (See 14RT 1731, 1734.)

43. This was the truck found in the parking lot for the Port Au Prince apartment complex. (See 16RT 2012-2013.)

told Carroll and Price that he would "do something about it," and he took out a book that indicated he had been a "maintenance guy" in Los Angeles. (16RT 2015.)

Wingate went to Price's apartment early on the morning of October 30. (16RT 2082.) Wingate told Price that she had been contacted regarding a job application Price had submitted, and that she was to start work on the morning of October 31. (16RT 2082-2083) Price told her mother that she would stop by Wingate's house before she started work the next morning, at approximately 6:20 to 6:30 a.m. (16RT 2083.) On Monday, October 30, Price's sister Carroll went to the apartment. (16RT 2015.) Carroll told Price that an appliance store had called her to verify that she was a reference for "Linda Price and Glen Rogers," in connection with a stereo rented by Price and appellant. (16RT 2015-2016, 2025.) Appellant told Carroll in a "mean way," "I'm Glen Rogers." That same day, Carroll made plans that Caroll would bring "the grandchildren" over on Halloween night. (16RT 2016.)

On October 30, Price called her sister, Reel, and asked her to come over to the apartment she shared with appellant. (16RT 2056.) Reel, her husband, and her son went to Price's apartment and "sat with her all day." While they were sitting there, appellant entered. (16RT 2056-2057.) Appellant told Price, "I know that was you talking because I could hear your big mouth everywhere." (16RT 2057.) Price was upset by appellant's comments and cried. Appellant spoke to Reel's husband and son. Later that evening, Reel's husband asked Price if she wanted to go out and drink a few beers with them. (16RT 2058.) Price asked appellant and he said, "It don't matter" and "We can go with him." Appellant, Price, Reel, and Reel's husband went to the Sportsmen's Lounge on Highway 80 in Jackson, Mississippi. While they were sitting and talking, Price told her sister that she loved her. In response, appellant told Price, "Don't be telling her that." Price replied, "Glen, I'm always telling my sister that." Price and Reel went to the restroom together and Price started crying. (16RT 2059.) That evening, Price also asked Reel to come to her apartment the next evening, for Halloween. (16RT 2060-2061.)

On the morning of October 31, Price did not go to her mother's house as expected. (16RT 2083-2084.) Wingate went to her daughter's apartment at approximately 9:00 a.m. (16RT 2084.) At that time, Wingate did not see appellant's truck and no one answered when she knocked on the door. (16RT 2084.) Wingate waited for Price, but Price never showed up. (16RT 2085-2086.) As it was out of character for Price not to keep an appointment, Wingate began looking for Price. (16RT 2086.)

That same day, at approximately 6:30 p.m., Carroll brought the children to Price's apartment. (16RT 2017.) At that time, Carroll did not see appellant's truck. Carroll knocked on the door and there was no answer. Carroll looked in the window and saw no activity. (16RT 2017-2018.) Carroll left the apartment, but called her mother indicating that she could not find Price. (16RT 2018-2019.)

On November 1, Wingate went to the apartment and looked into the bedroom window. The bedroom was "dimly lit" and Wingate could see into the hallway. (16RT 2086.) Wingate noticed that the shower curtain was pulled closed. (16RT 2087.) Wingate thought this was odd, as Price was an "immaculate housekeeper," and never closed the shower curtain when she cleaned the bathtub. Wingate called the police and then filed a missing person's report with the police the next morning. (16RT 2087-2088; see also16RT 2018-2019.)

On November 3, Wingate went with the police to the apartment. (16RT 2088.) A maintenance man unlocked the apartment door and the police entered the apartment. (16RT 2020, 2088.) Approximately five minutes later, a policeman exited the apartment and told Wingate that Price was dead and that she was in the bathtub. (16RT 2020, 2088-2089.) Jackson Police Department Detective Chuck Lee went to the apartment, located at 3630 Raney Road in Jackson, arriving at approximately 10:40 p.m. (17RT 2117-2119.) Detective Lee entered the apartment and noticed that the living room area was in "disarray," with cassette tapes, beer cans, and ashtrays full of cigarette butts scattered on the floor. (17RT 2121.) Some live .22 caliber bullets were

on the floor, and there were blood stains on the white tile floor in the kitchen. (17RT 2121, 2123-2124.) A white plastic garbage can in the kitchen had blood smears on it, and there were bloody paper towels in the garbage can. (17RT 2121-2122.) A blue-handled mop was on the counter for the kitchen sink and there appeared to be blood on the mop head. (17RT 2123.)

Detective Lee went inside the bathroom. On the bathroom mirror, written in red lipstick, was: "Glen, we found you." The shower curtain for the bathtub was closed, and Detective Lee pulled aside the curtain. (17RT 2125.) Price's body was laying in the bathtub and was completely nude. (17RT 2125-2126.) Her head faced the faucet and her feet faced the foot of the bathtub. She was lying on her back and a washcloth covered her face. Price's body had several stab wounds, including: a cut to her neck "from ear to ear" that was "completely slashed open"; two stab wounds under her right breast; one stab wound above her right breast; one stab wound on her right side just below the armpit; and one stab wound to the right shoulder blade area. (17RT 2126.)

Shortly after Wingate returned to her house following the funeral, she received a phone call from someone asking to speak to "Linda's mother." (16RT 2089.) Wingate picked up the phone and the person asked, "Is this Linda's mother?" When Wingate said that it was, the person said, "I'm Glen's brother. I am looking for Glen Rogers." (16RT 2089-2090.) Wingate told the person, "We are looking for him, too." When the person on the phone asked, "Why?," Wingate responded, "My daughter had ended up dead. I want to know where he is." The person then said, "I am not surprised that your daughter is dead because anybody that has been around Glen for the last seven years has ended up dead." When Wingate asked the person why he was calling her, he stated, "Your f-ing daughter is dead, isn't she?" Wingate recognized the voice as appellant's. (16RT 2090.)

2. Testimony Regarding Appellant's 1991 Arrest In Hamilton, Ohio

On March 7, 1991, Hamilton, Ohio Police Department Officer Kevin Flannery received two calls to respond to appellant's address at 619 Ludlow Street in Hamilton.

(16RT 2030-2031.) The first call from an anonymous caller indicated that appellant was "inside tearing up the house." (16RT 2031.) Officer Flannery and another officer responded to appellant's address at approximately 3:00 to 3:30 p.m., and found the house unlocked and appellant "passed out asleep on the bed." (16RT 2031-2032, 2040.) The house was "pretty much of a mess" and there were holes "all over the masonry or dry wall." It appeared that someone had used a hammer to damage the wall, and Officer Flannery saw a hammer in the house. The officers did not wake up appellant, but just left him there. (16RT 2032, 2043.)

Later that day, Officer Flannery received another call to go to appellant's home address. At that time, Officer Flannery was informed by his dispatch that appellant had a gun and had threatened a "live-in girlfriend" that he planned to "blow away anybody that came near his house." (16RT 2033.) When Officer Flannery approached appellant's house, he heard appellant inside being "very loud." (16RT 2033-2034.) Officer Flannery described appellant as in an "uncontrollable rage." (16RT 2044.) Officer Flannery and other officers attempted to talk to appellant, but appellant advised them that he was going to "blow away anyone that came to the door." (16RT 2034, 2044.) As the officers believed appellant had a gun, they cordoned off the area and cleared people from inside the surrounding houses. (16RT 2035.) Hamilton Police Department Lieutenant Asher Collette attempted to negotiate with appellant through a hole in the door, trying to get appellant to exit the building peacefully. (16RT 2035-2036, 2047-2048.)

After approximately a half-hour, Officer Flannery snuck inside the house and into a bedroom and observed appellant through a cracked door. (16RT 2035-2037.) Officer Flannery saw a lit acetylene blow torch in appellant's hand, as well as a hammer. (16RT 2035, 2045-2046.) At one point, appellant put the nozzle of the blow torch through the hole in the door, close to Lieutenant's Collette's face. (16RT 2036-2037.) The blow torch went within two feet of Lieutenant Collette, forcing Lieutenant Collette to back up. (16RT 2037.) Shortly thereafter, the front door caught on fire.

(16RT 2037.) At that point, Officer Flannery was advised to enter the room where appellant was located, and Officer Flannery went inside and tackled appellant. (16RT 2038.) Appellant was arrested and taken into custody. (16RT 2031, 2038.) Appellant was subsequently convicted of aggravated menacing inducing panic and attempted arson.[44/] (16RT 2039, 2051.)

3. Testimony That Appellant Abused His Former Girlfriend In Los Angeles

In 1994, appellant and Maria Gyore lived together in an apartment at 527 Las Palmas in Hollywood, California. (17RT 2148-2149, 2167.) Shortly after they moved in together, appellant learned about a former boyfriend of Gyore's and he became angry and "slapped her around." (17RT 2149, 2153.) Gyore called her brother, Laszlo, and he went to the apartment. Gyore had a black eye and "all kinds of bruises." (17RT 2168.) The police came later that night and appellant was arrested the next day. (17RT 2150.) On another occasion, when they were still living together in Hollywood, appellant "beat [] up" Gyore with his hands and fists.[45/] (17RT 2150.)

Appellant and Gyore moved to an apartment on Woodman Avenue in Los Angeles. (17RT 2148, 2151, 2160.) Gyore worked as the apartment manager and appellant was the "maintenance guy" for the apartment complex. (17RT 2148.) In August of 1995, appellant told Gyore to move out of the apartment. (17RT 2151, 2154.) Gyore moved out of the apartment and she moved into a motel. (17RT 2151, 2153-2154.) Appellant threatened to kill Gyore, her brother, and her two young sons. (17RT 2169.) Gyore's brother, who was concerned for Gyore's safety, encouraged her to leave the country, and Gyore went to Hungary two days later. (17RT 2151, 2154, 2168.)

---

44. These charges were filed as felonies, but were later reduced to misdemeanors. (16RT 2051.)

45. While they were living in Hollywood, there was a fire in the apartment. (17RT 2152.)

4. Victim Impact Evidence Regarding Sandra Gallagher

Jan Baxter was Gallagher's mother. (17RT 2216.) Baxter had four children: Sandra, Leason, Jeri, and Duane. (17RT 2216.) Baxter, who described Gallagher as a "bright child," was "very close to her daughter." Baxter indicated that Gallagher "stole her heart" and "everybody else's" and that Gallagher was "always so excited over everything." (17RT 2218.) Gallagher and her sister, Jeri Vallicella, had a "special relationship." (17RT 2219.) Vallicella, who was five years younger than Gallagher, looked up to her big sister. Gallagher acted as a "second mother" to Vallicella. (17RT 2219; see also 17RT 2173.)

When Gallagher graduated from high school, she worked at a radio station where she had a "talk show with a kind of help line." (17RT 2174.) Gallagher then did a counseling job, and then received her cosmetology license. Afterwards, when she was 23 years old, she joined the Navy, scoring the highest score in Butte County for the Navy intelligence test. (917RT 2174-2175, 2185.) In the Navy, Gallagher worked as an aviation electronic technician and was stationed in Jacksonville, Florida. (17RT 2176.) While Gallagher was in Florida, her sister Vallicella moved out to Florida to help since they had children of similar ages. (17RT 2176-2177.) Gallagher had three children: Dustin, Garrett, and Jacob.[46] (17RT 2177, 2178.) Gallagher met Stephen Gallagher when they were both in the Navy. (17RT 2187.) After four years, Gallagher left the Navy with an honorable discharge. (17RT 2177.) Gallagher and Stephen were married in 1985 or 1986, after Gallagher left the Navy. (17RT 2179, 2187.) Gallagher then worked at a submarine base for a military contractor, where was in charge of the electronics on the base. Gallagher and her husband then moved to San Diego, where Gallagher worked with Ford Aerospace for two to three years. (17RT 2178.) While in San Diego, Gallagher also worked at Southern Illinois University at the Navy base. (17RT 2179.) Gallagher left Southern Illinois University because she wanted to move

---

46. Stephen Gallagher is not the father to any of Gallagher's children. (17RT 2187.)

near Vallicella. In 1990 or 1991, Sandra and Stephen Gallagher moved to Los Angeles. (17RT 2189.)

Gallagher's death "totally destroyed" Baxter and the whole family. (17RT 2183, 2220.) In addition, Gallagher 's children were "devastated" by their mother's death. (17RT 2220.) Gallagher 's son, Dustin, was 15 years old when his mother died. When Dustin learned about his mother's death, he "closed up" because he "was only able to talk to his mother about things." Gallagher 's other children were seven years old and eight years old at the time of her death, and "they've never had a mother." (17RT 2221; see also 17RT 2183.) After Gallagher 's death, Vallicella has had no one that she could trust to "just talk to." (17RT 2183.) Gallagher was 33 years old at the time of her death. (17RT 2185.)

B. Defense Evidence

1. Testimony Of Appellant's Family Members

Appellant's mother, Edna Rogers, had seven children: Sue, Claude Jr., Gary, Clay, Craig, appellant, and Clint. (17RT 2238, 2241.) Edna lived in Hamilton, Ohio, "her whole life" and married appellant's father, Claude, when she was 16 years old. (17RT 2239-2240.) The family lived in Hamilton, Ohio, a working class town 20 miles north of Cincinnati with a population of approximately 50,000 people. (See 18RT 2353.) When they were first married, Edna was "left alone a lot" while her husband went to the local bars and drank. (17RT 2244.) Claude drank every day and was "rarely sober." (17RT 2241, 2246, 2248, 2281; 18RT 2329-2330, 2351-2352.) When Claude drank, he had a violent attitude. (17RT 2244.) Claude also beat his wife, including when she was pregnant. (17RT 2243-2246, 2249; 18RT 2352.) On a couple of occasions, Claude beat Edna in front of the children. However, Edna tried to hide the beatings from the children and "[m]ost of the time the kids weren't around." (17RT 2249, 2281-2282; 18RT 2331; see also 18RT 2365.) When Claude had been drinking, Edna "wanted everyone to be quiet" and not disturb him. (17RT 1182.) Edna suffered a broken nose from a beating and lost consciousness from another

beating. (17RT 2254; 18RT 2356-2357.) However, she never went to the hospital because she did not want anyone to know that her husband had beat her. (17RT 2254.) Edna called the police when she was beaten, but they ignored her. (17RT 2254.) On one occasion, the police came when her daughter, Sue, called and told them that Claude was going to kill her mother. (17RT 2275.) The police came on another occasion when Claude's mother called them. (17RT 2275.) Edna had a breakdown and was hospitalized for a short while. (17RT 2259-2260; see also 18RT 2360.)

Claude threatened to kill Edna if she ever left him. (17RT 2246-2247.) Claude kept guns in the house, including a pistol, a rifle, and a shotgun. (17RT 2247, 2282; 18RT 2333, 2360-2361.) Claude played "Russian roulette" inside the house, and bit the heads off the bullets and ate the gunpowder. (18RT 2360.) On one occasion, Claude shot at Edna, but the bullet did not strike her. (17RT 2247; see also 17RT 2251.) Claude also forced Edna to have sex against her will, and he took nude photographs of her and threatened to send them to relatives if she left him. (17RT 2252; see also 18RT 2338.) On one occasion, Claude kept Edna prisoner in her bedroom for three days. (17RT 2257-2258.) Edna was afraid of Claude because she did not know what he would do to her. (17RT 2256, 2259; see also 18RT 2331-2332.) Edna tried to leave Claude, but "[w]ith so many kids, it was very hard to go anywhere." (17RT 2258; see also 17RT 2280-2281; 18RT 2330-2331.)

Claude worked at the Champion paper mill in Hamilton for 16 years. (17RT 2240.) He was fired from the mill because he was "drinking on the job." (17RT 2241, 2249.) Appellant was born shortly after Claude lost his job. (17RT 2260.) When Claude lost his job, the family lost their home and had to move "from the better part of town to the worst part of town." (17RT 2250; see also 18RT 2353.) The family moved to a "not-so-nice house" on Park Avenue in Hamilton. (17RT 2250; see also 17RT 2278.) The house was a "rundown building" with two upstairs bedrooms, a converted downstairs bedroom, and a single bathroom. (18RT 2297-2298, 2327.) Edna and Claude slept in the converted downstairs bedroom, while appellant, Clint and

Craig shared one of the upstairs bedrooms and Gary, Clay, and Claude shared the second upstairs bedroom. (18RT 2327.) In the winter, there was ice in the bathtub and the pipes froze. (18RT 2298, 2326.) The floor for the house was "eaten out with termites" and the "paint was peeling off" the walls. (18RT 2326.) The Rogers children were "pick[ed] on, beat[en] up, [and] chased around" by neighborhood children. (17RT 2278; see also 18RT 2295-2296, 2358-2359.) Claude encouraged his children to fight the neighborhood children. (18RT 2358-2359.) The family was "on welfare" for "quite a few years," but received some assistance from Edna's brother, Harold. (17RT 2251; see also 17RT 2280; 18RT 2352, 2370.)

As a child, appellant did not sleep as much as his siblings and was considered "rowdy." (17RT 2260, 2368.) Edna tied appellant in his crib when he was an infant. (18RT 2368.) When appellant was approximately two years old, he sat and dug at loose plaster in the house, and ate paint chips. (17RT 2260-2261; 18RT 2302, 2341; see also 18RT 2368.) Appellant also ate dirt from the front yard. (18RT 2342.) On one occasion, when appellant was approximately five years old, appellant burned himself on a heater but wanted to touch the heater again. (18RT 2342-2343.) Appellant also had problems wetting the bed. (17RT 2261; 18RT 2369.) Until appellant was approximately 10 or 11 years old, he put himself to sleep every night by banging his head on the edge of the bed for 30 to 45 minutes. (18RT 2302-2303; 18RT 2340-2341.) Appellant, who was not very studious, was held back in third grade, and he was in several classes for children with learning disabilities. (18RT 2343-2344.)

Appellant's brother, Clay, was the biggest influence on appellant. (17RT 2262; see also 18RT 2345.) When appellant was approximately 12 years old, Edna learned that Clay had given appellant alcohol. Edna also "knew" that appellant was using drugs, and was told that appellant had overdosed on drugs on one occasion. (17RT 2263.) Claude physically disciplined the children, using his hands or a belt. (18RT 2299; see also 18RT 2334, 2336.) Edna made the children stand in the corner for six

to eight hours a day. (18RT 2375-2376.) Appellant was beaten more frequently and severely by Claude, as appellant "was a little more rebellious" and "drew more attention." (18RT 2335.) On one occasion, Claude chased appellant down the street, dragged appellant back in the house, threw appellant on the bed, and beat appellant "for a long time," striking appellant approximately 30 or 40 times. (18RT 2344.)

When appellant was approximately 16 years old, Claude had a massive heart attack and became disabled. (17RT 2264; see also 18RT 2323, 2374.) From that point on, the beatings stopped. (17RT 2265; 18RT 2355.)

Appellant's brother, Gary, was six to seven years older than appellant. (17RT 2271.) At the time of trial, Gary had been married for 23 years and had worked as a custodian at Hamilton School District for 17 years. (17RT 2270-2271; 18RT 2304-2305.) Gary joined the Army after high school for four years, and then returned to Hamilton and got married. (17RT 2273-2274; 18RT 2299.) At that point, Gary drank alcohol and became violent with his wife. (18RT 2300.) Gary found himself "in situations where anger would build up" and "rage came on quickly." (18RT 2301.)

Appellant's brother, Craig, was 15 months older than appellant. (18RT 231.) At the time of trial, Craig lived in San Diego and worked for a medical group doing administration and case coordination. (18RT 2321.) Craig left home when he was 16 years old, after his father discovered he was gay and encouraged him to leave. (18RT 2322, 2325-2326.) Craig went to California, obtained a G.E.D., and went to business school. (18RT 2322.) Craig used alcohol as a teenager and was a "daily drinker" by age 19 or 20. (18RT 2339.) Craig frequently had "blackouts" when he drank. (18RT 2340.) Craig "could not stay clean" until he was diagnosed with depression and began to take antidepressants. (18RT 2340.) With professional help and medication, Craig learned "coping skills" and "how to get along." (18RT 2347-2348.)

Another brother, Claude, was 12 years older than appellant. (18RT 2350, 1367.) At the time of trial, Claude had lived in Palm Springs for approximately 15 years, and was married and working in "real estate" as a broker. Claude was also

working in the "restaurant business." (18RT 2350, 1382.) Claude began to live with his aunt when he was 14. (18RT 2351.) Claude left Hamilton in 1970. (18RT 2354.) Claude began drinking "pretty heavy" at age 18, and stopped drinking on January 27, 1986, when he decided to "turn [his] life around." (18RT 2371, 2381-2382.)

The youngest brother, Clint, was in the Air Force and stationed in Japan at the time of trial. (18RT 2373.) Appellant's sister, Sue, was 13 years older than appellant and left the house when appellant was six or seven years old. (18RT 2325.) Sue was placed in reform school when she was 12 or 13 years old. She was also an alcoholic and a drug abuser. (18RT 2378.) Appellant's other brother, Clay, was "on drugs since the early years." On one occasion, Clay was caught teaching appellant "how to shoot up." Clay had been "in and out of institutions." (18RT 2379.)

2. Testimony That Appellant Sought Religious Guidance Prior To His Arrest In Kentucky

In November, 1995, Diana Smith was working as a bookkeeper at the Kentucky Mountain Mission, a youth haven bible camp in Beattyville, Kentucky. (18RT 2307-2308.) The Mission was located off a rural mount road in eastern Kentucky. (18RT 2309.) One day, Smith saw a small white car with Tennessee license plates pull into the parking lot. (18RT 2309.) Appellant, who had long hair pulled back in a pony tail, exited the car, went inside the Mission office, and asked for a chaplain. (18RT 2310-2311.) Smith told appellant that the director of the Mission was a pastor, but that the director was not there. Appellant appeared "down-hearted," and left. After appellant left, Smith told the other workers in the office that appellant looked "really troubled." (18RT 2313.) Smith also asked a coworker whose husband was a pastor to go out and speak to appellant and tell him that the coworker's husband was working on premises "up on the hill." (18RT 2311, 2313-2314.) The coworker, Amy Brandenberg, went out and spoke to appellant while appellant was in his car. (18RT 2311-2313.) Brandenberg went back inside the Mission office and told Smith that appellant "just sort of grunted and shook his shoulders." (18RT 2315, 2318.) Brandenberg also told

Smith that appellant "gave her the creeps." (18RT 2317.)

3. Attack On The Victim Impact Testimony Regarding Gallagher's Employment

Sidney Klessinger, the Assistant Coordinator for Southern Illinois University at the North Island, San Diego Naval Station, was Gallagher's supervisor in 1989. (19RT 2404.) Gallagher worked as an assistant coordinator for the company for "just shy of six months" and was terminated before the expiration of her probationary period. (19RT 2405.) Gallagher was terminated from employment owing to inappropriate dress in the office, foul language, tardiness, the display of affection in inappropriate places, arguing with Klessinger's boss, and making computing errors. (19RT 2406.) As part of Gallagher 's responsibilities, she was charged with handling the billing of student accounts. However, Gallagher made "multiple errors" worth "over a hundred thousand dollars," requiring the paperwork to be redone and resulting in the late payment of tuition to the school. (19RT 2407-2408, 2409.)

4. Expert Psychiatric And Psychological Testimony

a. Appellant's Mental Status And Brain Function

Dr. Roger Light, a neuropsychologist,[47] examined appellant to ascertain appellant's level of brain function. (19RT 2419-2430.) Dr. Light performed a number of tests on appellant, reviewed appellant's hospital records, educational records, and some police reports. Dr. Light also obtained some background information on appellant's family. (19RT 2431-2435.) Dr. Light concluded that appellant had certain areas of cortical dysfunction and damage. Specifically, he found that there was a deficient range of functioning to the right frontal lobes and temporal lobe areas. (19RT 2436-2437.) According to Dr. Light, the right frontal areas of the brain controlled sequencing, planning, organizing, and processing information, and did not control intelligence. (19RT 2438, 2450.) Thus, people with frontal lobe deficiencies tended

---

47. Dr. Light was not a medical doctor. (19RT 2465.)

to be impulsive and have difficulty recognizing their problems and knowing what they needed to do about their problems. (19RT 2438-2439, 2448-2449, 2498-2500; see also 20RT 2666.) Despite the findings regarding the temporal lobe, appellant performed in the average range "for the most part" of the tests, and with some tests appellant was determined to be in the "high average" range of functioning. (19RT 2472, 2480-2484, 2493.) Appellant's educational history also revealed that he was in the average range. (19RT 2474-2479, 2483.) Appellant's I.Q. was tested as being "pretty average." (19RT 2486.)

Headbanging could lead to localized and diffuse brain injury depending on the severity, but Dr. Light did not believe that appellant's headbanging "was anything to worry about." (19RT 2441-2442, 2470-2471.) A lack of empathy and love, in addition to a lack of visual stimulation, can impact brain development and great "life-long psychological personality deficits" as well as "cognitive and neuropsychological deficits." (19RT 2444.)

Dr. Light reviewed the CT scans taken of appellant following a 1991 hospitalization for an injury where appellant was struck on the head with a pool cue and lost consciousness. (19RT 2445-2446.) Dr. Light characterized this injury as of "moderate severity." (19RT 2488-2490.) The CT scan revealed a closed head injury with fractures, and an intercerebral hemorrhage with a subfrontal temporal hemorrhage and contusion. (19RT 2446.) Someone with this type of brain injury would have a more difficult time controlling his or her behavior, making the "right" decisions, and recognizing trouble and the consequences of such trouble. (19RT 2451.) Moreover, this type of injury would make it more difficult for a person to stop using alcohol. (19RT 2452-2453; see also 20RT 2667.) Right frontal lobe injuries would not preclude any ability to feel remorse, and would not damage an individual's ability to distinguish between right and wrong. (19RT 2495, 2500.)

Dr. Michael Gold, a neurologist, performed a PET scan on appellant. (20RT 2651-2661.) This PET scan, which showed areas of inactivity or diminished activity

within the brain, revealed a scar in the right frontal lobe of appellant's brain. (20RT 2658-2661, 2663.) Specifically, there was a "subtle area of diminished metabolic activity to the frontal lobe." (20RT 2673; see also 2-RT 2678, 2686.) This area corresponded to the area of hemorrhage shown in the 1991 CAT scan. (20RT 2665-2666.) The PET scan was consistent with Dr. Light's findings (19RT 2448), and a person with such an injury would be more angry, aggressive, and impulsive than a typical person would be.[48] (20RT 2675-2676.)

b. The Effects Of Appellant's Early Childhood

Psychologist Stuart Hart, whose area of emphasis was human rights of children and the psychological maltreatment or emotional abuse and neglect of children, assessed the effects of appellant's childhood on his development. (20RT 2583-2587.) Dr. Hart interviewed appellant's mother, and appellant's siblings, Claude, Craig, Gary, Clint, and Sue. Dr. Hart also interviewed Sergeant Kilgore from the Hamilton Police Department. (20RT 2588.) Dr. Hart reviewed appellant's school records and the criminal history of family members, as well as trial testimony by appellant's family members. (20RT 2589.) Dr. Hart did not interview appellant. (20RT 2636.) Dr. Hart concluded that appellant grew up in a "toxic" or "poisonous" social environment, where there was poverty, a lack of family values or negative family values, and multiple indicators of neglect and abuse. (20RT 2589-2590.) According to Dr. Hart, such an environment would have produced the most negative outcome for a child. (20RT 2593; see also 20RT 2622.)

Cruel and punitive verbal communication would be linked to delinquency and regression. (20RT 2597.) Verbal abuse by a mother would increase the likelihood of having a noncompliant, uncooperative child who lacked control of his impulses. (20RT 2594.) Where a mother ignored a child, there would be a decline in

---

48. Dr. Gold previously testified in another capital case that a temporal lobe injury (as opposed to a frontal lobe injury), would similarly render an individual unable to control his emotions. (20RT 2680-2683, 2689.)

competency, along with low self-esteem and sometimes abusive behavior. (20RT 2594.) Negative attention would further hyperactivity and great difficulties in learning and problem solving. (20RT 2595.) Appellant's father would have been a powerful role model for appellant. (20RT 2597.) Moreover, the family lacked any concept of protection, and the children were not sufficiently protected from the father. (20RT 2599.) Family members would have learned violent behavior from their parents, as well as from the surrounding environment and from the family culture. (20RT 2602-2603.)

The early introduction of alcohol and drugs would have impacted the family by rendering family members "less capable of good judgment" and permitting an "escape from pain" through drug and/or alcohol use. (20RT 2600-2601.) Appellant's siblings exhibited common characteristics: they had problems dealing with their emotions, they grew up afraid of their father, they learned to keep their feelings "bottled up" until a rage developed, they experienced signs of depression, they had "violent tempers," they mistreated their spouses, they had a history of trouble with the law, and they had alcohol and substance abuse problems. (20RT 2609.)

Appellant was mistreated more severely than his siblings and was characterized as the "throw-away child." (20RT 2603-2604.) Appellant was ridiculed by family members because he was pigeon-toed and clumsy. (20RT 2603.) Appellant manifested characteristics that showed he was distressed – he had great trouble sleeping, he ate large quantity of paint flakes, he ate dirt, and he banged his head to get himself to sleep. (20RT 2604-2605, 2607.)

c. Appellant's Alcoholism

Dr. Jeffrey Wilkins, a psychiatrist who specialized in the effects of substance abuse on mental illness, reviewed appellant's medical records, police reports, and obtained a family history for appellant. (19RT 2502-2507.) Dr. Wilkins, however, never spoke to appellant. (19RT 2544.) Dr. Wilkins concluded that appellant manifested an "alcohol dependence" based on evidence of alcohol use by appellant.

(19RT 2505-2507.) Specifically, Dr. Wilkins concluded that appellant appeared to manifest evidence of chronic alcoholism. (19RT 2058.) Appellant may have had an inherited vulnerability for alcohol, as he grew up in an alcoholic home and his father and five of his siblings were alcoholics.[49] (19RT 2511-2514.)

In 1986, appellant was hospitalized at Mercy Hospital and it was determined that he had a blood alcohol level of .165. (19RT 2520-2521.) In September, 1986, appellant was admitted to the hospital and determined to be intoxicated after he was found unconscious in a parking lot. (19RT 2520.) In 1991, appellant was hospitalized after he tried to set fire to his house using a butane torch, and appellant was diagnosed with violent outbursts, alcohol intoxication, and porphyria,[50] a metabolic disturbance that leads to skin lesions. (19RT 2521-2522.) In April, 1991, appellant was struck on the head with a pool cue. When he was admitted to the hospital, his blood alcohol level was recorded to be .336. (19RT 2523-2524.) In June, 1991, appellant's blood alcohol level was recorded at .145. (19RT 2524-2525.) Between 1981 through 1995, there were 20 police reports that had references to appellant's alcohol abuse. (19RT 2526.)

Alcohol intoxication over the years would effect brain function. (19RT 2526.) Specifically, alcoholism would produce disinhibition, by "deaden[ing] portions of the brain that keep people from behaving certain ways." (19RT 2526-2528.) There would be a correlation between alcoholism and an inability to control rage. (19RT 2530.) However, appellant never took advantage of Alcoholics Anonymous Meetings, alcohol abuse programs supplied by the court, or any other kinds of self-help situations. (19RT 2535-2543, 2550-2552.)

---

49. Dr. Wilkins' determination that these siblings were alcoholics were based on second, third, or fourth-hand information. (19RT 2547.)

50. This condition would be worsened by alcohol use. (19RT 2523.)

ARGUMENT
I.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S UNCHARGED MURDERS IN FLORIDA AND LOUISIANA

Appellant first contends that the trial court improperly admitted evidence of the Florida and Louisiana murders. (AOB 30-88.) Specifically, appellant asserts that the uncharged murders were inadmissible under Evidence Code section 1101, subdivision (b) because: (1) he did not concede that he murdered Sandra Gallagher; (2) he did not dispute that the charged murder was premeditated; and (3) the uncharged murders were insufficiently similar to the charged murder. (AOB 42-69.) Appellant further asserts that the uncharged murders should have been excluded under Evidence Code section 352 (AOB 70-77), and that admission of such evidence compels reversal. (AOB 78-83.) Finally, appellant argues that the admission of the uncharged murders violated his federal constitutional right to a fair trial. (AOB 83-88.) All these arguments must be rejected.

A. Underlying Proceedings

On December 28, 1998, the prosecution filed a motion to introduce evidence under Evidence Code section 1101, subdivision (b). (1CT 231-245.) In this motion, the prosecution sought admission of evidence concerning the murders of Linda Price, Tina Cribbs, and Andy Sutton, to demonstrate appellant's "common plan and design to kill women [whom] he selected as his victims." (1CT 233.) The prosecution further argued that appellant's "plan and design to murder these women [was] evidence that the killing of Sandra Gallagher was a premeditated [] murder in the first degree." (1CT 233; see also 1CT 235 ["appellant's common plan establishes that he premeditated each murder well in advance of the actual killing"].) Thus, such evidence refuted any argument that the killing of Sandra Gallagher resulted from an argument between

Gallagher and appellant.[51] (1CT 235.) It was noted that the evidence was not offered as propensity evidence, and that the following similarities rendered the evidence admissible under Evidence Code section 1101, subdivision (b):

> (1) the victims were all women of approximately the same age (31 to 37 years); (2) in each murder, the defendant went to a bar or other venue where adult beverages were served to meet his victim; (3) the defendant sought out a lone woman unknown to him; (4) the defendant socialized with the victim (talked, drank and danced) in an effort to gain her trust; (5) the defendant convinced the victims to give him a ride in their vehicle to his residence; (6) the murders occurred in a small enclosed area, usually belonging to the victim (cab of a truck, bathtub or waterbed); (7) the defendant took property from each victim, including jewelry, money, handbags, keys and a car; (8) the defendant attempted to clean up the crime scene or otherwise conceal evidence of the murder; (9) the defendant immediately left town after the killing; (10) all of the murders occurred approximately within a six week period.

(1CT 233-234, 236-237.)

The defense opposed the prosecution's motion, citing various reasons why the uncharged murders should be excluded. (2CT 411-418.) First, the defense argued that evidence concerning the out-of-state murders should be excluded under Evidence Code section 352, as the evidence was unduly prejudicial because it would "result in four murder trials in one," and permit the jury to hear that appellant was "a mass murdering serial killer." (2CT 412-413; see also 2CT 448-451.) The defense further argued that evidence of the uncharged offenses was irrelevant because the charged killing of

---

51. The prosecution noted that appellant had admitted to a common plan, as his sister told Detective Mussucci that appellant called her on November 8, 1995, and she informed him that he was wanted for murder. In response, appellant told his sister, "That's all right, the count is going up tomorrow, because I'm calling from the apartment of two other girls right now. I'm going to keep going until they catch me." (1CT 237.)

Gallagher was "an unplanned, impulsive crime," and that evidence of "subsequent planned acts" had no bearing on the charged murder. (2CT 413; see also 2CT 448-451.) Moreover, the defense argued that such evidence would create an undue consumption of time by requiring testimony of a large number of witnesses. (2CT 412; see also 2CT 448-451.) In addition, the defense argued that admission of the uncharged offenses was unwarranted, as proof of the uncharged offenses required a a lower the burden of proof. (2CT 414; see also 2CT 451.) Further, the defense asserted that admission of such evidence would force appellant to testify regarding the uncharged murders, "potentially aiding the prosecutors" in the other states. (2CT 415; see also 2CT 451-452.) Finally, appellant argued that the "distinguishing marks" were not sufficiently similar between the charged offense and uncharged crimes to permit admission of such evidence. (2CT 415-417; see also 2CT 452-454.)

The defense filed a subsequent trial brief in opposition to the prosecution's motion to introduce evidence of the uncharged out-of-state murders.[52/] (2CT 440-453.) In this brief, the defense made the additional argument that the uncharged offenses were inadmissible, as the defense would "not argue that the act [of killing Sandra Gallagher] was done by accident or without intent to kill." (2CT 445.) Thus, the defense reasoned that intent was "really not an issue in this case," and the uncharged murders were inadmissible under Evidence Code section 1101, subdivision (b).[53/] (2CT 445-446.)

Argument on the motion was heard on January 7, 1999. (5RT 37-57.) At that time, the court indicated a tentative ruling that it intended to exclude evidence concerning the Mississippi case as the factors were not sufficiently similar. (5RT 38.)

---

52. This opposition was faxed to the prosecution the night before the hearing. (See 5RT 39; see also 2CT 440.)

53. The defense conceded that should appellant testify that he killed Gallagher by accident or without an intent to kill, then the out-of-state murders could be offered as rebuttal evidence. (2CT 446.)

The prosecutor then argued that the true issue in the case was whether it was "first degree murder or not," and that the uncharged offenses supported the theory of premeditation by showing a "common plan and design by [appellant] to go out, meet women, seek out his victims, and kill them in the fashion that he did in Florida and Louisiana and here in Los Angeles." (5RT 39-40.) Defense counsel argued that the Florida and Louisiana murders were dissimilar – that the Florida victim "picked up" appellant; that the out-of-state murders involved the victims being stabbed with a knife; that appellant was merely in the same age-range of the victims; that in the California case, appellant had been trying to "pick up" the bartender over a long period of time; that appellant drove in Gallagher 's truck as a "matter of convenience"; that Gallagher was killed in a vehicle on a public street; and that Gallagher 's vehicle was set on fire whereas appellant tried to clean up the crime scenes in the other cases. (5RT 43-45.) Defense counsel argued that the prosecution was attempting to put evidence before the jury showing that appellant was a serial killer, and that any conviction would be the "result of [appellant] being labeled as a killer by character." (5RT 46-47.) Defense counsel also asserted that by permitting the admission of evidence, appellant would need to "make admissions" about the other cases. (5RT 49.)

The trial court then ruled that evidence concerning the Florida and Louisiana murders was admissible. (5RT 52-55.) The trial court noted that it was vested with discretion in determining whether such evidence was permissible under Evidence Code section 1101, subdivision (b). The court further explained that the Florida and Mississippi murders were highly relevant "on the issue of common plan":

> I know, [defense counsel], you say intent is not an issue. I think premeditation is intent. Your argument is that the real issue is that [appellant], after committing the first murder, had nothing to lose. If that was the case, I wouldn't expect such similarities in the pattern. I would expect it to be more random. I would expect it to be more unusual or opportunistic. He meets strangers in a bar. Interestingly enough, he is given a ride home every single

time, and I think that even includes Mississippi. In each case the victim drove the victim to his place, [appellant's] place, except for, I guess, in Louisiana they changed their mind and ended up going to her apartment, but the initial intent was for the victim to drive him home.

He does take property. I agree that doesn't seem to be a motive, but that is a similarity, that it wasn't motive. It doesn't seem he is doing this for purposes of financial gain or to take their car.

And the other compelling aspect is this all occurs within a 40-day period, less than six weeks, a very very tight time span, besides the age, which is not to me compelling.

The suggestion that the other cases, that Florida – I am assuming Florida, but Mississippi and Louisiana, that the case is circumstantial. Everything in this case is going to be circumstantial, too. Just because a case is circumstantial doesn't mean that it's weak. The factors that have been given to me dispel that inference that somehow the cases are not compelling.

The argument that the California case rose from an argument is an additional factor that doesn't detract from the similarity as far as I know. Perhaps there was an argument in the other cases. The only way we know that in this case is ostensibly because he told somebody. I don't think that detracts.

The fact that in one case the victim may have pursued the defendant, the defendant pursued the victim is of no consequence. It's strangers meeting in a bar. That is consistent in each situation.

The fact we have stabbings in bathtubs in some and not the other, I don't know, maybe there was no bathtub in the Van Nuys case. I don't know, but I don't think that is of any consequence.

The increase in the trial time is not a factor. Your argument there is confusion involved. The People would argue in fact it's just the opposite, in fact, we are expanding the search.

I think to the extent it would be unfair to create this totally artificial setting, ignoring a pattern that has overwhelming factors in common. I go back to bars. Somehow the defendant orchestrates the victim driving him back to his place.

Whether it's prejudicial. Obviously it's highly prejudicial. I think anything that is relevant is going to be prejudicial, so that alone doesn't resolve the fact.

[¶]. . . .[¶] The court does find in three cases, Florida, Louisiana and California, under *Ewoldt*, that they are common scheme as well as intent, and the court will be permitting the use of the Florida and Louisiana cases in the California case.

(5RT 52-55.)

Defense counsel subsequently requested that the court defer its ruling until after the defense elected whether to present a factual innocence defense. (5RT 55-56.) The prosecution opposed this notion, indicating that it was the prosecution's burden "to prove all the elements of the crime," including premeditation and deliberation, regardless of the defense presented. The prosecutor also noted that such a decision would be tremendously inconvenient, as the prosecutor would need to "be able to produce" "many witnesses from across the country" at defense counsel's "whim." (5RT 56-57.) In response, the court indicated that the defense could "concede or have a stipulation or admission to one of the elements up front," but that it was unwilling to "undo what [it] just did." (5RT 57.)

On April 29, 1999, defense counsel again attempted to exclude evidence of the out-of-state murders. (6RT 104.) At that time, the defense indicated it was considering the possibility of stipulating to the degree of murder as first degree and thereafter asking the court to rule that the out-of-state murders were irrelevant in the guilt phase. (6RT 105.) The court permitted defense counsel additional time to research the issue. On May 26, 1999, defense counsel re-raised the issue of admissibility of evidence regarding the out-of-state murders. (6RT 110, 178-190.) At that time, defense counsel argued that the Louisiana murder was dissimilar and was "a

lot closer to the Mississippi domestic violence live-in arrangement than it [wa]s to picking up a woman in a bar with the the intention of taking her back and killing her." (6RT 179-180, 183-185.) Defense counsel asserted that the court had been initially misinformed that the Louisiana murder involved appellant "picking up" the victim in a bar and killing her. (6RT 186.) The prosecution, relying on declarations previously submitted, responded that no new facts were presented justifying modification of the earlier decision. (6RT 186-187.) After noting that it would still find a common pattern with respect to the Florida matter, the court took the matter of admissibility of the Louisiana murder under submission. (6RT 187-190.)

On June 2, 1999, defense counsel again argued that dissimilarities between the California and Louisiana murders precluded admission of evidence that appellant killed Andy Sutton in Louisiana. (6RT 197-202.) Conversely, the prosecution argued that sufficient similarities existed to permit the introduction of such evidence. (6RT 202-204.) The court reviewed the additional materials presented, as well as a chart generated by the prosecution showing similarities between the cases, and ruled that the Louisiana murder was admissible: "I don't find it to be a close call. The Louisiana incident is very close in time, and I am going to permit it, again pursuant to my original assessment." (6RT 207.)

Thereafter, defense counsel indicated that his client was offering to stipulate that this was "a first degree or nothing type of a case," "which would eliminate the need for proving intent . . . or proving premeditation and deliberation." (6RT 211.) Defense counsel indicated that this proposed stipulation was "a way to keep out the Louisiana and Florida fact pattern out of the guilt phase." (6RT 211.) The prosecution objected, noting the late date, that defense counsel had failed to demonstrate that such a procedure was acceptable and legal, and that the Evidence Code section 1101, subdivision (b), evidence was "much larger in a sense than just first degree murder." (6RT 212.) The court indicated that it did not think it could force the prosecution to accept such a stipulation (6RT 214), and defense counsel then suggested there could

be a court trial on the issue of whether the murder was first or second degree (6RT 214-215). The prosecution rejected the offer. (6RT 215.)

After testimony was given by the first witness concerning the Florida murder, appellant renewed his previous objections to the out-of-state evidence based on the theory that the prosecution should be required to rely on the length of time of strangulation as the basis for premeditation, as was the theory presented during the preliminary hearing. (11RT 1150-1152.) Defense counsel further argued that the probative value of the out-of-state murders was lessened given the coroner's strangulation testimony. (11RT 1151.) The prosecution responded that it was not "limited to one theory of premeditation," but that the out-of-state murders were relevant to argue that the California murder was not a "rage killing." (11RT 1152-1152.) The court indicated that it did not believe the prosecution was limited to one theory of premeditation. The court further found that the probative value of the evidence outweighed any prejudice. (11RT 1153-1154.) The court also noted it would give the jurors a cautionary instruction regarding the other crimes evidence. (11RT 1154.)

Shortly after, the trial court admonished the jury that evidence of the out-of-state murders was "admitted for a very limited purpose" for "consideration of the state of mind of the [appellant] as to the Sandra Gallagher murder, whether there was premeditation, deliberation, whether or not there was malice aforethought, express malice aforethought as opposed to something committed as a result of rage or provocation or other heat of passion." (11RT 1157.) The court further reminded the jury that such evidence was not admitted to show that appellant was a person "of bad character" or that he had "a disposition to commit crimes." (11RT 1157.)

Following the guilt phase, the jury was instructed pursuant to CALJIC No. 2.50 as follows:

> Evidence was introduced for the purpose of showing that [appellant] committed crimes other than that for which he is on trial. This evidence relates

to two homicides alleged to have been committed by [appellant] in November of 1995 in the states of Florida and Louisiana.

Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that [appellant] is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show whether [appellant] committed the murdered alleged in Count 1 with express malice aforethought and with premeditation and deliberation, and not as a result of rage or provocation or other heat of passion.

For the limtied purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose. (7CT 1579; 14RT 1782-1783.)[54]

B. The Uncharged Murders Were Admissible Under Evidence Code Section 1101, Subdivision (b)

1. Relevant Law Regarding Admission Of Uncharged Offenses

Evidence of other crimes is not admissible to prove the defendant's propensity to commit the charged offense. (Evid. Code, § 1101, subd. (a).) However, subdivision (b) of Evidence Code section 1101 states that such evidence is admissible to prove some relevant fact such as identity, motive, intent, knowledge, or common design, plan or scheme. (Evid. Code, § 1101 , subd. (b).) Admissibility under Evidence Code section 1101, subdivision (b) "depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705; *People v. Daniels* (1991) 52 Cal.3d 815, 856; *see also People v. Gray* (2005) 37

---

54. The admissibility of the out-of-state murders was also litigated in connection with appellant's Penal Code section 1118.1 motion. (21RT 2816-2817.)

Cal.4th 168, 202.) When a defendant pleads not guilty, he or she places *all issues* in dispute, and thus the perpetrator's identity, intent and motive are all material facts. (*People v. Roldan, supra*, 35 Cal.4th at pp. 705-706.)

The materiality of the uncharged offense or offenses depends on the degree of similarity between the present offense and the prior uncharged offense. This Court has required varying levels of similarity, depending on the type of fact to be proved. To prove identity, the uncharged crime must be highly similar to the charged offense. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; see also *People v. Abilez* (2007) 41 Cal.4th 472, 500 ["admissibility 'depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity.' [Citation.]"]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

> Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a '"pattern and characteristics . . . so unusual and distinctive as to be like a signature."' [quoting from *Ewoldt*, 7 Cal.4th at p. 403, quoting 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803.] 'The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks.' (*People v. Thornton* (1974) 11 Cal.3d 738, 756 [523 P.2d 267], italics in original, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].)

(*People v. Kipp, supra*, 18 Cal.4th at p. 370.)

A lesser degree of similarity is required to establish the existence of a common design or plan. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402, 403.) To demonstrate the existence of a common plan, "the common features must indicate the existence of

a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*Id.* at p. 403.) The least degree of similarity is required to establish relevance on the issues of knowledge and intent. Accordingly, where admission of a prior offense is sought to establish intent or knowledge, the uncharged conduct need only be sufficiently similar to the charged offenses to support the inference that the defendant probably harbored the same knowledge and intent in each instance. (*People v. Lewis* (2001) 25 Cal.4th 610, 636-637; *People v. Kipp, supra*, 18 Cal.4th at pp. 369-371; *People v. Carpenter* (1997) 15 Cal.4th 312, 379.)

On appeal, the trial court's determination of materiality is reviewed for an abuse of discretion. (*People v. Lenart, supra,* 32 Cal.4th at p. 1123; see also *People v. Kipp, supra,* 18 Cal.4th at p. 369; *People v. Carter, supra,* 36 Cal.4th at p. 1147.) The court's ruling should be upheld unless its decision was arbitrary, capricious, or otherwise without reason. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

2. The Trial Court Properly Admitted Evidence Of Appellant's Out-Of-State Murders Under Evidence Code Section 1101, Subdivision (b)

Here, the trial court acted well within its discretion in permitting admission of evidence of the Louisiana and Florida murders. Evidence concerning the Louisiana and Florida murders was properly admitted to prove intent and common scheme or plan, as those murders were sufficiently similar under the standards set forth in *Ewoldt.* Specifically, the Louisiana and Florida murders shared common features that indicated the existence of a plan, and were sufficiently similar to support an inference that appellant harbored the same intent on each occasion. All three murders (California, Louisiana, and Florida) involved the scenario where appellant met the victim, an unaccompanied female at a bar. In all three cases, appellant engineered for the victim

to drive him back either to his "place," or in the case of the Louisiana murder, the place where he was staying with the victim. In all three cases, appellant took property after he killed the victim, and this taking of property did not appear to be the impetus for the murder but occurred as an afterthought. In all three cases, appellant took steps to conceal his crimes, and then fled. Finally, as recognized by the court, significantly all three murders occurred within a very short time span – within a 40-day time period. (See 5RT 52-56.)

Moreover, as argued by the prosecutor, additional similarities existed between the offenses: the victims were all of similar age (ages 31 to 37); and the murders occurred in a small enclosed area (the cab of a truck, a bathtub, and a waterbed). (See 1CT236-237.) Thus, such similarities support the conclusion that appellant killed all three women as part of a plan, and that he harbored an intent to kill on each occasion. (See 5RT 52-56; see also 1CT 240-245 [declaration supporting 1101(b) motion and alleging facts of each murder].) As such evidence was admitted for purposes of proving intent and/or common plan, there was no requirement that the three murders share unusual or distinctive marks – all that was required was that the offenses be sufficiently similar (to prove intent) or support an inference that appellant employed a common plan (to prove common scheme). (See *People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) Since the three murders met this threshold, they were properly admitted by the trial court in accordance with Evidence Code section 1101, subdivision (b).

Appellant argues that the offenses were not sufficiently similar to permit introduction of the out-of-state murders. (AOB 57-67.) Attacking the trial court's findings of similarity as "overstated, inconsequential and/or illusory" (AOB 59), appellant criticizes each of similarities relied upon by the court (see AOB 59-67). Appellant argues that the fact appellant met his victims "in a bar" was an insufficient ground of similarity because "there was nothing distinctive about the fact that he 'talked, danced and drank' in bars with women his own age." (AOB 60.) Appellant, however, neglects that this factor, while potentially generic in isolation, was distinctive

in consideration with other evidence of methodology, including evidence that: appellant "picked up" women who were unaccompanied by any male; appellant socialized with the victim; appellant arranged for the victim to drive him to the place where he was staying; appellant murdered the victim at the subsequent location; appellant took property from the victim and/or victim's residence; appellant attempted to conceal the crime; and appellant fled from the crime scene. (See *People v. Miller* (1990) 50 Cal.3d 954, 987 ["The features of substantial but lesser distinctiveness may yield a distinctive combination when considered together."]; see also *People v. Haston* (1968) 69 Cal.2d 233, 245); *People v. Harvey* (1984) 163 Cal.App.3d 90, 101, n. 2.)

Appellant also attacks the trial court's finding of similarity between the charged offense and the Louisiana offense, alleging there was no evidence Sutton gave appellant a ride home. (AOB 60.) The evidence initially offered by the prosecution alleged that Sutton met appellant in a bar and "[a]fter a few hours, the victim agreed to give the defendant a ride to his motel room, because he was too intoxicated to drive," but that instead they "went to her apartment." (1CT 244.) The defense later argued that although appellant met Sutton in a bar, he spent a couple of days with her, left town, and then returned. (6RT 183-184.) Thus, according to defense counsel, the Louisiana case did not "fit the pattern of picking somebody up in a bar and taking somebody home and killing them." (6RT 184; see also 6RT 197-198.)

However, as noted by the prosecutor, the fact that appellant did not kill Sutton the night he met her did not eliminate any similarities between the Louisiana and the Florida and California murders: "Defendant is a good looking guy, he meets them in a bar, and he is like a shark in a tank. He picks them up. And because of his hatred of women, or for whatever reason, he kills these women in a short period of time." (6RT 204; see also 6RT 202-204.)

Moreover, the fact that Sutton drove to the apartment where she was staying did not render the Louisiana case dissimilar. Whiteside's apartment appeared to be the place where appellant was staying upon his return to Louisiana — there was no

evidence that appellant had a motel room or any other "place" at that time, and it was reasonable to assume appellant would stay with Sutton upon his return to Louisiana based upon his previous stay in the apartment and the fact that he left his car with Sutton. Thus, although Sutton drove appellant back to her apartment, it appeared that this was the apartment where appellant was also staying at the time.

Appellant also disputes the finding that appellant took property in connection with each murder, on the basis that he took no property from Sutton. (AOB 60.) Again, appellant neglects that although no property was recovered from appellant's possession that was identified as personally belonging to Sutton, numerous items of property found in the car at the time of appellant's arrest were identified as belonging to Sutton's roommate, Theresa Whiteside. Such evidence included: a big igloo ice chest packed full of food, including peanut butter, "rice-a-roni", and some spices (13RT 1496-1498); a child's comforter (13RT 1496-1498); and Social Security cards for Whiteside's two sons (12RT 1368-1370; 13RT 1498) Thus, the point of similarity between the Louisiana, Florida, and California murders was not that appellant took property from the victims, per se. Rather, the point of similarity was that appellant stole property as he was given the opportunity to do so by virtue of the murders – in the case of the murders of Gallagher and Tina Cribbs, this involved taking property from the victims, but in the case of the murder of Andy Sutton, it involved taking property from the apartment where she was residing.

Appellant also argues that there were insufficient similarities between the murders regarding the allegation that he attempted to "conceal and hide" the murders before fleeing, asserting that such actions were only taken as regards to the Florida case. (AOB 61-62.) Although appellant points to differences in the methods employed by appellant to conceal, he does not deny that attempts to conceal were made in all three cases. (See AOB 61.) In California, appellant burned Gallagher 's truck containing her body; in Florida, appellant paid for an extra day's stay at the motel where he murdered Cribbs and placed a "do not disturb" sign on the motel room door;

in Louisiana, appellant covered Sutton with sheets and cut the telephone wire. (See 6RT 203.) Thus, in all cases appellant undertook some efforts to conceal and prevent revelation of his crimes. Such evidence, in combination with appellant's fleeing from the crime scenes, suggests that appellant undertook such concealment to assist his escape and elude apprehension. (See 6RT 203-204.) Accordingly, the fact that appellant undertook such concealment, regardless of the type of concealment used, contributed to the similarity of the offenses for purposes of Evidence Code section 1101, subdivision (b).

Lastly, appellant asserts that the fact the murders occurred within a relatively short time frame was irrelevant to any inquiry under Evidence Code section 1101, subdivision (b) regarding the similarity of the offenses. However, the short time span during which the murders occurred effected the materiality of the fact to be proved (in this case, intent and common plan), and was properly considered by the court in conducting its Evidence Code section 1101, subdivision (b) analysis. Hence, the fact that the out-of-state murders were not remote in time, but occurred during a very short time frame, rendered evidence relating to the murders particularly material to show that appellant harbored an identical intent and acted according to a common plan. (See *People v. Robbins* (1988) 45 Cal.3d 867, 879 ["We have long recognized 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution."].)

3. The Uncharged Murders Were Admissible Notwithstanding Any Dispute Concerning Identity

Appellant also attacks the court's evidentiary ruling under Evidence Code section 1101, subdivision (b), arguing the uncharged murders were inadmissible

because appellant's identity as the perpetrator of the Gallagher murder was a disputed issue. (AOB 43-46.) In essence, appellant argues that uncharged offenses could only be used to prove elements other than identity (i.e., common plan or scheme, intent, knowledge, motive), if those elements were disputed and if the identity of a defendant was not in dispute. Appellant relies on a civil case, *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, to support this assertion.

In *Hassoldt*, a property owner sued an outdoor advertising company for "severely" trimming a tree located on the property owner's property. (*Hassoldt, supra*, 84 Cal.App.4th at p. 157-158.) At trial, the court admitted the testimony of a former employee of the advertising company's predecessor company, who testified that he trimmed trees without the owners' consent in 80 to 90 percent of the jobs. (*Id.* at p. 163-164.) On appeal, the advertising company claimed that such testimony was inadmissible under Evidence Code section 1101, as the former employee's testimony was introduced to prove the identity of the party that committed the tree trimming, and there was no testimony regarding shared common features that were sufficiently distinctive. (*Id.* at p. 165.) The court also found that the testimony was inadmissible on the issues of intent, motive, or lack of mistake or accident. (*Id.* at pp. 165-166.) The court then extrapolated that *Ewoldt* "mean[t] that where the identity of the actor is in dispute and the uncharged misconduct fails to satisfy the stringent 'so unusual and distinctive as to be like a signature' standard . . ., the uncharged conduct is not admissible on such issues as intent, motive or lack of mistake or accident where the identity of the actor is not yet determined." (*Id.* at p. 166-167.)

Appellant's reliance on *Hassoldt*, however, is misplaced.[55] First, *Hassoldt* appears to have no application to criminal cases. This Court has held on numerous

---

55. As a lower court opinion, *Hassoldt* has no binding effect on this court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also *Worthley v. Worthley* (1955) 44 Cal.2d 465, 472 ["propositions of law laid down in opinions of the district courts of appeal are not binding on this court"].)

occasions that in situations dealing with the admissibility of Evidence Code section 1101, subdivision (b) evidence, a not guilty plea places *all* issues in dispute, including identity, intent, and common plan. (See *People v. Roldan, supra*, 35 Cal.4th at pp. 705-706; see also *People v. Balcom* (1994) 7 Cal.4th 414, 422-423; *People v. Catlin* (2001) 26 Cal.4th 81, 146.) This is true regardless of whether a defendant contests each and every element of the crime. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4, ["'[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.' (*Estelle v. McGuire* (1991) 502 U.S. 62, 69)."].) If, however, *Hassoldt* were applied to criminal cases, this Court's recognition of varying levels of similarity depending on the element sought to be proved would be meaningless. In other words, application of *Hassoldt* in the criminal context would necessarily require that the highest level of similarity (i.e., that the offenses share common features that are "sufficiently distinctive") be applied to the introduction of any evidence under Evidence Code section 1101, subdivision (b), regardless of the purpose for its admission. This, clearly, is contrary to numerous opinions by this Court, which have required different degrees of similarity according to the purpose served by the other crimes/bad acts evidence.[56] (See *People v. Kelly* (2007) 42 Cal.4th 763, 783-784; *People v. Abilez* (2007) 41 Cal.4th 472, 500-501; *People v. Prince* (2007) 40 Cal.4th 1179, 1271; *People v. Gray, supra*, 37 Cal.4th at p. 202; *People v. Carter* (2005) 36 Cal.4th 1114, 1149-1150; *People v. Roldan, supra*, 35 Cal.4th at p. 705; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123-1124; *People v. Caitlin* (2001) 26 Cal.4th 81, 111; *People v. Lewis* (2001)

---

56. Moreover, the opinion in *Hassoldt* does not indicate if a limiting instruction was given in the case, advising the jury that other crimes/bad acts evidence was admitted for a specific and limited purpose. (See *Hassoldt v. Patrick Media Group, Inc., supra,* 84 Cal.App.4th at pp. 164-166.) However, it seems unlikely given that the standard limiting instruction given regarding evidence admitted pursuant to Evidence Code section 1101, subdivision (b) is a criminal jury instruction (see CALJIC Nos. 2.50, 2.50.1; CALCRIM No. 375), and there appears to be no comparable standard civil instruction.

25 Cal.4th 610, 636; *People v. Kraft* (2000) 23 Cal.4th 978, 1031-1032; *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

Second, assuming *Hassoldt* is applicable to criminal cases, it has no bearing on the present case because at the time the admissibility of the out-of-state evidence was litigated, appellant indicated that identity was not contested and that the defense intended to show the killing of Sandra Gallagher was "an unplanned, impulsive crime." (2CT 413, 450; see also 5RT96-214 [no indication by defense counsel that identity would be contested]; see also 11RT 1150-1155 [same].) Accordingly, the trial court was entitled to rely on the defense's representations, and appellant cannot attack the court's evidentiary ruling on the basis of its own change in tactics made well after the court's ruling. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120 [trial court's ruling is reviewed based on the record or evidence before the court at the time of the ruling]; *People v. Welch* (1999) 20 Cal.4th 701, 739 [same].)

4. The Uncharged Murders Were Admissible Notwithstanding Appellant's Offer To Stipulate To First Degree Murder

Appellant also challenges admission of the uncharged murders on the basis that he offered to stipulate that the charged murder was premeditated, ostensibly removing the element of intent from the jury's consideration. (AOB 47-56; see also *People v. Daniels* (1991) 52 Cal.3d 815, 857-858 [A "defendant's plea [of not guilty] does put the elements of the crime in issue for the purpose of deciding the admissibility of evidence under Evidence Code section 1101, unless the defendant has taken some action to narrow the prosecution's burden of proof."].) Appellant further asserts that the stipulation should have been accepted by the court and enforced, regardless of any position taken by the prosecution. (AOB 47-56.) However, as explained below, the trial court was unauthorized to enforce such a stipulation in this case.

A trial court cannot compel a prosecutor to accept a stipulation that would deprive the state's case of its evidentiary persuasiveness or forcefulness. (*People v. Waidla* (2000) 22 Cal.4th 690, 723, fn. 5; *People v. Edelbacher* (1989) 47 Cal.3d 983,

1007; *People v. Thornton* (2000) 85 Cal.App.4th 44, 49; *People v. Sakarias* (2000) 22 Cal.4th 596, 629; *People v. Scheid* (1997) 16 Cal.4th 1, 16-17; *People v. Arias* (1996) 13 Cal.4th 96, 131.) The United States Supreme Court has recognized the "familiar, standard rule . . . that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." (*Old Chief v. United States* (1997) 519 U.S. 172, 186-187, 117 S.Ct. 644, 136 L.Ed.2d 574.) Relying in part on *People v. Hall* (1980) 28 Cal.3d 143, overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 415, appellant argues that his proposed stipulation in this case should have been forced upon the prosecution. In *Hall*, this Court held that where a defendant was charged with being an ex-felon in possession of a firearm, the defendant may stipulate to his status as an ex-felon, thereby precluding the prosecution from introducing the highly prejudicial fact of his prior felony conviction: "Thus, if a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element to the jury." (*People v. Hall*, *supra*, 28 Cal.3d at p. 152.) However, *Hall* recognized certain exceptions to this rule where stipulations governing the admission of such evidence would not be enforced: (1) the evidence remained relevant to a disputed fact not covered by the stipulated facts; (2) the stipulation would force the prosecution to elect between theories of guilt; and (3) excluding the evidence would hamper a coherent presentation of the evidence on the remaining issues. (*Id.* at pp. 152-156.) Additionally, the court in *Hall* found that evidence would be admissible if the stipulation was ambiguous or limited in scope, or if a party sought "'to deprive his opponent of the legitimate force and effect of material evidence'"during trial. (*Id.* at p. 153.)

Here, the proposed stipulation was unenforceable for several reasons. First, although the stipulation sought to eliminate any need for consideration of intent, the out-of-state murders, as found by the trial court, were independently admissible to show that appellant engaged in a common plan. (See 5RT 52-55.) Thus, the Louisiana

and Florida murders were nevertheless admissible to show that appellant employed the same plan in committing all three murders. (See Evid. Code, § 1101, subd. (b); *People v. Ewoldt, supra*, 7 Cal.4th at p. 403 ["the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense"].) In other words, evidence of the out-of-state murders remained relevant to the issue of whether appellant murdered Sandra Gallagher, irrespective of any issue of intent. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 393 ["'The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.' [Citation.]"].)

Second, the stipulation was unenforceable, as the Florida murder remained relevant to the special circumstance allegation. Here, it was alleged pursuant to Penal Code section 190.2, subdivision (a)(2), that appellant was previously convicted of first degree murder. (See 1CT 214.) Hence, evidence regarding the Florida murder was not only admissible, but was necessary to prove the special circumstance allegation.[57]

Third, the stipulation was unenforceable, as it would have "hamper[ed] a coherent presentation of the evidence on the remaining issues" and deprived the prosecution of the "legitimate force and effect of material evidence." (See *People v. Hall, supra*, 28 Cal.3d at p. 152-156.) By eliminating the evidence of the out-of-state murders, appellant's defense that another person (Kele) killed Gallagher , unjustifiably assumed an aura of plausibility. Without the evidence of the Louisiana and Florida murders, the jury had no way to evaluate the credibility of appellant's testimony that Kele left his apartment with Gallagher and later killed her. Evidence of the out-of-state murders, on the other hand, enabled the jury to more accurately evaluate appellant's

---

57. In offering his stipulation, appellant never indicated that he would stipulate to first degree murder in exchange for excluding evidence of the Louisiana murder. Rather, he made clear that his stipulation intended to "keep out" *both* "the Louisiana and Florida fact pattern out of the guilt phase." (See 6RT 211.) Similarly, appellant made no offer to stipulate to the special-circumstance allegation. (See 6RT 211-215.)

credibility, inasmuch as it showed that his involvement in a gruesome murder was not an isolated event. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 629 ["'"[The] general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness."' [Citations.]".) Indeed, this factor was emphasized by the trial court in it's ruling, as the court recognized that exclusion of the out-of-state evidence "would be unfair []and creat this totally artificial setting, ignoring a pattern that has overwhelming factors in common." (5RT 54.)

Accordingly, the trial court did not abuse its discretion by refusing to force the prosecution to agree to appellant's proffered stipulation. (See *People v. Waidla* (2000) 22 Cal.4th 690, 717-718 ["Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. [Citations.] Speaking more particularly, it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question. [Citations.]"].) Therefore, appellant's offer to stipulate to the first degree murder of Sandra Gallagher did not render the out-of-state murders inadmissible.

C. The Probative Value Of The Evidence Outweighed Any Undue Prejudice

Appellant also asserts that evidence of the uncharged homicides should have been excluded under Evidence Code section 352. (SEe AOB 70-77.) On this point he is also wrong.

Uncharged offenses admitted pursuant to Evidence Code section 1101, subdivision (b), are subject to the balancing test of Evidence Code section 352. Accordingly, the probative value of any uncharged crimes must also outweigh any prejudice. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) Evidence Code Section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury."

Here, as noted by the trial court, evidence of the out-of-state murders was of great probative value to show appellant's intent and a common plan. (See 5RT 52-55.) As discussed above, the similar pattern of appellant meeting the victim at a bar, arranging for the victim to drive him to his "place," and then killing the victim, taking the victim's property as incidental to the murders, and taking steps to conceal the crimes, tended to show that appellant intended to kill Sandra Gallagher when he met her and that he employed a similar plan in the commission of all three murders. The mere fact that such evidence was also prejudicial did not automatically render evidence of the out-of-state murders inadmissible. As noted by the trial court, "anything that is relevant is going to be prejudicial, ..." (5RT 54-55.) However, "'[i]n applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging."'" (*People v. Bolin* (1998) 18 Cal.4th 297, 320, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Rather, "'[t]he "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.'" (*Ibid.*)

Here, evidence of the Florida and Louisiana murders was of tremendous relevance to the issues of intent and common plan, and evidence of the Florida murder was also highly probative of the special-circumstance allegation. Although appellant argues that such evidence unfairly characterized him as a serial killer (see AOB 73-74), throughout the trial appellant was never called a "serial killer," nor was he likened to any particular "serial killer." Moreover, although the Louisiana offense did not result in a criminal conviction (see AOB 73-74), the Florida murder did result in a first degree murder conviction, evidence of both out-of-state murders was no more inflammatory than evidence presented concerning Sandra Gallagher's murder, and all three murders occurred in the relatively compressed time period of less than two

months.[58] (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211 ["The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses."].)

Additionally, the prejudicial impact of the out-of-state murders was necessarily minimized by the limiting instruction given the jury in this case. Here, the jury was instructed that it could not consider evidence of the Florida and Louisiana homicides "to prove that [appellant] [wa]s a person of bad character or that he ha[d] a disposition to commit crimes" and was only to be considered "for the limited purpose of determining if it tends to show whether [appellant] committed the murder alleged in Count 1 with express malice aforethought and with premeditation and deliberation, and not as a result of rage or provocation or other heat of passion." (14RT 1782-1783; 7CT 1579 [CALJIC No. 2.50].) As it is presumed that the jury followed this instruction (*People v. Smith* (2007) 40 Cal.4th 483, 517-518), the instruction minimized any danger that the jury relied upon evidence of the out-of-state murders for any improper purpose (see *People v. Barnett* (1998) 17 Cal.4th 1044, 1119; *People v. Garceau* (1993) 6 Cal.4th 140, 178, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118). Indeed, defense counsel emphasized the instruction to the jury during closing argument, noting that the jury was bound to follow the instruction and not "consider such evidence for any other purpose" than determining if the Louisiana and Florida murders "tend[ed] to show whether [appellant] committed

---

58. The relevance of the short time-period is emphasized when considered that at least one other state requires that for an aggravated "serial killer" scheme to apply, the killings must occur within the period of forty-eight months. (See Tenn. Code Ann. § 39-13-204(i)(12) (2003).)

the murder alleged in count I with express malice aforethought and with a premeditation and deliberation and not as a result of rage or provocation . . . or other heat of passion." (See 15RT 1877-1878.) Thus, the limiting instruction given in this case decreased any possibility of prejudice created by admission of the uncharged murders.

Lastly, the possibility of undue consumption of time did not render the uncharged murders inadmissible under Evidence Code section 352. (See 5RT 54) The evidence of the out-of-state murders did not extend the overall length of the trial, as it was uncontested such that evidence concerning the Florida and Louisiana murders would have been admissible during the penalty phase of the proceedings. (See 5RT 47 [defense counsel acknowledges that out-of-state murders would be admissible during penalty phase].)

In sum, the probative value of the Florida and Louisiana murders outweighed any probability that the evidence would create undue prejudice. Hence, the trial court acted well within its discretion in finding that Evidence Code section 352 did not bar admission of the Louisiana and Florida murders.

D. Any Error In Admission Of The Evidence Was Harmless Given The Overwhelming Evidence That Appellant Was Guilty Of The Murder Of Sandra Gallagher

Appellant further argues that the error in the admission of evidence concerning the out-of-state homicides requires reversal, under either the harmless error standard for state law errors or the more stringent standard for errors of constitutional magnitude. (AOB 78-83.) As support for his prejudice argument, appellant asserts that evidence of the uncharged murders was pivotal to the prosecution's case and that other evidence of guilt was not overwhelming. (AOB 78-82.) He also argues that the limiting instructions were "completely inadequate to ameliorate the prejudice" (AOB 80-81). Appellant's arguments regarding prejudice, however, lack any basis.

First, contrary to appellant's characterization, evidence of the out-of-state murders was not the "lynchpin" of the prosecution's case regarding Gallagher's murder. Rather, the testimony given by Walker and Flynn, including Walker's testimony that appellant told her that "He had bigger problems" and that Gallagher "was dead" (10RT 916-922), and Flynn's testimony that he saw the silhouette of someone making a strangling motion inside Gallagher 's truck, shortly after Gallagher and appellant were last seen together in her truck (10RT 839, 854-855), established that appellant killed Gallagher and refuted the defense theory that appellant was innocent (see 15 RT 1933 ["We are hoping you accept the word of Mr. Rogers when he tells you he did not commit the crime."].) Walker's testimony was corroborated by evidence of Gallagher 's earring found in appellant's apartment (9RT 637-638; 13RT 1611-1614), and Flynn's testimony was corroborated by the coroner who determined that the cause of death was asphyxiation (11RT 1101). This evidence was further bolstered by testimony that someone who resembled appellant was seen leaning into Gallagher's truck immediately before the truck containing Gallagher's body was set on fire. (10RT 999-1003.) In contrast, the defense case was weak and implausible, resting on the self-serving and unsubstantiated testimony of appellant that he and Gallagher met Steve Kele, all three went to the apartment while Walker slept, and that Gallagher left with Kele while he remained in the apartment. (See 13RT 1641-1645.) In light of the overwhelming evidence of guilt and weak defense case, it was not reasonably probable appellant would have received a more favorable verdict in absence of evidence concerning the uncharged homicides. (See *People v. Holloway* (2004) 33 Cal.4th 96, 128-129 [applying standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836]; *People v. Malone* (1988) 47 Cal.3d 1, 22 [error in admitting Evid.Code, § 1101 evidence tested by *Watson* harmless error standard].)

Second, appellant fails to show that the jury did not apply the limiting instruction given in this case. (See AOB 81.) As previously indicated, the jury was specifically and repeatedly advised to consider evidence of the Florida and Louisiana

homicides for the "limited purpose of determining if it tend[ed] to show whether [appellant] committed the murder [of Sandra Gallagher] with express malice aforethought and with premeditation and deliberation, and not as a result of rage or provocation or other heat of passion." (7CT 1579; 11RT1157; 14RT 1782-1783.) During closing argument defense counsel emphasized this instruction, heeding the jury to "follow the law and follow this instruction about evidence admitted for a limited purpose and set aside the emotions and make your decision based on the facts." (15RT 1878.) Thus, the limiting instruction repeatedly given by the court necessarily rendered any erroneous admission of evidence nonprejudicial, as the jury would not have considered evidence of the out-of-state offenses if it found such evidence immaterial to appellant's intent or common plan. Accordingly, any error in the admission of the uncharged murders was necessarily harmless and does not compel reversal in this case.

E. Admission Of The Uncharged Murders Did Not Violate Appellant's Federal Constitutional Rights

As a final point of contention relating to his attack on the admissibility of evidence, appellant asserts that admission of the out-of-state homicides rendered his trial "fundamentally unfair" in violation of the Fourteenth Amendment's Due Process Clause. (AOB 83-88.) This argument also fails. As explained above, the evidence of the Louisiana and Florida murders supported the permissible inferences that appellant premeditated the murder of Sandra Gallagher and acted with a common plan. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [admission of relevant evidence does not offend due process unless the evidence is "so prejudicial as to render the defendant's trial fundamentally unfair"].) Therefore, this Court need not decide to what extent, if any, evidence solely going to character might violate appellant's due process rights. (See *People v. Kelly* (2007) 42 Cal.4th at p. 787; *People v. Steele* (2002) 27 Cal.4th 1230, 1246; *People v. Caitlin*, *supra*, 26 Cal.4th at p. 123 [citation to federal cases finding that admission of uncharged offenses violated due process was unpersuasive because in those cases courts determined that evidence was immaterial to any

legitimate issue].) Therefore, appellant's claim of federal constitutional error must be rejected.

F. Conclusion

In sum, evidence of the Florida and Louisiana murders were properly admitted pursuant to Evidence Code section 1101, subdivision (b), to prove appellant's intent and common plan. This evidence was properly admitted notwithstanding any dispute concerning the identity of the perpetrator in the instant case, and appellant's offer to stipulate to first degree murder with respect to the charged murder. Additionally, admission of evidence of the uncharged murders did not violate Evidence Code section 352. Moreover, any error in admission of the evidence was nonprejudicial, and admission of the evidence did not violate appellant's federal constitutional rights. Accordingly, appellant's numerous claims regarding the admission of evidence pertaining to the out-of-state homicides must be rejected.

II.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR NUMBER 3156 FOR CAUSE

Appellant next argues that the trial court erroneously granted the prosecution's challenge for cause against prospective juror number 3156. (AOB 89-104.) Specifically, appellant asserts that the jury questionnaire and voir dire pertaining to prospective juror number 3156 merely showed that he was uninformed about the death penalty, and that he did not reject the possibility of imposing a death sentence. (AOB 95-98.) Accordingly, appellant urges that there was insufficient evidence that prospective juror number 3156's ability to serve as an impartial juror was substantially impaired. (AOB 99-104.) This argument, however, must be rejected because the prospective juror was properly excused because his views on capital punishment would have prevented or substantially impaired the performance of his duties as a juror.

A. Underlying Proceedings

Juror questionnaires were distributed to potential jurors prior to oral voir dire. (See, e.g., 4CT 703-715.) Prospective juror number 3156 completed the questionnaire, indicating that he was a 27-year-old concierge for the Regal Biltmore Hotel, and that he resided in Los Angeles. (4CT 982.) As to the death penalty portion of the questionnaire, he indicated that he did not "know what to think about capital punishment if it is good or bad, right or wrong." (4CT 989.) Prospective juror number 3156 further indicated that he felt that way "because there has been a lot of people who received capital punishment who did not deserve it and then there were others who did." (4CT 989.) He characterized the strength of his views as "like many people whom [he] talk[ed] with." (4CT 989.) Prospective juror number 3156 stated that he supported life imprisonment if someone was "not capable to be in city life" and that the death penalty and life in prison were equally severe because "you lose your life either way." (4CT 989.) However, he responded that he would not always vote for life in prison without parole or the death penalty based on his views. (4CT 989.) He indicated he would want to "hear and review all of the circumstances and facts of a case" before deciding the appropriate penalty, as well as "all the circumstances concerning the defendant and his background." (4CT 990.) Prospective juror number 3156 was unable to identify cases in which the death penalty should have been imposed, and in response to a question on whether the death penalty was imposed too frequently in California, he stated that he never "hear[d] about the death penalty in California." (4CT 990.) He stated that he did not "follow any religion" and that if selected to be on a jury, he would "just want to do what [wa]s right by law." (4CT 990-991.)

During oral voir dire, prospective juror number 3156 elaborated on his response in the questionnaire regarding people who received the death penalty who "did not deserve it." He explained that this response was based on, "[j]ust growing up and just knowing about the few people that I've known that, you know, just didn't get a fair

chance." (8RT 546.) Prospective juror number 3156 then stated that "[a]t this time [he] really d[id]n't know too much about the death penalty so [he was] not for it or against it." (8RT 546.) However, he then followed up with the statement that he was "not for it" (8RT 546) and that he was "against it" (8RT 547). He elaborated that if the mitigation was more substantial compared to the aggravation, he would not vote for death. (8RT 547.) However, prospective juror number 3156 also stated that he could not see himself voting for life where the aggravating evidence outweighed the mitigating evidence. (8RT 547.) The prospective juror then stated that he could not "conceive of anything that might cause [him] to vote for death." (8RT 547.) When the court indicated that prospective juror number 3156's opinions had become stronger than those reflected in the questionnaire, the prospective juror responded that his views had changed because he "had time to think about it" and that "to actually have to make that decision, [he] couldn't do it." (8RT 547-548.) Prospective juror number 3156 stated that it would be "hard" to vote for death if the defendant was Jeffrey Dahmer or Richard Ramirez. (8RT 548.) He also explained that even if the aggravating factors outweighed the mitigating factors, he could not vote for life because he did not "feel like [he was] in the position to really make a decision on what punishment one should get for their crime." (8RT 549.) Therefore, as clarified by prospective juror number 3156, he could not see himself "voting for life or the death penalty" and that he "just fe[lt] [he] couldn't make that decision." (8RT 549-550.)

Following oral voir dire, the prosecution challenged prospective juror number 3156 for cause, and the trial court found cause on the basis that the prospective juror would refuse to vote for either life imprisonment or death. (8RT 568-569.)

B. Relevant Legal Principles

Under federal and state law, a prospective juror may be excluded for cause only where his or her views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841,

clarifying *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21, 88 S.Ct. 1770, 20 L.Ed.2d 776 [framing issue as whether it is ""unmistakably clear"" the prospective juror would ""automatically"" vote for life or death].) A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Jenkins* (2000) 22 Cal.4th 900, 987.) "At bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case." (*People v. DePriest* (2007) 42 Cal.4th 1, 20.)

"'Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court.' [Citation.]" (*People v. Gray, supra,* 37 Cal.4th at pp. 192-193.) A reviewing court must afford "substantial deference" to the trial court's findings regarding the nature and effect of a prospective juror's views on capital punishment. (*People v. Ledesma* (2006) 39 Cal.4th 641, 675; *People v. Griffin* (2004) 33 Cal.4th 536, 558-559.) If a prospective juror's answers on voir dire are "equivocal or conflicting," the trial court's assessment of the prospective juror's state of mind is generally "binding" on appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007.) If "'the statements are consistent, the court's ruling will be upheld if supported by substantial evidence.'" (*People v. Ledesma* (2007) 39 Cal.4th 641, 671, quoting *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

> ""There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' [Citation.]" (*People v. Gray, supra,* 37 Cal.4th at pp. 192-193, 33 Cal.Rptr.3d 451, 118 P.3d 496.)

(*People v. Abilez* (2007) 41 Cal.4th 472, 497.)

Here, the trial court properly excused prospective juror number 3156 for cause.

First, it appears that the juror's views on capital punishment would have prevented or impaired the performance of his duties as a juror, within the meaning of *Witt*. Prospective juror number 3156 unequivocally stated that he was unwilling to render any penalty decision regarding life imprisonment or death. He stated that he could not be "part of th[e] decision-making" process as regards penalty and that he could not see himself "voting for life or the death penalty." (8RT 549.) Thus, although he could render a decision as to guilt, he would be unwilling to participate and make a determination as to an appropriate sentence. (See 8RT 550.) Such a refusal to participate in the deliberative process of any penalty phase necessarily equated with an inability to perform his duties as a juror, and constituted sufficient basis to excuse prospective juror number 3156 for cause. (See CALJIC No. 17.41.1 [instruction that if "any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on any improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation"; *People v. Cleveland* (2001) 25 Cal.4th 466, 475 [Penal Code section 1089, permitting removal of juror where good cause is shown, has "been applied to permit the removal of a juror who refuses to deliberate, on the theory such a juror is 'unable to perform his duty'"].) Thus, substantial evidence supported the trial court's finding that prospective juror 3156's views would have prevented or substantially impaired the performance of his duties as a juror.

Acknowledging the basis for the trial court's excusal, appellant nevertheless asserts that the record failed to unequivocally disclose that prospective juror number 3156 necessarily refused to participate in any penalty phase deliberations. (See AOB 96-102.) Rather, appellant characterizes the prospective juror's attitude as neutral with regard to penalty, but willing to engage in such a determination with a simple recognition that such a process would be "hard." (AOB 98-99.) The record simply does not support this interpretation – while prospective juror 3156 characterized the deliberative process as "hard (8RT 548, 550), he made clear that he "couldn't vote for life" (8RT 549) and that under no circumstances could he conceive of anything that

might cause him to vote for death (8RT 547). Although the prospective juror at times couched his language in terms of hypothetical possibility (i.e., it "would be hard" to make decision for death (8RT 548); prospective juror "just d[idn]'t feel like [he was] in the position to really make a decision on what punishment one should get" (8RT 549); prospective juror d[id]n't feel [he] [could] make that decision or be a part of that decision-making" (8RT 549); prospective juror "couldn't see [him]self voting for life or the death penalty"; prospective juror "just fe[lt] [he] couldn't make that decision" (8RT 550)), his statements made clear that these were truly his opinions and that he was unwilling to consider to vote for death or life imprisonment.

Moreover, appellant's reliance on prospective juror number 3156's juror questionnaire as demonstrating that there was no substantial impairment is misplaced. Both the court and prospective juror number 3156 indicated that the prospective juror's views had evolved since he had completed the questionnaire, and that at the time of oral voir dire, he held the belief that he could not engage in any penalty phase determination. Additionally, any ambiguity in prospective juror 3156's statements was properly assessed by the trial court, with the trial court ultimately determining that the prospective juror was substantially impaired inasmuch as he "wouldn't do either one." (See 8RT 569.) Thus, the trial court was left with the "definite impression" that prospective juror 3156 would be unable to faithfully and impartially apply the law. The trial court's assessment of the prospective juror's anti death-penalty attitudes sufficiently supported its decision to excuse the prospective juror for cause. (See *People v. Abilez, supra*, 41 Cal.4th at p. 497.) Accordingly, appellant's claim attacking the trial court's excusal of a prospective juror for cause must be rejected.

III.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING APPELLANT'S FLIGHT (CALJIC NO. 2.52)

Penal Code section 1127c provides:

In any criminal trial or proceeding where evidence of flight of a defendant

is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:

> The flight of a person immediately after the commission of a crime . . . is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to decide.

Consistent with this section, and without any objection by the defense, the trial court instructed the jury with CALJIC No. 2.52 – "Flight After Crime" – as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether the defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(14RT 1784-1785; 7CT 1579.)

Appellant attacks the instruction as facially invalid under federal constitutional and state law, making three distinct arguments: (1) the instruction "improperly duplicate[d] the circumstantial evidence instructions" (AOB 107-108); (2) the instruction was unduly partisan and argumentative (AOB 108-113); and (3) the instruction improperly permitted the jury to infer a defendant's consciousness of guilt based on the acts that "supposedly constituted flight" (AOB 113-118). Appellant further attacks the instruction as applied to himself, arguing that CALJIC No. 2.52 improperly permitted the jury to infer he was guilty of first degree murder and arson because he fled after the commission of uncharged murders. (AOB 118-120.) Appellant asserts that any instructional error requires reversal. (AOB 120-122.) Appellant's challenge to CALJIC No. 2.52, however, must be rejected.

A. CALJIC No. 2.52 Is Not Improperly Duplicative Of Other Instructions

Appellant asserts that CALJIC No. 2.52 was duplicative of instructions given on circumstantial evidence, and therefore was improper in this case. (AOB 107-108.)

This, however, is not the case. "[A] trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 659; see also *People v. Griffin* (2004) 33 Cal.4th 536, 591 [trial court need not give duplicative instructions]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277 [trial court may refuse an accurate instruction if it is duplicative].) However, an instruction regarding a defendant's flight is mandated under Penal Code section 1127c whenever "evidence of flight of a defendant is relied upon as tending to show guilt. . . ." (Pen. Code, § 1127c.) This Court has found that the instruction is not unnecessarily duplicative, but has observed that a flight instruction such as CALJIC No. 2.52,

> "is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual environs, . . . logically permits an inference that his movement was motivated by guilty knowledge."

(*People v. Lucas* (1995) 12 Cal.4th 415, 470, quoting *People v. Turner* (1990) 50 Cal.3d 668, 694; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

Here, the jury was instructed on circumstantial evidence in CALJIC Nos. 2.00[59]

---

59. CALJIC No. 2.00, as given, states:

> Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.
>
> Evidence is either direct or circumstantial.
>
> Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.
>
> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.
>
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
>
> It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct

and 2.01[59], as well as flight in CALJIC No. 2.52. (See 7CT 1574-1576.) The flight instruction was not duplicative of the other instructions, inasmuch as it specifically "'made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior.'" (*People v. Boyette* (2002) 29 Cal.4th 381, 438, 439, quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) As further explained, "The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" (*Ibid.*) Moreover,

---

and circumstantial evidence are acceptable as a mans of proof. Neither is entitled to any greater weight than the other.

(14RT 1773-1774; 7CT 1574-1575.)

60. CALJIC No. 2.01, as given, states:

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that [appellant] is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, once of which points to [appellant's] guilt and the other to his innocence, and reject that interpretation that points to his guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(14RT 1774-1775; 7CT 1575.)

appellant's argument necessarily concedes that any duplication was necessarily harmless, as the jury would have already been instructed with the general principles regarding consciousness of guilt as embodied in CALJIC Nos. 2.00 and 2.01, and was further instructed to not draw any inference based on any "rule, direction or idea" that is repeated in the instructions. (See 7CT 1574 (CALJIC No. 1.01).) Thus, appellant's challenge to CALJIC No. 2.52 as duplicative must be rejected.

B. CALJIC No. 2.52. Is Not Unfairly Partisan And Argumentative

Appellant further argues that CALJIC No. 2.52 was improperly given because the instruction was "unfairly partisan and argumentative." (AOB 108-113.) However, CALJIC No. 2.52 was not impermissibly argumentative in that it invited the jury to draw inferences favorable to the prosecution. As noted by numerous courts, the instruction does not "invite" the jury to draw any inference. Rather, it simply states that: (1) evidence of flight alone is not sufficient to establish guilt and; (2) it may be considered along with all other evidence. Thus, the instruction simply confirms the inference that the jury would naturally draw from the admission of evidence of flight, i.e., that it can be considered in evaluating guilt. (*People v. Visciotti, supra,* 2 Cal.4th at p. 61; see also *People v. Carter, supra,* 36Cal.4th at p. 1182; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) In other words, CALJIC No. 2.52 does "not assume that flight was established," but leaves to the jury the factual determination of whether flight occurred and what inference should be drawn from such flight. (*People v. Visciotti, supra,* 2 Cal.4th at p.61.) Accordingly, appellant's argument regarding the allegedly partisan and argumentative nature of the instruction must be rejected. (*People v. Jurado* (2006) 38 Cal.4th 32, 125-126; see also *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Kipp, supra,* 18 Cal.4th at p. 375.)

C. CALJIC No. 2.52 Did Not Permit The Jury To Draw Irrational Permissive Inferences Of Guilt

Appellant also attacks the court's instruction with CALJIC No. 2.52 by arguing

that the instruction permitted the jury to draw "irrational permissive inferences of guilt." (AOB 113-118.) CALJIC No. 2.52, however, permits no such irrational inferences. To determine whether a jury instruction creates an impermissible inference, the "threshold inquiry" is to determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference.

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissible inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

(*Francis v. Franklin* (1985) 471 U.S. 307, 313-315, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344.) Mandatory presumptions violate the Due Process Clause if they "relieve the State of the burden of persuasion on an element of the offense," whereas a permissive inference creates a constitutional violation "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Ibid.*) Instruction on a permissive inference is invalid only if there is "no rational way the jury could draw the permitted inference. [Citations.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244.) "A reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.' [Citations.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5, &545, fn. 6.) CALJIC No. 2.52 "permits a jury to infer, if it so chooses, that the flight of a defendant immediately after the commission of a crime indicates a consciousness of guilt." (*People v. Mendoza*, *supra*, 24 Cal.4th at pp. 180-181.) The flight instruction does not alter the prosecution's burden, but simply informs the jury that it may use the fact of a defendant's flight, along with all the other evidence, to determine guilt, giving the fact of flight the weight the jury deems appropriate. (*People v. Mendoza*, *supra*, 24 Cal.4th at pp. 180-181.)

"A reasonable juror would understand 'consciousness of guilt' to mean

'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.' The instruction[] advise[s] the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution[s] that such evidence is not sufficient to establish guilt . . . . The instruction[] do[es] not address the defendant's mental state at the time of the offense and do[es] not direct or compel the drawing of impermissible inferences in regard thereto."

(*People v. Bolin* (1996) 18 Cal.4th 297, 327, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 871; see also *People* v. *Pensinger* (1991) 52 Cal.3d 1210, 1243-1244 [instruction that jury may infer consciousness of guilt from flight creates proper permissive inference].) Thus, the instruction did not encourage the jury to infer appellant's legal guilt from evidence of his flight.

On the contrary, the[] instruction[] "made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior."

(*People v. Bolin, supra,* 18 Cal.4th at p. 327, quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; see also *Pensinger, supra,* 52 Cal.3d at pp. 1243-1244.) Hence, CALJIC No. 2.52, as given, embodied a reasonable and permissive inference, and "the flight instruction d[id] not violate due process." (*People v. Mendoza, supra,* 24 Cal.4th at pp. 180-181.) Appellant's argument regarding permissive irrational inferences with respect to CALJIC No. 2.52 must be rejected.

D. CALJIC No. 2.52 Was Appropriate As Applied To Appellant

"A flight instruction is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual environs, or of his escape from custody after arrest, logically permits an inference that his movement was motivated by guilty knowledge." (*People v. Turner* (1990) 50 Cal.3d 668, 694; see also *People*

v. Bradford (1997) 14 Cal.4th 1005, 1055.)

> "'Flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" [Citations.] "*Mere* return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so." [Citation.]

(*People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Smithey* (1999) 20 Cal.4th 936, 982.) The instruction does not require that the defendant know criminal charges have been filed, nor does it require "a defined temporal period within which the flight must be commenced, nor resistance upon arrest." (*People v. Carter* (2005) 36 Cal.4th 1114, 1182; see also *People v. Mason* (1991) 52 Cal.3d 909, 941.) For example, in *People v. Mason*, *supra*, 52 Cal.3d 909, this Court rejected a defendant's claim that the trial court erred in instructing the jury regarding flight when the alleged flight occurred four weeks after a murder:

> Defendant's flight took place on January 6, 1981, only four weeks after, and in the same jurisdiction as, the murder of Dorothy Lang. Defendant argues that his flight was so remote from the charged offenses that it "was of marginal probative value, if any." Common sense, however, suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks. Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt. In *People v. Santo* (1954) 43 Cal.2d 319, for example, we held that the trial court properly admitted evidence of flight occurring more than a month after the charged murder because the facts fairly supported that inference. [Fn. omitted.] (43 Cal.2d at pp. 327-330, 273 P.2d 249.)"

(*People v. Mason*, *supra*, 52 Cal.3d at pp. 941-942.)

Here, the flight instruction was required under Penal Code section 1127c based on evidence of appellant's flight, and irrespective of any intervening time period between Sandra Gallagher's murder and appellant's departure from Los Angeles. Here, the evidence showed that Sandra Gallagher was killed during the early morning hours of September 29, 1995. (See 9RT 809; 10RT 901-916.) Appellant was next identified as being in Bossier City, Louisiana, on November 2, 1995. (12RT 1372-1377.) Appellant then went to Tampa, Florida, where he killed Tina Cribbs between the evening of November 5, 1995 and the morning of November 6, 1995. (11RT 1212 [Cribbs was last seen alive at 6:45 p.m. on November 5, 1995]; 11RT 1244 [Chenden Patel saw appellant drive away from the motel on the morning of November 6, 1995, and he never returned]; 12RT RT 1296-1297, 1346.) Appellant testified in his own defense that he left Los Angeles on a pre-planned trip "shortly" after September 29, 1995, and that he went to Las Vegas for "a couple of days" and then reached Jackson, Mississippi "a week or two later." (13RT 1684-1687.) Accordingly, there was evidence that appellant left the crime scene and fled to Louisiana and then Florida. The mere fact that appellant falsely stated he was a truck driver (12RT 1381), as well as a carnival worker (11RT 1183), and also represented that he was from Jackson, Mississippi (11RT 1140), abandoned his own vehicle and took Cribb's car, and replaced the license plates on Cribb's vehicle with plates stolen from Tennessee (12RT 1475-1476), indicates that appellant was attempting to avoid being arrested by hiding his connection with California and concealing any connection to the victims in Mississippi and Florida. Indeed, appellant's act of failing to yield to Kentucky authorities, and only stopping after having his vehicle rammed by state troopers (12RT 1477-1481), shows that he was avoiding arrest. Hence, such evidence sufficiently supported the flight instruction in the case. (See 15 RT 1860-1861.) The mere fact his arrest and apprehension occurred approximately six weeks after Gallagher's murder did not negate the applicability of the flight instruction, as appellant's actions demonstrated continued flight from both Gallagher's murder and his mounting number

of crimes in other states. For these reasons, CALJIC No. 2.52 was applicable in this case and properly given.

E. Any Error In Instruction With CALJIC No. 2.52 Was Harmless

Even assuming that the flight instruction was given in error, it was necessarily harmless. Any error in instruction with CALJIC No. 2.52 warrants reversal only it is reasonably probably the defendant would have obtained a more favorable result in absence of the instruction. (See *People v. Turner* (1990) 50 Cal.3d 668, 695 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of prejudice when court instructed jury under CALJIC No. 2.52].) Here, no such reasonable probability exists.

First, the instruction itself created little possibility of prejudice. "The purpose of the flight instruction is to protect the defendant from the jury's simply assuming guilt from flight." (*People v. Han* (2000) 78 Cal.App.4th 797, 808.) CALJIC No. 2.52's cautionary nature benefitted appellant, "'admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]'" (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 438-439; see *People v. Henderson* (2003) 110 Cal.App.4th 737, 742.)

Moreover, CALJIC No. 2.52 assumed neither the guilt nor the flight of appellant. (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1029, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 923-925; see also *People v. Carter*, *supra*, 36 Cal.4th at pp. 1182-1183; *People v. Visciotti*, *supra*, 2 Cal.4th at p. 61.) "Alternative explanations for flight conduct go to the weight of the evidence, which is a matter for the jury, not the court, to decide. [Citations.]" (*People v. Rhodes* (1989) 209 Cal. App. 3d 1471, 1477.) Accordingly, the instruction was harmless, as it protected appellant from unwarranted assumptions concerning his flight and left to the jury the determination of whether flight occurred and any inferences to be extrapolated from such flight. (See 7CT 1589 [CALJIC No. 17.31 instruction advising jury to disregard any instruction "which applies to facts determined by you not to exist"].)

Second, the instruction was nonprejudicial in light of the extremely strong evidence of guilt in this case, rendering appellant's consciousness of guilt undisputed. Such evidence included: testimony that Gallagher left McRed's with appellant; testimony that appellant and Gallagher were seated in her truck outside appellant's apartment immediately prior to Flynn's arrest (10RT 807); Flynn's observation during his arrest of a silhouette holding someone's neck in Gallagher's truck (10RT 839, 854-855); confirmatory testimony by the coroner that Gallagher died from asphyxia due to manual strangulation (11RT 1101); appellant's statement to Walker within a few hours of the murder that Gallagher was dead (10RT 916); Walker's observation of Gallagher's purse, cigarettes, keys, and an earring in appellant's apartment (10RT 920-922); and the later discovery of Gallagher's earring inside appellant's apartment (9RT 637-638; 13RT 1611-1614). Accordingly, even assuming the flight instruction was unwarranted, there was no reasonable probability appellant would have obtained a more favorable result in absence of the instruction. Thus, reversal is not required in this case and appellant's argument must be rejected.

IV.

ANY ERROR IN THE COURT'S INSTRUCTION WITH CALJIC NO. 2.15 WAS NONPREJUDICIAL

Appellant argues that the trial court's instruction with CALJIC No. 2.15,[61]

---

61. The instruction, as given, states:

> If you find that [appellant] was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of murder or arson. Before guilt may be inferred, there must be corroborating evidence tending to prove his guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attributes of possession – time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, or any other evidence which tends to connect him with

regarding inferences to be drawn from appellant's possession of stolen property, was erroneous because the instruction "permitted the jury to draw an irrational permissive inference that improperly lightened the state's burden of proof" and "gave the jury a fundamentally incorrect theory of culpability." (AOB 123; see also AOB 123-137.) Specifically, he asserts that the instruction impermissibly allowed the jury to find him guilty of murder or arson "based solely on the alleged fact that he was 'in conscious possession of recently stolen property,'" and subject only to the condition that there was "'slight'" corroborating evidence of guilt. (AOB 123.) Appellant argues that such an instructional error compels reversal. (AOB 126-133.) As discussed below, any error in the court's instruction was necessarily harmless, and appellant's argument for a guilt-phase reversal on the basis of any error must be rejected.

A. Underlying Proceedings

During discussion between the court and counsel on jury instructions (14RT 1743-1750), defense counsel broached the issue of instruction with CALJIC No. 2.15, and the trial court indicated that the instruction required the prosecution to prove the property was stolen by a preponderance of the evidence. (14RT 1750.) Hence, the court instructed the jury with CALJIC No. 2.15. (14RT 1776.) During the prosecutor's guilt-phase argument, the prosecutor argued that appellant could be convicted on several theories of first degree murder, including the theory that she was killed during the commission of a felony, i.e., robbery. (14RT 1841-1849.) The prosecutor specifically referenced the court's instruction with CALJIC No. 2.15, and then went on to argue there was corroborating evidence supporting an inference of guilt based on appellant's possession of recently stolen property. The prosecutor argued that appellant was seen with Gallagher's purse the morning of the murder, and Walker saw Gallagher's earring drop out of the purse. (14RT 1849-1850.) As argued by the prosecutor, the earring was later found in the apartment. (14RT 1848-1849.)

---

the crime charged.
(14RT 1776; 7CT 1576.)

The prosecutor argued that Walker's testimony concerning appellant's admission that he had a "bigger problem" and that Gallagher was dead, further corroborated the inference of guilt. (14RT 1850-1851.)

Following the prosecutor's argument, defense counsel brought to the court's attention a list of objections regarding the prosecutor's argument. (See 14RT 1867.) At that time defense counsel indicated that he was objecting to the instruction as "improper" based on the view that the instruction misstated that "all you need is slight corroboration to go from being in possession of some stolen property to get to murder and arson." (14RT 1868-1869.) The court indicated that the instruction was applicable to evidence regarding appellant's possession of Gallagher's purse, keys, and other property, as well as to appellant's possession of property owned by Whiteside and Cribbs at the time of his arrest. (14RT 1869.) The court concluded that the prosecution carried the burden of proof as to those facts, and that it would be required to give the instruction. (14RT 1869.) The court then overruled the objection. (14RT 1870.)

B. Any Error In The Court's Instruction With CALJIC No. 2.15 Was Necessarily Harmless

CALJIC No. 2.15 is based upon a long-standing rule of law that allows a jury to infer guilt of a theft-related crime from the fact a defendant is in possession of recently stolen property when accompanied by *slight* corroboration of other inculpatory circumstances that tend to show guilt. (*People v. McFarland* (1962) 58 Cal.2d 748, 754-758, superseded by statute on another ground as stated in *People v. Burns* (1984) 157 Cal.App.3d 185, 598; *People v. Anderson* (1989) 210 Cal.App.3d 414, 423.) It is a permissive, cautionary instruction which inures to a criminal defendant's benefit by warning the jury not to infer guilt merely from a defendant's conscious possession of recently stolen property, without at least some corroborating evidence tending to show guilt. (*People v. Johnson* (1993) 6 Cal.4th 1, 35-37; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173-1174; *People v. Gamble* (1994) 22 Cal.App.4th 446, 452-455

[CALJIC No. 2.15 appropriate instruction for theft].)

In *People v. Prieto* (2003) 30 Cal.4th 226, this Court held that a "trial court's application of CALJIC No. 2.15 to nontheft offenses like rape or murder [is] improper." (*Id.* at p. 248.) In that case, the court had instructed the jury that it could infer the defendant's guilt of the "charged offenses" – which included rape and murder – if it determined he had conscious possession of recently stolen property and there existed slight corroborating evidence of his guilt. (*Id.* at p. 248 & fn. 5.) The jury found the defendant guilty of the charged offenses and sentenced him to death. On automatic appeal, the defendant argued that application of CALJIC No. 2.15 to nontheft offenses such as rape and murder was improper because it allowed the jury to draw an impermissible inference favorable to the prosecution. (*Id.* at p. 248.) This Court agreed that proof of a defendant's conscious possession of recently stolen property did not naturally and logically lead to the conclusion that he committed rape or murder. (*Id.* at p. 249.) However, this Court found the error harmless because the unrebutted evidence of guilt was so strong (two surviving victims identified defendant as the man who raped and murdered the third victim) that there was no reasonable likelihood the jury would have reached a different result but for the instructional error. (*Ibid.*)

This Court reached the same conclusion in *People v. Coffman* (2004) 34 Cal.4th 1. The trial court in *Coffman* had instructed the jury that it could infer the defendants' guilt of the nontheft offenses by virtue of their conscious possession of stolen property and slight corroborating evidence of guilt. (*Id.* at p. 101.) The jury convicted the defendants of all charges. As in *Prieto*, this Court found the instruction's reference to nontheft crimes erroneous, but harmless

> in view of the overwhelming evidence of the defendants' guilt . . . and the panoply of other instructions that guided the jury's consideration of the evidence, (e.g., CALJIC Nos. 2.90 [presumption of innocence and reasonable doubt standard], 2.00 [defining direct and circumstantial evidence], 2.02

[sufficiency of circumstantial evidence to prove specific intent], 3.31 [requirement of union of act and specific intent], 1.01 [duty to consider instructions as a whole]).

(*Ibid.*) Thus, there was "no reasonable likelihood of a more favorable outcome for either [defendant] had the instruction not been given." (*Ibid.*; see also *Barker, supra,* 91 Cal.App.4th at pp. 1173-1177 [CALJIC No. 2.15's erroneous reference to nontheft offense (murder) was harmless considering the instructions in their entirety and the abundant evidence of guilt.)

According to *Prieto* and *Coffman*, then, it appears the reference in this case to murder and arson contained within CALJIC No. 2.15 was error. However, as in *Prieto* and *Coffman*, the overwhelming and unrebutted evidence of appellant's guilt and the other instructions read to the jury establish that there was no reasonable likelihood the jury would have reached a different result but for the instructional error. In analyzing claims regarding the misadministration of CALJIC No. 2.15, the reviewing court applies the harmless error standard set forth under *People v. Watson, supra,* 46 Cal.2d at p. 836. (See *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1229 [no reasonable probability of more favorable result had CALJIC No. 2.15 not been given].) Here, there was no reasonable probability appellant would have incurred a more favorable result in absence of instruction with CALJIC No. 2.15.

The evidence presented in this case was at least as strong as that presented in *Prieto*, wherein the two surviving victims identified the defendant as the third victim's killer (*Prieto, supra,* 30 Cal.4th at pp. 241-242, 249), and stronger than that in *Coffman*, which was predominantly circumstantial (*Coffman, supra,* 34 Cal.4th at pp. 16-19, 101). Here, Gallagher was last seen alive in her truck with appellant. As Flynn was being transported to the police station, he looked back at Gallagher's truck and saw the silhouette of what appeared to be someone strangling something. (9RT 808-809, 839, 855-856.) Walker testified that, at approximately 5:00 a.m., appellant told her he had "bigger problems" several times, and when asked about Gallagher's

whereabouts presence appellant stated, "She's dead." (10RT 913-917.) Walker also testified that later that morning she saw appellant searching through Gallagher 's purse, during which time an earring fell from the purse. (10RT 922.) Walker's testimony was confirmed by the discovery of Gallagher's earring in the apartment. (9RT 638-639; 9RT 672; 13RT 1611-1612.) Testimony by the coroner similarly confirmed Flynn's observations that Gallagher had been strangled to death. (See 11RT 1100-1101.) This evidence was further bolstered by testimony that someone with long blond hair resembling appellant's was seen leaning into Gallagher's truck shortly before the vehicle was set on fire. (10RT 999-1003.) Moreover, testimony regarding the subsequent murders of Tina Cribbs and Andy Sutton, both with a similar modus operandi, similarly established appellant's guilt.

Moreover, the jury's consideration of the foregoing evidence was properly guided by other instructions read by the trial court. As in *Coffman*, the court below instructed the jury regarding its duty to consider the instructions as a whole (CALJIC No. 1.01), the sufficiency of circumstantial evidence to prove a crime (CALJIC No. 2.01), the presumption of innocence and reasonable doubt (CALJIC No. 2.90), and the requirement of a union between an act and specific intent (CALJIC No. 3.31). (7CT 1574, 1575, 1582.) The court also instructed the jury regarding the evaluation of witness credibility (CALJIC Nos. 2.20, 2.23 & 2.92), the elements of murder (7CT 1583) and felony murder (7CT 1585), and the court's special-circumstance instructions which required that "before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt" (see 7CT 1586-1587 [CALJIC No. 8.83].) Furthermore, the court instructed with CALJIC No. 17.31, directing the jury to disregard those instructions that were inapplicable. (7CT 1589.) Indeed, the court's instruction to disregard any argument of counsel that conflicted with the court's instructions (7CT 1573 [CALJIC No. 1.00], minimized any prejudice incurred by virtue of the prosecutor's argument

that appellant's possession of stolen property created an inference of guilt.

Appellant's reliance on a federal case, *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 (AOB 128-131), does not compel a contrary conclusion. First, this Court is not "bound by decisions of the lower federal courts, even on federal questions." (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3). Second, *Schwendeman* did not involve the instructional error that occurred here, but a Washington State jury instruction that permitted an inference of reckless driving from evidence of speeding. (See *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.) Third, the instructional error in *Schwendeman* permitted the jury to convict the defendant without making a determination as to every element of the crime, whereas the error in this case allowed the jury to consider improper evidence but did not remove any element of the charged crime from its consideration. (See *ibid.*) And fourth, the error in *Schwendeman* was not harmless, as it was here, because the evidence against the defendant in that case was not overwhelming and the other instructions did not properly guide the jury's consideration of the evidence. (See *ibid.*)

In sum, the strength of the evidence against appellant and the guidance provided by the court's other instructions, established that there was *no* reasonable likelihood the jury would have reached a different result but for the "murder or arson" language in CALJIC No. 2.15. Hence, the error was harmless and no due process violation occurred.

V.

IF ERROR OCCURRED IN THE TRIAL COURT'S INSTRUCTION WITH CALJIC NOS. 2.51 AND 2.50.1, IT WAS INVITED BY DEFENSE COUNSEL; REGARDLESS, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NOS. 2.50 AND 2.50.1

Appellant seeks reversal of the guilt phase verdict, special-circumstance finding, and penalty verdict, based on alleged "structural" error. (AOB 138-146.) Specifically, appellant maintains that instruction with CALJIC Nos. 2.50 and 2.50.1 was improper

because the instructions permitted the jury to find appellant guilty by proof less than BEYOND a reasonable doubt. (AOB 62-67.) This argument, however, fails because if any instructional error occurred, it was invited by defense counsel. Moreover, the instructions did not improperly dilute the prosecution's burden of proof.

A. Underlying Proceedings

Prior to trial, and in connection with litigation concerning the admissibility of the out-of-state homicides, defense counsel indicated that he did not believe the jury would follow the court's limiting instructions pertaining to the out-of-state evidence. (See 6RT 213.) Nevertheless, after the court decided to admit evidence of the Louisiana and Florida murders, and shortly after commencement of evidence regarding the Florida murder, defense counsel submitted a modified version of CALJIC No. 2.50, and requested that the court instruct the jurors on the limited use of the out-of-state evidence at that point and at the conclusion of the guilt phase. (11RT 1149-1150.)

Thereafter, the trial court admonished the jury concerning the limited use of the out-of-state murders. (11RT 1157.) At the conclusion of the guilt phase, the trial court also instructed the jury with CALJIC No. 2.50 as follows:

> Evidence was introduced for the purpose of showing that [appellant] committed crimes other than that for which he is on trial. This evidence relates to two homicides alleged to have been committed by [appellant] in November of 1995 in the states of Florida and Louisiana.
>
> Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show whether [appellant] committed the murder alleged in Count 1 with express malice aforethought and with premeditation and deliberation, and not as a result of rage or provocation or other heat of passion.
>
> For the limited purpose for which you may consider such evidence, you

must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose.

(7CT 1579; 14RT 1782-1783.)

The trial court also instructed the jury with CALJIC No. 2.50.1:

> Within the meaning of the preceding instructions [CALJIC No. 2.50 relating to other crimes evidence], the prosecution has the burden of proving by a preponderance of the evidence that the defendant committed the homicides other than that for which he is on trial.
>
> You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other homicides.[62]

(7CT 1579; 14RT 1783-1784.)

The trial court then defined "preponderance of evidence" as "evidence that has more convincing force than that opposed to it," and further instructed that "[i]f the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it." (7CT 1579 [CALJIC No. 2.50.2]; 14RT 1784.) In connection with this instruction, the court cautioned the jury to "consider all of the evidence bearing upon every issue regardless of who produced it." (7CT 1579 [CALJIC No. 2.50.2]; 14RT 1784.)

---

62. This instruction was modified in 2002 to include the following language:

> If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged or any included crime in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

B. If Error Occurred In The Trial Court's Instructions With CALJIC Nos. 2.50 And 2.50.1, It Was Invited By The Defense Counsel

"'"The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction. [Citations.]"'" (*People v. Thornton* (2007) 41 Cal.4th 391, 436.) "'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.' [Citation.]" (*People v. Coffman*, *supra*, 34 Cal.4th at p. 49.) Thus, "[i]n cases involving an action affirmatively taken by defense counsel," this Court has found a "clearly implied tactical purpose" that is "sufficient to invoke the invited error rule." (*Ibid.*)

In the present case, and in spite of his initial position that the jury was incapable of following any limiting instructions, defense counsel requested limiting instructions regarding the admission of the out-of-state homicides after the trial court ruled such evidence was admissible. Moreover, defense counsel tailored the instruction to refer to the specific justification for admission of the evidence, i.e., that the out-of-state murders were admitted "for the limited purpose of showing [appellant] committed the California murder with express malice aforethought and with premeditation and deliberation, and not as a result of rage or provocation or other heat of passion." (See 11RT 1150; see also 11 RT 1149 [trial court asks defense counsel if it could "use the language *you* submitted to me . . . ?"]; 11RT 1149 [defense counsel tells prosecutor that he submitted "a special" limiting instruction on evidence of the out-of-state murders]; 11RT 1150 ["I put *your* language into 2.50 because actually it comes in twice in jury instructions, but *yours*, *your* language is that it's for the limited purpose . . . ."].) As defense counsel undertook affirmative steps to ensure the court instructed with the modified version of CALJIC No. 2.50 as given – both by modifying the instruction and requesting that it be given – he is now barred from challenging the

instruction on appeal.[63] Hence, the doctrine of invited error bars consideration of the present claim. (See *People v. Thornton*, *supra*, 41 Cal.4th at p. 436; *People v. Medina* (1995) 11 Cal.4th 694, 763 [invited error where defense requested instruction with CALJIC No. 2.50.1].)

C. The Trial Court Properly Instructed With CALJIC Nos. 2.50 And 2.50.1

"'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]'" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 328, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 538-539; see also *People v. Harrison* (2005) 35 Cal.4th 208, 252.) To prevail on a claim that an instruction was misleading, a defendant must establish a reasonable likelihood that the jury misunderstood the instructions as a whole. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, 112 S.Ct 475, 116 L.Ed.2d 385; *People v. Thornton*, *supra*, 41 Cal.4th at p. 436; *People v. Clair* (1992) 2 Cal.4th 629, 663.) "'The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole. [Citation.]'" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 328, quoting *People v. Burgener*, *supra*, 41 Cal.3d at p. 539; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) "'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107,1112; accord *People v. Clair*, *supra*, 2 Cal.4th at p. 663.)

It is also well settled that evidence of other crimes presented in the guilt phase of a criminal trial may be proved by a preponderance of the evidence. (*People v.*

---

63. As recounted in Argument I, the trial court admitted the Florida and Louisiana murders for purposes of proving common plan and intent. (See 5RT 52-55.) However, the instruction submitted by defense counsel, that was ultimately given, referred only to intent.

Medina, supra, 11 Cal.4th at p. 763; *People v. McClellan* (1969) 71 Cal.2d 793, 804.) The facts tending to prove the defendant's other crimes for purposes of establishing his criminal knowledge or intent are deemed mere "evidentiary facts" that need not be proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the "ultimate fact" of the defendant's knowledge or intent. (*People v. Medina, supra,* 11 Cal.4th at p. 763; *People v. Lisenba* (1939) 14 Cal.2d 403, 430-431.)

Here, the instructions as a whole did not permit the jury to convict appellant under a standard less than beyond a reasonable doubt. Contrary to appellant's claim, there was no evidence that the jury was confused regarding the different standard of proof for guilt of the charged crimes and for finding the out-of-state-murders evidence true. The jury was advised that the other crimes evidence, even if adequately proved, was subject to consideration only for limited purposes. (7CT 1579 [CALJIC No. 2.50]; 14RT 1782-1783.) Thus, the jury was aware that proof of the out-of-state criminal conduct by a preponderance of the evidence established at most an inference of intent, rather than proof beyond a reasonable doubt of those elements of the crimes. Moreover, the jury was given the standard instruction on the presumption of innocence and the burden of the prosecution to prove defendant's guilt beyond a reasonable doubt. (7CT 1580-1581 [CALJIC No. 2.90]; 14RT 1786-1787.) The jury was also instructed on the essential elements of murder and arson (14RT 1793-1797, 1805; 7CT 1583-1585, 1588 [CALJIC Nos. 8.10, 8.11, 8.20, 14.80]), and was further instructed pursuant to CALJIC No. 2.01 as follows:

> [E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

(14RT 1774; 7CT 1575 [CALJIC 2.01].) In addition, the court advised the jury pursuant to CALJIC No. 1.01: "Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole, and each in light of all the others." (14RT 1770-1771; 7CT 1574 [CALJIC No. 1.01].) It is assumed that the jury understood and followed these instructions. (See *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 148, citing *People v. Osband* (1996) 13 Cal.4th 622, 714). Accordingly, since appellant fails to show, beyond mere speculation, that CALJIC Nos. 2.50 and 2.50.1 diluted the burden of proof in the present case, his claim necessarily fails.

Support for this conclusion is also found within this Court's opinions. For example, this Court has explicitly approved of CALJIC No. 2.50. (See *People v. Wilson* (2005) 36 Cal.4th 309, 328 ["CALJIC No. 2.50 'was and is a correct statement of the law.' (Citations.)"; see also *People v. Caitlin*, *supra,* Cal.4th at p. 147.) This Court has also sanctioned "other crimes" instructions, including CALJIC No. 2.50.1, that inform the jury that the existence of a defendant's other crimes can be proved by a preponderance of the evidence. (*People v. Carpenter*, *supra,* 15 Cal.4th at p. 383; *People v. Medina*, *supra,* 11 Cal.4th 694 at pp. 763-764.) In both *Carpenter* and *Medina,* this Court recognized that a criminal defendant has a due process right to have each fact necessary for conviction proven beyond a reasonable doubt, but concluded that this burden is not diminished by an instruction that other crimes evidence need only be proved by a preponderance of the evidence where these instructions are given in conjunction with CALJIC Nos. 2.90 (presumption of innocence, reasonable doubt, burden of proof) and 2.01 (sufficiency of circumstantial evidence generally). (*People v. Carpenter, supra,* 15 Cal.4th at p. 383; *People v. Medina*, *supra*, 11 Cal.4th at pp. 763-764; see also *Estelle v. McGuire, supra,* 502 U.S. at pp. 72-73.)

Relying on a federal case, appellant argues that CALJIC Nos. 2.50 and 2.50.1, as given in this case, lowered the prosecution's burden of proof by enabling the jury to convict appellant "by relying on facts found only by a preponderance of the

evidence." (AOB 140, citing *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812.) In *Gibson v. Ortiz*, the jury was instructed, using CALJIC No. 2.50.1 and the 1996 version of CALJIC No. 2.50.01, and told that if it found, by a preponderance of the evidence, that the defendant had committed a prior sexual offense, it could infer that he had a disposition to commit such offenses and that he was likely to and did commit the charged offenses. The Ninth Circuit held that the two instructions, read together, instructed the jury that it could find the defendant guilty based solely on facts it found true merely by a preponderance of the evidence. Although the jury was given other instructions on the burden of proof (CALJIC Nos. 2.01 and 2.90), it was not told how those instructions should be harmonized with CALJIC Nos. 2.50.1 and 2.50.01. (*Gibson v. Ortiz, supra*, at pp. 822-823.) Appellant's reliance on *Gibson* is misplaced, as the court in *Gibson* considered the interplay between CALJIC Nos. 2.50.1 and the pre-1999 version of 2.50.01.[64] CALJIC No. 2.50.01 was not given in the present case,

---

64. The jury in *Gibson* was instructed with CALJIC No. 2.50.01 as follows:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. . . .
>
> If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.
>
> Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(See *Gibson v. Ortiz, supra*, 387 F.3d at p. 817.) The jury was instructed "in tandem" with a modified version of CALJIC No. 2.50.1 as follows:

> Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses and/or domestic violence other than those for which he is on trial.
>
> You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other sexual offenses and/or domestic

and therefore the decision in *Gibson* has little application to appellant's contention regarding the court's instructions with CALJIC Nos. 2.50 and 2.50.1. This is underscored by the fact that the decision in *Gibson* rested on language contained in the former version of CALJIC No. 2.50.01 that permitted the jury to "infer that the defendant committed the charged crime if it found 'that the defendant committed a prior sexual offense.'" (*Id.* at p. 822.) Therefore, reasoned the federal court, "the interplay of the two instructions [CALJIC Nos. 2.50.01 and 2.50.1] allowed the jury to find that Gibson committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the *charged* acts based upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." (*Ibid.*) In this case, in contrast, CALJIC No. 2.50 did not direct the jury to infer that appellant committed the charged offense if it found the other crimes true by a preponderance of the evidence. Rather, the jury was simply asked to "consider" the other crimes evidence "for the limited purpose" of determining an element of the charged offense, namely, intent. (See 7CT 1579.) Thus, the decision in *Gibson*, and its analysis pertaining to CALJIC No. 2.50.01, is factually distinguishable from the issue presented in the current case.[65] (See also *People v. Jeffries* (2000) 83 Cal.App.4th 15, 23-25 [CALJIC No. 2.50.1 and former version of CALJIC No. 2.50.01 did not allow jury to find defendant guilty without proof beyond a reasonable doubt]; *People v. Van Winkle*, *supra*, 75 Cal.App.4th at pp. 147-149 [same].)

---

violence.
(*Id.* at p. 818)

65. Moreover, *Gibson* has no binding effect on this Court because it is a decision by a lower federal court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3 [California courts are "not bound by decisions of the lower federal courts, even on federal questions"].)

D. Any Error In The Court's Instructions With CALJIC Nos. 2.50 And 2.50.1 Was Harmless

Appellant asserts that error resulting from the trial court's instruction with CALJIC Nos. 2.50 and 2.50.1 amounted to structural error and compels automatic reversal. (AOB 146.) However, as explained above, no such structural error occurred in the present case because the instructions given as a whole did not permit the jury to find appellant guilty of first degree murder based on a mere preponderance of the evidence. Moreover, misdirection of the jury, like the improper admission of evidence, is a form of error for which the California Constitution expressly requires an individualized prejudice assessment. (*People v. Breverman* (1998) 19 Cal.4th 142, 175; see also *People v. Flood* (1998) 18 Cal.4th 470, 487-490; *People v. Wims* (1995) 10 Cal.4th 293, 314.) The word "misdirection" logically includes every kind of instructional error. (*People v. Wims, supra*, 10 Cal.4th at p. 314.) Instructional error requires reversal only if the reviewing court, after considering the entire cause, including the facts, instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict, determines that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Wims, supra*, 10 Cal.4th at p. 314; Cal. Const., art. VI, § 13; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Assuming arguendo the jury was confused on the standard of proof due to CALJIC Nos. 2.50 and 2.50.1, any instructional error was harmless. As previously explained, there was overwhelming evidence that appellant murdered Sandra Gallagher independent of evidence presented regarding the out-of-state murders. Such evidence included: testimony given by Walker that appellant told her that "he had bigger problems" and that Gallagher "was dead" (10RT 916-922); testimony given by Flynn that he saw the silhouette of someone making a strangling motion inside Gallagher's truck, shortly after Gallagher and appellant were last seen together in her truck (10RT 839, 854-855); evidence that Gallagher's earring was found in appellant's apartment

(9RT 637-638; 13RT 1611-1614), which corroborated Walker's testimony; evidence by the coroner that Gallagher was asphyxiated (11RT 1101), which corroborated Flynn's testimony; and evidence that someone resembling appellant was seen leaning into Gallagher's truck immediately before the truck containing Gallagher's body was set on fire. (10RT 999-1003.) Such compelling evidence established that appellant killed Gallagher and refuted the defense theory that appellant was innocent (see 15 RT 1933 ["We are hoping you accept the word of [appellant] when he tells you he did not commit the crime."].) In contrast, the defense case was weak, as it rested on the self-serving and unsubstantiated testimony of appellant that he and Gallagher met Steve Kele, all three went to the apartment while Walker slept, and that Gallagher left with Kele while he remained in the apartment. (See 13RT 1641-1645.)

In addition to the above-mentioned evidence of appellant's guilt, the jury was instructed to employ the "beyond a reasonable doubt" standard in determining appellant's guilt of the charged offenses (CALJIC Nos. 2.01 and 2.90). Defense counsel reminded the jury that it needed to find appellant guilty beyond a reasonable doubt of murder in order to convict. (15RT 1874-1875, 1879, 1883, 1922.) The jury never communicated to the court that it was confused as to burdens of proof for the prior crimes evidence and the current offenses. Thus, under the circumstances of this case, it was not reasonably probable that a result more favorable to appellant would have been reached in the absence of the claimed error. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Thus, any error in instructing the jury with CALJIC Nos. 2.50 and 2.50.1 does not compel reversal.

VI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE MURDER

Appellant next argues that the trial court erroneously failed to instruct the jury that "if it found the murder was of the first degree, it had to agree unanimously on the

type of first degree murder." (AOB 147-155.) Recognizing that this Court has rejected an identical claim on numerous occasions, appellant nonetheless asserts that the failure to give an unanimity instruction deprived him "of his rights to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, to the verdict of a unanimous jury, and to a fair and reliable determination that he committed a capital offense." (AOB 147-148, citing *People v. Benavides*, *supra*, 35 Cal.4th 69 at pp. 100-101; *People v. Nakahara*, *supra*, 30 Cal.4th 705 at pp. 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 394-395.) Respondent maintains that these prior decisions were properly decided and require rejection of the instant claim.

An unanimity instruction must be given sua sponte[66] when there is evidence of more than one act that might constitute the charged offense. (*People v. Jones* (1990) 51 Cal.3d 294, 321.) This instruction is designed to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agreed the defendant committed. (See *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) However, no unanimity instruction is required when the prosecution presents *multiple theories* regarding *one* discrete criminal act or event. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1024-1026; *People v. Carlin* (2007) 150 Cal.App.4th 322, 347.) In *People v. Russo*, this Court explained the distinction between multiple theories (not requiring a unanimity instruction) and multiple acts (requiring a unanimity instruction):

> [W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or ... the 'theory' whereby the defendant is guilty. . . . [¶¶] . . . [¶¶] . . . The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some

---

66. A defendant's failure to request a unanimity instruction does not waive the issue on appeal. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

> jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.

(*People v. Russo*, *supra*, 25 Cal.4th at pp. 132, 1134-1135.)

As regards cases involving a charge of murder, this Court has repeatedly found that "as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918; see also *People v. Morgan* (2007) 42 Cal.4th 593, 616-617, quoting *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712 ["'jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. [Citations.]'"]; *People v. Benavides*, *supra*, 35 Cal.4th at pp. 100-101; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026.)

In the present case, the court instructed the jury on the alternative first degree murder theories of willful premeditated, and deliberate murder, as well as felony murder and second degree murder. (14RT 1794-1798; 7CT 1583-1585 [CALJIC Nos. 8.10, 8.11, 8.20, 8.21, 8.30, 8.31, 8.70].) It also instructed that if the jury agreed the defendant was guilty of murder, they must unanimously agree whether the murder was first or second degree. (14RT 1798; 7CT 1585 [CALJIC No. 8.71].) Defense counsel never requested, and the trial court was not obligated, to instruct that the jury must

unanimously agree which of the two *theories* of first degree murder supported the verdict. (See *People v. Morgan*, *supra*, 42 Cal.4th at pp. 616-617; *People v. Nakahara*, *supra*, 30 Cal.4th 705, 712; *People v. Benavides*, *supra*, 35 Cal.4th 69, 100-101; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1025-1026.) Therefore, appellant's claim of error necessarily fails.

In addition, the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, compels no different result. As previously noted by this Court, *Apprendi* found that "any *fact* that increases the maximum penalty for a crime" must be "formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt," but that nothing in the decision "require[d] a unanimous jury verdict as to the particular *theory* justifying a finding of first degree murder." (*People v. Nakahara*, *supra*, 30 Cal.4th at pp. 712-713, italics added; *see* also *People v. Morgan*, *supra*, 42 Cal.4th at pp. 616-617.) Thus, appellant's claim that the trial court erroneously failed to give a unanimity instruction regarding the theory of murder must be rejected.

VII.

THE TRIAL COURT DID NOT COMMIT ERROR BY INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1

While conceding that this Court has previously rejected constitutional challenges regarding CALJIC No. 17.41.1[67], the anti-jury nullification instruction (see AOB 156-157, citing to *People v. Engelman* (2002) 28 Cal.4th 436), appellant argues

---

67. The jury was instructed with CALJIC No. 17.41.1 as follows:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

(14RT 1806-1807; 7CT 1589.)

that the instruction is unconstitutional because it "chills speech and free discourse." (AOB 157-162.) Based on this Court's prior decisional law resolving the constitutionality of CALJIC No. 17.41.1, so too must the present argument be rejected.[68]

In *People v. Engelman, supra*, 28 Cal.4th 436, this Court "concluded that 'the instruction [CALJIC No. 17.41.1] does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict.'" (*People v. Barnwell* (2007) 42 Cal.4th 1038, 1055, quoting *People v. Engelman, supra*, 28 Cal.4th at pp. 439-440.)[69] Specifically, this Court held that CALJIC No. 17.41.1 properly informed the jury it had a duty to deliberate because a juror who refuses to deliberate may be discharged by the trial court. (*Id.* at p. 442, citing *People v. Cleveland*, *supra*, 25 Cal.4th at p. 484.) This Court also held that CALJIC No. 17.41.1 properly informed the jury it was to follow the law as given by the trial court because a juror who proposes to reach a verdict without regard to the law or the evidence, i.e., engage in nullification, may also be discharged by the trial court.

---

68. Although defense counsel referred to "CALJIC No. 17.40.1," he objected to the instruction that asked "jurors to rat off other jurors if they don't follow the rules." (See 14RT 1818.) This objection, however, occurred after the instruction had already been read to the jury. (See 14RT 1806-1807.) Therefore, inasmuch as appellant's claim of instructional error does not affect his substantial rights, this claim must be deemed waived. (*People v. Elam* (2001) 91 Cal.App.4th 298, 310-313; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 20 ["'"'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable"'"].) Although it appears this claim is easily resolved on the merits in accordance with *People v. Engelman*, *supra*, 28 Cal.4th 436, respondent nonetheless requests, for purposes of any future litigation on habeas corpus, that this Court determine whether appellant's delinquent objection sufficiently preserved the issue for review.

69. However, in exercising its supervisory power, this Court directed that the jury instruction not be used in the future. (*People v. Engelman, supra*, 28 Cal.4th at pp. 439-440, 441.)

(*People v. Engelman, supra*, 28 Cal.4th at p. 442, citing *People v. Williams* (2001) 25 Cal.4th 441, 463.) This Court further held that CALJIC No. 17.41.1, given along with CALJIC Nos. 17.40 [individual opinion required - duty to deliberate], and 17.50 [concluding instruction; "all twelve jurors must agree to the decision"], fully informed the jury of its duty to reach a unanimous verdict based on the independent and impartial decision of each juror.[70] (*People v. Engelman, supra*, 28 Cal.4th at p. 444.) Finally, this Court held that CALJIC No. 17.41.1 was not tailored to a deadlocked jury and did not encourage the displacement of the independent judgment of the jury in favor of considerations of compromise and expediency. (*Id.* at pp. 444-445.) Rather, the instruction, in combination with other instructions given, encouraged a unanimous verdict based on the independent and impartial decision of each juror. (*Ibid.*)

For the above-stated reasons, as expressed in *People v. Engelman*, so too should this Court reject the current challenge to CALJIC No. 17.41.1. Therefore, appellant's claim of error as to this point should be rejected.

VIII.

APPELLANT WAIVED HIS PRESENT CLAIM OF ERROR RELATING TO THE VALIDITY OF THE "PRIOR MURDER CONVICTION" SPECIAL CIRCUMSTANCE; REGARDLESS, THE "PRIOR MURDER CONVICTION" SPECIAL CIRCUMSTANCE WAS VALID

Appellant complains that the "prior murder conviction" special circumstance was invalid in the present case. (AOB 163-183.) Appellant attacks the special-circumstance finding on two grounds. First, he argues the finding was invalid in this case because his Florida conviction, which formed the basis of the special-circumstance charge, was "not final on appeal at the time of trial in this case." (AOB 163, 167-171.) Second, he asserts that the special circumstance finding was invalid because the Florida murder occurred after the charged offense. (AOB 167, 171-177.)

---

70. The trial court instructed the jury in this instance with CALJIC Nos. 17.40 and 17.50. (14RT 1807-1808; 15RT 1956; 7CT 1589, 1591.)

Appellant reasons that *both* the guilt and penalty phase verdicts must be reversed by virtue of the alleged error, as he was "unfairly tried by a 'death qualified' jury." (AOB 181-183.) These arguments must all be rejected. As explained below, appellant waived his present claim of error concerning the validity of the special-circumstance allegation. Regardless, the "prior murder conviction" special circumstance was valid and properly pled and proved against appellant.

A. Underlying Proceedings

Prior to the commencement of trial, appellant moved to strike the special-circumstance allegation of "prior murder conviction." (3CT 471-661.) Appellant argued that the Florida conviction was invalid based on "numerous errors of federal constitution dimension," (3CT 471-472), and attached a copy of the appeal filed in the Florida Supreme Court. (3CT 474-661.) The prosecutor filed an opposition, arguing that appellant had not established that the Florida conviction was constitutionally infirm. The prosecutor specifically addressed the three alleged guilt-phase errors raised by the Florida appellate defense. The prosecutor noted that the argument made in Florida regarding whether the jury should not have been instructed on first degree murder ("Issue I" in the Florida brief) did not "rise to the level of 'a fundamental constitutional flaw'" as defined in *People v. Horton* (1995) 11 Cal.4th 1068, 1135. The prosecutor also indicated that the issue of whether the trial court erroneously refused to recuse prosecutors in the case based on a jail cell search conducted by prosecutors ("Issue II" in the Florida brief) lacked merit because law enforcement officials involved in the search had testified that no one read the seized materials, and therefore there was no violation of appellant's right to counsel. Finally, the prosecutor argued that the issue of whether a new trial motion based on newly discovered was erroneously denied by the Florida trial court ("Issue VI" in the Florida brief) also lacked any merit as the new evidence was unreliable and inconsistent with other evidence produced at trial. (3CT 667-670.)

At the hearing on the motion to strike (6RT 153-178), defense counsel argued

that the Florida conviction involved prosecutorial misconduct based on an improper search of appellant's cell by the prosecutor and by improper argument[71] (6RT 153-158). Accordingly, defense counsel requested that the court strike the special-circumstance allegation "unless there's a good showing that [the Florida case] is in fact going to be a conviction that is going to be upheld and something that the court should have faith in the chance of this conviction being upheld." (6RT 159.) Defense counsel indicated that he was raising the issue through a motion to strike the special circumstance, rather than waiting until resolution of the Florida case, because "if somebody goes through a death penalty voir dire and you get death qualified jurors, . . . those jurors are more likely to vote for guilt on the guilt phase." (6RT 158.)

The prosecutor agreed that if the Florida case were to be overturned, there would be "no special circumstance here." (6RT 159.) However, the prosecutor argued that there was nothing in the Florida Public Defender's brief that rose "to what is required at this stage for the court to find that the special circumstance would have to be struck", and that he was amenable to continuing the case until resolution of the Florida case. (6RT 160-164, 167-168.)

The trial court denied the motion to strike, noting that the defense had failed to meet its burden, and specifically explaining why no grounds justified to strike the special-circumstance prior conviction allegation as to each of the three guilt-phase arguments asserted in the Florida appeal. (6RT 168-171.)

B. Appellant Waived His Present Claims Attacking The Validity Of The Prior Murder Conviction Special Circumstance

In the present case, appellant claims the "prior murder conviction" special-circumstance was invalid under two theories: (1) the jury's true finding was invalid because the Florida conviction was not final at the time of the California trial (AOB 167-171); and (2) the jury's true finding was invalid because the Florida murder

---

71. As later pointed out by the prosecutor, this argument occurred during the penalty phase of the Florida trial. (6RT 161-162.)

occurred prior to the California murder (AOB 171-177.) In moving to strike the special circumstance allegation, defense counsel never asserted these arguments – rather, defense counsel simply argued that the prior murder special-circumstance allegation should be stricken because the Florida conviction had fundamental constitutional flaws. (See 3CT 471-661; 6RT 153-171.) Although defense counsel acknowledged during argument on the motion that no appellate review had been conducted in the Florida case (6RT 165; see also AOB 178), this argument was made in response to whether the trial court should apply the standard of review of whether there was a fundamental constitutional flaw in the Florida case. (See 6RT 165.) At no time, however, did defense counsel suggest that the special circumstance was invalid for any reason pertaining to the lack of finality of the Florida case, or the sequence of occurrence of the murders. Accordingly, the trial court was never presented with the specific grounds now raised, precluding appellate review of the claim. (See *People v. Frank* (1985) 38 Cal.3d 711, 739-740.)[72]

---

72. Appellant appears to concede that the issue was not adequately raised by trial counsel, as he argues that his claim is cognizable on appeal for five reasons: (1) this Court has previously considered "as applied" challenges to California's death penalty law in the absence of an objection in the trial court (AOB 178-179); (2) Penal Code section 1260 permits review of any unauthorized sentence (AOB 179); (3) the claim raises a "pure question of law" and rests on no disputed facts (AOB 179); (4) any objection would have been futile (AOB 179); and (5) appellant did not invite any erroneous application of the special circumstance by declining the court's offer to continue the case. (AOB 179-180). These reasons, although numerous, are insufficient to excuse any waiver in this case.

First, even though this Court has considered "as applied" challenges to California's death penalty law without discussing whether they were raised at trial (see *People v. Hernandez* (2003) 30 Cal.4th 835, 863, citing *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1078; *People v. Davenport* (1995) 11 Cal.4th 1171, 1225; *People v. Garceau*, *supra*, 6 Cal.4th at p. 207; *People v. Roberts* (1992) 2 Cal.4th 271, 323), such challenges have been entertained where the defendant challenges the constitutionality of the death penalty scheme, and not typically in connection with the validity of a specific special circumstance allegation based on technical

C. The "Prior Murder Conviction" Special Circumstance Was Valid Notwithstanding The Finality Of Appellant's Florida Conviction

Penal Code section 190.2, subdivision (a), provides that the penalty for a defendant who has been found guilty of first degree murder is death or life imprisonment without the possibility of parole, conditioned on the finding of one or more enumerated special circumstances. (Pen. Code section 190.2, subd. (a).) Subsection (2) of this provision sets forth the "prior murder conviction" special circumstance, permitting a sentence of death or life imprisonment without parole where "[t]he defendant was convicted previously of murder in the first or second degree." Subsection (2) further specifies that, "For purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree."

Despite the absence of any language in the statute, appellant attempts to ascribe

---

arguments (see *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Kraft, supra*, 23 Cal.4th at p. 1078; *People v. Davenport* (1995) 11 Cal.4th 1171, 1225; *People v. Garceau*, supra, 6 Cal.4th at p. 207; *People v. Roberts* (1992) 2 Cal.4th 271, 323). Moreover, the waiver doctrine nonetheless applies to those cases that do not involve a "close call" of whether a defendant has preserved his claim (see *People v. Hernandez*, *supra*, 30 Cal.4th at p. 863, citing *People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6).

Second, Penal Code section 1260 does not permit review of the current claim regarding the validity of the special-circumstance allegation, as the section pertains solely to punishment. (See *People v. Smith* (2001) 24 Cal.4th 849, 852 .) Third, the waiver doctrine is applicable, regardless of whether resolution of the present claim rests on a "pure question of law," as appellant fails to show that the present issue is "pertinent to a proper disposition of the cause or involved matters of particular public importance." (See *People v. Randle* (2005) 35 Cal.4th 987, 1001.) Appellant's insistence that the waiver doctrine is inapplicable because any objection would have been futile is flawed, inasmuch as he accords the argument sufficient merit to present it to this Court. Finally, respondent does not contend that appellant's refusal to continue the case invited any error. Therefore, the exceptions to the waiver doctrine offered by appellant do not apply in the present case.

finality of judgment to the term "convicted" for purposes of Penal Code section 190.2, subdivision (a)(2). (AOB 167-171.) However, a plain reading of the statute renders such does not support such an interpretation, as the subsection immediately following permits such a special-circumstance allegation if "[t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." (See Pen. Code, § 190.2, subd. (a)(3).) As "convictions" arising from the same proceeding would be appealed at the same time, Penal Code section 190.2, subdivision (a)(3) would have no force or application if the statute were interpreted to require finality in the sense of exhaustion of appellate remedies. (See *People v. Johnson* (2006) 38 Cal.4th 717, 723-724 ["[I]f '"the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature."' [Citation.]"]; *People v. Montes* (2003) 31 Cal.4th 350, 356 [courts should avoid any statutory interpretation that would lead to absurd consequences]; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided."].) Therefore, a plain reading of the statute itself controverts appellant's argument.

Moreover, appellant's strained interpretation of the term "conviction" is not supported by California decisional law. Although "'the word conviction . . . has been used with various meanings'" in California (*People v. Martinez* (1998) 62 Cal.App.4th 1454, 1460, quoting Ready *v. Grady* (1966) 243 Cal.App.2d 113, 118), the term has generally been applied to two concepts:

> "The term "conviction" has been used in two different contexts, as constituting an adjudication of guilt and as constituting a final judgment of conviction from which an appeal may be taken. [Citations.] In the statutes which address the civil consequences of a conviction the latter sense has been used. [Citations.]"

(*People v. Martinez, supra*, 62 Cal.App.4th at p. 1460, quoting *Padilla v. State Personnel Bd.* (1992) 8 Cal.App.4th 1136, 1142.) In general, the broader definition

of the term has been adopted when construing statutes affecting the civil consequences of a conviction (See, e.g., *Boyll v. State Personnel Board* (1983) 146 Cal.App.3d 1070, 1076 [prior "conviction" barred employment as peace officer]; *Helena Rubenstein Internat. v. Younger* (1977) 71 Cal.App.3d 406, 418 [prior "conviction" prevented person from holding public office]; *Truchon v. Toomey* (1953) 116 Cal.App.2d 736, 744-745 [prior "conviction" prevented person from voting].) In contrast, the narrower definition has been applied to penal statutes. Thus, in *People v. Castello* (1998) 65 Cal.App.4th 1242, the appellate court found that "[t]he ordinary legal meaning of 'conviction' is a verdict of guilty or the confession of the defendant in open court, and not the sentence or judgment" (*id.* at p. 1253), and that the term "conviction is used throughout the Penal Code to indicate the jury verdict" (*id.* at p. 1254). Similarly, in *People v. Martinez, supra*, 62 Cal.App.4th at pp. 1460-1463, it was concluded that the word "conviction" as used in the Evidence Code referred to an adjudication of guilt for impeachment purposes. (*People v. Martinez, supra*, 62 Cal.App.4th at pp. 1460-1463.) Indeed, this Court adopted the narrower definition of the term for purposes of the Three Strikes Law. (*People v. Rosbury* (1997) 15 Cal.4th 206, 210; see also *People v. Laino* (2004) 32 Cal.4th 878, 898.) In *People v. Banks* (1959) 53 Cal.2d 370, this Court also held that for the purpose of determining if the defendant had acquired the status of a person convicted of a felony, one is "convicted" when a verdict is entered. (*Id.* at p. 391.) It is only in rare cases that the term "conviction" has been construed to include post-sentencing proceedings, such as the termination of parental rights. (*In re Sonia G.* (1984) 158 Cal.App.3d 18, 22-23.)

Moreover, Legislative intent in enacting Penal Code section 190.2, subdivsion (a)(2), supports the interpretation that the term "conviction" does not require any finality of judgment. (See *In re Jennings* (2004) 34 Cal.4th 254, 263 [to ascertain meaning of statute, "look to the intent of the Legislature in enacting the law"].) In *People v. Hendricks* (1987) 43 Cal.3d 584, this Court noted that the Legislative intent of the "prior murder conviction" special circumstance was to classify certain factors

as death-eligible or life in prison without parole eligible based on certain specific aggravating circumstances:

> The function of section 190.2(a)(2) is also clear - to circumscribe, as the Eighth Amendment requires (*Zant* v. *Stephens* (1983) 462 U.S. 862, 878 [77 L.Ed.2d 235, 250, 103 S.Ct. 2733]), the classes of persons who may properly be subject to the death penalty. . . . Unlike recidivism statutes, . . ., section 190.2(a)(2) is directed neither to deterring misconduct nor to fostering rehabilitation.

(*Id.* at p. 595; see also *People v. Gurule* (2002) 28 Cal.4th 557, 636 ["the purpose of the prior-murder special circumstance is to narrow the class of persons who may be given the death penalty, as required by the Eighth Amendment"].) Accordingly, the Legislature did not enact the special circumstance to inure to a defendant's benefit, but to punish those individuals guilty of particularly heinous or multiple murders for the benefit of society. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1178, italics added ["Retribution on behalf of the community *is* an important purpose of all society's punishments, including the death penalty."].)

In sum, the plain meaning, decisional law, and legislative intent behind Penal Code section 190.2, subdivision (a)(2), evinces that the "prior murder conviction" special circumstance does not require that all appeals be exhausted and complete in order to allege a "conviction" under the statute – rather, all that is required is a finding of guilt. Accordingly, appellant's argument as to this point must be rejected, as the special-circumstance allegation in this case was properly pled and proved.

D. The Prior Murder Conviction Special Circumstance Was Valid Notwithstanding The Fact That The Florida Murder Occurred After The Charged Offense

Acknowledging that this Court has held on various occasions that Penal Code section 190.2, subdivision (a)(2), applies even where the alleged special circumstance murder occurred after the charged murder (AOB 171-172, citing *People v. Hendricks*, *supra*, 43 Cal.3d at pp. 595-596; *People v. Hinton* (2006) 37 Cal.4th 839, 879; *People*

v. Gurule, *supra*, 28 Cal.4th at pp. 634-638; *People v. McLain* (1988) 46 Cal.3d 97, 107-108; *People v. Grant* (1988) 45 Cal.3d 829, 848), appellant nevertheless argues that "use of the prior-murder-conviction special circumstance to make a defendant death-eligible on the basis of a crime that had not happened at the time of the charged murder violates the notice and fundamental fairness requirements of the due process clause of the Fourteenth Amendment, as well as the cruel and unusual punishment clause of the Eighth Amendment." (AOB 172; see also AOB 171-177.) This argument, however, is meritless.

As explicated by this Court in *People v. Hendricks*, *supra*, 43 Cal.3d at pp. 595-596, and *People v. Gurule*, *supra*, 28 Cal.4th at pp. 635-638, the purpose of the prior murder conviction special circumstance is to narrow the class of persons eligible for the death-penalty and is not directed at punishing recidivism. Thus, analogies to cases involving recidivism laws where it was found that commission of the first offense put a defendant on notice of increased penalties for subsequent offenses, are not applicable. (See *People v. Hendricks*, *supra*, 43 Cal.3d at p. 595; *People v. Gurule*, *supra*, 28 Cal.4th at pp. 635-636.) Similarly, the application of the special circumstance to those murders occurring after the commission of the charged murder does not amount to "arbitrary and capricious capital sentencing," (see AOB 175-177) as the "order of the commission of the homicides is immaterial" (see *People v. Hendricks*, *supra*, 43 Cal.3d at p. 596.) Accordingly, for those reasons already expressed by this Court in *Gurule* and *Hendricks*, appellant's claim of federal constitutional error should be rejected.

E. Even Assuming The Special Circumstance Was Invalid, The Guilt Verdict Need Not Be Reversed

Appellant also urges that if the "prior murder conviction" special-circumstance allegation is invalid, then both the penalty and guilt phase verdicts should be reversed. (AOB 181-183.) Appellant advances the theory argued by defense counsel at trial, that reversal of the guilt phase would be necessary because the guilt conviction was

"unfairly" rendered by a "death qualified" jury that was "'slanted' [] in favor of conviction." (AOB 181, citing 6RT 158.) However, as recognized by appellant, the argument that "death qualified" jurors are more likely to vote for guilt, and therefore pure penalty phase errors render the guilt verdict unreliable, has been rejected by this Court and our nation's high court. (AOB 182, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 177, 106 S.Ct. 1758, 90 L.Ed.2d 137.) For example, as expressed by the United States Supreme Court in *Lockhart v. McCree*,

> it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

(Id. at pp. 183-184; accord *People v. Lenart* (2004) 32 Cal.4th 1101, 1120; *People v. Jackson* (1996) 13 Cal.4th 1165, 1198-1199; *People v. Hovey* (1980) 28 Cal.3d 1, 68-69.) Thus, should this Court find the special circumstance invalid, reversal of the guilt phase is not warranted. Rather, reversal of the penalty phase verdict would be correct and appropriate.

IX.

THE TRIAL COURT PROPERLY EXCLUDED INFLAMMATORY AND IRRELEVANT EVIDENCE REGARDING THE "UNIQUE NATURE OF THE VICTIM"

Appellant's next assignment of error involves the exclusion of evidence regarding the "unique nature of the victim." (AOB 184-208.) Specifically, appellant asserts that the trial court improperly denied defense counsel's attempts to introduce "negative victim impact evidence" including: (1) Gallagher's alleged involvement in

a motorcycle gang; (2) Gallagher's prior convictions and/or arrests; (3) the fact that Gallagher was on felony probation for firearm possession at the time of her death; (4) evidence that Gallagher "was a less-than perfect" mother and spouse; and (5) evidence that Gallagher came to work with "black eyes after 'moonlighting at a biker bar . . . .'" (AOB 184.) However, as found by the trial court, such evidence was properly excluded because it had little probative value and was unduly inflammatory. Moreover, even assuming the trial court's exclusion of such evidence constituted error, any such error was harmless.

A. Underlying Proceedings

1. Defense Counsel's Attempts To Introduce Evidence Regarding Gallagher's Alleged Association With Motorcycle Gangs

During the cross-examination of Gallagher's sister, Jeri Vallicella, at the penalty phase, defense counsel asked whether Gallagher had "h[ung] around" a motorcycle club. Vallicella responded that Gallagher had "numerous friends and friends of friends" and that there were a "lot of people" Vallicella did not know. (17RT 2194) Defense counsel specifically asked whether Vallicella knew if Gallagher "h[u]ng out with [the] Devils Disciples motorcycle gang." The prosecution's objection was sustained. (17RT 2194-2195.) At sidebar, the trial court indicated that such evidence was inadmissible unless the defense first established the foundation that Vallicella had seen Gallagher with such people. (17RT 2194-2196.) Following a short recess, defense counsel gave an offer of proof, indicating that Gallagher was acquainted with "motorcycle gang riders." The prosecutor objected to the admission of such evidence on relevancy grounds, as there was no evidence showing that Gallagher herself was in a motorcycle gang. (17RT 2198.) The trial court agreed, indicating that there would need to be some evidence that Gallagher was a motorcycle gang member in order for the evidence to be admissible:

If you want to dirty her up with the fact that she is associating with gang

members, that's good enough. There's no other relevance other than if you want to try to suggest that the marking her as a narc is something that goes to lingering doubt. It's irrelevant.[73]

(17RT 2200; see also 17RT 2199.) In response to defense counsel's argument that such evidence painted a "whole different picture" of the victim, the trial court further responded:

> . . . [S]he [Vallicella] has seen her [Gallagher] with these biker guys, and then argue the hell out of it or call in your own witnesses to show that she spent some time with them. [¶] But at some point there's going to be a 352 issue. I understand that you want to paint a different picture of her. You can do that with this witness, but you don't have enough information to say she's a member of the gang or hangs around with the gang members other than what you have through this sister Jeri.

(17RT 2201; see also 17RT 2202.)

A short while later, defense counsel asked Vallicella if she was aware of any association her sister had with "any motorcycle groups." (17RT 2209.) Vallicella responded that on one occasion, Gallagher picked up a trailer from Vallicella and that Gallagher was accompanied by "motorcycle members." (17RT 2210.) Vallicella recounted that she was told by one of the "motorcycle members" that the name of the group was the "Devil's Disciples." (17RT 2210-2211.)

2. Defense Counsel's Attempts To Introduce Evidence Regarding Gallagher's Prior Criminal Record

Immediately after defense counsel questioned Vallicella about the "motorcycle members," he approached the bench and indicated that he wanted to ask Vallicella "some questions about her sister's criminal record" and that he understood that

---

73. The trial court's reference to "marking her as a narc" referred to an investigator's note that indicated that Gallager had gone to Apple Valley with a "Devil's Disciple" gang member and that he had Gallagher "marked as a narc." (17RT 2199.)

Gallagher had a "felony conviction for illegal gun possession at the time." (17RT 2211.) The prosecutor objected on relevancy grounds, and the trial court agreed with the objection, noting that Gallagher's credibility was not at issue. (17RT 2211-2212.) Defense counsel further explicated that Gallagher was arrested for a "DUI with a gun in the car" in 1994 and was convicted of a misdemeanor, and that six months later she was arrested "for gun in a car in a DUI situation, and it [was] charged as a felony." (17RT 2212.) Defense counsel argued that the evidence was relevant because it "paint[ed] a different picture . . . of her lifestyle . . . and [] g[a]ve[] the jury the true balance, ..." The court sustained the objection, finding there was no "relevance that [Gallagher] ha[d] a gun in her car and a DUI" and that they jury already knew Gallagher drank alcohol. Defense counsel further indicated that Gallagher "also had a sexual battery about that time," and "some batteries on the husband," but that he did not know the facts of the arrests. (17RT 2213.) The trial court responded that Gallagher's strained relationship with her husband had already been "clearly" presented to the jury during the guilt phase:

> I am not going to let you get into it. It's a collateral trial. You are not doing anything to counter a different portrait that is being painted. All this is already in front of the jury. They don't need additional details as to who did what. We already talked about the fact there was a custody battle. I am not letting you get into it.

(17RT 2214.)

3. Defense Counsel's Attempts To Introduce Evidence Regarding Gallagher's Marriage And Relationship With Her Children

Later during the penalty phase defense case, defense counsel informed the court of his intention to call Stephen Gallagher as a witness "regarding victim impact." (18RT 2284-2285.) Specifically, defense counsel indicated that Stephen Gallagher would testify about his relationship with his wife and that Gallagher's children lived with their grandparents. (18RT 2285-2286.) Defense counsel further indicated that

Stephen Gallagher would testify about Gallagher's stay at a psychiatric hospital due to multiple personality disorder, and about Gallagher's involvement with a motorcycle gang. (18RT 2287-2289.) Defense counsel also stated that Stephen Gallagher would testify that Gallagher "got into coke [cocaine] with the people at McRed's" and that Gallagher's mother had the habit of taking her children to bars and leaving them in the car while she drank. (18RT 2290-2291.) As a final offer of proof, defense counsel stated that Stephen Gallagher would testify that he was worried about Gallagher stalking his new girlfriend. (18RT 2291.) The prosecutor objected to the proposed witness "as to 352 and relevancy." (18RT 2284.) The trial court ruled that such evidence was barred under Evidence Code section 352, but that defense counsel was free to argue these points to the jury:

> We are not going to get into a little mini soap opera about their fractured relationship, Mr. Coady. It is all part of that same thing. I am not going to let you do it.
>
> No one is suggesting it was perfect. It was clear from the beginning when Steve Gallagher testified in the guilt phase that it's an estranged relationship. You made it clear that he never even went looking for her, that the only reason she called was not because of concern but because she wanted to kind of flaunt her good fortune and her position, her status at the bar.
>
> So you had that information available. I think this is pushing beyond what I think under 352 would be appropriate.
>
> So you can ask about the kids. I'm not sure there is anything else in there that I think is appropriate.

(18RT 2291-2292; see also 18RT 2285-2291.) Defense counsel subsequently elected not to call Stephen Gallagher as a witness. (See 18RT 2292-2293.)

4. Defense Counsel's Attempts To Introduce Evidence Regarding An Incident Where Gallagher Allegedly Came To Work With Black Eyes And Talked About "Moonlighting" At A "Biker Bar"

Prior to the testimony by Sidney Klessinger regarding Gallagher's employment at Southern Illinois University, defense counsel informed the court that Klessinger had information about Gallagher "coming in with black eyes and talking about problems she was having and the fact that she was working a moonlighting job at a biker bar in Imperial Beach." (19RT 2397.) The trial court indicated that such evidence was irrelevant and inadmissible under Evidence Code section 352. (19RT 2397-2398.) Specifically, the trial court noted that the defense had already presented evidence of Gallagher's contact with "biker bars," and that the proposed evidence lacked any contextual background. (19RT 2397-2398.) Accordingly, defense counsel was barred from introducing such evidence. (19RT 2397-2398.)

B. The Trial Court Properly Excluded Inflammatory And Irrelevant Evidence Regarding The Victim

At the penalty phase, a defendant must be permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record. (Pen. Code, § 190.3; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4- 8, 106 S.Ct. 1669, 90 L.Ed.2d 1; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-116, 102 S.Ct. 869, 71 L.Ed.2d 1; *People v. Ramos* (2004) 34 Cal.4th 494, 528; *In re Gay* (1998) 19 Cal.4th 771, 814; *People v. Mickey* (1991) 54 Cal.3d 612, 692-693.) However, the rule allowing all relevant mitigating evidence has not "abrogated the California Evidence Code." (*People v. Phillips* (2000) 22 Cal.4th 226, 238; *People v. Edwards* (1991) 54 Cal.3d 787, 837.) "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Phillips*, supra, 22 Cal.4th at p. 238, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.) The trial court retains its traditional discretion to exclude particular items of evidence offered in the penalty phase pursuant

to section 190.3, factor (a), which are misleading, cumulative, or unduly inflammatory. (*People v. Box* (2000) 23 Cal.4th 1153, 1200-1201; *People v. Cain* (1995) 10 Cal.4th 1, 64; *People v. Karis* (1988) 46 Cal.3d 612, 641-642, fn. 21.) In exercising such discretion, the trial court "is not required to admit evidence, . . ., 'that merely makes the victim of a crime look bad.'" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496, quoting *People v. Kelly* (1992) 1 Cal.4th 495, 523.) The trial court also has authority to exclude, as irrelevant, evidence that does not bear on the defendant's character, record, or circumstances of the offense. (*People v. Frye* (2004) 18 Cal.4th 894, 1015.) "[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally." (*Id.* at pp. 1015-1016.) In addition, "'excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.'" (*People v. Ramos*, *supra*, 34 Cal.4th at p. 528, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

In the present case, exclusion of the proffered evidence regarding the victim's alleged association with a motorcycle gang, her prior criminal record, her "fractured" marriage and relationship with her children, and an incident where she had "black eyes" and told a coworker she was "moonlighting" in a "biker bar," had minimal relevance and was unduly inflammatory. As noted by the trial court, there was no evidence that Gallagher was a member of a motorcycle gang or associated with motorcycle gang members. Rather, the only evidence given by Gallagher's sister was that Gallagher was seen on one occasion with a member of the "Devil's Disciplines," which was presumably some sort of motorcycle club or gang. (See 17RT 2201.) Thus, although the trial court permitted defense counsel to ask about this incident, there was no basis to permit additional or more detailed questions pertaining to Gallagher's involvement or association with motorcycle gangs, as any additional evidence would have been cumulative, unduly inflammatory, and unduly time consuming. In addition, evidence regarding Gallagher's alleged association with motorcycle gang members had no bearing on appellant's character, record, or the circumstances of the offense. (See

People v. Frye (2004) 18 Cal.4th at p. 1015.) The victim's association with such people was entirely independent of the charged offense, and did not involve circumstances "which surround[ed] materially, morally, or logically" the crime. (See *People v. Edwards, supra,* 54 Cal.3d at p. 833 ["circumstances of the crime" is broadly defined and "does not mean merely the immediate temporal and spatial circumstances of the crime."] Hence, evidence pertaining to Gallagher's alleged association with motorcycle gang members was properly excluded as irrelevant and inadmissible under Evidence Code section 352. (See *People v. Valdez* (2004) 32 Cal.4th 73, 109 [reviewing court will not normally second-guess a trial court's ruling under Evidence Code section 352].)

Similarly, evidence regarding Gallagher's prior criminal record was irrelevant and properly excluded under Evidence Code section 352. Gallagher's prior arrests and/or convictions for driving under the influence were irrelevant to the circumstances of the offense, in that Gallagher's character was not in issue and evidence pertaining to her use of alcohol had already been presented to the jury. Although prior felony convictions that involve moral turpitude are admissible for impeachment purposes (see *People v. Clair, supra,* 2 Cal.4th 629, 654), such a purpose was not contemplated here because Gallagher was not subject to impeachment as she never testified. As noted by the trial court, there was no "relevance that [Gallagher] ha[d] a gun in her car and a DUI" and to the extent the evidence was offered to "paint[] a different picture" of the victim, such evidence was cumulative since the jury already knew that Gallagher drank, went to bars, and was "playing around on her husband." (17RT 2213.) Moreover, even where prior felony convictions are admissible, such evidence is subject to the trial court's discretionary power under Evidence Code section 352. (*Ibid.*) In light of the minimal relevance of Gallagher's criminal record, the danger of undue prejudice posed by such inflammatory evidence weighed heavily against its admission. Hence, the trial court's ruling on this point was proper.

Likewise, evidence regarding Gallagher's fractured marriage was cumulative,

irrelevant, and properly excluded under Evidence Code section 352. As noted by the trial court, evidence concerning the victim's relationship with her husband had already been made "clear" to the jury. (18RT 2291-2292.) Hence, any additional testimony by Gallagher was cumulative of testimony given earlier regarding their "estranged relationship." Moreover, testimony relating to Gallagher's poor marital relationship was irrelevant, in that such evidence did not pertain to the "circumstances of the offense." (See *People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) Gallagher's strained marriage had no connection, either morally, materially, or logically, to the murder, and the prosecution never presented any victim impact testimony by Stephen Gallagher or pertaining to Gallagher's marriage. Therefore, additional evidence relating to Gallagher's marriage was properly excluded as irrelevant and unduly prejdicial under Evidence Code section 352.

Similarly, evidence regarding an incident where Sidney Klessinger saw Gallagher with black eyes and Gallagher told Klessinger that she was "moonlighting" at "biker bars" was also irrelevant and properly excluded under Evidence Code section 352. As noted by the trial court, there was no evidence proffered as to when or how Gallagher got the "black eyes," and there was nothing to corroborate Klessinger's statement regarding the "biker bars." (19RT 2397.) Similarly, the incident allegedly occurred while Gallagher was living in San Diego, long before the time of the murder. Therefore, such evidence had little probative value. Moreover, evidence concerning an incident where Gallagher was seen with an alleged member of the "Devil's Disciples" was already presented, such that defense counsel was able to show that Gallagher had some association with "motorcycle members." (See 19RT 2398.) Accordingly, the trial court properly excluded the evidence because it was irrelevant and unduly prejudicial under Evidence Code section 352.

In sum, in excluding the challenged evidence, the trial court did not exercise its discretion in an "'"arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citations.]" (*People v. Ochoa* (2001) 26 Cal.4th

398, 437-438; see also *People v. Gimines* (1975) 14 Cal.3d 68, 72 ["[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered."].) As the trial court's exclusion of such evidence rested on "ordinary rules of evidence," appellant's constitutional rights were not infringed. (See *People v. Phillips*, *supra*, 22 Cal.4th at p. 238; see also *People v. Boyette*, *supra*, 29 Cal.4th at pp. 427-428 [excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense].) Accordingly, appellant's claim of penalty phase error must be rejected.

C. The Erroneous Exclusion Of Evidence Pertaining To The Victim Was Harmless

Even assuming that the trial court erroneously excluded the proffered "negative victim impact" evidence, any such error was necessarily harmless. Errors involving the erroneous exclusion of evidence at the penalty phase are reviewed under the "more exacting" standard of whether there is a "reasonable possibility" the error affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448; see also *People v. Carter*, *supra*, 36 Cal.4th at p. 1275.) Here, given that appellant was a quadruple murderer, there is simply no reasonable possibility that a more favorable result would have been reached had such irrelevant evidence regarding Gallagher been admitted.

First, as observed by the trial court with respect to much of the challenged evidence, other evidence presented gave the jury an accurate picture of Gallagher, her relationship to her husband and children, and the fact that she drank. (See 17RT 2213 ["[T]he jury already knows she drinks. The jury already knows she goes to bars. The jury already knows she is apparently playing around on her husband and he is playing around on her."]; see also 17RT 2214 ["All this is already on in front of the jury."]; 18RT 2289-2291 [statements that it was "clear" victim's marriage was an "estranged relationship"]; 19RT 2398 ["You have already got in information about her contact with biker bars."].) Thus, the jury was well aware that there was "no goody two-shoes portrait here." (17RT 2213.)

Second, such evidence had little bearing on the jury's penalty phase determination, as it did not detract from the victim impact evidence regarding the "unique loss" to society and Gallagher's family by Gallagher's murder. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 827, 822, 111 S.Ct. 2597, 115 L.Ed.2d 720.) Rather, such evidence simply showed that Gallagher associated with "motorcycle members," that her relationship with her husband was "estranged," and that she drank alcohol. Such evidence did not negate evidence regarding the personal losses experienced by Gallagher's mother, sister, and children, in relation to her murder. (See 17RT 2183, 2220-2221.) Nor did such evidence negate Gallagher's societal contributions, such as her service in the United States Navy, her gainful employment after she left the Navy, and her role as a mother to three young children. (See 17RT 2176-2179, 2206.)

Third, the aggravating evidence in the case outweighed any mitigating evidence, even if additional evidence regarding the victim were considered. Such evidence included: appellant's commission of three additional murders of women within a 45-day time period immediately following Gallagher's murder; appellant's previous convictions for aggravated menacing inducing panic and attempted arson; and appellant's history of violence against women, such as by beating up a prior girlfriend. In contrast, the defense penalty phase case focused on presenting mitigating evidence of appellant's childhood and a possible brain dysfunction. Considering the jury rejected such evidence, there is little basis to believe the jury would have rendered a different verdict had it been presented with additional evidence of the victim's background.

Based on the above, there was no reasonable possibility of appellant would have received a more favorable penalty phase verdict had the evidence been admitted. Accordingly, the present claim of error must be rejected.

X.

THE TRIAL COURT PROPERLY REFUSED TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS ON "LINGERING DOUBT"

Appellant claims that the trial court erred in failing to give the jury a requested instruction on "lingering doubt," which resulted in violating his right to due process and a reliable determination of penalty pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Appellant further claims that he was prejudiced by the court's failure to give the "lingering doubt" instruction. (AOB 209-221.)[74] Respondent submits the trial court properly refused to give appellant's instruction on "lingering doubt." In any event, appellant was not prejudiced by the trial court's alleged failure to give such an instruction.

A. Underlying Proceedings

During discussion on the penalty phase instructions, appellant requested a "lingering doubt" instruction. (19RT 2568.) The trial court rejected this notion outright:

> I can cite you 20 cases that say that is improper and I can go get them if you want but I am not going to. It's totally improper. There is case after case that says we are not to instruct it and you can argue it but you are not allowed to give evidence on it. So that request is denied.

(19RT 2568.)

During argument, defense counsel touched upon the concept of "lingering doubt":

---

74. Appellant waived any claims that the trial court's refusal to give his instruction on lingering doubt violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because he failed to raise these federal constitutional claims at trial. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3; *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1; see also 19RT 2568.)

. . . . I will talk a little bit about the idea of the difference here of proof beyond a reasonable doubt. We spent a lot of time talking about what the prosecution has to prove to you. There is kind of a concept of certainty. One of the factors that you are allowed to consider is any factor that – any factor that causes you as an individual not to want to give the death penalty is a legitimate factor for you to consider.

The factor of lingering doubt that you need to find yourself is a factor that you can consider on an individual basis in deciding, if you decide that death is appropriate in an individual case.

To be convicted of the crime you have to be proved beyond a reasonable doubt, and we have already gotten past that point. But before you decide that death is the appropriate answer, you are also allowed to ask yourself am I certain enough on whatever level it is – and I don't know what it is, you decide the case on whether it was the theory of the felony murder information we had or whether it was the serial, the pattern of the following up after, you know, the crimes afterwards, or Mr. Dixon showing you about the strangulation theory.

But you as an individual – 12 jurors are going to sit on this case – have to decide for yourself. Are you satisfied to a sufficient level to know that death is the appropriate answer in this case. And it's an individual decision for each of the 12 to make, not subject to Mr. Dixon's interpretation or my interpretation or the court's for that matter, it's an individual decision for each of you.

(20RT 2743-2744.)

B. The Trial Court Properly Refused To Give Appellant's Requested Instruction On "Lingering Doubt"

"A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California* (1994) 512 U.S. 967, 979, 114 S.Ct. 2630, 129 L.Ed.2d 750.) "'[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that

it may do so.'" (*People v. Brown* (2003) 31 Cal 4th 518, 567 quoting *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 357; *People v. Demetrulias, supra,* 39 Cal.4th at p. 42; *People v. Gray, supra*, 37 Cal.4th at pp. 231-232; *People v. Lawley* (2002) 27 Cal.4th 102.) "The rule is the same under the state and federal Constitutions." (*People v. Brown, supra*, 31 Cal.4th at p. 567, citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174, 108 S.Ct. 2320, 101 L.Ed.2d 155; *People v. Lawley, supra*, 27 Cal.4th at p. 166; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1187 ["Defendant clearly has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt."].) Thus, the proposed "lingering doubt" instruction was not required to be given, under either state or federal law. (*People v. Lawley, supra*, 27 Cal.4th at p. 166.; *People v. Berryman* (1993) 6 Cal.4th 1048, 1104, *People v. Rodrigues, supra*, 8 Cal. 4th at p. 1187.)

Moreover, the "lingering doubt" instruction was unnecessary in the present case. The trial court already instructed the jury that in making its penalty determination, it could consider "the circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstance found to be true," and "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (7CT 1633; 19RT 2708-2708 [CALJIC No. 8.85]; see also *People v. Bonilla, supra*, 31 Cal 4th at p. 567; *People v. Demetrulias, supra,* 39 Cal.4th at p. 42; *People v. Gray, supra,* 37 Cal.4th at p. 232; *People v. Earp* (1999) 20 Cal.4th 826, 903-904; *People v. Hines* (1997) 15 Cal.4th 997, 1068; see CALJIC No. 8.85.) "These instructions sufficiently encompassed the concept of "lingering doubt," and the trial court was under no duty to give a more specific instruction. [Citations.]" (*People v. Hines, supra*, 15 Cal.4th at p. 1068; see *People v. Brown, supra*, 31 Cal.4th at p. 568.)

Furthermore, the trial court did not preclude defense counsel from raising the issue of "lingering doubt" in his closing argument. (19RT 2568; see *People v. Hines*, *supra*, 15 Cal.4th at p. 1068 [the court permitted defendant to argue mitigating factor of lingering doubt even though it denied instruction on same].) Indeed, defense counsel did just that, by arguing that the jury could consider any "lingering doubt" of whether death was an appropriate penalty in the present case. (See 20RT 2743-2744; see also 20RT 2779-2780 [defense counsel acknowledges that he argued "lingering doubt as a reason not to impose the death penalty"].) Thus, contrary to appellant's assertion, the trial court did not remove the matter of "lingering doubt" from the jury's consideration. (See AOB 221.)

In sum, the trial court was not required to instruct on "lingering doubt," and any concept regarding "lingering doubt" was properly encompassed in other instructions and argued by defense counsel. Accordingly, no error occurred in the present case and appellant's argument as to this point must be rejected.

XI.

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

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at appellant's trial. He maintains that many features of the death penalty law violate the federal Constitution. (AOB 222-239.) As he himself concedes (AOB 222), these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected.

A. Penal Code Section 190.3, Factor (a) Is Neither Vague Nor Overbroad

Appellant claims that the instruction which set forth Penal Code section 190.3, factor (a) "resulted in the arbitrary and capricious imposition of the death penalty" because the instruction was vague and overbroad inasmuch that it "has been applied

in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as 'aggravating.'" (AOB 223; see also AOB 222-223.) This challenge based on overbreath and vagueness, however, has been repeatedly rejected by this Court. (*People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; *People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 373; see also *Tuilaepa v. California, supra*, 512 U.S. at p. 976 [explaining that section 190.3, factor (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). As explained in *Tuilaepa v. California*, a focus on the facts of the crime permits an individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 304, 307, 110 S.Ct. 1078, 108 L.Ed.2d 255.) Thus, possible randomness in the penalty determination disappears when the aggravating factor does not require a "yes" or "no" answer, but only points the sentencer to a relevant subject matter. (*Tuilaepa v. California, supra*, 512 U.S. at p. 975.)

> In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

Appellant points to no factors in his own case which were arbitrarily or capriciously applied. He merely states that the aggravating factors were applied in a "wanton and freakish manner." (AOB 223.) Appellant does not, and cannot, demonstrate that factor (a) was presented to the jury in his case in other than a constitutional manner. Noticeably missing from appellant's analysis is any showing that the facts of his crimes or other relevant factors were improperly relied on by the jury as facts in aggravation. Accordingly, this sub-claim should be rejected.

B. The Death Penalty Statute And Instructions Set Forth The Appropriate Burden Of Proof

Appellant also contends that the death penalty statute and accompanying jury instructions failed to set forth the appropriate burden of proof. (AOB 224-235.) Specifically, appellant raises the following subclaims: (1) the death penalty statute and accompanying instructions unconstitutionally failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor (AOB 224-225); (2) the State was required to bear some burden of proof at the penalty phase and, if not, the jury should have been instructed there was no burden of proof at the penalty phase (AOB 226-227); (3) the instructions failed to required juror unanimity as to the aggravating factors and "unadjudicated criminal activity" (AOB 227-229); (4) the instructions were impermissibly broad by providing that the aggravating circumstances must be "so substantial" in comparison with the mitigating factors (AOB 230); (5) the instructions failed to inform the jurors that the central determination is whether death is the appropriate punishment (AOB 230-231); (6) the instructions failed to inform the jury that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole (AOB 231-232); (7) the instructions failed to inform the jury that even if they determined aggravation outweighed mitigation, they could still return a sentence of life without the possibility of parole (AOB 232-233); (8) the instructions failed to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances (AOB 233-234); and (9) the instructions failed to inform the jury on the presumption of life (AOB 234-235). As explained below, each of these claims have previously been rejected by this court and are meritless.

First, this Court has held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Burgener* (2003) 29 Cal.4th 833, 885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Thus, the penalty

phase instructions were not deficient by failing to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (See *People v. Morgan*, *supra*, 42 Cal.4th at p. 626; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Nothing in *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, or *Blakely v. Washington* (2004) 542 U.S. 296, impact what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that *Apprendi, Ring,* and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. (*People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto*, *supra*, 30 Cal.4th 226, 262-263; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.)

Second, there was no requirement that the penalty jury be instructed concerning the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, or that no burden of proof applied. (*People v. Morgan*, *supra*, 42 Cal.4th at p. 626; *People v. Cornwell* (2005) 37 Cal.4th 50, 104; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.) Third, there was also no requirement that the penalty jury achieve unanimity as to the aggravating circumstances or any unadjudicated criminal activity. (*People v. Kelly*, *supra*, 42 Cal.4th at pp. 800-801; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731.) Hence, the penalty phase instructions were not deficient by failing to so instruct.

Fourth, this Court has previously found that the "so substantial" language embodied in the penalty phase instructions was not impermissibly vague and ambiguous. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 494-465.) Thus, the instructions as they related to the comparison of aggravating and mitigating factors were not unconstitutionally vague or overbroad. Fifth, this Court has also found that the death penalty statute was not unconstitutional by virtue of its instruction that the

jury can return a death verdict if the aggravating evidence "warrant[ed]" death, rather than requiring that the jury find death to be the "appropriate penalty." (*People v. Mendoza* (2007) 42 Cal.4th at p. 707; *People v. Perry* (2006) 38 Cal.4th 302, 320.) Accordingly, the penalty phase instructions were not erroneous based on the "so substantial" or "warrant" language.

Sixth, no presumption existed in favor of either death or life imprisonment without the possibility of parole in determining the appropriate penalty. (*People v. Mendoza, supra*, 42 Cal.4th at pp. 707-708; *People v. Morgan, supra*, 42 Cal.4th at p. 625; *People v. Cornwell* (2005) 37 Cal.4th 50, 104.) Thus, an instruction informing the jury that they would be required to return a sentence of life without the possibility of parole if the mitigating factors outweighed the aggravating factors, would have been improper. (*Ibid.*) Seventh, this Court has found that a defendant is "not entitled to a specific instruction that the jury may choose life without possibility of parole even if it finds the aggravating circumstances outweigh those in mitigation." (*People v. Morgan, supra*, 42 Cal.4th at pp. 625-626, citing *People v. Kipp, supra*, 18 Cal.4th at p. 381 and *People v. Medina* (1995) 11 Cal.4th 694, 781-782.) Hence, there was no requirement that the trial court give such instructions.

Eighth, this Court has previously found that "[t]he trial court need not instruct that the beyond-a-reasonable-doubt standard and the requirement of jury unanimity do not apply to mitigating factors." (*People v. Rogers* (2006) 39 Cal.4th 826, 897; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1365; *People v. Breaux* (1991) 1 Cal.4th 281, 314-315.) Thus, the instructions were not deficient by any failure to so instruct the jury. And finally, this Court has held that the trial court need not "instruct the jury on the presumption of life." (*People v. Prieto, supra*, 30 Cal.4th at p. 271; see also *People v. Kelly, supra*, 42 Cal.4th at p. 800.) Hence, omission of such language from the instructions did not constitute error.

In sum, appellant's challenges to the death penalty statute and jury instructions pertaining to the death penalty regarding the burden of proof are meritless. Hence, the

claim and subclaims must all be rejected.

C. Written Findings Pertaining To Aggravating Factors Were Not Required

Appellant next argues that the federal Constitution required that the jury make written findings regarding the aggravating factors. (AOB 235-236.) However, this Court has held on numerous occasions that the jury need not file written findings as to which aggravating factors were relied on in imposing the death penalty. (*People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Snow, supra,* 30 Cal.4th at p. 127; *People v. Lucero* (2000) 23 Cal.4th 692, 741 *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Davenport* (1995) 11 Cal.4th 1171, 1232.) Hence, appellant's argument regarding the alleged requirement of written findings should be rejected.

D. Instructions On Mitigating And Aggravating Factors Did Not Violate Appellant's Constitutional Rights

Appellant's also claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights because the instructions used "restrictive adjectives in the list of potential mitigating factors," the instructions failed to delete inapplicable sentencing factors, and the instructions failed to indicate that "statutory mitigating factors were relevant solely as potential mitigators." (AOB 236-237) As previously noted by this Court, the use of restrictive adjectives, such as "extreme" and "substantial," in the list of mitigating factors "does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. Hoyos* (2007) 41 Cal.4th 872, 927; see also *People v. Harris* (2005) 37 Cal.4th 310, 365; *People v. Brown, supra,* 33 Cal.4th at p. 402.) Similarly, this Court has found that the trial court is not required to delete inapplicable sentencing factors from CALJIC No. 8.85. (*People v. Mendoza, supra,* 42 Cal.4th at p. 708; *People v. Stitley* (2005) 35 Cal.4th 514, 574; *People v. Kipp, supra,* 26 Cal.4th at p. 1138; *People v. Reil* (2000) 22 Cal.4th 1153, 1225; *People v. Earp, supra,* 20 Cal.4th at p. 899; *People v. Carpenter, supra,* 15 Cal.4th at p. 1064.) Likewise, appellant's claim that the failure

to instruct that statutory mitigating factors are relevant solely as mitigators violated the Eighth and Fourteenth Amendments has been rejected by this Court. (*People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Kraft, supra,* 23 Cal.4th at pp. 1078-1079.) Appellant has not presented this Court with any persuasive reason to reconsider its prior holdings on these issues, and his claims of instructional error must be rejected.

E. Appellant's Constitutional Rights Were Not Violated Based On An Absence Of Intercase Proportionality Review

Appellant also contends that the absence of intercase proportionality review from California's death penalty law violated his Eighth and Fourteenth Amendment right to be protected from the arbitrary and capricious imposition of the death penalty. (AOB 237-238.) This point is not well taken. Neither the federal or state Constitutions require intercase proportionality review. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Kipp, supra,* 26 Cal.4th at p. 1139.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required in California (*Pulley v. California* (1984) 465 U.S. 37, 51-54) and this Court has consistently declined to undertake it as a constitutional requirement (*People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Welch, supra,* 20 Cal.4th at p. 772; *People v. Majors* (1998) 18 Cal.4th 385, 442.) Appellant's claim should thus be rejected.

F. The Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution

Appellant claims California death penalty law violates the Equal Protection Clause of the federal Constitution because non-capital defendants are accorded more procedural safeguards than a capital defendant. (AOB 238.) However, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection

principles. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Boyette, supra,* 29 Cal.4th at pp. 465-467.) Thus, appellant's claim of an Equal Protection Clause violation is meritless and must be rejected.

G. California's Use Of The Death Penalty Does Not Fall Short Of International Norms

Finally, appellant's claims that the use of the death penalty as a regular form of punishment falls short of international norms. (AOB 239.) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Morgan, supra,* 42 Cal.4th at p. 628, quoting *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; see also *People v. Elliot* (2005) 37 Cal.4th 453, 488.) Appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions, and the present claim must therefore be rejected.

XII.

APPELLANT RECEIVED A FAIR TRIAL AS THERE WAS NO CUMULATIVE PREJUDICE

Appellant's final contention is that "the combined impact of the various errors" requires reversal of his judgment and death sentence. (AOB 240-243.) Respondent disagrees.

A claim of cumulative error necessarily fails when there is no error to accumulate. (*People v. Carpenter, supra,* 15 Cal.4th 312, 354; *People v. Cooper* (1991) 53 Cal.3d 771, 839.) As explained above, there was no error committed by the trial court's admission of Florida and Louisiana murder convictions, the exclusion for cause of a prospective juror, the court's instructions with CALJIC No. 2.52, 2.50, 2.50.1, 17.41.1, the trial court's failure to instruct on unanimity regarding the theory of murder or lingering doubt, the trial court's failure to strike the special circumstance

allegation, the trial court's exclusion of evidence pertaining to the "unique nature" of the victim, and application of the death penalty statute and instructions to appellant. Although respondent acknowledges that the trial court's instruction with CALJIC No. 2.15 constituted error, such error was necessarily nonprejudicial and does not require reversal. Accordingly, aside from the instructional error pertaining to CALJIC No. 2.15, there were no errors to accumulate. Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Hinton, supra,* 37 Cal.4th at p. 913; *People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah, supra,* 37 Cal.4th at p. 1165; *People v. Burgener* (2003) 29 Cal.4th 833, 884.) Rather, the record shows that appellant received a fair trial and appellant's claim of cumulative error should be rejected.

CONCLUSION

Based on the above, respondent respectfully requests this Court affirm the convictions the sentence imposed.

Dated: January 28, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

JOHN R. GOREY
Deputy Attorney General

G. TRACEY LETTEAU
Deputy Attorney General

Attorneys for Plaintiff and Respondent

LA1996X50013
50215958.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 51,613 words.

Dated: January 28, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

G. TRACEY LETTEAU
Deputy Attorney General

Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Glen Rogers**
No.: **S080840**

I declare:

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

On JAN 2 8 2008, I served the attached **RESPONDENT' BRIEF (CAPITAL CASE)** 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

William Hassler
Deputy State Public Defender
Office of the State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105
(Counsel for Appellant Rogers) - 2 copies

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Patrick Dixon
Deputy District Attorney
Los Angeles County District Attorney
210 West Temple Street, 18th Floor
Los Angeles, CA 90012

Addie Lovelace
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

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 JAN 2 8 2008, at Los Angeles, California.

M.I. Rangel
Declarant

Signature

GTL:ir
LA1999XS0015
80218120.wpd