In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ROBERT BOYD RHOADES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S082101

Sacramento County Superior Court Case No.
98F00230
The Honorable Maryanne G. Gilliard, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC CHRISTOFFERSEN
Assisant Deputy Attorney General
JENNIFER M. POE
Deputy Attorney General
State Bar No. 192127
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5474
Fax: (916) 324-2960
Email: Jennifer.Poe@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

On May 16, 1996, eight-year-old Michael Lyons was walking home from school in Yuba City, playing with a stick and jumping in rain puddles as he went. This was the last anyone saw him. His body was found the next morning partially nude and concealed under the grass and brush on the banks of the Feather River, just two miles from his home. His throat was slashed and he had suffered countless other knife wounds, including numerous small jabbing cuts all over his body inflicted to induce pain and suffering and several deep slashes to his chest and abdomen. He had been sodomized with such force as to be a major contributor to his death. Under his body lay a bracelet which had been in appellant's truck, and near his body heavily soiled with blood was appellant's camping blanket.

Soon after, about a half mile downstream from the boy's body, law enforcement found appellant, high on methamphetamine and naked save for a pair of jeans, sitting motionless in his truck which was stuck on the muddy banks of the swiftly rising river. On the tailgate lay appellant's seven-inch fillet knife with Michael Lyons' blood on it. The boy's footprints were found on the inside of the windshield. Pubic hair matching appellant's was found on Michael's shirt and sweatshirt. A fiber matching Michael's sweatshirt was found in appellant's pubic region.

A jury convicted appellant of first degree murder with the special circumstances of lewd and lascivious acts with a child, forcible sodomy, and torture, and he was sentenced to death. He challenges his convictions in this automatic appeal.

STATEMENT OF THE CASE

On March 31, 1998, the Sutter County District Attorney filed a fourth amended information charging appellant Robert Boyd Rhoades with one count of murder (Pen. Code § 187) [1] with the special circumstances that the murder was committed while appellant was engaged in the commission of kidnapping (§ 207, 209), sodomy (§ 286), and lewd and lascivious acts upon a child under 14 (§ 288), and was intentional and involved the infliction of torture (§ 206). (§ 190.2, subds. (a)(17), (18).) The information further charged appellant with, in count two, kidnapping (§ 207, subd. (a)); in count three, kidnapping for the purpose of committing a lewd act on a child (§ 207, subd. (b)); in count four, torture (§ 206); in count five, sodomy upon a child under 14 or by force (§ 286, subd. (c)); in count six, lewd and lascivious touching of a child under 14 (§ 288, subd. (a)); in count seven, lewd and lascivious touching of a child under 14 by force (§ 288, subd. (b)(1)); in count eight, oral copulation with a child under 14 or by force (§ 288a, subd. (c)); in count nine, possession of methamphetamine (Health & Saf. Code § 11377, subd. (a)); and, in count ten, possession of a hypodermic needle or syringe (Bus. & Prof. Code § 4140). With regard to the first nine counts, the information also alleged that appellant suffered prior serious and violent felony convictions for forcible oral copulation (§ 288a, subd. (c)), robbery (§ 211), kidnapping (§ 207), and lewd and lascivious touching of a child under 14 (§ 288(a)). (§§ 667, subds. (a), (e)(2)(A), 1170.12, subd. (c)(2)(A).) Finally, the information alleged that appellant served prior prison terms (§ 667.5, subds. (a), (b)) for the same four offenses as well as for a forgery conviction (§

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

470). (7 CT 2033-2042.) Appellant pled not guilty and denied the allegations. (7 CT 2044.)

After transferring the case on a change of venue motion to Sacramento County, appellant's jury trial began on April 14, 1998. (3 CT 899; 8 CT 2249.) On June 17, 1998, the jury found appellant guilty on all counts with the exception of the kidnapping and oral copulation charges (counts two, three and eight), and found the special circumstances of sodomy, lewd act on a child, and torture to be true. (9 CT 2532-2546.) The jury was unable to reach a decision on counts two, three, and eight, and the court declared a mistrial as to those counts only. (9 CT 2546.) On the People's motion, the court dismissed counts two, three, and eight and the special circumstances regarding kidnapping. (*Ibid.*) In a court trial, the allegations regarding the prior convictions were found to be true. (*Ibid.*)

In the penalty phase, the jury was unable to reach a unanimous verdict on either penalty, and the trial court granted the defense motion for a mistrial. (9 CT 2685, 2687.) On September 10, 1999, following a retrial of the penalty phase, appellant was sentenced to death. (16 CT 4654-4659.)

STATEMENT OF FACTS

A. Guilt Phase Facts

1. Prosecution Case

a. Michael Lyons Goes Missing

In 1996, Sandy Friend[2] lived in an apartment at 390 McRae Way in Yuba City, California. (12 RT 3688.) She lived with her husband, Billy Friend, her son, eight-year-old Michael Lyons, and her daughters, four-

[2] Throughout the record on appeal, the mother of Michael Lyons is alternately referred to as Sandy Friend, Sandy Lyons, and Sandy Friend Lyons. For ease of reading, respondent refers to her as Sandy or Sandy Friend.

year-old Alithya and three and a half-month-old Mettea. (*Ibid.*) May 16, 1996, was a Thursday and a school day for Michael and Alithya. (12 RT 3688-3689.) That morning, Sandy had Michael summon Mary Urquhart, who lived in the same apartment complex, to babysit. (12 RT 3689.) Urquhart came over to care for Mettea, and Sandy drove Michael and Alithya to Bridge Street School where Michael was in third grade and Alithya was in preschool. (12 RT 3689-3690.) After dropping off Michael and Alithya, Sandy drove to Marysville to work on a house which the family was going to move into. (12 RT 3690.) At noon, Sandy returned to the school and picked up Alithya. (*Ibid.*) At that time, she saw Michael playing outside during his lunch recess. (*Ibid.*) That was the last time she saw her son. (12 RT 3691.)

After dropping off Alithya at home with Urquhart, Sandy returned to the house on H Street in Marysville to finish painting. (12 RT 3691.) Around 5:00 p.m., Billy Friend and his stepfather, Jarrett Willis, picked up Sandy, and they returned to the apartment. (*Ibid.*) Jarrett Willis left, and Sandy and Billy Friend went into the apartment. (*Ibid.*) Urquhart was there with the girls but Michael was not home, and Urqhart had not seen him. (12 RT 3692.) It was not unusual for Michael to be absent because he often went to his grandmother's house after school. (12 RT 3691.) His grandmother, Linda Willis, was Billy Friend's mother. (12 RT 3691, 3697.) If Michael received a sticker from his teacher, he could go to his grandmother's house which was three houses down from the Bridge Street School and stay there until Billy Friend got off work. (12 RT 3691.) Billy Friend would then bring Michael home. (12 RT 3691-3692.) If he did not get a sticker, Michael would go to his grandmother's, call Sandy, and come home. (*Ibid.*) He usually called either way because if he got a sticker he was happy. (*Ibid.*) Sandy started getting dinner ready and then asked Billy to call his mother and have her send Michael home. (12 RT 3691.)

When they discovered Michael was not at his grandmother's house, they began looking for him. Billy Friend went to the school and looked along the route Michael usually took when he walked home. (12 RT 3692.) Michael's grandmother also helped search for Michael. (12 RT 3697.) They looked around the apartment complex and checked with friends and neighbors. (*Ibid.*) At about 6:00 p.m., Sandy called the police to report Michael missing. (*Ibid.*) At that time, the police provided no assistance, telling Sandy to check with his friends in the neighborhood and suggesting that perhaps he was slow coming home. (12 RT 3692-3693.) Sandy asked a friend to drive her around to look for Michael at local stores that Michael frequented. (12 RT 3693.) At 8:00 p.m., Sandy called the police again. (*Ibid.*) It was getting dark. (*Ibid.*) Sandy explained to the police that it was not typical of her son to be missing like this. (12 RT 3694.) At that time the police began actively searching for Michael. (12 RT 3693-3694.) At some point, Billy Friend checked the river bottoms, but Michael never went to the river bottoms alone. (12 RT 3694-3695.)

Sandy explained that she initially told police Michael was wearing green pants and a Batman shirt because those are the clothes she had laid out for him to wear. (12 RT 3698-3699.) When they left the house that morning, however, Sandy did not pay attention to what pants Michael was wearing. (12 RT 3698.) She was running late and was busy trying to get her four-year-old, Alithya, dressed. (12 RT 3698-3699.) After Michael turned up missing, Sandy found his green pants in the hamper in the bathroom where he got dressed. (12 RT 3700.) Michael only had one pair of green pants. (*Ibid.*) However, Michael also owned a pair of black pants.

(*Ibid.*) Once Michael was discovered to be missing, Sandy could not find his black pants anywhere inside their home.[3] (*Ibid.*)

Billy Friend was Michael's stepfather and had lived with him for six years. (12 RT 3707-3708.) Billy Friend was close to Michael and like a father to him. (12 RT 3710, 3714.) Billy used to take Michael down to the Feather River river bottoms[4] to go fishing a couple of times a month when Billy Friend had a day off. (12 RT 3710-3711.) They fished all along the Yuba City side of the river. (12 RT 3710.) Usually they went to a spot known as Shanghai Bend which is about two or three miles from their house. (12 RT 3711.) Billy Friend had told Michael he was not allowed to go to the river bottoms by himself. (*Ibid.*) To Billy Friend's knowledge, Michael had never gone there alone. (*Ibid.*) Michael did not have his own fishing equipment, and none of Billy's fishing equipment was missing the night of May 16, 1996. (*Ibid.*)

Billy Friend last saw Michael the morning of May 16 prior to leaving for work at 8:00 a.m. (12 RT 3708.) That day, he worked his job painting and left with his stepfather Jarrett Willis to go pick up Sandy between 4:30 and 5:00 p.m. (12 RT 3708-3709.) Sandy was at the H Street house in Marysville. (12 RT 3715.) Upon arriving home, they realized Michael was not at home with Urquhart and the two girls. (12 RT 3709.) After confirming with his mother, Linda Willis, that Michael was not with her, Billy walked around the apartments. (*Ibid.*) He then walked to Bridge

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[3] Sandy later found his black pants at the river bottoms. (12 RT 3700-3701.) She put them in the back of her sister's truck. (*Ibid.*) They were very clean and were inside out. (*Ibid.*) She turned the pants over to the police department. (*Ibid.*)

[4] "River bottoms" is defined as low-lying land along a river (http://www.merriam-webster.com/dictionary/river%2520bottom), or a channel occupied (or formerly occupied) by a river (http://www.wordwebonline.com/en/RIVERBOTTOM).

Street School to look at the school as well as on Michael's walking route. (*Ibid.*) Bridge Street School was about a mile from their home. (*Ibid.*) Billy Friend also went to the river bottoms searching for Michael. (12 RT 3712.)

Linda Willis was Michael Lyons' grandmother and lived three doors down from Bridge Street School. (12 RT 3747-3748.) Michael would often come to her house after school. (12 RT 3748.) On May 16, Willis had to work late. (*Ibid.*) The rule was that if Michael came to Willis' house and she was not there, he was to go home. (*Ibid.*) Willis returned to her house at 4:15 p.m., and was told by Billy around 5:30 p.m. that Michael was missing. (12 RT 3748-3749.)

Mary Urquhart explained that on the morning of May 16, 1996, Michael Lyons came to her apartment and asked her to babysit. (12 RT 3722.) Urquhart had been babysitting Sandy's children for about a month, and Michael was excited about Urquhart being their babysitter. (12 RT 3721, 3729.) Michael usually got out of school at around 2:40 p.m. (12 RT 3725-3726.) Urquhart smoked marijuana on and off during the day. (12 RT 3732.) She watched Mettea that morning and Alithya after Sandy dropped her off around noon. (12 RT 3731-3732, 3741.) She reckoned Billy Friend came home around 5:00 p.m. (12 RT 3731.) When pressed about the time Sandy and Billy Friend arrived home, however, she could not remember. (12 RT 3745.) On the morning of May 17, Urquhart reported to police that Sandy came home at around 5:00 p.m. (*Ibid.*) Urquhart helped search for Michael. (12 RT 3743.)

Katherine Menghini was Michael Lyons' third grade teacher. (12 RT 3831.) Class got out at 2:40 p.m. (*Ibid.*) As usual, Michael stayed after school to discuss his behavior with Menghini and to get a sticker from her. (*Ibid.*) At 2:50 p.m., Menghini asked him to leave because she had a reading class coming in at 3:00 p.m. (12 RT 3831-3832.) Menghini was

probably Michael's best friend. (12 RT 3832.) It was raining very hard that day. (12 RT 3834.) She told everybody to hurry home because it was raining hard. (*Ibid.*) It was hard to get Michael to go because he was easily distracted. (12 RT 3850.) Menghini testified that Michael was wearing a green sweatshirt but she did not remember what color pants. (12 RT 3851.) After Michael was reported missing, the news reported that Menghini said Michael was wearing green pants. (12 RT 3853-3854.) This upset her because she did not tell anyone he was wearing green pants; she did not know what color his pants were. (*Ibid.*) She only knew that he was wearing a green sweatshirt. (12 RT 3855.) She told police that Michael liked to play in the rain. (12 RT 3857.)

Susan Cuquet was a counselor at Bridge Street School conducting gate duty at the back end of the school on Plumas. (12 RT 3858-3859.) Her job was to wait at the back gate for all of the students to leave. (*Ibid.*) It was very cold and rainy day. (12 RT 3859.) She looked at her watch, and it was 3:05 p.m. (12 RT 3859, 3864-3865.) Just then, Michael Lyons came around the corner. (*Ibid.*) Cuquet said, "Michael, you're getting soaking wet. You better hurry home your mom's going to get worried." (12 RT 3860.) Michael said, "okay," jumped in a puddle and took off home. (*Ibid.*) Cuquet waited for him to go through the gate and then walked back into the school. (*Ibid.*)

Henry Battles lived at the Bridge Way Apartments, unit 45. (12 RT 3869.) Battles lived cattycorner and across the way from Sandy Friend and Michael Lyons. (12 RT 3870.) Battles had known the Friend family for about three or four years and was familiar with all of their children. (*Ibid.*) Michael Lyons used to come over and play with Battles' son. (*Ibid.*) On May 16, 1996, Battles left his work at U-Haul in Yuba City at about 2:45 p.m. (12 RT 3871.) Battles drove home by taking Franklin to Wilbur and then turned left on C Street. (*Ibid.*) Sometime after 3:00 p.m., on the

corner of Wilber and C Street, Battles saw Michael Lyons getting ready to cross the road to go onto C Street. (12 RT 3871-3872.) Michael was walking by himself with a stick in his hand. (12 RT 3872, 3874.) The stick was one of the markers used for building construction. (12 RT 3872.) There was construction taking place between Bridge Street School and the place Battles saw Michael Lyons. (*Ibid.*) When questioned further about the exact time he saw Michael, Battles explained that he told police it was before or after 3:00 p.m., but probably after. (12 RT 3875-3876.)

Raymie Clark was visiting his cousin Charlie Wilber at an apartment complex on McRae Way, unit number 48. (12 RT 3881.) He went out on the balcony to smoke a cigarette. (*Ibid.*) From there, he could see out to C Street. (12 RT 3884.) It was raining and the sun was out, making for very bright conditions. (12 RT 3885.) Clark stated that it was about 2:45 or 2:50 p.m. when he saw a Toyota four-wheel-drive truck with a camper shell driving rapidly down the road. (12 RT 3882, 3884.) The whole truck including the camper was the same color and appeared to be shiny gold and brand new. (12 RT 3885, 3891.) It turned down Boyd Street. (12 RT 3886.) It stopped suddenly and pulled in between the Trading Post and the Armor place. (*Ibid.*) There was a little blond-haired boy wearing dark pants coming down the road. (12 RT 3886, 3888.) The boy was playing with a stick. (12 RT 3889.)

When the truck stopped, the little boy ran up to the truck, and it seemed to Clark that the boy may have known the person in the truck, like perhaps it was his father coming to pick the boy up because it was raining. (12 RT 3890.) But then the little boy backed up from the truck and started pointing which seemed kind of weird to Clark at the time. (*Ibid.*) Then the boy went back up to the truck. (*Ibid.*) The truck pulled away, and the little boy was not there anymore. (*Ibid.*) After the truck was moving, Clark saw the passenger door swing open and then slam shut. (*Ibid.*) At the time, this

struck Clark as unusual but he did not consider reporting it to the police. (*Ibid.*) His cousin Charlie Wilber came out as the truck was leaving. (12 RT 3882, 3890-3891.) Clark said, "Didn't you see that? That was kind of curious, I mean, kind of weird." (12 RT 3891.) Charlie said, "What?" (*Ibid.*) Clark told him that the little boy was standing there and that now he wasn't standing there. (*Ibid.*) Charlie said that he did not see it; he only saw the truck driving off. (*Ibid.*) Clark had seen other kids walking on the streets, and Clark figured it was about 3:00 p.m., after school let out. (13 RT 3908.)

Charlie Wilber lived at apartment number 48. (13 RT 3925.) On May 16, between 3:30 and 4:00 p.m., Clark said to Wilber, "Look at this kid getting snatched up in the vehicle." (13 RT 3925, 3928.) As soon as Wilber looked, the truck was taking off down C Street going eastbound. (13 RT 3925-3926.) Wilber said the truck was creamy white, possibly a white truck, and looked dirty. (13 RT 3926, 3931.) The truck was not shiny gold at all. (13 RT 3931-3932.) It was kind of misty outside that day. (13 RT 3926.) The truck sped off on C Street heading eastbound towards the courthouse. (*Ibid.*) The truck looked like a Toyota pickup with a camper shell the same color as the truck. (*Ibid.*) The kids were walking by as they had just gotten out of school. (13 RT 3930.)

The next morning at about 7:00 a.m., Clark saw on television that a little boy was missing from the area of the McRae Way Apartments. (12 RT 3891-3893.) Clark connected it with what he had seen and called the police right away. (12 RT 3892-3893.) He told the police that he had seen the gold truck and the boy at about 3:00 p.m. (13 RT 3906-3907.) This was the approximate time; Clark's son got out of the same school at 2:45.

(13 RT 3907-3908.) Clark's girlfriend was going to pick Clark up at 3:00 after his son got out of school, and they had not picked him up yet.[5] (*Ibid.*)

That afternoon, there was a report on television that someone had been arrested. (12 RT 3894.) Clark's attention was also caught by footage of the truck down at the river. (*Ibid.*) Clark got a real good look at the truck on television, and he recognized it as looking like the same truck he had seen the day before. (12 RT 3894-3895.) That evening there was another report about the little boy who was missing. (12 RT 3893.) People's Exhibit 73 was a videotape and was played for the jury. (12 RT 3898; 13 RT 3904.) The videotape was the television clip Clark saw on May 17 showing the truck. (13 RT 3904.) Clark identified the truck on the television clip as looking like the same model and shape of the truck he saw on May 16. (*Ibid.*) However, the truck on television appeared to be white, so Clark was not sure that it was the same truck. (13 RT 3905.)

When he talked to Detective Michael Green, Clark told him that the boy walking near the pickup was wearing dark green pants. (13 RT 3911-3913.) He also said the truck had shiny new rims and appeared new, maybe 1995. (13 RT 3914, 3917.) Clark had been concerned because the boy was out in the rain walking by himself. (13 RT 3915.) Clark had noticed that the boy was kind of pointing, like he was giving directions. (13 RT 3916.) When Detective Green asked Clark if he noticed what kind of shirt the boy was wearing, Clark said he did not notice but remembered the green pants. (13 RT 3915-3916.)

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[5] Sergeant Jeff Webster of the Yuba City Police Department received a call from Clark at about 6:00 a.m. on May 17. (13 RT 3919.) Clark reported the details of the incident involving the little boy and told Webster that the incident had occurred sometime between 3:00 and 4:00 p.m. (13 RT 3920-3923.)

Green estimated that the distance from the balcony where Ray Clark was standing to the intersection of C Street and Boyd Street was approximately 400 yards with no trees or other visual impairments. (14 RT 4484; 51 CT 15008.)

b. Discovery of Michael Lyons' Body

Yuba City Police began searching for Michael the evening he went missing. (13 RT 3959-3960.) The immediate areas around his home and school were searched. (*Ibid.*) A flyer containing a picture of Michael Lyons was created and disbursed to law enforcement agencies and in the nearby community. (13 RT 3961.) A friend of the family was searching the area of the river bottoms where he had been with Michael fishing in the past. (13 RT 3964.) The search was called off at 11:00 p.m. and resumed again the next morning at 6:30 or 7:00 a.m. (13 RT 3966.) The FBI was called in to assist in the investigation. (*Ibid.*) An employee of the Parks and Recreation Department of Yuba City who was out looking for Michael as part of one of the search teams discovered his body in a wet and muddy area near the river at approximately 11:00 a.m.[6] (13 RT 3921, 4033-4034, 4044.) Michael's naked body was concealed under some bushes in the river bottoms on the Sutter County side. (13 RT 3966-3967, 4035.) His body was found on something of a peninsula that formed as a result of a lagoon.[7] (14 RT 4466-4467.) The lagoon was to the west of the body and the river was to the east. (*Ibid.*) It is a brushy area with trees and grass ranging from a couple of inches to a couple of feet high. (*Ibid.*) At the time of the murder, the lagoon was larger than ordinary due to heavy rains

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[6] The searchers had thick mud on their shoes and pants from being in the area. (13 RT 4037.)

[7] Michael Green of the Yuba City Police Department identified locations of things on a map which was People's Exhibit 122. (14 RT 4463-4466.)

and a raised river. (14 RT 4467.) From the time Michael Lyons' body was found until the following day, the river came up about another six to eight feet. (13 RT 3921-3922.)

Michael Lyons was identified at 11:30 a.m. when he was found completely nude from the waist down. (13 RT 4038-4039.) Michael was lying face down with his dark green sweater or sweatshirt pulled up near the chest of his body and up to his hairline, concealing his face. (13 RT 4045; 14 RT 4206; 49 CT 14655-14656.) He did not have on any pants, underwear, socks, or shoes. (14 RT 4206.) It was 2.4 miles from Michael Lyons' house to the area where his body was found. (14 RT 4497.)

c. Appellant Is Taken Into Custody

Sean Harvey was with Jeremy Griffin, Robert Davis and Dan Anderson in the river bottoms of the Feather River to help in the search for Michael Lyons. (13 RT 4095-4096, 4099, 4105, 4110.) There were other search parties out. (13 RT 4101.) The group was calling for Michael. (13 RT 4106.) As they walked through a heavily wooded and muddy area, they came upon appellant. (13 RT 4096-4097, 4111.) Appellant appeared nervous and shocked. (13 RT 4111.) Appellant frightened Harvey because he appeared out of nowhere from behind the bushes. (13 RT 4097.) They were surprised to find anyone down at the edge of the river because the water had come up. (*Ibid.*) Appellant was wearing nothing but a pair of jeans. (13 RT 4098.) Appellant asked them to help him pull his vehicle out of the mud but the group decided not to. (13 RT 4098, 4111-4112, 4113.) They asked appellant if he had seen a little boy who was missing and handed him the fliers which had Michael Lyons' picture but he said he had not. (13 RT 4111, 4113.) Appellant said he needed to hurry and get out of town or be somewhere, possibly Sacramento. (13 RT 4111, 4113-4114.) Only a short time later, they saw appellant arriving at the boat ramp in the

sheriff's boat. (13 RT 4099, 4107, 4112.) He was taken away in a patrol car. (*Ibid.*)

Sergeant Jess Harris was assigned to the Boat Patrol unit of the Sutter County Sheriff. (13 RT 4049.) Harris, along with Deputy Barbara Burns and Hunt, was patrolling the Feather River in the area of Yuba City on the morning of May 17. (13 RT 4049-4050, 4077.) The boat they traveled in was a marked sheriff's patrol boat with the word "sheriff" on both sides and the back. (13 RT 4052.) The boat had an extremely loud exhaust system; the exhaust ports were above water. (*Ibid.*) It was so loud that at times it impeded communication with people aboard the boat. (*Ibid.*) The noise could be heard from a long distance away. (13 RT 4069.) The sheriff's office had since modified the exhaust system because of the loud noise by moving the ports so they are submerged. (13 RT 4052.)

Harris was informed at about 11:00 a.m. that a body had been discovered south of the Yuba City boat ramp and just north of Halpern's Lagoon. (13 RT 4049-4050, 4077.) He steered the boat south towards Halpern's Lagoon, and saw Officer Sanbrook standing up in a wooded area along the bank just north of the lagoon. (13 RT 4050.) He steered the boat towards the bank where Sanbrook was standing and confirmed the location of the body. (*Ibid.*) Harris then proceeded south and stopped at the entrance to Halpern's Lagoon at which time the officers made contact with Kim Kingsbury and Joris Lebhart. (*Ibid.*) The two were released to land units to be interviewed. (*Ibid.*)

Harris continued on down south of the lagoon to an area which was heavily wooded and brushy. (13 RT 4051.) It was there Harris saw something white in behind the trees and foliage.[8] (13 RT 4051, 4078.) As

[8] Exhibit 74B is a photograph depicting the area as the boat approached. (13 RT 4089-4090.)

the officers approached, they discovered it was a white truck with a camper shell. (*Ibid.*) At that time Harris was about 150 feet from the bank of the river. (*Ibid.*) They steered the boat toward the truck. (*Ibid.*) The pickup was facing south, or downstream, along the very edge of the bank, and the water was lapping up against the bottom edge of the wheels.[9] (*Ibid.*) The truck was stuck. (*Ibid.*) There was a come-along type pulley device attached to the rear bumper and a tree a few feet behind it. (*Ibid.*) Harris then saw appellant with no shirt on sitting in the driver's seat leaning back on the seat. (13 RT 4051, 4065.) Appellant was not moving at all; he sat motionless in the vehicle. (13 RT 4053.) He did not hail the boat. (13 RT 4087.) It appeared that either appellant did not see the officers or just did not want any help. (13 RT 4078.) As Harris got closer, there was a point in the brush where there was an opening allowing Harris to see appellant's face. (13 RT 4053.) Harris could see appellant was looking directly at them. (*Ibid.*) Appellant was lying back watching the officers. (13 RT 4079.)

Once eye contact was made, appellant got out of the truck and stood along the edge of the water as the boat approached.[10] (13 RT 4079.) Appellant was wearing only a pair of wet blue jeans. (13 RT 4054, 4079.) He had no shirt or socks or shoes on. (13 RT 4054, 4069, 4079.) He was not wearing any underwear. (13 RT 4067.) This was despite the fact that it was cold and breezy and had been raining on and off all morning. (*Ibid.*) He had tattoos on his upper body, arms, chest and back. (13 RT 4054.) Harris told his partner they were going to get appellant on board where appellant was handcuffed. (*Ibid.*) At no point did appellant ask for help.

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[9] Exhibit 74A is a photograph showing appellant's truck after appellant was apprehended. (13 RT 4089-4090.)

[10] The motor of the boat was loud enough so appellant could hear it prior to Harris making eye contact with him. (13 RT 4053-4054.)

(*Ibid.*) The truck was obviously in a perilous position under the circumstances with the river rising and the bad weather. (*Ibid.*) Appellant was not enthusiastic at all about the sheriff being there. (13 RT 4062.) This caught Harris' attention because appellant was clearly in a state of peril with his truck being stuck and the river rising. (13 RT 4062-4063.) Harris did not recall testifying that at one point, when Harris got close to the bank where appellant was standing, appellant asked for help in getting his truck out. (13 RT 4064, 4072.)

Once the officers had appellant handcuffed and seated in the boat, appellant mildly asked what was going on. (13 RT 4072.) Harris asked his name. (13 RT 4063.) Appellant responded, "Bob." (*Ibid.*) Harris asked for his complete name, and appellant said "Bob Rhoades." (*Ibid.*) Harris asked appellant what he was doing there, and appellant responded that he was there for a couple of days fishing. (13 RT 4073, 4079.) Harris asked if appellant was on probation or parole, and appellant said parole. (13 RT 4063.) Harris asked appellant what he was on parole for, and appellant said drugs. (*Ibid.*) He also stated robbery and kidnapping. (13 RT 4074.) Appellant did not tell Harris he was on parole for child molestation or for forcible oral copulation. (13 RT 4063-4064.) Harris gave dispatch the license plate number of the pickup, 3NFG240. (13 RT 4065-4066.) Harris told appellant that he was in proximity to a major crime scene and that due to his parole status and proximity to the crime scene they were going to detain him and question him. (13 RT 4066.) Appellant asked what was going to happen to his pickup. (13 RT 4071.) Appellant asked several times about his truck; he was very concerned about it. (13 RT 4073.)

After going upstream to speak with Deputy Porter, the officers then proceeded with the boat north, back to the Yuba City boat ramp. (13 RT 4064, 4080.) They passed by the area where Sanbrook was with Michael Lyons' body. (*Ibid.*) By that time there were several people there in white-

colored overalls. (13 RT 4065.) It was very visible at that time that people were out there. (13 RT 4080.) Appellant just sat there staring straight ahead. (*Ibid.*) He did not look over towards the shore. (*Ibid.*) At the boat ramp, appellant was placed in a patrol car and taken away.[11] (*Ibid.*)

On May 16, Sergeant Michael Johnson retrieved appellant's pants and bagged them as evidence. (14 RT 4391-4392.) When appellant took off his pants, Johnson saw that appellant was not wearing any other garment other than the pants. (14 RT 4392.)

Todd Drost of the FBI Evidence Response Team arrived at the area where Michael Lyons' body was found, and the Yuba City Police Department turned control of the crime scene over to the FBI. (14 RT 4201-4203.) There was a problem getting down to the area of the body, and the Evidence Response Team's van became stuck trying to get to the area of the body and had to be pushed out by several people from the team.[12] (14 RT 4468.) Wearing Tivex suits, the FBI drove in as far as they could and then walked in about a quarter mile to the location of the body.[13] (14 RT 4203-4204.) It was tough-going as the terrain was wet and hilly with a lot of branches and areas of deep water. (14 RT 4204.) After setting up an outer perimeter, photographs were taken. (14 RT 4205, 4238.) Michael Lyons' body was located about ten to fifteen feet from the river. (14 RT 4210.) Between the river and Michael's body was a blood-stained blanket, later identified by appellant's wife to be one that was they used for camping. The blanket was usually kept in the back of appellant's truck.

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[11] Exhibit 76 was a television clip of appellant which was shown to the jury. (13 RT 4068-4069.)

[12] Green testified that he was never able to get a vehicle into the place where Michael Lyons' body was found. (14 RT 4486.)

[13] The Tivex suits cover the investigators and prevent the transfer of evidence between the crime scene and investigators. (14 RT 4204.)

(14 RT 4210, 4216-4217, 4251, 4254; 50 CT 14797-14798.) Underneath Michael Lyons' body law enforcement found a silver bracelet. (14 RT 4213, 4215; 49 CT 14643; 50 CT 14795-14796.) The bracelet was also identified by appellant's wife as one she had found in appellant's truck two days before the murder.[14] (14 RT 4252-4253.) Footprints were found in the dirt and sand next to the river starting about 12 to 15 feet from Michael Lyons' body. (14 RT 4219, 4239-4245;49 CT 14641.) The footprints indicated the person was heading south towards the river. (14 RT 4244.) The FBI made castings of the footprints. (14 RT 4219-4220, 4242.)

Sergeant Claudie Brookman drove to the staging area and from there was led in to view appellant's truck which was stuck in the mud. (13 RT 4118-4119.) The truck was located between one-third and one-half a mile from the location of Michael Lyons' body.[15] (13 RT 4180-4181.) The back wheels of the truck were in about four to six inches of water. (13 RT 4123.) The driver's side window was open. (13 RT 4125-4126.) The tailgate of the bed was open, and there was a camper shell on top of the vehicle. (13 RT 4119.) A portable come-along cable had been wrapped

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[14] On May 20, 1996, Lynette Rhoades (Lynette), appellant's wife, identified the blanket as one usually found in the back of appellant's pickup. (14 RT 4251, 4254.) They had used it on numerous occasions during camping. (*Ibid.*) Lynette also told law enforcement that she had seen the bracelet in appellant's pickup two days prior to Michael Lyons' disappearance. (14 RT 4252.) She had been washing the truck and found the bracelet underneath the driver's seat. (*Ibid.*) She placed it on the dashboard of the truck when she left. (14 RT 4253.)

[15] Brookman took photographs from the air of the river, Exhibits 78A through 78I. (13 RT 4143.) Exhibit 78D depicts the lagoon. (13 RT 4146-4147; 50 CT 14782.) The aerial pictures shown to the jury were taken a month after the murder, and the river was much lower in the pictures than it was on May 17. (13 RT 4177-4178.) Exhibit 79 was a videotape of the area. (13 RT 4150.)

around the rear axle of the vehicle and then wrapped around a tree that had been laid crossways between two other trees. (13 RT 4119-4120.) Lying on the open tailgate was a fish filet knife with a thin, seven-inch blade with a serrated edge. (13 RT 4120, 4130; 50 CT 14788.) The knife was dirty.[16] (13 RT 4176.) Another knife, this one with a folding blade, was found on the front passenger seat of the vehicle.[17] (13 RT 4126, 4129.) A pair of men's underwear was on the driver's side floorboard. (13 RT 4126.) A couple of tool boxes were behind the passenger seat. (13 RT 4127-4128.)

Green retrieved a strap that was located at the right rear bumper of the appellant's truck. (*Ibid.*) The strap matched another portion of strap lying on the tailgate next to the knife. (15 RT 4661.)

In order to extricate appellant's truck from the river bottoms, law enforcement tried to use a four-wheel-drive tractor after being told by a tow truck driver that the tow truck could not pull out appellant's pickup without getting stuck. (13 RT 4134-4135.) The tractor eventually became stuck also. (13 RT 4090, 4135.) A larger tractor was then brought in and law enforcement was able to pull appellant's truck out of the mud at about 5:30 p.m. (13 RT 4136.) The pickup was taken to the Yuba City Police Department and placed in a secured garage. (13 RT 4136-4137.)

d. Autopsy Results

Dr. James Dibdin performed an autopsy on Michael Lyons. (14 RT 4256-4258.) The boy had suffered many stab wounds, several of which would have been deadly in and of themselves. (14 RT 4265.) One of these was a deep, ragged-edged cut from a knife on the left side of his neck

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[16] Exhibit 80-G, a photograph depicting the knife as it was found, was shown to the jury. (13 RT 4121-4122.) Item number 23, the knife itself, was identified by Brookman. (13 RT 4124.)

[17] The folding knife was depicted in a photograph at Exhibit 49. (13 RT 4129.)

extending from just below his ear across the front of his neck to just past the midline. (14 RT 4260-4265; 49 CT 14678; 50 CT 14706, 14737.) It was a deep cut which cut through muscle, veins, the carotid artery, and finished by actually cutting right into the bone on the spine. (14 RT 4261.) The cut was inflicted while Michael Lyons' head was turned sharply to the right and as a result the airway was not severed. (*Ibid.*) The cut started at the back and traveled to the front. (14 RT 4263.) The wound continued on across the body of Michael Lyons' striking him on the front of the right shoulder. (14 RT 4263-4264.) Dibdin explained that the cut was actually two cuts inflicted one on top of the other. (14 RT 4264-4265.) This cut would have resulted in very severe hemorrhaging, killing the boy. (14 RT 4265.)

Michael Lyons also suffered a knife wound on the right side of his neck. (14 RT 4265; 50 CT 14737.) This one extended from behind the right ear down to the front of the neck. (14 RT 4265-4266; 50 CT 14722.) It was a half an inch deep and cut into muscle but did not cut any major blood vessels. (14 RT 4267.) Although this wound would not ordinarily be a deadly wound, it would have been painful, and Dibdin explained that the cut was inflicted from front to back. (14 RT 4266-4267.)

Another deadly stab wound which would have killed the boy was inflicted on the left-hand side of Michael Lyons' chest. (14 RT 4267-4276.) It was five-eighths of an inch in length and three inches deep with a blunt angle at the top and a sharp angle at the bottom indicating it was caused by a single-edged knife. (14 RT 4268-4270; 50 CT 14725.) The knife had been twisted slightly. (14 RT 4275.) The wound completely cut through the fourth rib and caused injury to the upper lobe of the left lung and hilum, which is the portion of the lung next to the center of the chest. (14 RT 4274-4277; 50 CT 14711, 14713.) Appellant's fillet knife (Exhibit 23) could have caused this wound. (14 RT 4274.)

Another wound was inflicted in the upper part of the abdomen, just below the rib cage, on the left side. (14 RT 4276-4277; 50 CT 14712, 14715.) It was about a half an inch in length and once again the knife had been twisted. (*Ibid.*) It entered the body causing injury to the muscles and actually came out of the back of Michael Lyons' body. (*Ibid.*) This stab wound would have caused death in and of itself. (14 RT 4277.)

Michael Lyons had defensive wounds on both of his hands. (14 RT 4278-4279; 49 CT 14677; 50 CT 14730, 14733.) Michael had put his hands in front of the knife and tried to grab the knife in an attempt to defend himself, causing cuts to his palm, fingers and wrists. (*Ibid.*)

Michael Lyons had multiple lacerations to his anus, the largest and longest being one inch. (14 RT 4280-4281; 50 CT 14714, 14718, 14719.) There was tremendous amount of hemorrhage inside the pelvis associated with the lacerations. (*Ibid.*) There were bruises and abrasions on his buttocks right next to the anus, one abrasion being two by three inches. (14 RT 4281.) The bleeding and tearing to Michael's anus were caused by a penis being inserted into the anus during the course of forceful sodomy. (*Ibid.*) The bruises and abrasions on his buttocks were caused the attacker's groin striking Michael Lyon on the buttocks. (*Ibid.*) This forceful sodomy was performed at or about the time Michael died. (14 RT 4281-4282.)

Michael sustained bruising on the inside of his lips suggested to Dibdin that it was caused by a penis being forcefully pushed into the child's mouth. (14 RT 4282-4283; 50 CT 14729.) Dibdin explained that the possibility that it could have been caused by someone forcefully placing a hand over the child's mouth was not excluded. (*Ibid.*) It could also have been caused by both actions. (*Ibid.*)

There were eight very shallow "jabbing" stab wounds to the right-hand side of Michael's neck, just below his chin. (14 RT 4283-4284; 50

CT 14722.) These were not deadly wounds, but would be painful as they were caused by the tip of a knife being repeatedly jabbed underneath Michael's chin. (14 RT 4284-4285.)

Michael also had three pairs of straight lines, abrasions, on his nose and just to the right of his eye as a result of someone scraping a serrated knife across the skin on his face. (14 RT 4285; 49 CT 14693, 14696.) Similar to the injuries on Michael's face, there were abrasions which were parallel lines across the skin on both of his thighs and buttocks caused by someone scraping a knife across his skin in those areas. (14 RT 4285-4286; 49 CT 14675-14676, 14682-14683, 14695, 14699; 50 CT 14702, 14710.) All of these injuries would have been painful. (*Ibid.*)

He also had four stab wounds on the right side of his hip and on the back of the right buttock. (14 RT 4288.) One was three and a half inches deep going straightforward across his hip and showed a slight twisting of the knife in the skin. (*Ibid.*) Another was three-quarters of an inch deep. (*Ibid.*) These stab wounds would not have been deadly in and of themselves. (14 RT 4289.) Another stab wounds was in the front of the right hip and a half-inch deep. (14 RT 4289.) The final wound was in the back of the right buttock and was only half and inch deep. (14 RT 4289.) These cuts would also have been painful. (14 RT 4290.) Michael Lyons also sustained some abrasions and contusions to the lower part of the left thigh and left knee. (14 RT 4290.) They were scraping from a blunt instrument. (*Ibid.*)

Dibdin's opinion as to the cause of death was due to multiple stab and incised wounds (meanings stabs and cuts). (14 RT 4291, 4294.) Other significant conditions that contributed to his death were anal penetration

and repetitive minor injuries.[18] (*Ibid.*) Dibdin estimated that the injuries were inflicted over a period of thirty minutes to an hour, and all were inflicted before Michael died. (*Ibid.*) There was no way to determine the order the injuries were inflicted. (*Ibid.*)

The injuries to Michael Lyons did not appear to have been inflicted in a random or frenzied manner. (14 RT 4292.) Dibdin explained:

> Well, I've done, had quite a lot of experience of doing autopsies in cases involving sexual assault. And, very often, these cases involve people who have thought for quite some time about committing a sexual assault. And some have a definite idea in their head as to what they want to do, whether they want to commit that type of assault, what type of injuries they want to inflict . . .
>
> And have thought a lot about what type of injuries they want to inflict so when they get control of a victim, they inflict these injuries in quite a deliberate manner to deliberate areas of the body.
>
> In this particular case, you can see this child's injuries concentrated around his buttocks and thighs, someone scraping a serrated knife there. He has injuries to his face for someone scraping serrated knife along his face. There is evidence he's been sexually assaulted in the region of his anus and buttocks, evidence of sodomy which is where these serrated injuries are. There's evidence he has been forced to engage in oral copulation and more serrated injuries on his face. So this suggests the individual is targeting the areas which he is sexually assaulting, these, scraping a knife across these areas (indicating).

(14 RT 4293-4294.)

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[18] During the penalty phase, Dibdin elaborated that it was possible that even without the stab wounds, the injuries to Michael Lyons' anus and remaining minor injuries may have been sufficient to kill the boy. (32 RT 9788.)

Dibdin estimated that the time of death was sometime between 4:00 p.m. on May 16 and 4:00 a.m. on May 17, although he emphasized that this was not an entirely reliable estimate. (14 RT 4298.)

The pattern of the serrations on the knife used to cut Michael Lyons was in pairs. (14 RT 4299.) Dibdin opined that the pattern of serrations on appellant's fillet knife was not consistent with the pattern of serrations on Michael Lyons' body. (14 RT 4303.) Dibdin took samples of Michael Lyons' blood as well as rectal samples. (14 RT 4304-4305.)

e. Forensic Evidence

On May 18, the FBI examined and searched appellant's pickup truck which was being held in a locked and secured garage by the Yuba City Police Department. (14 RT 4221.) Evidence was collected and fingerprinting done. (14 RT 4223.)

An examination of appellant's white, muddy truck took place in a locked area of the Yuba City Police Department. (14 RT 4399, 4401; 50 CT 14769.) The interior and the exterior of the vehicle were photographed.[19] (14 RT 4400.) In between the two front seats was a blue sleeping bag. (14 RT 4400-4401.) In the bed of the pickup truck, underneath the camper shell, was a dark-colored, striped shirt. (14 RT 4401; 50 CT 14770.) On the front passenger floorboard were a pair of socks, a pair of white, slip-on shoes, and other miscellaneous items. (14 RT 4402-4403; 50 CT 14772.) On the floorboard in front of the driver's seat, investigators found a pair of underwear crumpled up with leaves and a small syringe containing a trace amount of liquid methamphetamine and a needle. (14 RT 4405-4406; 15 RT 4540, 4691-4692; 50 CT 14773-14774.)

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[19] There were miscellaneous items located inside the truck which were photographed but not seized or placed into evidence. (14 RT 4402; 50 CT 14771.)

Wedged on the inside of the passenger seat was .33 grams of methamphetamine, a usable amount, wrapped in foil and toilet paper. (14 RT 4413; 15 RT 4538-4540, 4690-4692.)

Investigators found a knife sheath directly behind the driver's seat. (14 RT 4408; 50 CT 14775.) There was a stone used for sharpening knives located on the floor of the driver's side. (14 RT 4413-4414.) An exacto knife was found behind the driver's seat. (14 RT 4414.) On the floor behind the passenger seat was another knife with a razor type blade which was retractable. (14 RT 4414.) Surgical tubing was found draped through the passenger side seatbelt buckle. (14 RT 4414-4415; 50 CT 14791.)

In the glove compartment was appellant's wallet containing one hundred and one dollars and various cards. (14 RT 4409-4411.) Also in the glove box were miscellaneous paperwork in appellant's name and a Sears coupon for a free tire rotation, wheel balance, and alignment check which expired May 31, 1996. (14 RT 4412-4413, 4496-4497; 50 CT 14754.) There was also loose money in the amount of $25.01 and bank receipts. (14 RT 4411.)

The FBI then conducted other evidence tests of the inside of the vehicle including using alternate light sources to find hairs and fibers and fingerprinting. (14 RT 4416.) Michael Lyons' footprints were found on the inside windshield of the truck on the passenger side. (14 RT 4416, 4428, 4433-4438; 50 CT 14843.) Fingerprints were found on the inside of the windshield of the vehicle on the passenger side but they were not able to be identified as being from appellant or Michael Lyons.[20] (14 RT 4416.) Pubic hair was also found in the vehicle, on the headrest of the vehicle, and

[20] The fingerprints were also compared with the prints of Bobbie Lemmons and James Hickman, and there was no match. (14 RT 4442-4445.)

on the blanket, and appellant could not be excluded as the source of these hairs. (15 RT 4584, 4589.)

A criminalist examining the fillet knife (Exhibit 23) found blood had collected in the corners of the knife where the blade meets the handle.[21] (15 RT 4504.) The blood was found underneath sandy soil the consistency of silt and containing niccolite particles which are found at river bottoms. (15 RT 4504, 4596-4597.) This indicated that the knife had been at or around the area of the river. (*Ibid.*) The blood was tested at the Department of Justice where a full DNA profile was obtained.[22] (15 RT 4505, 4616.) Appellant was eliminated as a source of the blood on the knife, however, Michael Lyons could not be eliminated as being the source of the blood. (15 RT 4617.) Appellant's fingerprint was found on the knife. (14 RT 4438-4441, 4448-4449; 15 RT 4504.)

The rectal swabs and smear taken from Michael Lyons tested positive for the presence of semen. (15 RT 4500-4502.) The oral swabs taken from Michael Lyons did not have semen as is the result of most oral swabs which are tested. (14 RT 4502-4503.)

Michael Lyons pants were fairly clean. (15 RT 4586-4587.) His sweatshirt was a dark green pullover type sweater and was ripped down the front but not completely ripped open. (15 RT 4515-4516, 4584; 50 CT 14743.) The sweater had a lot of dirt and vegetation matter on it. (15 RT 4586-4587.) There were copious amounts of blood on the upper area of the

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[21] The blood was located in the corners of the knife making it difficult to see until the knife was examined under a microscope. (14 RT 4504.) A chemical test confirmed that it was blood. (15 RT 4505.)

[22] Niki Duda Shea, a criminalist at the Berkeley DNA lab for the Department of Justice who specialized in DNA analysis, testified that the DNA testing done in this case was PCR analysis, Polymerase Chain Reaction. (15 RT 4599-4600, 4610.) Shea had a reference sample from appellant and a reference sample from Michael Lyons. (15 RT 4614.)

sweater. (*Ibid.*) A total of five pubic hairs were found on Michael Lyons' clothing. (15 RT 4528.) Four pubic hairs were found on the sweater: two on the back, one on the front left sleeve, and one on the back of the left sleeve. (15 RT 4517, 4527; 50 CT 14744.) One pubic hair found on the inside on the back portion of the boy's batman tee shirt. (15 RT 4527; 50 CT 14745.) Children do not form pubic hairs until they reach the age of puberty at about 13 or so. (15 RT 4527-4528.)

The pubic hairs were compared to the pubic hairs taken from appellant's pubic region. (15 RT 4528.) Based on the hair characteristics of the five pubic hairs found on the sweater and shirt, those pubic hairs could have come from the pubic region of appellant. (15 RT 4530.) They were consistent in their range of color, shape, and internal structure. (15 RT 4530-4531.)

When a pubic combing of appellant was conducted, the criminalist found in appellant's pubic region silty material with niccolite particles found in the river bottom. (15 RT 4532.) The combing also produced a small green polyester fiber which was then compared to the fiber standards taken from Michael Lyons' sweater. (15 RT 4532.) The criminalist determined that the fiber found in appellant's pubic region could have come from Michael Lyons' sweater. (15 RT 4534, 4544-4545.) The fibers were indistinguishable, and were the same in color, shape, diameter, internal structure, and fiber type. (*Ibid.*) Finding a fiber in a victim's or suspect's pubic region which relates back to the other person's clothes is very significant. (15 RT 4537.) Appellant's shirt (Exhibit 27) was cotton and therefore could not have been the origin of the green polyester fiber found in appellant's pubic region. (15 RT 4595.)

A sexual assault examination was performed on appellant on May 18 at 1:00 a.m. (14 RT 4311.) The examiner collected hair from his head, body and public region as well as oral and penile swabs and a blood

sample. (14 RT 4312-4313-4315.) Testing of appellant's blood showed that it contained methamphetamine. (15 RT 4691.) A Woods Lamp was used which illuminates any dried stains, fibers or new bruises. (14 RT 4313.) The Lamp illuminated an area on appellant's penis. (*Ibid.*) He had generalized dirt throughout his body. (14 RT 4312.) There was a linear abrasion on the left inner arm and three linear abrasions on his ventral hip and left outer hip in the area of the buttocks. (14 RT 4315.) The abrasions on the ventral hip appeared to be finger-type scratches. (14 RT 4316.) There were four linear abrasions on the outer hip which did not appear to be from fingers and appeared to be recent. (14 RT 4316.) On the right inner thigh were reddish grazed areas. (*Ibid.*) There were scattered grains of dirt in the pubic region. (*Ibid.*)

Appellant's underwear was tested and found to have blood on the front portion of the briefs although the blood was very diluted. (14 RT 4406; 15 RT 4506, 4625.) The blood appeared to have been rinsed out. (15 RT 4507.)

Appellant's short-sleeved shirt was covered in blood. (15 RT 4507, 4509-4512.) It also appeared to be somewhat rinsed out. (50 CT 14741.) Most of the blood was found on the left shoulder and arm of the shirt as well as on the upper back of the shirt from the left shoulder down to the right arm pit. (15 RT 4512; 50 CT 14741.) The lower right hand side of the back of the shirt had a heavier amount of blood. (15 RT 4512.) Some of the material from the shirt was sent to the DNA lab in Berkeley. (15 RT 4507.) The shirt tested positive for blood but it was very diluted. (15 RT 4623.) The criminalist could not definitely say that it was blood. (15 RT 4623.) The DNA she obtained from the shirt could have been extracted from something other than the diluted blood, such as skin cells that had attached to the fabric. (15 RT 4628-4629.) Michael Lyons was excluded as being the source of the stain, but appellant could not be excluded. (15

RT 4623-4624.) There was blood found on various areas of appellant's jean with a heavier amount of blood on the rear right leg and on the front thigh area. (15 RT 4513-4515; 50 CT 14742.)

The criminalist took impressions and casts of appellant's feet which were compared to the three casts of foot impressions taken by the FBI from the crime scene and to photographs of the foot impressions at the crime scene. (15 RT 4545-4549.) The foot impressions at the crime scene matched appellant's feet in length, width, shape, dimension, and other idiosyncrasies specific to appellant. (15 RT 4551-4555.) Appellant could not be excluded as the source of the foot impressions. (15 RT 4557.)

Michael Lyons' shirt and sweatshirt had cuts that correlated with the stab wound to Michael Lyons' chest. (14 RT 4472-4474.) The zipper on the sweatshirt had been ripped or cut all the way down to the bottom elastic area of the sweatshirt. (14 RT 4474-4475.) The blanket found near Michael's body contained copious amounts of blood which pooled on the blanket and appeared to change direction, meaning the blanket was at an angle when the blood hit it or the blanket was moved after the blood landed on it. (15 RT 4540-4544; 50 CT 14746-14753.)

f. Appellant's Involvement

Appellant was born September 11, 1952. (14 RT 4410.) Boyd Rhoades, appellant's father, owned a barber shop called King's Men located at 1016 Lincoln Road in Yuba City. (12 RT 3750-3751, 3758.) Appellant, a parolee, was a full-time employee there and was working on May 16. (12 RT 3753, 3758-3759.) Business was slow that morning, and at about 11:00 a.m., appellant told Boyd that he was going to take his truck to Sears for a realignment. (12 RT 3754.) At about 1:00 p.m., appellant

called Boyd and told him that his truck was not finished yet.[23] (12 RT 3754-3755, 3764.) Appellant said he would come back into the barber shop when the truck was done.[24] (*Ibid.*) Boyd told appellant to come in quickly, as soon as the truck was finished. (*Ibid.*) On cross-examination, however, Boyd testified that business was slow and he probably told appellant there was no reason to return. (12 RT 3764.)

Boyd's barber shop was open the following day, Friday, May 17. (12 RT 3768.) Boyd did not know where appellant was, but it was a regularly-scheduled work day for appellant. (12 RT 3768-3769.) Boyd did not hear from appellant until he called Boyd the following day from jail. (12 RT 3755.) Appellant said he had been down at the river bottoms. (12 RT 3756.) He told Boyd that he was being held on a parole violation but that he did not know why he had been arrested. (12 RT 3764-3765.)

On Saturday, May 18, Boyd provided a statement to police. (12 RT 3757-3758.) When Boyd talked to the police, he did not tell them that appellant got stuck in the river bottoms all the time. (*Ibid.*) Boyd said that his cousin helped appellant one time, but Boyd would not identify the name of his cousin to police. (12 RT 3768.) Boyd did not want to tell them. (*Ibid.*)

Appellant went to the river bottoms a lot. (12 RT 3756.) Appellant had acquaintances who also went to the river bottoms. (*Ibid.*) Appellant

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[23] Boyd told police that appellant called between 1:30 p.m. and 2:00 p.m. (12 RT 3768.)

[24] The parties stipulated that Sears Automotive Service Department in Yuba City had no records showing that automotive services were provided to appellant on May 16, 1996. (12 RT 3771.) The Sears records do not contain a coupon presented by appellant on that date. (*Ibid.*) Had appellant's truck received services, the Sears records would reflect a work order and the coupon would be lodged in the file. (*Ibid.*)

had gotten his truck stuck before. (*Ibid.*) One time appellant asked Boyd for assistance when the car's battery was dead but that was not at the river bottoms. (12 RT 3756, 3763.) Boyd had never helped appellant get his truck out of the river bottoms, and if the police report said that Boyd would help appellant, that would not be accurate. (12 RT 3766.)

Boyd did not approve of appellant playing cards. (12 RT 3760.) Boyd insisted that appellant maintain a clean appearance and kept a clean appearance himself. (12 RT 3759.) Appellant rented a chair from Boyd. (*Ibid.*) Boyd had a lot of bills coming due the week after appellant was arrested. (*Ibid.*) If appellant had taken customers, it would have cut into Boyd's income. (*Ibid.*) Appellant would let Boyd take customers when Boyd had bills piling up. (12 RT 3760.) On May 16, Boyd told appellant that he had some outstanding bills pending, and appellant took the opportunity to do whatever he wanted to do. (*Ibid.*)

Boyd had been to the river bottoms with appellant often to fish. (12 RT 3763, 3769.) He recognized People Exhibit 23 as the filet knife he and appellant used when they went fishing. (12 RT 3769-3770.)

Rooney's Card Room is located at 505 4th Street in Marysville. (12 RT 3776.) Rooney's was running a promotion in which the house would double a player's money to put down so long as the player played cards for at least two hours. (12 RT 3777.) If the person was winning and left prior to the expiration of the two hours, the player would forfeit the money the house gave him. (12 RT 3777-3778.)

Records showed that on May 16, appellant played a game beginning at 1:00 p.m. which made him eligible to leave at 3:00 p.m. without forfeiting the house money. (12 RT 3780, 3784.) At 2:15 p.m., appellant wanted to leave the game because he was winning. (12 RT 3780-3781.) Miguel Castellanos, a manager at Rooney's, told appellant that the time was not up yet and he would not be allowed to leave without forfeiting the

house share of his money. (12 RT 3781-3782.) Appellant returned to his seat. (12 RT 3782.) Appellant left the card room at 3:15 p.m. (12 RT 3782, 3784.) The next person sat down at 3:20 p.m. (12 RT 3784.)

When Castellanos was interviewed by prosecution investigator Vicki Van Natta, he told her that appellant left Rooney's sometime between 3:00 and 3:15 p.m. (12 RT 3783.) Castellanos told Van Natta he could not be exactly sure until he looked at his list. (*Ibid.*)

Valerie LaFontsee was a dealer at Rooney's who knew appellant. (12 RT 3791.) She started dealing on May 16 at 1:00 p.m. (12 RT 3791-3793.) Appellant tipped LaFontsee quite a few times while he was playing. (12 RT 3798.) At 3:00 p.m., LaFontsee began a half-hour break during which time appellant left the cardroom. (*Ibid.*) Appellant got up and left as LaFontsee was sitting there. (*Ibid.*) It was about 3:15 p.m. (*Ibid.*)

On May 20, LaFontsee talked to police. (12 RT 3800.) She was tipped $50 total from different players. (12 RT 3802.) She told police it was between 3:00 and 3:30 when appellant left. (*Ibid.*) Appellant was going to leave earlier but then he talked to the manager and sat back down. (12 RT 3803.) It was crowded and someone was waiting for his seat. (12 RT 3804.) LaFontsee remembered a Mexican guy called Cresent who took appellant's spot. (*Ibid.*)

Zepor Thao worked at Rooney's and began dealing at 2:00 p.m. on May 16. (12 RT 3812.) Appellant was playing in the card game. (12 RT 3814.) At 2:30 p.m., Thao left Rooney's to pick up his children from school at Cedar Lane which is two miles away. (*Ibid.*) Thao picked them up, dropped them off at home, and returned to work. (*Ibid.*) He did not remember if appellant was still there when he returned at 3:00 p.m. (12 RT 3815.) When he was interviewed by Van Natta, however, Thao told her that when he returned around 3:00 p.m. to Rooney's, appellant was already gone. (12 RT 3822.)

Ed Gordon was at Rooney's playing in the card game that afternoon. (12 RT 3827-3828.) Gordon started playing at 1:00 p.m. with appellant. (*Ibid.*) Appellant left at 3:15 p.m. or 3:17 p.m. (12 RT 3828.) Gordon knew this because both appellant and the clock were directly in Gordon's line of sight and Gordon was envious of the fact that appellant was winning. (12 RT 3829.) Appellant was in a good mood and had been winning. (12 RT 3828-3829.) Gordon got the idea that appellant was going to meet someone to go fishing. (12 RT 3828.) Appellant was in a hurry. (12 RT 3828-3829.) He stopped by the door just long enough to tell the other players that he was going leaving; he said, "I gotta get." (12 RT 3829.)

Green twice timed the drive from Rooney's Card Room to the intersection of C and Boyd Streets. (14 RT 4477.) It took him three minutes and forty-five seconds the first time and three minutes thirty-five seconds the second time. (14 RT 4478.) The first trip included a stop at a traffic light, so if you hit all the traffic lights green you could do it even faster. (14 RT 4478.)

Pamela Lebhart was living on a houseboat on the river with her husband Joris Lebhart. (13 RT 3973.) Prior to May 16, their houseboat had been stationed on the Feather River right outside what people call the lagoon or pond. (*Ibid.*) On the day of May 16, the Lebharts moved their houseboat into the pond so that they were out of the flow of the river. (13 RT 3974.) On this day, the water had come up and was high. (*Ibid.*) After moving the houseboat into the lagoon, a large tree fell right onto the houseboat during the afternoon when the Lebharts were not on the boat. (13 RT 3974-3975.) When they returned to the houseboat at about 4:30 or 5:00 p.m., they discovered the tree lying across the houseboat. (13 RT 3975.) They were concerned because the water was rising and they had to get the tree off of the houseboat or it would sink. (*Ibid.*)

Lebhart was not really sure about the time, but at about 5:30 or 6:00 p.m., perhaps later, Benny Strickland and his wife arrived. (13 RT 3976.) At about dusk, approximately 7:30 or 8:00 p.m., other friends converged on the houseboat with a chainsaw, generator, and lights to help cut the tree off of the boat. (13 RT 3977-3978.) Some friends came by jet ski. (13 RT 3984-3985.) The chainsaw was very loud when used to cut up the tree. (13 RT 3978.) It took about 45 minutes to an hour to free the houseboat and then another 20 minutes to maneuver the houseboat to the mouth of the Feather River. (*Ibid.*) This whole process was finished after it was dark. (*Ibid.*) Lebhart was not sure of the time; she was not wearing a watch. (13 RT 3986.)

The next morning at about 11:00 a.m., the police came out to the houseboat, and Lebhart gave a report. (13 RT 3979, 3982-3983.) Lebhart provided a false name and told police her husband was not there when he really was. (13 RT 3983.) Lebhart did see lights on side of the river when they were moving the houseboat. (13 RT 3987.) The lights came from the Sutter County side. (*Ibid.*)

Benny Strickland was with his wife by the lagoon when he heard Joris Lebhart calling for help. (13 RT 3991-3992.) Joris explained what was going on, and Strickland left to go get help. (13 RT 3992-3993.) Strickland and his wife went to the shop of Randy Buetler in Linda. (13 RT 3993.) They loaded generators, chainsaws, floodlights and other equipment into Buetler's truck, and Strickland drove the truck to the mouth of the lagoon while Buetler and another friend took jet skis to the houseboat. (13 RT 3995.) They used a small rowboat to ferry the equipment to the houseboat, and then spent the next couple of hours cutting the tree off of the boat. (13 RT 3995-3996.) While working, at around 10:00 or 11:00 p.m., they noticed headlights as someone drove right up to the area of Beutler's truck. (13 RT 3996-3997, 4002-4003.) They became very

concerned because the truck had additional equipment in it and was unlocked. (13 RT 3996-3997, 4002.) Vandalism was common in the area. (13 RT 4002-4003.) One of the friends took a jet ski to the area to check on Beutler's truck. (*Ibid.*) After cutting the tree off of the houseboat, they moved the houseboat to the middle of the lagoon and close to the mouth of the lagoon. (13 RT 3997.)

After ferrying the equipment back to the truck, Strickland and his wife drove the truck back to the shop. (13 RT 4000-4001.) As they were leaving the lagoon, Strickland saw lights from a vehicle which seemed to be in a hurry and sounded like it was peeling out in the gravel area. (13 RT 4001-4002.) It sounded like it was a truck with a tool box and stuff in the back which was rattling around. (13 RT 4002.) They stopped and shut their truck off and just sat there for a minute. (*Ibid.*) The other vehicle disappeared to the south.[25] (*Ibid.*)

Randy Beutler explained that he was contacted by Strickland the evening of May 16. (13 RT 4005.) The storm had caused a tree to fall on the Lebharts' houseboat. (*Ibid.*) Beutler and a friend took their jet skis to the lagoon. (13 RT 4006.) It was already dark when they left for the houseboat, and they worked in the dark freeing the houseboat from the tree. (*Ibid.*) Beutler saw vehicle lights on the peninsula, and he pointed the area out as shown on Exhibit 69. (13 RT 4007; 50 CT 14760.) The vehicle drove about 100 yards in a southbound direction on the peninsula. (13 RT 4011-4013.) About 30 minutes later, Beutler noticed more vehicle lights on the other side of the mouth of the peninsula near Beutler's truck. (13 RT 4014-4015.) The vehicle seemed to stop by Beutler's truck, and Beutler wanted his friend to check out to make sure his truck was okay. (*Ibid.*)

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[25] Strickland identified the different points he had described in Exhibit 68. (50 CT 14759.)

Gary Long testified that when he was on the houseboat, at about 9:00 or 10:00 p.m., he saw headlights of a vehicle drive around the lagoon and in the area of Beutler's truck. (13 RT 4019-4024, 4027-4028; 50 CT 14761.) The vehicle drove by a monument which was located next to the lagoon. (13 RT 4024.) He heard the revving of an engine, and it sounded like the vehicle was stuck or was spinning out. (13 RT 4028-4030.)

Several people testified as to the conditions in the area of Halpern's Lagoon and Shanghai Bend. There were rough trails that went from the area near the lagoon south to Shanghai Bend. (14 RT 4469-4470.) Near Shanghai Bend one could gain access to the top of the levy. (14 RT 4470.)

Sheriff's Deputy Bruce Ramos testified that he was very familiar with the levies and somewhat familiar with the river bottoms which was a fairly dangerous place. (13 RT 4189, 4196.) The top of the levy is flat and could serve as a road although the public is not allowed to drive on top of the levy and there were gates along the levy to prevent the public from doing so. (13 RT 4190; 15 RT 4743-4744.) There were many trails near the Shanghai Bend area and a dirt trail leading up to the top of the levy. (13 RT 4190-4192.) It had been raining quite a bit prior to May 17, and the area was muddy making it difficult for a four-wheel drive vehicle to get up the side of the levy. (13 RT 4192-4194.) Bogue Road did not go all the way to the levy, but Shanghai Bend Road did. (13 RT 4197.) There were trails that went from over the levy out towards Bogue Road. (13 RT 4198.) It would be easier for a four-wheel-drive vehicle to get up onto the levy at about Bogue Road than to go down through the trails that border the river. (13 RT 4199.)

Janet Lemmons was married to Bobbie Lemmons, and they lived in a trailer at Mosquito Beach next to the lagoon in the Feather River bottoms. (14 RT 4362-4365.) On May 16, Janet Lemmons was out standing next to the trailer when she heard tires spinning as if someone was trying to back

up and get out. (17 RT 5273.) She could just barely hear it. (*Ibid.*) Her husband Bobbie Lemmons was with her. (17 RT 5274.) Lemmons had returned home about 5:30 p.m. and remained with her the entire evening. (17 RT 5277.)

The next day, Janet and Bobbie decided to take a walk. (14 RT 4363, 4368; 17 RT 5272.) Janet was looking for a pair of shoelaces. (*Ibid.*) They found a pair of white children's tennis shoes between the lagoon and the levy. (14 RT 4363-4364, 4367, 4370.) The first shoe was out in plain sight. (14 RT 4368.) Janet picked up one of the shoes and started to pull out the shoe lace when a woman, Sandy Friend, came up and asked Janet if she could look at the shoe. (14 RT 4363-4364, 4368; 17 RT 5273.) Janet handed Sandy the shoe. (14 RT 4369.) Bobbie then drove with Sandy to search around the lagoon which was heavily forested, and they found Michael Lyons' pants. (14 RT 4369.) Janet went back to the trailer as Bobbie and Sandy Friend searched more of the area. (14 RT 4360.) That morning they saw a lot of searchers in the area. (14 RT 4366.) Janet Lemmons explained that while she was testifying, sometimes the questions became confusing to her. (17 RT 5273.) She was very nervous and was receiving Social Security for a medical condition relating to her nervousness. (*Ibid.*)

Sandy Friend explained that on May 17, after her son's body had been found and after appellant's truck was pulled out of the river bottoms, she went with Linda Willis down to the river bottoms to pray for Michael. (14 RT 4375-4376.) She drove her sister's truck there, and at that point had no idea where her son's body had been found. (14 RT 4376.) She was going to the place where the truck had been located. (*Ibid.*) As she was driving to the area, she saw a couple of people and a woman was holding a shoe that caught her eye. (14 RT 4376.) The shoe looked very familiar because Michael had shoes like that. (14 RT 4376-4377.) The woman was taking

the shoe lace out of the shoe. (14 RT 4377.) Sandy contacted the woman and asked if she could have the shoe. (*Ibid.*) Sandy also recognized the shoe because she and Michael had picked them out together. (14 RT 4378.) Farther down a little embankment Sandy found the second shoe. (14 RT 4379.) Sandy then walked with Bobbie Lemmons down further and found Michael Lyons' pants. (14 RT 4380.) They were black, size eight, and Sandy Friend took them and turned them over to law enforcement. (12 RT 3700-3701; 14 RT 4381.)

Sandy Friend and Bobbie were walking pretty fast, and Linda was driving the truck behind them. (14 RT 4381.) She put the shoes and pants in the back of the truck. (14 RT 4381.) Sandy Friend turned the pants and shoes over to the police. (14 RT 4382-4384.) She then confirmed at home that Michael's black pants were not at home but his green pants were. (14 RT 4382-4384, 4397.) Johnson did not collect the green pants Sandy Friend found at home although he was aware that the initial description of Michael involved green pants. (14 RT 4397.) The black pants were damp when Michael Johnson first saw them. (14 RT 4396.) Johnson saw them in the back of the truck, and it had been raining outside. (14 RT 4397-4398.) Sandy Friend also showed the police the area in the river bottoms where she found these items of clothing. (14 RT 4393.) They had been found on a slope on the side of an embankment. (14 RT 4394.) If someone were driving south along the top of the embankment they would be on the left side of the vehicle, and the items would have been on the left side of the vehicle. (*Ibid.*)

On May 16, 1996, appellant was on parole. (15 RT 4635.) One of the terms of his parole is that he was forbidden to possess any type of weapon. (*Ibid.*) Specifically, appellant could not possess any knife with a blade longer than 2 inches. (15 RT 4637.)

In May of 1996, Camille Ottinger lived with her boyfriend, James Hickman, in the Feather River bottoms at Shanghai Bend.[26] (15 RT 4638-4639.) When they were living down in the river bottoms, she became acquainted with appellant when he wandered into their camp one day. (15 RT 4639-4640.) Appellant knew a lot of the people that Hickman and Ottinger knew, and both appellant and Hickman were Vietnam vets. (15 RT 4640.) Appellant introduced Ottinger to his wife, and later told Ottinger that he was having marital difficulties. (15 RT 4640-4641.)

On two occasions in April of 1996, appellant drove Ottinger and Hickman to his home in Sutter which is 15 to 20 miles west of Yuba City. (15 RT 4641, 4643.) They drove in appellant's four-by-four truck which Ottinger described as, "A beige color. Off white. Beige." (15 RT 4641.) Ottinger and Hickman stayed at appellant's home for quite a few days on the second trip. (*Ibid.*) Appellant's wife was not there on either occasion. (*Ibid.*)

The bracelet found underneath Michael Lyons' body belonged to Ottinger. (15 RT 4641-4642.) The last time she had the bracelet was when she put it in her bags at appellant's home. (15 RT 4642.) She later put her bags into the back of appellant's truck. (*Ibid.*) She did not see the bracelet again until investigators came out to her camp and asked her if she could identify it. (15 RT 4643-4644.)

James Hickman testified that he lived with Ottinger at Shanghai Bend. (15 RT 4650-4651.) About three other couples lived in that area of the river bottoms which was very heavily forested. (15 RT 4651-4652.) Hickman met appellant in April, 1996, when "he kind of just showed up out of nowhere, I guess, and introduced himself (sic)." (15 RT 4653.) As they talked, Hickman realized they had grown up in the same area and knew

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[26] Ottinger's maiden name was Verney. (15 RT 4638-4639.)

some of the same people. (*Ibid.*) Hickman and appellant got to be friends. (15 RT 4654.) Hickman and Ottinger visited appellant's home several times. (15 RT 4654.) They rode in appellant's truck on several different occasions. (15 RT 4657.) Hickman recalled appellant getting stuck down at the river one time, and Hickman assisted him in getting unstuck. (15 RT 4662-4663.)

Appellant's mother, June Rhoades, lived in Yuba City. (15 RT 4721.) During the spring of 1996 appellant's marriage was not going well, and appellant's wife Lynette spent some time in Stockton. (15 RT 4722-4723.) Appellant left June a voicemail on May 17, 1996, telling her that he was at Sutter County Jail and that he would call her later. (15 RT 4724.) Appellant did not ask her to try to get his truck. (*Ibid.*) Appellant called a second time the following day and this time when he talked to his mother he told her that he was there on a parole violation. (15 RT 4727.) He was very concerned about his truck and asked her to get his truck back from the police department. (15 RT 4727-4728.) Appellant told her he did not want to pay the storage fees. (*Ibid.*) He also said he had over $125 in the truck (15 RT 4729.) June also tried to retrieve personal items of appellant from the jail but the jail would not release his belongings. (15 RT 4729.) June once was instrumental in helping appellant get his truck unstuck from the river bottoms. (15 RT 4725.) She heard people laugh that appellant used to get stuck every time he went down to the river bottoms. (*Ibid.*) Green had been informed by June Rhoades that appellant was playing cards at Rooney's Card Room. (14 RT 4484.)

Carlton Dinwiddie was a deputy sheriff for the Sutter County Sheriff's Department. (15 RT 4759-4760.) On October 22, 1996, he was assigned to transporting appellant to the preliminary hearing. (15 RT 4760.) Immediately before a recess, the parties had been discussing the time of death for Michael Lyons. (15 RT 4761.) During the recess that

followed, Dinwiddie was guarding one of the doors to the jury room where appellant and his attorney and investigator were consulting. (15 RT 4760-4763.) As appellant stood up from the table, Dinwiddie heard him say, "I can give them a better time of death than what they have." (15 RT 4761.)

At appellant's trial, Michael Prodan was qualified as an expert in the field of crime scene analysis. (15 RT 4765-4766.) In this case, the crime scene was not altered by the perpetrator. (15 RT 4767-4768.) "Staging" is when an individual intentionally alters a crime scene to make the investigating officers think it is something else, such as making it appear the crime is related to a robbery, moving a weapon, or planting a weapon to make it appear there was a struggle or perhaps a suicide. (15 RT 4770-4771.) There was no evidence of staging in this case. (15 RT 4771-4772.) There was nothing at the crime scene to suggest that there was more than one person involved in the crime. (15 RT 4772.) There was positive evidence that only one person was involved. (15 RT 4773-4774.) Three types of injuries were found on the victim: defensive, nonlethal, and lethal injuries. (15 RT 4775.) The defensive injuries indicated that Michael Lyons was able to put up a minimal amount of resistance which was overcome. (*Ibid.*) The perpetrator then engaged in inflicting painstaking, methodical, nonlethal injuries, and then directed focused, direct, lethal injuries. (*Ibid.*)

Mike Green testified that there was a Quik-Stop store with a telephone booth on the corner of Burns and Garden Highway which was there in May of 1996. (15 RT 4732-4734.) There were new streets constructed in the area west of the levy but east of Garden Highway in the month after Michael Lyons' murder. (15 RT 4730-4736; 51 CT 15004.)

g. Bus Incident

Alicia Tapia and her two daughters were riding a bus on May 14, 1996. (15 RT 4667-4669.) Tapia rode the bus a lot. (*Ibid.*) Appellant got on at Clark and Washington with a big knife in a holster on his side. (15 RT 4668-4670, 4674.) The knife reached from appellant's waist to the middle of his thigh and was shaped like a machete. (15 RT 4670, 4675.) Appellant smelled bad and was wearing only blue jeans with no shirt. (15 RT 4674-4675.) He was not wearing any shoes or socks. (15 RT 4680.) As a figure of speech she later told police he looked like he had not taken a bath in two weeks. (15 RT 4675.) Tapia's daughters were scared as they had never seen anyone get on the bus with a weapon. (15 RT 4669.) Appellant was at the back of the bus talking to a black man who was also on the bus. (15 RT 4670-4671.) Tapia had seen the black man frequently on the bus. (15 RT 4671.)

Tapia spoke to the bus driver, Patsy Alvarado, in Spanish, asking her if she was allowed to let on appellant when he had such a big knife. (15 RT 4670, 4673, 4677.) Tapia spoke to Alvarado in both English and Spanish but asked her about the knife in Spanish. (15 RT 4678.) Appellant then yelled out that he only used the knife for hunting. (15 RT 4670-4671, 4678.) Tapia continued talking to the bus driver. (15 RT 4671.) The conversation between appellant and the black man grew heated but Tapia could not make out what they were talking about. (*Ibid.*) The black man also told Alvarado he had concerns about the knife. (15 RT 4677.) Alvarado told appellant he needed to change the conversation because it was upsetting the passengers. (15 RT 4673-4674.) Appellant got off the bus at Clark and Ainsley. (15 RT 4674.)

Tapia later saw a picture of appellant in the newspaper and recognized him as the person with the knife on the bus. (15 RT 4675-4676.) At trial, appellant appeared different than in the photograph and on the bus; he was

cleaner and was shaven. (15 RT 4676.) Tapia was serving time for child endangerment. (15 RT 4680.)

Kevin Buchanan got on a bus May 14. (15 RT 4693-4694.) A man got on the bus after him. (*Ibid.*) At first, Buchanan was not able to identify anyone in court as being the man on the bus. (15 RT 4694, 4701.) He did see the person on the bus on television being arrested at the river bottoms of the Feather River and went immediately down to the police station to report the incident on the bus. (15 RT 4694, 4703.) He described the man on the bus as having black hair and a sunken in face. (15 RT 4702.) He was kind of dirty and was wearing blue jeans, a brown jacket and old black shoes or boots. (*Ibid.*) During cross-examination, Buchanan noticed appellant sitting at the table in court based on his face structure. (15 RT 4704-4705.) Appellant was wearing glasses and did not have black hair, but Buchanan recognized him. (*Ibid.*)

Appellant had a serrated edged knife like a ginzu knife on the bus. (15 RT 4695.) Appellant sat close to Buchanan. (15 RT 4695-4696.) The bus was traveling up Plumas Street to Bridge when they saw a woman abusing her child. (15 RT 4696.) Buchanan said the woman was beating the kid like a dog and that is why kids grow up to abuse others. (15 RT 4696-4697.) Appellant agreed. (*Ibid.*) They talked further and then got into the topic of people who molest their kids. (*Ibid.*) Appellant said, "I know what you're talking about." (*Ibid.*) Buchanan said when kids get molested they grow up and molest other kids. (15 RT 4697.) Buchanan said, "I hate child molesters." (*Ibid.*) Appellant said, "I know what you're talking about, um, I just got out of prison for that." (15 RT 4697-4698.) Buchanan said, "Well, man, I don't like child molesters. Usually I just beat those people down." (15 RT 4698.) He asked appellant if he ever felt as though he would molest a child again. (*Ibid.*) Appellant said, "Yes." (*Ibid.*) Buchanan asked, "Well, what do you do?" (*Ibid.*) Appellant stated

that he worked at a barber shop and that when he felt like molesting a child he would leave the shop so he could get control of himself. (15 RT 4698.) Appellant pointed out his barber shop to Buchanan as being Lloyd's on Plumas Street. (15 RT 4705-4706.) The conversation became heated and they were going to fight on the bus. (15 RT 4698.) Buchanan was really mad and ready to fight. (15 RT 4708.) Buchanan asked appellant if he did it again whether he would threaten to kill his victim. (15 RT 4698.) Appellant said, "No, I'll kill them." (*Ibid.*) Buchanan asked, "Well how? Break their neck or threaten them?" (15 RT 4699.) Appellant responded no, and pulled out a knife and said, "I'll use this." (*Ibid.*) Buchanan asked why, and appellant said, "Because they make straight cuts. It's like a ginzu knife, they make straight, clean cuts. Not like other knives where they rip and cut. This makes a straight, precision cut." (*Ibid.*)

Then they started talking about molestation again. (15 RT 4699.) Buchanan asked appellant, "Well, where would you dump the body, the dumpster or something?" (*Ibid.*) Appellant said, "No, the river bottoms, down at Mosquito Beach. Nobody goes down there, they'd never find the kid." (*Ibid.*) Appellant said there would be no one around to hear any screams. (15 RT 4718.)

Buchanan explained that the Mexican lady was also on the bus with her two children. (15 RT 4699-4700, 4710.) Although he could not remember her name, he was familiar with her because the rode the same route on the bus and had talked about how Yuba City used to be fun but had turned into a dirt hole. (15 RT 4701-4702.) The lady told the men to change the subject because they were scaring the children. (*Ibid.*) An older lady talked to the bus driver and asked the driver to tell the men to talk about something else. (15 RT 4700.) Buchanan identified the serrated knife found on the tailgate of appellant's truck as the same type of knife appellant pulled out on the bus. (15 RT 4700-4702; 50 CT 14788, 14794.)

Buchanan was shown pictures of appellant's knife on May 24, 1996 when he spoke with Detective Green. (15 RT 4701-4702.)

Buchanan denied that appellant was doing anything crazy like waving the knife around or stabbing the roof, but appellant did take out the knife. (15 RT 4708-4709.) Buchanan initially did not remember where appellant got off the bus but then stated that he was dropped off by the Town Pump Bar. (15 RT 4711-4712.) Buchanan saw him one other time when appellant was dirty. (15 RT 4712.) Buchanan was not sure whether Lloyd's Barber Shop and the Town Pump were next to each other. (15 RT 4713.) Buchanan thought he got off the bus by the Town Pump and by Bridge Street School. (15 RT 4716.) He remembered appellant saying he had to leave Lloyd's Barber Shop when he could not deal with the kids getting haircuts and would go to the Town Pump Bar next door to cool off. (15 RT 4717-4718.) Appellant would lose control and leave or just go for a walk. (15 RT 4718.)

h. Appellant's Prior Sex Crimes

Crystal T. was nine years old at the time of trial. (15 RT 4787.) In January, 1993, when she was four years old, she lived with her mother and brother in Pine Grove. (15 RT 4787, 4790-4791.) Crystal's grandmother lived in a trailer near the house along with her husband, appellant, whom Crystal called "Grandpa." (15 RT 4787-4788.) One morning appellant had Crystal come to his trailer. (15 RT 4788.) He told her to take off her clothes, which she did. (*Ibid.*) Appellant then took off his clothes and put his penis in Crystal's mouth. (*Ibid.*) He also touched her vagina. (15 RT 4789.) At dinner that evening, Crystal told her mother that Grandpa made her put his pee-pee in her mouth. (15 RT 4791.) Appellant later pled guilty to one count of lewd and lascivious acts with a child (§ 288, subd. (a)). (50 CT 14890-14895.)

In August, 1985, Sharon Thorpe was 29 years old and worked at Mr. Steak waiting tables. (15 RT 4793.) She lived in an apartment in Marysville near 18th and Swezy Streets where she had resided for nine years. (15 RT 4794; 16 RT 4836.) She had just gotten back from a vacation and had been to a concert the night before. (15 RT 4794.) It was about 12:30 p.m. when she heard a knock at the door. (*Ibid.*) She answered the door but there was no one there. (*Ibid.*) Then the phone rang a few minutes later. (*Ibid.*) It was appellant asking why she had not answered the door because he was just there. (15 RT 4795.) Sharon had known appellant for about seven years. (*Ibid.*) She met him initially at Mr. Steak, and then he cut her hair. (*Ibid.*) On one occasion Sharon went with appellant and appellant's son to the movies for his birthday. (*Ibid.*) Appellant then told Sharon he wanted to come over to her apartment. (15 RT 4796.) He was working for an investment company that wanted to put a restaurant on the property next to Mr. Steak. (*Ibid.*) Appellant wanted to talk to Sharon about that. (*Ibid.*) Sharon agreed, and a few minutes later, appellant came to her apartment carrying a shaving kit bag and a black notebook. (15 RT 4796-4797.) Appellant was dressed scruffy, wearing a t-shirt and jeans, and he had not shaved. (15 RT 4797.) He came in, sat down, and started asking Sharon questions about Mr. Steak. (*Ibid.*)

At some point, appellant told Sharon he had something in his eye. (15 RT 4799.) Sharon looked at it for him but did not see anything. (*Ibid.*) She offered him a mirror but he said no. (*Ibid.*) Appellant talked more about Mr. Steak. (*Ibid.*) The phone rang so Sharon got up and answered it. (*Ibid.*) As she did so, she saw appellant get up and start looking through some of her bills and mail that were stacked on the floor due to her recent vacation. (*Ibid.*) She talked a couple of minutes and then went back and sat down with appellant on the couch. (*Ibid.*) Appellant moved closer and started rubbing her leg. (16 RT 4800.) He grabbed her hair and pulled her

head back very hard. (*Ibid.*) He then produced a hunting knife with a seven-inch blade and held it to her throat. (16 RT 4800-4801.) Appellant told Sharon that he was wanted for armed robbery and that he needed a place to stay for 24 hours. (*Ibid.*) He announced that he was going to stay at her house. (*Ibid.*) Sharon told him that she did not want him to stay, but he told her that was too bad and she did not have a choice. (*Ibid.*) Sharon told appellant she had to go to work. (16 RT 4801.) He said that was too bad. (*Ibid.*) He threatened to kill her if she did not do everything as he instructed. (*Ibid.*)

Appellant asked if she had money in the house. (16 RT 4801.) He asked for her ATM card and pin number which she gave to him. (16 RT 4801-4802.) She got money out of a desk drawer, but appellant got mad because it was only $50. (*Ibid.*) Sharon then asked him to leave and said she needed to go to the bathroom. (16 RT 4802-4803.) He agreed to let her but he went with her. (*Ibid.*) Then he grabbed Sharon by the arm, told her to turn around, and put handcuffs on her. (*Ibid.*) He put her on the bed and told her to lay there without making noise or he would kill her. (16 RT 4803.) He walked away and then returned to the bedroom. (*Ibid.*) He took off his clothes and then started taking her clothes off but the handcuffs got in the way. (*Ibid.*) He was going to tear them off of her but she asked him not to so he unhooked one of the handcuffs and took her clothes off. (*Ibid.*) Appellant threatened to kill her unless she did everything he told her to do. (16 RT 4803-4804.) He wanted her to perform oral sex and stuck his penis in her mouth as he held a knife to her throat. (16 RT 4803-4805.) He ejaculated in her mouth and she spit out as much as she could. (*Ibid.*) Appellant then took her into the living room and started gathering up his belongings. (16 RT 4804.) Using a bandana, he wiped down everything he had touched in her house including his glass of water and all the things he had gone through on the table. (16 RT 4804-4805.) Sharon said she could

not believe that he remembered everything he had touched in her apartment. (16 RT 4805.) Appellant was very cool about it and said, "People who make mistakes get caught; people who don't, don't." (*Ibid.*) He continued to wipe things down. (*Ibid.*) He then took everything he had touched and put all of it into his shaving kit and returned her to the bedroom. (16 RT 4806.) He told her to put on a pair of shorts and a shirt, put his clothes on and took her back to the living room. (*Ibid.*)

He then told her they were going to the river, a place in Riverfront Park called Ellis Lake Slough. (16 RT 4805-4807.) He said he had to meet some friends out there and kept asking what time it was. (16 RT 4806-4807.) Sharon explained that to get there you would take 14th Street and make a right turn at the levee. (*Ibid.*) Appellant removed the handcuffs but told Sharon he would kill her if she got any ideas about running away and that he had a .22 Derringer in his pocket. (16 RT 4807-4808.) He told her he had no problem with shooting her. (*Ibid.*) He took the keys to her car, grabbed her arm, and took her outside and placed her in her car on the passenger side. (16 RT 4808-4809.) He got in the driver's side, told her to lock the door, and started driving. (*Ibid.*) Appellant drove down Swezy Street, made a left on 18th Street and stopped at a light when they reached Highway 70. (16 RT 4809.) It was there appellant started laughing and said, "This is like Bonnie and Clyde, but Bonnie's not going to make it." (16 RT 4809-4810.) Appellant thought this was very funny. (*Ibid.*)

Appellant then pulled up in front of a Foster's Freeze on B Street and told her to just stay in the car. (16 RT 4810, 4835-4836.) He repeated that if she got out of the car he would shoot her. (*Ibid.*) He parked so that four newspaper stands were blocking the driver's side, and the traffic was bad on her passenger side. (*Ibid.*) Appellant stood about six feet away at the order window and paid for some drinks. (16 RT 4810-4811.) He stood so that he was facing her and watched her the entire time. (16 RT 4811.)

When he returned to the car, they proceeded down B Street to 14th Street and turned towards the river bottoms. (16 RT 4811, 4835-4836.) After passing under a railroad overpass, there were some county buildings on the right. (16 RT 4811-4812.) After that was the levee and river. (16 RT 4812.) Sharon explained that after the levee, "[T]here's nowhere to go. There was nothing down there." (*Ibid.*) She knew that appellant was going to kill her so she decided to jump from the car. (16 RT 4812-4813.) Appellant went to open a pack of cigarettes, and Sharon squeezed the door handle which released the lock, opened the door, and jumped out. (16 RT 4813-4814.) Appellant called her a little bitch and told her he was going to kill her as he grabbed her from behind. (16 RT 4814.) He held on to her arm and shirt as he was driving, trying to pull her back in the car. (*Ibid.*) Sharon struggled and was able to fall out of the door as the car was still rolling. (16 RT 4814-4815.) She hit the ground and then looked back to see the door swinging back towards her. (16 RT 4815.) Appellant backed up the car towards her. (16 RT 4831.) She ducked and rolled underneath the car door and then got up and ran to a nearby county building where people called the police. (16 RT 4815, 4831-4832.) She injured her leg from jumping from the car. (16 RT 4815.) She had a road burn as well as cuts and bruises throughout her head, neck and body. (16 RT 4831.)

On August 3, 1985, appellant was pulled over by Marysville Police Officer Don Strickland who found in appellant's vehicle an eight-inch, fixed-blade knife in a brown leather sheath commonly used for hunting and gutting game. (16 RT 4839-4841.) Appellant was later tried and convicted of kidnapping (§ 207), oral copulation with force (§ 288a, subd. (c)), and robbery (§ 211). (50 CT 14886-14888.) The parties stipulated that Sharon could not identify the knife.

2. Defense

Larry McCormack was appellant's defense investigator. (16 RT 4937.) He was somewhat familiar with the levee on the Sutter County side of the Feather River. (16 RT 4938-4939.) He described the river bottoms as an area where people partied and became intoxicated. (16 RT 4938.) The Magellan GPS device was used to calculate the latitude and longitude where you're standing but it was sometimes several yards off in accuracy. (16 RT 4944-4946.) There are difficult trails in the area appellant was found. (16 RT 4950.) Michael Lyons' body was found about a half mile from where appellant's truck was stuck. (16 RT 4952.) The distance from Bridge Street School to Michael Lyons' apartment was a half mile. (16 RT 4958.)

The defense recalled Urquhart to the stand. Urquhart was not Michael Lyons' regular babysitter. (16 RT 5009.) Urquhart testified that she had moved out of town and was gone until about a month before Michael Lyons was murdered. (16 RT 5010.) About a year prior to his murder, during the time when Michael Lyons' father went to jail, there may have been one or two occasions when Sandy Friend came to Urquhart's apartment looking for Michael. (16 RT 5010.) Urquhart had described Michael Lyons as a loner but he would only go off by himself once in a while. (16 RT 5009.) She saw him with other kids as well as alone. (*Ibid.*)

Two years prior to Michael Lyons' murder, Kenneth Slatton lived in one of the apartments near Michael Lyons' apartment. (16 RT 5015.) At the time of Michael Lyons' murder, Slatton was living in the northern part of Yuba City, north of Highway 20. (16 RT 5025-5026.) On May 16, 1996, Slatton was walking at Mosquito Beach, a little recreation area down by the river, at about 4:15 p.m. (16 RT 5014.) Slatton was trying to cool off after an upsetting argument with his wife. (16 RT 5017, 5019.) He did not know Michael Lyons. (16 RT 5022.) Slatton saw kids playing at

Mosquito Beach without adults all the time. (16 RT 5017.) There were usually kids running around playing. (16 RT 5019.) On that particular day, he saw Michael Lyons there playing with a Hispanic child about the same age. (16 RT 5014-5015.) Slatton recognized the Hispanic child as also living near the apartments where Michael Lyons lived. (16 RT 5015.) Slatton thought the Hispanic child's name was Gabriel. (16 RT 5018.) Slatton was within 20 yards of them. (16 RT 5020.) Slatton remembered seeing the kids because it was cold and raining out and he did not see any normal kids out playing like that. (16 RT 5019.) He called police the following day after seeing Michael Lyons' picture in the newspaper. (16 RT 5013-5014.)

On cross-examination, Slatton agreed there was no picture of Michael Lyons in the newspaper on May 17, 1996, but stated that he must have recognized the boy from the article or seen his picture somewhere. (16 RT 5021-5023.) When he called police, Slatton told the dispatcher he saw a child that looked like Michael Lyons. (16 RT 5021.) At that time, he had not recognized Gabriel as the boy who was at the beach. (16 RT 5022.)

On May 16, 1998, Sherrie Luster went to Armor Loan to make a payment and then drove down to the Feather River at between 11:30 a.m. and 12:30 p.m. (16 RT 5033, 5041-5042.) She was fishing on the Marysville side of the river and could see across to the other side. (*Ibid.*) She noticed a man whom she knew was camping on the Yuba City side of the river. (*Ibid.*) Although she could not see his tent, she knew it was under a willow tree on that side. (*Ibid.*) The man was pacing around his campsite and sharpening a knife. (16 RT 5033, 5035.) He had dark, scraggly hair and lots of facial hair, including a mustache and beard. (16 RT 5039, 5046.) He was wearing a dark Levi jacket. (16 RT 5034.) Luster had seen this man four or five days earlier when she was fishing on the Yuba City side of the river. (16 RT 5033.) He had frightened by

standing behind her and asking for anchovies while she fished with her 11-year-old son. (16 RT 5033-5035.) Luster never went back there. (*Ibid.*)

Sometime later, between 3:00 and 4:00 p.m., appellant drove up in his white pickup truck and parked near the man camping on the Yuba City side of the river. (16 RT 5029-5042.) She was certain it was appellant who drove up in a boxy-looking white pickup with two-wheel-drive, got out, and started talking to the man who was camping. (16 RT 5035-5037, 5043-5045.) Luster noticed Michael Lyons, who had a blank look on his face, walking from the back of the pickup truck to the driver's side. (16 RT 5036-5038.) Michael Lyons was wearing a jacket that was too big on him. (16 RT 5039.) All three quickly got in the pickup and drove away. (16 RT 5038-5040.)

The following day, Luster called police when she saw Michael Lyons picture in the newspaper. (16 RT 5029, 5043.) She also talked to the police on each of the following three days. (16 RT 5031-5032.) The police said she had the wrong time and the clothing she described for appellant did not match. (16 RT 5040, 5043.) She did not tell the police that the pickup did not have a camper shell. (16 RT 5043.)

Christopher Carlson lived at the Bridge Way Apartments with his parents and brothers who were 14 and 21 years old at the time of trial. (16 RT 5048.) Christopher saw Sandy Friend around looking for Michael Lyons once or twice. (16 RT 5049.) He also saw Michael Lyons down at the river bottoms two or three times, always with a group of kids playing. (16 RT 5049-5051.) Christopher saw Michael usually right behind the courthouse where there was a rope swing and never south of the courthouse. (16 RT 5051.) The last time he saw Michael there was anywhere from a week to a year before his murder. (16 RT 5050-5053.)

21-year-old Michael Carlson testified that he saw Michael Lyons down at the river bottoms as many as four times, once with an adult and

usually with other kids. (16 RT 5055-5058.) The last time he saw Michael Lyons there was six months to a year prior to his murder. (16 RT 5058.) A couple of times a week someone would come to Carlson's apartment looking for Michael Lyons. (16 RT 5054-5055.)

Marjorie Kearby was Linda Willis' 78-year-old neighbor. (16 RT 5062-5064.) Sometimes she would sit outside with Michael Lyons when he waited for Willis to come home. (16 RT 5064-5066.) Michael Lyons played with other children in the neighborhood. (16 RT 5064-5065.) Sometimes he stayed there until 5:30 p.m. (16 RT 5065-5067.)

Joris Lebhart lived on a houseboat with his wife Pamela. (16 RT 5068-5069.) On May 16, 1996, a tree had fallen on the houseboat and it was sinking. (16 RT 5069.) They were scared. (*Ibid.*) Randy Beutler probably did not have shoes on but the rest of the people helping Lebhart did. (16 RT 5073-5074.) The wind was whipping around like crazy and the river had jumped up six feet tremendously fast. (16 RT 5069.) The wind was blowing so hard that all Lebhart could hear was the snapping of tree limbs from as far as a quarter of a mile away. (16 RT 5073-5074.) Lebhart did not hear any vehicles in the area, only the wind and the snapping of trees. (16 RT 5074-5075.) Other people who lived down in the area of the river bottoms were Hickman, Camille Varney, Bobbie Lemmons and his wife, and Don Dugger and his wife. (16 RT 5070-5071.) Bobbie Lemmons' wife would come around looking for cigarettes and food. (16 RT 5070.)

In 1996, Lloyd Bullard owned Lloyd's Barber Shop located at 758 and a half Plumas Street in Yuba City. (17 RT 5100.) In February of that year, a parolee named Paul Smith laid carpet at the barber shop. (17 RT 5101.) Smith had worked three times for Bullard in the past. (17 RT 5102.)

Appellant's father was in court during the course of the trial and heard Buchanan testify that appellant was on a bus on May 14, 1996. (17 RT 5103.) The week after Michael Lyons' murder, appellant's father talked to the defense investigator and explained that he remembered May 14 as the day appellant and his wife returned a boat to Boyd after which appellant came to work. (17 RT 5104-5105.) Appellant then took his wife's car to an auto repair shop and then returned to work and worked the rest of the day. (17 RT 5105-5106.) Boyd had never seen appellant in a dirty condition, with no shoes and scraggly, dirty hair. (17 RT 5106.)

Andrew Schuy owned an auto repair shop across the street from Boyd's barber shop. (17 RT 5124.) Appellant came into Schuy's shop on May 14, 1996 to get a thermostat replaced in a car. (17 RT 5124-5125; 51 CT 15014.) Appellant dropped off the car in the morning and returned in the afternoon to pick it up. (17 RT 5125.) Appellant did not appear dirty or scruffy looking. (*Ibid.*)

Petra Garcia, whose maiden name was Patsy Alvarado, used to drive a bus and knew both Tapia and Buchanan as riders of the bus. (17 RT 5107-5111.) At the time appellant was arrested, Garcia saw appellant on television and recalled telling her husband that appellant was someone who rode on her bus a couple of times. (17 RT 5113-5115.) She did not recall appellant having a knife. (17 RT 5115.) Garcia was required to report minor, unusual incidents after each bus route and to contact police in an event such as a person on the bus exposing a knife in a threatening manner. (17 RT 5109-5111.) The mere fact that someone on the bus was caring a knife, like a pocket knife, would not greatly concern Garcia. (17 RT 5116-5120.) A person without shoes or a shirt was not allowed to ride the bus. (17 RT 5110.) Garcia did not recall Tapia ever telling her in Spanish that somebody on the bus was waving a knife and threatening children. (17 RT 5111.) Nor did she recall Buchanan telling her about another rider who was

waving a knife around. (17 RT 5112.) Garcia had seen a man called Rambo ride the bus in a different county, and the man had long hair and a leather jacket. (17 RT 5122.) Garcia had seen Rambo carry a knife. (*Ibid.*)

Defense investigator McCormack interviewed both Tapia and Buchanan who each described a different bus route concerning the incident involving appellant, and the routes had differing lengths. (17 RT 5134-5137, 5139.) Neither route went by Kingsmen Barber shop but the route described by Buchanan went by Lloyd's Barber shop which was right next door to the Town Pump. (17 RT 5137.) Buchanan had been in a coma at one time. (17 RT 5139.) There were no records with the Yuba Sutter Transit lodged by a bus driver describing this type of incident. (*Ibid.*)

Frank Starmer was one of the detectives assigned to the Michael Lyons case and had interviewed Luster on May 19, 1996. (17 RT 5143, 5146.) Luster described the boy who she thought was Michael Lyons as wearing a dark-colored sweat shirt with a zipper and pockets in the front. (17 RT 5143-5145.) She described an older white boxy pickup and that the pickup did not have a camper shell. (17 RT 5144.) Starmer went to the place on the river Luster reported as having been. (17 RT 5146.) Starmer instructed a person he knew to stand across the river. (17 RT 5147.) When he looked across the river to the place where that person was standing, he could not clearly distinguish the person or see their features clearly enough to identify them. (17 RT 5146-5147.)

Mark Regan was a private investigator. (17 RT 5148.) Regan interviewed Luster. (17 RT 5149.) Luster reported seeing Michael Lyons on May 16, 1996, sometime between 12:15 and 6:00 p.m. (17 RT 5150.) She saw Michael Lyons with appellant. (17 RT 5151.) She described appellant as wearing a red tank top under a Levi jacket with fleece, blue jeans, and work-style boots. (*Ibid.*) Appellant was also wearing some type of necklace or chain around his neck. (*Ibid.*) When Regan told Luster that

he thought appellant may have been in a reddish-orange colored truck, Luster seemed very confused and disappointed. (17 RT 5152-5153.) She said, "Well, I thought Mr. Rhoades had a white pickup truck." (*Ibid.*) About two hours after the interview, Luster called Regan and asked again about the color of the pickup truck, appearing disappointed that she perhaps had the wrong color pickup truck. (*Ibid.*) Regan then told her that she was correct, the pickup was white. (*Ibid.*)

Bobbie Lemmons and his wife Janet lived in a house trailer in the river bottoms just north of the lagoon for about two years prior to Michael Lyons' murder. (17 RT 5186, 5190.) Lemmons made money by gathering a recycling cardboard. (17 RT 5187.) He had a storage locker in Marysville. (*Ibid.*)

On May 16, 1996, at dusk which was about 8:00 to 8:30 p.m., Lemmons was out walking and came upon some shoes. (17 RT 5192-5193.) The shoes were out in the open and down a hill. (17 RT 5192.) The shoes were pretty good looking shoes, but Lemmons did not take them. (17 RT 5192-5193.) He thought the person who owned the shoes would come back and pick them up. (*Ibid.*) Plus, the shoes did not fit him. (*Ibid.*) A short time later, between 9:00 and 9:30 p.m., Lemmons returned to the trailer and went to bed. (17 RT 5193-5194.) His wife Janet was with him at the trailer. (17 RT 5203.) That night he heard what sounded like children playing. (*Ibid.*) He also heard the sound of a truck which was stuck in the mud. (*Ibid.*) A lot of people get stuck in the mud down in the river bottoms. (*Ibid.*) Lemmons heard the tires spinning like the truck was stuck for about a half hour. (17 RT 5194-5195.) He never told his wife to tell anyone that he was not there when the tires were spinning if she was asked. (17 RT 5203.)

The following afternoon or evening, Lemmons and his wife were out looking for shoe strings for Janet. (17 RT 5187-51888.) They located the

shoes Lemmons had seen the night before, and as they held the shoes, Sandy Friend approached them. (17 RT 5188.) They gave Sandy Friend the shoes. (*Ibid.*) Sandy Friend then asked Lemmons to help her look for other articles of clothing belonging to her son, and Lemmons did so, walking with Sandy through the area. (17 RT 5188-5189.) Janet went back to the trailer because she did not want to walk further. (*Ibid.*) Lemmons found a pair of pants obscured by some tall grass and gave them to Sandy. (17 RT 5189-5190.)

Lemmons' feet were measured and the length of his foot from heel to toe was nine and three-quarters inches. (17 RT 5212-5213.) He wore size eight and a half shoes. (17 RT 5193.)

Donald Dugger lived with his wife in a trailer in the river bottoms about a half a mile upstream from the lagoon. (17 RT 5218.) He had been acquainted with Bobbie Lemmons for four years. (17 RT 5216, 5219.) On the morning of May 17, Dugger and his wife left early to have breakfast. (17 RT 5217.) As they were walking back into the river bottoms, they encountered police cars blocking the front of Mosquito Beach. (*Ibid.*) The police placed Dugger and his wife in the police car and drove them to a different area while others were interviewed. (*Ibid.*) Eventually they allowed Dugger and his wife to return to their trailer. (*Ibid.*) Dugger then saw Bobbie Lemmons who appeared normal. (17 RT 5217-5219.) They were all trying to figure out what was going on. (*Ibid.*) The next day, May 18, after Dugger got off work, Bobbie Lemmons asked Dugger if Dugger would be an alibi for him for the night of the 16th. (17 RT 5219.) Dugger later reported this to McCormack but never told the police because the police did not question him. (*Ibid.*) Dugger did not know appellant. (17 RT 5219-5220.)

The defense called Vicki Van Natta, the prosecution investigator. Van Natta received some items from McCormack that had been taken out

of Bobbie Lemmons' storage locker. (17 RT 5221.) These included a fishing pole which Bobbie Lemmons found near Whitaker Hall and a black knife with the initials "LR" on it. (17 RT 5222-5223, 5230.) Lemmons told Van Natta that he had seen Dugger a night or two after Michael Lyons was found. (17 RT 5223.) Mr. Johner told Van Natta that he had given one or both of the fishing poles to Bobbie Lemmons. (17 RT 5224.)

McCormack had spoken to Bobbie Lemmons at least eight to ten times.[27] (17 RT 5227.) The Sunday before Bobbie Lemmons testified at trial was the first time Lemmons told McCormack that he had seen the shoes on May 16. (17 RT 5227-5228.) McCormack got a court order to search Bobbie Lemmons locker and then turned items over to the district attorneys office. (17 RT 5228.) Lynette went with McCormack to the storage locker and pointed something out to him. (17 RT 5234.) Bobbie Lemmons told McCormack that he had obtained the black fishing pole from a friend, and the friend later confirmed what Bobbie Lemmons said. (17 RT 5229.) The other fishing pole Bobbie Lemmons found near a culvert pipe near the river. (*Ibid.*) Lemmons said that he could not remember where he had obtained the knife. (17 RT 5230.) He had either traded cigarettes for the knife or found it somewhere. (*Ibid.*)

The prosecution's criminalist, Stephen Bentley, was recalled to the stand by the defense. He explained that Exhibit 60-D was a cast of the impressions of appellant's feet made in sand. (17 RT 5290.) Exhibit 60-C was a photograph of three casts that were made of three foot impressions found at the crime scene. (17 RT 5291.) The foot size for the casts photographed in Exhibit 60-C was about 10 and 3/4 inches, which means a

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[27] McCormack testified that he does not always tape record information from a person when investigating a crime. (17 RT 5285-5286.)

foot from about 10 and 1/2 inches to 11 inches would make such an impression in the soil conditions that existed. (17 RT 5297.) Appellant could not be excluded as one who made the foot impressions found at the crime scene. (17 RT 5299.) In other words, appellant could have made the impressions at the crime scene. (*Ibid.*)

a. Appellant's Testimony

Appellant was 45 years old at the time of trial. (17 RT 5311.) He was born and raised in the area of Yuba City and Marysville, spending most of his childhood on Bogue Road in Yuba City. (17 RT 5311-5312.) He had been going to the river bottoms since he was 17 years old and had done so hundreds of times. (17 RT 5311-5312, 5316.) He knew the area of the levee. (17 RT 5312.) He had gone over the levee many times in his truck even though it is illegal. (17 RT 5385.) It is more difficult to get to the Shanghai Bend area without climbing and driving the levee. It is also more difficult to get to the Shanghai Bend area from the river bottoms. (17 RT 5318.)

Appellant bought his white pickup truck in August or September of 1994. (17 RT 5315.) Appellant liked four-wheel drives because they allowed him to go places only four-wheel drives could go. (17 RT 5316.) Appellant spent a lot of time in the river bottoms fishing. (*Ibid.*) Appellant was experienced with four-wheel driving and could get over the levee anywhere in his Toyota. (17 RT 5317.) Appellant often got stuck in the river bottoms even though he never intended to. (17 RT 5321.) It would take a lot of work to get himself out, a lot of digging, jacking the truck up, and placing objects under the wheels. (*Ibid.*) At times it would take him two or three days but he would get himself out. (17 RT 5322.) He did not call his father when he got stuck in the river bottoms because usually when he was in the river bottoms he was partying or doing drugs, activities that his father did not approve of. (17 RT 5321.) He had a come-along which

was a hand winch with a 10 to 12 foot cable, however he did not have the come-along on his truck the night of May 16. (17 RT 5322.) Appellant left the come-along in his shed at home because it was missing a hook and needed to be repaired. (*Ibid.*)

For a year appellant worked cutting hair at his father's barber shop.[28] (17 RT 5312-5313.) Appellant gave 30% of his proceeds to his father. (*Ibid.*) He described his father as a devout Christian with extremely high moral and social standards and unquestioned integrity. (*Ibid.*) His father would not allow him to show up for work dirty, full of mud, and looking like he needed a bath. (*Ibid.*) Appellant did not go to work while on drugs. (17 RT 5321.) He only did drugs on the weekends. (*Ibid.*) He generally stayed away from his home on the weekends until late Sunday night so that he could avoid his parole officer. (17 RT 5382.) Appellant injected a much smaller amount of methamphetamine than most people because he had to make his drug purchase last for the entire weekend. (17 RT 5383-5384.)

Appellant admitted suffering prior convictions including forgery for passing checks with the intent to defraud in San Mateo County. (17 RT 5386-5387.) He also was convicted of forgery for passing bad checks in Sutter County in 1984. (17 RT 5388.) In 1985, he was convicted of robbery, kidnapping and forcible oral copulation in Yuba County. (17 RT 5329, 5388.) He went to prison for those offenses, and after his release, he was convicted of lewd and lascivious acts with a child in Amador County. (17 RT 5329, 5389.)

Although he was on parole at the time at the time of Michael Lyons' murder and was not allowed to have a knife, he was told by one of his parole officers that he could keep the knife he used to clean fish in the back

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[28] The shop was about four or five miles from Lloyd's Barber Shop. (17 RT 5328.)

of his truck with the rest of his fishing gear. (17 RT 5330-5331.) The parole officer told appellant that so long as the knife was in the back of his truck, appellant would not violate his parole. (*Ibid.*) The parole officer told appellant this over the phone. (17 RT 5365.) It was not necessary to get the permission in writing; his parole office had given him a lot of conditions verbally. (*Ibid.*) Appellant identified Exhibit 23 as his fillet knife which he used to clean and fillet salmon. (17 RT 5367-5368.) In the past, a parole officer told appellant he would probably permit appellant to keep a shotgun hung up on the wall of his shed with a sign saying "for snakes only" because they were moving to an area where appellant's wife found rattlesnakes in her garden. (18 RT 5429.)

In explaining his whereabouts, appellant testified that on May 15, he spent the night at his home in Sutter with his girlfriend Lisa Wilkinson. (17 RT 5333.) He was separated from his wife as they had been having problems for quite some time. (*Ibid.*) In the morning, May 16, Wilkinson rode into work with appellant because her apartment is near the barber shop. (*Ibid.*) Appellant never saw her again. (*Ibid.*) Appellant went to work that morning. (17 RT 5332.) He left work a little before noon. (*Ibid.*) He was trying to give as much work to his father as possible because his father had to pay bills the following week. (17 RT 5333.) Boyd needed the money worse than appellant did. (*Ibid.*)

Initially, appellant was going to have his truck repaired but instead he went to see if he could buy some drugs. (17 RT 5334.) He drove out to Linda in Yuba County to the house of his friend, Harold Crane. (17 RT 5383; 18 RT 5404, 5418.) He knew he was violating his parole just by going to Linda as he was not allowed to be in Marysville. (18 RT 5421.) He bought $60 worth of methamphetamine or "crank," which was about a gram and a quarter to a gram and a half. (17 RT 5332, 5383.) The methamphetamine was in a small plastic baggie. (18 RT 5424.) He

injected a small amount before driving to Rooney's card room in Marysville to play cards, which was also a violation of his parole. (17 RT 5334-5335; 18 RT 5421.) He arrived at about 1:00 p.m. (17 RT 5327.) He played poker for between two and two and a half hours. (17 RT 5331.) He tipped the dealers. (17 RT 5332.) Appellant explained that the card room had a promotion in which the house would match a player's $20 or $25 buy-in so long as the player played for a minimum of two hours. (17 RT 5331.) Once you played for two hours you could cash out. (17 RT 5331-5332.) Rooney's told appellant that he could not leave until 3:20 p.m. or later. (17 RT 5332.) Appellant thought he left around 3:30 p.m. (*Ibid.*)

On cross examination, appellant testified someone told him he could not leave at 3:00 p.m.[29] (17 RT 5361.) He had in fact tried to leave earlier, around 2:30 or so, because he was still planning on going to get his truck fixed and maybe making it back in time to work some more that afternoon. (*Ibid.*) He even called his father to check in, but the people at Rooney's told him he could not leave until after 3:00 p.m. (*Ibid.*) He was winning anyway so he stayed and played. (17 RT 5363.) At that point he was in no hurry to leave because he had decided he was not going back to work. (*Ibid.*)

After leaving Rooney's card room, appellant drove to a bar called the Play Room in search of his friend Julia Willoughby who had recently had a baby. Willoughby needed a ride to pick up some things for the baby. (17 RT 5335; 18 RT 5422.) Willoughby was not there so he drove to the Olympic Hotel where Willoughby stayed. (17 RT 5335-5336.) He was told that she was at a residence in Yuba City. (17 RT 5336-5337.) He left there and had to backtrack a little bit because there was bridge work going

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[29] He also stated someone told him, and he had seen documents confirming that, he could not leave until 3:20 p.m. (17 RT 5361.)

on at the 5th Street bridge. (17 RT 5336.) The work on the bridge caused a bottleneck and backed up traffic. (*Ibid.*) Appellant then drove to Yuba City to look for Willoughby. (*Ibid.*) He stopped at the Peach Bowl Club and talked to the owner there. (*Ibid.*) He then drove to 602 Church Street in search of Willoughby, but never found her. (17 RT 5337.) He then drove to his home in Sutter. (17 RT 5337.)

While at his house, appellant did not change his clothes or shoes. (18 RT 5424.) He did not think about putting on boots or some other kind of footwear because he went fishing in his work shoes all the time. (*Ibid.*) He stayed at his house for about an hour before going to the river bottoms. (17 RT 5337, 5385.) He injected methamphetamine while he was at his house. (*Ibid.*) He then went to the river bottoms to avoid his family. (*Ibid.*) His mother would often come by his house to check on him after work. (*Ibid.*) He went to the river bottoms because there he could do whatever he wanted without worrying about running into his family or the police or his parole officer. (17 RT 5337.) The river bottoms was a safe place to do drugs and avoid the police and his parole officer. (*Ibid.*) He did see police boats on the river all the time. (*Ibid.*) He got to the river bottoms at about 5:30 p.m. (17 RT 5338.) He spent the next several hours not doing anything unusual. (17 RT 5339.) He was just drinking, doing drugs, fishing, and four-wheel driving. (17 RT 5321, 5339.) The methamphetamine gave him energy and elevated his mood. (17 RT 5390.)

He got stuck in the mud right after dark which was between 8:00 and 8:30 p.m. (17 RT 5339.) This was the first of two times in which he became stuck prior to his arrest. (*Ibid.*) At first he was not very concerned and worked on getting unstuck on and off for a few hours. (17 RT 5389.) He threw a fishing line in the water to fish in between trying to get his truck out. (*Ibid.*) He ended up trying to get his truck out for quite some time. (17 RT 5339.) When he realized that it would not be easy to get his truck

out, appellant decided that he needed his come-along. (17 RT 5340.) He locked up his truck completely and made sure the windows were up. (17 RT 5341.) He walked out of the river bottoms, over the levee, and out to Burns Drive near a Quick Stop which was about a half mile away. (17 RT 5392.) From there he walked to his father's barber shop where he rested and injected some more drugs. (*Ibid.*) He was carrying his syringe and methamphetamine with him although he knew that doing so was a violation of his parole. (17 RT 5392; 18 RT 5405.) By this time it was about 11:00 p.m. (*Ibid.*) He stayed at the barber shop for about ten minutes and then walked to the intersection of Highway 99 and Lincoln Road. (17 RT 5393.) He walked right by his girlfriend's house which is about a hundred yards from the barber shop. (18 RT 5402.) He did not try to contact her for help because she did not have a vehicle that could help him. (*Ibid.*)

He continued walking past Highway 99 on Lincoln Road, and after debating on whether to go to his father's house, he decided to hitch-hike. (17 RT 5393.) He hitch-hiked from there, past Township, to the intersection of Lincoln Road and Humphrey Road. (17 RT 5394, 5396.) These roads were rural roads and were dark and had very small shoulders. (17 RT 5396.) Appellant agreed that it could be 6.9 miles from the intersections of Township Road and Lincoln Road to his home in Sutter. (17 RT 5395-5396.) He did not remember it being wet. (17 RT 5397.) He estimated that he walked about four or five miles to his house. (*Ibid.*) He walked a total of about ten miles that night, all in his deck shoes. (17 RT 5398-5399.) During the trek to his house he passed by a hundred pay phones but did not call anyone to help him. (17 RT 5340-5341.) He thought he could get unstuck by himself. (*Ibid.*)

Once at his house, appellant got the come-along and a rope with a hook from his shed and then walked along the railroad tracks back to the corner of Highway 99 and Humphrey. (18 RT 5403.) Then he hitch-hiked

to the barber shop on Lincoln Road. (17 RT 5340-5341; 18 RT 5403.) From there he walked to the river, over the levee, and in to where his truck was. (17 RT 5341-5342.) He had done a lot of walking and arrived back at his truck between 3:00 and 4:00 a.m. (17 RT 5343.) Appellant did not remember whether it was raining on May 16. (17 RT 5360.)

Upon his return, appellant found his truck "tore all apart." (17 RT 5345; 18 RT 5401.) Although there was no indication that anyone had pried the doors or windows open, the small sliding windows on the rear of the cab, which was inside the camper shell, were open. (*Ibid.*) He did not know if he had inadvertently left them open or not. (17 RT 5345; 18 RT 5400.) There were papers from his glove compartment thrown all over the ground and inside his truck. (17 RT 5345.) The dash cover had been torn off and the mirror was broken off. (*Ibid.*) Appellant did not feel comfortable staying in that location. (*Ibid.*) He did not know who had broken into his truck and did not know if they were still around. (*Ibid.*) He wanted to get to an area with which he was more familiar and where he had people he knew close by. (*Ibid.*) So he took 30 minutes to free his truck and drove it to the Shanghai Bend area where he knew everyone that lived there and was more comfortable there. (17 RT 5342-5345, 5369.) He wanted to hang out in the Shanghai Bend area until daylight. (17 RT 5370.) He probably would have ended up going to Hickman's and Varney's camp as soon as it was daylight. (17 RT 5369-5370.)

At about 4:00 a.m., just south of where he had previously been stuck, appellant got stuck again. (17 RT 5369.) Appellant had never been stuck in that particular location before. (17 RT 5324.) He was stuck pretty good but believed he would have gotten his truck out eventually. (17 RT 5323-5324.) The easiest way to get out of the area around the lagoon was Bogue Road. (17 RT 5324.) It was not difficult to get out that way. (17 RT 5325.) Appellant knew that he could not do anything but sit there until

daylight. (17 RT 5369.) It was at about this time that he took off his underwear and socks. (17 RT 5369; 18 RT 5420.) He also took off his shirt, which was a nice, casual dress shirt. These items were white and he did not want to get stains on them from the river water. (17 RT 5357-5358, 5378.) He admitted that by the time he took them off they were already stained from getting in and out of the truck. (17 RT 5375.) Appellant was wearing blue deck shoes which were slip-on shoes which he always kept in the back of his truck. (*Ibid.*) One of the shoes had a hole in the toe but they were good walking shoes. (*Ibid.*) One shoe ripped completely out from the suction of the mud and sand. (*Ibid.*)

At daylight he realized he was in a bad spot because there was nothing directly behind his truck to hook onto in order to pull his truck backwards. (17 RT 5371.) Appellant was stuck there about eight hours, until about noon. (17 RT 5372.) During that time he did not try to contact his father or anyone else to help him. (*Ibid.*) He would have eventually got his truck out by himself. (*Ibid.*) Appellant did not go to the Hickman camp which was about one hundred yards away because Hickman could not help him. (*Ibid.*) Hickman did not have a vehicle and could not do anything that appellant could not do himself. (*Ibid.*) Appellant did not want to call any of his friends that he and Hickman knew because he had not associated with them much. (17 RT 5373.) He did not call his cousin Matt, who had a four-wheel-drive vehicle because Matt was on dialysis and was a very sick young man. (*Ibid.*) He did not call his father because his father would have been very upset with appellant for missing work and doing drugs. (17 RT 5373-5374.) His father probably would have fired him from his job. (*Ibid.*)

At about 11:00 a.m., appellant heard some people yelling so he walked out about a hundred yards from the area of his truck. (17 RT 5351-5352; 18 RT 5407-5408.) He ran into four young men who said they were

searching for a little boy. (*Ibid.*) Appellant did not remember them showing him a poster. (*Ibid.*) Appellant first asked the men to follow him to his truck but they said no because they did not want to leave their trucks. (*Ibid.*) Appellant then asked if they would help him get unstuck, and they agreed. (*Ibid.*) Appellant went back to his truck and waited for them. (*Ibid.*) Appellant explained that one had to walk through a short stretch of water to get to his truck, but he assumed that the young men would come in and find him. (18 RT 5408.) When they did not show up, appellant did not worry about it. He just got out and kept trying to get his truck out by himself. (18 RT 5409.) During the entire time he had been in the river bottoms appellant had injected himself with methamphetamine about six times. (17 RT 5384.)

Appellant was found and arrested sometime after noon on May 17 in his pickup truck. (17 RT 5313, 5323.) When appellant first saw the police boat, he was not happy to see them because he had drugs in his truck. (17 RT 5354.) But appellant did not think they would bother him since they were out on the river. (*Ibid.*) Appellant then got out of his truck and decided he would ask them for help. (*Ibid.*) The police told him that they would get him some help. (17 RT 5355.) Then the female officer asked appellant to climb aboard the police boat saying that they were going to take him just a short distance away to where one of their superiors wanted to talk to him about an incident that occurred in the river bottoms. (17 RT 5313-5314, 5355-5356.) Before doing so, appellant walked back to his truck because he knew his truck would be towed and he wanted to unhook his truck and get it ready. (17 RT 5355.) He was not happy about having a tow truck come because it would cost him money and because he knew he could get his truck unstuck by himself. (17 RT 5355-5356.) He left his truck unlocked and everything in it because he thought he would be coming right back. (17 RT 5356.) Appellant was not wearing underwear or a shirt

because it was not cold to him; he was going a lot of hard physical work. (17 RT 5357.)

While on the boat, appellant saw some guys wearing what looked like moon suits but he "didn't trip on it." (17 RT 5356.) Appellant was concerned about why the police were taking him to the boat docks and not back to his truck. (*Ibid.*) He did not know the reason for his arrest. (17 RT 5313.) From the time he was arrested until the next day, and even in the interviews with detectives, appellant wanted to know why he was being held and where his truck and property were. (17 RT 5358-5359.) The police had a list of appellant's property found in his truck but there were things like his money which were not on the list. (17 RT 5359.) Appellant knew that the police had been inside his truck searching and that they ransacked it. (*Ibid.*) He was also concerned about paying storage fees for his truck after the police towed it. (*Ibid.*)

That night, May 17, appellant was told that officers wanted to question him about Michael Lyons. (17 RT 5314.) Several days later, appellant talked to McCormack. (*Ibid.*) Appellant told his parents and McCormack about the card room and asked his mother to call the FBI or the authorities about it. (17 RT 5314-5315.)

At the time of his arrest, there were five different knives in appellant's truck. (18 RT 5406.) There was a fishing holder in the back of his truck. (17 RT 5358.) He kept blankets and extra clothes and shoes in the truck. (*Ibid.*) He had a sharpening stone in his truck which he used to sharpen his pocket knife. (18 RT 5406-5407.) He explained that he kept sharpening stones everywhere because he was a barber and they were part of the tools of the trade. (*Ibid.*) Appellant also had a piece of surgical tubing in his truck which he used on his fishing lures. (18 RT 5423.) He did not know why the surgical tubing was hooked through the passenger side seatbelt,

which is where the FBI found it. (18 RT 5423-5424.) Appellant had never seen the bracelet. (17 RT 5359-5360.)

Appellant denied being on a bus on May 14. (17 RT 5325-5326.) He denied riding a bus shirtless, pulling out a knife, and waving it around on May 14 or at any other time. (*Ibid.*) He never waived a knife around saying he was going to take a child down to the river bottoms. (17 RT 5326.) Appellant was on parole at the time for check forgery crimes in both Sutter and San Mateo Counties. (17 RT 5328-5329.) Pursuant to his parole conditions, appellant was not allowed to carry a knife with a blade over two inches. (17 RT 5329.) Appellant knew where he was every minute of the day on May 14. (17 RT 5327.) He explained that his father had called him at 6:00 a.m. that morning to tell him that they had returned from their trip to Washington State. (*Ibid.*) Boyd wanted appellant to return Boyd's boat to him. (17 RT 5327-5328.) Appellant returned the boat, and his wife followed him in her car. (*Ibid.*) After dropping off the boat, appellant went to work. (*Ibid.*) Once there, he called a mechanic, and later that morning they took his wife's car to the mechanic, Schuy. (*Ibid.*) There was no need for appellant to ride the bus on May 14. (*Ibid.*)

He cleaned his fish at the facilities at the boat docks because it was easier to do it there. (17 RT 5368-5369.) There was a long rectangular cleaning table which was slanted to it drained into a large drain. (18 RT 5426-5427.) Appellant did not remember using the knife to cut the red strap. (17 RT 5353.)

The river was high and was flowing at a good rate but appellant did not throw anything in the river in order to secret it from anyone. (17 RT 5360-5361.) Appellant denied ever having any contact with Michael. (17 RT 5310.) He denied kidnapping or killing him. (17 RT 5310-5311.)

With regard to Dibdin's testimony that appellant said, "I can place the time of death better than that," appellant explained that he and his attorney

and McCormack were dumbfounded by Dibdin's testimony. (17 RT 5343.) They thought Dibdin was a nut. (*Ibid.*) Appellant knew that his truck had been broken into and ransacked during a certain period of time and knew that Michael Lyons probably was killed some time during that time period. (17 RT 5343-5344.) That was the only time the kid could have been in appellant's truck. (*Ibid.*) Appellant had said, "This guy is a nut. I could do better than that." (*Ibid.*) There was more to appellant's conversation with his lawyer than what Dibdin had said. (*Ibid.*)

While appellant was in custody, McCormack brought various items to appellant for appellant to identify. (17 RT 5348.) There was a light brown fishing pole which appellant had not seen before. (*Ibid.*) A black fishing pole was in the back of appellant's truck. (*Ibid.*) Appellant had purchased it from his drug connection and was going to put a new tip on it so that his wife could use it as a salmon fishing pole. (*Ibid.*) Exhibit 229 was the lock-blade, Buck knife that appellant bought for his wife in 1995. (17 RT 5349.) Appellant's wife carved an L on one side of the knife and an R on the other to indicate her initials. (*Ibid.*) There were several other knives belonging to his wife in his truck. (*Ibid.*) Among these was a utility knife. (*Ibid.*)

Appellant admitted that he left some methamphetamine in a blue container inside his truck which was there when he was arrested. (17 RT 5350.) Appellant denied purchasing the drugs that were found stuffed down in the passenger seat. (17 RT 5351.) He could have purchased the drugs at some time in the past or perhaps the drugs belonged to someone else. There were a lot of people in his truck and almost everyone he knows does drugs. (*Ibid.*) Appellant let Hickman and Camille Varney use his truck on several occasions. (17 RT 5320.) Almost everyone at the river bottoms used crank. (17 RT 5335.)

On cross examination, appellant explained that his shirt had his own blood on it because he had been scratched by dragging logs. (17 RT 5377, 5379.) He also slipped and fell. (17 RT 5378.) Appellant did not know how the large area of bloodstains got on the left shoulder and across to the area of the right arm. (17 RT 5379-5380.) The scratches on his rear end and thighs were from dragging logs. (*Ibid.*) He explained that at one point he got pinched between a big limb and some other logs. (*Ibid.*) He was scratched up badly everywhere which was not unusual when he got stuck in the river bottoms. (17 RT 5378-5379.) He did not know if he was bleeding slightly or profusely; he was not paying attention. (17 RT 5381.)

Shortly after his arrest, appellant believed that Hickman and Varney may be involved in the murder and so he wrote a letter to his wife asking her to search the Hickmans' camp for any of the items which were missing and stolen out of his truck. (17 RT 5370-5371.)

3. Rebuttal

Paul Smith, the parolee identified by the owner of Lloyd's Barber Shop as working for there, was in custody in state prison on a parole violation from February 16, 1996 through July 21, 1996. (17 RT 5100-5102; 18 RT 5438.)

During the time the FBI was first searching the crime scene, Mike Green spoke with Janet Lemmons who had the closest camp to the crime scene, about 1500 to 1600 feet away. (18 RT 5439-5440.) Green spoke to Janet Lemmons who consented to Green searching her campsite. (*Ibid.*) He searched the Lemmons' trailer, which was visible from the levee, and found nothing of evidentiary value. (18 RT 5441-5442; 50 CT 14940.) He did not recall seeing a machete at the trailer. (18 RT 5445.) In September of 1996, Green accompanied Van Natta, McCormack, Johnson, and Lynette back to this same area but there was no campsite there anymore. (18 RT 5443-5446.) Then they went to the Hickmans' campsite which was made

up of some tarps and pieces of plastic wrapped over the top of some trees and bushes. (18 RT 5443-5445.) There was no one living there anymore, and no vehicles, however, Green collected a few items pointed out by Lynette and McCormack. (18 RT 5444-5445.)

B. Penalty Phase Facts

As noted above, the first penalty phase trial ended in a hung jury and a mistrial. At the second penalty phase trial, the prosecution presented evidence for the new jury, including the circumstances of the crime involving Michael Lyons and appellant's prior sex crimes. Appellant also relied on some evidence of the crime in an effort to raise a lingering doubt as to his guilt. Thus, both parties reintroduced much of the same evidence presented at the guilt phase. Rather than repeat the guilt phase evidence here, respondent sets forth the evidence which is new and was first introduced during the second penalty phase trial.

1. Victim Impact Evidence

Tina Lyons was Sandy Friend's sister. (32 RT 9638.) Prior to Michael's death, Tina talked with her sister about every other week on the telephone. (32 RT 9681.) The day after Michael Lyons' death, Sandy, Billy Friend, Alithya and Mettea moved into Tina Lyons' apartment for three or four weeks because of the attention. (32 RT 9641.) From that point forward, Tina Lyons had much more frequent contact with her sister and their family. (32 RT 9641, 9681.) She saw Sandy every three or four days and had the girls stay with her a couple of nights a month. (32 RT 9681.) Tina missed Michael a lot and had lost a sense of security. (32 RT 9689.) The last time she saw the boy was when she brought him and Alithya their Easter baskets. (32 RT 9690.) The kids were asleep and Tina told her sister not to wake them and that she would come back the following day. (*Ibid.*) Tina Lyons never had the chance to see him after

that. (32 RT 9691.) Ever since his death, she had trouble thinking about him because when she thought about him, all she thought about was the way he disappeared. (34 RT 10313.) She had not been able to get over his death. (*Ibid.*)

Sandy had a part of her that was missing since the death of her son. (32 RT 9686.) Tina Lyons described her as "lifeless." (*Ibid.*) The sparkle in her eye was now missing. (*Ibid.*) She was no longer as happy and carefree. (32 RT 9686-9687.)

Tina Lyons explained that Alithya missed her brother a lot; he was "her protector." (32 RT 9684.) On a regular basis Alithya made it known to others that she had a brother. For instance, on one occasion she screamed out to a waitress at a pizza parlor, "And there's a boy in this family too, ("Bubba") my brother." (32 RT 9685.)

2. Defense Mitigation Evidence

Catherine Menghini was Michael's teacher. (35 RT 10554.) She described him as very outgoing, friendly, and probably the happiest child she had ever met. (35 RT 10558.) Michael liked people. (*Ibid.*) She also described him as clingy. (35 RT 10566-10567.) He came to school clean, although sometimes he showed up dirty. (35 RT 10559, 10567.) He liked to play in the rain. (35 RT 10560.) Menghini remembered one time Michael wrote that he went to the river bottoms with his father fishing. (35 RT 10569.)

Jolene Preader testified that in May of 1996, she lived on Church Street in Yuba City with a "neighborhood grandpa," in his late '70s or early '80s, named Edwin Helsome. (35 RT 10723.) Preader was heavily into drugs at the time. (35 RT 10726, 10738.) She stole checks from Helsome and wrote them for which she was convicted of a felony. (35 RT 10724-10726.)

On May 16, Preader woke up at 12:00 or 1:00 p.m. (35 RT 10728.) That afternoon between 1:00 and 4:00 p.m., a man she had never seen before, but who appellant resembled, came to the door looking for Julia Willoughby. (35 RT 10729-10730.) Preader spoke with the man outside and then left, leaving Helsome inside with his daughter, Shirley Galbraith. (35 RT 10731.) Preader did not see the man's vehicle but did see a small blue car. (35 RT 10737.)

A few days after Michael Lyons was found, Preader spoke to defense investigator McCormack and told him she did not remember what the man who came to the house was wearing but that she did not think he was wearing a shirt. (35 RT 10732-10733.)

On October 9, 1996, Preader told Van Netta the man came between 2:00 and 4:00 p.m., but Preader could not identify the man and did not really know which day he was there. (35 RT 10737; 39 RT 11813-11819.) Preader said he may have come by on May 15, 16, or 17. (35 RT 10737; 39 RT 11821-11822.) When interviewed by Green, Preader told him the man came over between 1:00 and 4:00 p.m., but during that period of time she was using drugs on a daily basis. (35 RT 10738.)

McCormack testified that sometimes he tape-recorded witnesses statements and sometimes not. (39 RT 11825-11826.) The fact that a statement is not tape-recorded is merely a reflection of convenience as sometimes tape recording is difficult to do. (39 RT 11826.) He interviewed Preader on May 24, 1996. (39 RT 11827-11828.) Preader told McCormack that a man came looking for Willoughby at 4:00 p.m. the same day Michael Lyons disappeared. (39 RT 11828-11829.) McCormack interviewed Galbraith on September 22, 1998. (39 RT 11830.) There was a report indicating Van Netta had interviewed Galbraith, however, Galbraith filed a declaration saying she never told Van Netta anything about this. (39 RT 11830, 11833-11834, 11838-11839.)

Shirley Galbraith Christianson (Galbraith) testified that Preader, who was in her late teens or early twenties, stayed with Helsome on and off for several years. (36 RT 11034.) Galbraith did not care for the arrangement. (*Ibid.*) Helsome received money monthly from tenants of several of his rental properties, and one time Preader collected the money from a tenant. (36 RT 11034-11035, 11048-11049.) Preader knew where Helsome's checks were. (36 RT 11048.) Galbraith did not like to talk about money with Helsome in front of Preader. (36 RT 11048.)

After having reviewed documents such as receipts and credit card bills, Galbraith recalled she returned from Las Vegas on May 16, 1996. (36 RT 11035-11043.) She arrived in Yuba City close to 3:00 p.m. (36 RT 11057.) She went to her father's house after 3:20 p.m. (36 RT 11043-11047.) Preader was there with Helsome. (36 RT 11047.) Between 3:30 and 4:00 p.m., Galbraith talked to Helsome about finances in the kitchen. (36 RT 11049-11051.) Galbraith and Helsome would not have been free to have the conversation about finances if Preader had been present. (36 RT 11053.) When Galbraith left the house, Preader was sitting on the couch. (36 RT 11052.)

In 1995, Billy Friend was convicted of misdemeanor spousal abuse against Sandy Friend. (38 RT 11508.) Also that year he was convicted of felony evading a peace officer. (38 RT 11510-11511.) Billy Friend admitted he was not a perfect person and had made some mistakes. (38 RT 11517.) However, he had the capacity to love people. (*Ibid.*) He had been living with Sandy Friend for ten years, since Michael Lyons was just two years old, and married her two years prior. (38 RT 11505, 11516.) Billy Friend was Michael's dad, and it killed him when Michael died. (*Ibid.*) He was very angry; Michael's death had ruined his life. (38 RT 11517.) He started drinking again a month after Michael's death, and he no longer lived with Sandy. (*Ibid.*)

The defense presented the testimony of forensic pathologist Donald Henrikson who had been hired by the Yuba City Police Department and the Nevada County Coroner to conduct reviews of assessments made by Dibdin in two unrelated cases. (37 RT 11115-11121.) In one case, Henrikson disagreed with Dibdin's conclusion that the victim, Ms. Cummings, died of blunt force trauma. (37 RT 11126.) Instead, Henrikson opined that Ms. Cummings had suffered a heart attack and an unprotected fall when she collapsed after the heart attack. (37 RT 11128.) In another case, Henrikson believed the victim, Mr. Evans, died as a result of shrapnel from an exploding artillery piece while Dibdin found that the cause of death was gunshot wounds. (37 RT 11131-11136.) Henrikson testified that he too, had made mistakes, including one where he thought a woman had suffered a gunshot wound when the wound was actually the result of a stabbing. (37 RT 11137.) He explained that there are situations where reasonable forensic pathologists can differ. (37 RT 11138.) Henrikson had not seen or reviewed any of the documents, reports, or photographs in the case of Michael Lyons' murder. (37 RT 11138.)

Appellant's father, Boyd, testified that he married appellant's mother, June, in 1950. (37 RT 11274.) He gambled and cheated on her. (*Ibid.*) Appellant was born in 1952. (37 RT 11275.) Boyd and appellant had a normal father/son relationship except that Boyd would go out and gamble and drink until 2:00 a.m. (*Ibid.*) Appellant's sister Janet was born in 1957. (37 RT 11276.) When appellant was about ten years old, Boyd returned to being a strict Seventh Day Adventist and expected his children to do the same. (37 RT 11277-11279.) Appellant was sent to church school and was restricted from doing some things that other kids were able to do. (37 RT 11279-11281.) Appellant had a curfew and could not play football. (37 RT 11281.) He was allowed to play Little League, and Boyd took them skiing

and camping. (37 RT 11282.) Appellant was a great singer. (*Ibid.*) He described appellant as have a normal childhood. (*Ibid.*)

Appellant and Boyd got into verbal battles when appellant was 16 and 17 years old. (37 RT 11283.) Appellant left the boarding school and was fighting for his independence. (*Ibid.*) He was irritated and rebellious. (37 RT 11284.) Appellant was married three times. The first wife deserted appellant and their son Robby. (37 RT 11286.) Appellant did not get along well with their second wife either. (37 RT 11287.) Boyd's grandson lived with Boyd for some time. (*Ibid.*) Boyd was aware appellant had a drug problem and that appellant tried to keep it from him. (37 RT 11289.)

Boyd divorced June, then remarried, and then divorced again. (37 RT 11284.) Boyd then married someone else and moved to Washington. (*Ibid.*)

June testified that for the first 12 years of their marriage, Boyd was running around, gambling, and drinking. (38 RT 11555.) There was a lot of problems and conflict. (*Ibid.*) When appellant was ten years old, Boyd changed dramatically and started going back to church. (38 RT 11558.) June and Boyd did what they could so that appellant and his sister had a regular family life. (38 RT 11562.) They had dirt bikes and horses. They went camping, fishing, and waterskiing. The kids always had friends that went with them. (*Ibid.*)

Appellant was not happy going to church school, and he and Boyd used to fight on Saturdays about whether appellant would have to go to church. (38 RT 11565-11566.) June was often a buffer between them. (38 RT 11566.) The marriage between June and Boyd broke down, and they divorced in 1978. (38 RT 11567.) They remarried a year later and then divorced again in 1982. (*Ibid.*) Appellant did not want to go to boarding school but would rather have gone to Yuba City High School. (38 RT 11568.) They did not have daily contact with appellant while he was at

boarding school but would see him on some weekends. (*Ibid.*) With regard to religion, it was very strict in their household. (38 RT 11570.)

Appellant went into the army shortly after high school. (38 RT 11571.) He returned with a wife and son. (*Ibid.*) The wife left appellant and the son. (38 RT 11572.) Appellant married a second time, and that marriage ended as well. (38 RT 11572-11573.) Appellant got married a third time, to Lynette, when he was in prison. (38 RT 11573-11574.)

All four of June's brothers were alcoholics. (38 RT 11574.) One of them murdered his wife and then committed suicide. (*Ibid.*) Appellant had seen this aunt and uncle and their five children regularly because they lived next door to June's parents. (38 RT 11575.) June loved appellant, and her relationship with Boyd was amicable. (*Ibid.*)

Lavena was Boyd's sister. (38 RT 11576.) For the first 10 or 12 years of appellant's life, Lavena did not have much interaction with appellant's family because Lavena and her family's life centered around church activities. (38 RT 11581.) When appellant was nine or ten, Lavena began taking him and his sister to church. (38 RT 11582.) Once Boyd got back into the church, Lavena involved herself more with his family. (38 RT 11584.) Appellant had a lot of energy and was a very kind person. (38 RT 11585.) Lavena did not sense any problem between appellant and his father about appellant attending church or adhering to the church guidelines. (*Ibid.*)

Janet Cordero, appellant's sister, testified that she grew up in the Seventh Day Adventist religion and went to its schools all the way through college. (38 RT 11588-11591.) She remembered that there was a lot of turmoil between Boyd and appellant. They were constantly butting heads and yelling. (38 RT 11589.) Boyd was overly critical and overly strict with appellant because he did not want him to do things he had done. (38 RT 11594.) Robert had a great musical talent. (38 RT 11592-11593.)

Cordero had been involved in drugs for over a year when she was 36 years old. (38 RT 11593.)

James Park was an expert concerning prisoner classification, prison operation and adult correctional facilities. (38 RT 11598.) He reviewed appellant's prior prison record and interviewed appellant. (38 RT 11624.) He did not take into consideration appellant's time on parole. (39 RT 11721.) He described form 115 as being a form used to document more serious disciplinary offenses which can carry a penalty consisting of a warning up to isolation for thirty days. (38 RT 11625, 11641.) Form 128-A was for less serious offenses or infractions. (*Ibid.*)

Appellant was committed to the Department of Corrections in January, 1986 and released in October, 1990. (38 RT 11631; 39 RT 11725-11729.) A supervisor opined that in 1989, appellant would leave prison with "a positive attitude to adjust to society." (39 RT 11723-11724, 11737.) He was incarcerated again in July, 1993, and released in September, 1994. (*Ibid.*)

During his years of incarceration, appellant had four disciplinary actions. (38 RT 11627; 39 RT 11710.) In 1986, he was found in another prisoner's cell without permission. (*Ibid.*) This was initially classified as a serious offense on form 115 and was reduced three months later to an administrative offense using the same form. (38 RT 11630; 39 RT 11710-11711.) In 1987, he used a bed sheet as a curtain. (38 RT 11630; 39 RT 11714.) Another incident that year involved refusing to sign for a rule book. (39 RT 11714.) Also in 1987, appellant incurred another disciplinary action for talking to an inmate on a visiting room telephone. (38 RT 11641; 39 RT 11716.) Appellant also lied to prison officials and told him he was married. (38 RT 11632.)

Appellant received good work reports indicating he was a productive prisoner and did not cause trouble. (38 RT 11633-11634.) He was not

dangerous or assaultive while working. (*Ibid.*) In 1989, a supervisor indicated appellant was an exceptional worker and wrote that appellant was eligible to be a lead man in charge of several departments overseeing other inmates. (38 RT 11635-11636.) He became a lead man thereafter. (38 RT 11636-11638.) In 1988 he was the victim of a stabbing but did not retaliate against his attacker. (38 RT 11637.)

Park opined that appellant was an excellent and outstanding prisoner and that he would again make a positive and useful adjustment if he served another prison term. (38 RT 11642.)

ARGUMENT

I. RESPONDENT DOES NOT OPPOSE THE REVIEW OF CONFIDENTIAL DOCUMENTS BY THIS COURT

Appellant asks this Court to review various confidential documents to determine if the trial court denied him his federal due process and confrontation rights by denying him access to the documents. (AOB 84-86.) Respondent does not oppose this request.

A. Background

On September 10 and 23, 1997, prior to trial, appellant subpoenaed and moved to compel the production of the records of Michael Lyons and/or his family from various agencies, including the Yuba City Police Department (YCPD), Yuba City Unified School District (YCUSD), Sutter County Department of Human Services (SDHS), Dr. Alfred French of Sutter-Yuba Mental Health Services (SYMHS), Susan Craig, school psychologist at YCUSD, and the FBI. (2 CT 516-556, 568-575; 49 CT 14431-14439.) The subpoenas sought medical and psychological records concerning prior instances of molestation of Michael Lyons as well as records of interviews with psychologists, psycho-therapists, and psychiatrists during the investigation of his murder. (*Ibid.*) The

prosecution opposed production of the documents on the ground that the records were protected by the psychotherapist-patient privilege pursuant to Evidence Code section 1014. (2 CT 557-563.) Sandy Friend, the YCPD, and Yuba City opposed the subpoenas on the same grounds. (2 CT 564-580.) At a hearing on September 23, 1997, the defense indicated that it subpoenaed similar records from Yuba County Children's Protective Services (YCCPS). (2 RT 238-239.) The prosecution informed the court that the FBI had no responsive documents. (2 RT 243-244.) The trial court granted appellant's request to conduct an in-camera review of the records. (2 RT 261-263; 2 CT 586, 588; 48 CT 14264-14418; 49 CT 14419-14430, 14440-14574, 14575-14639.)

On October 9, 1997, the court indicated that it weighed appellant's constitutional rights against the privileges asserted. (2 RT 288-289.) The court found no relevant evidence in the entire packet of documents which would assist appellant in his right to confront witnesses in the case or his right to present a defense. (*Ibid.*) Most of the documents reviewed were remote to May, 1996, and the court refused to discover any of the documents to the defense pretrial. (*Ibid.*) The court indicated the request was subject to renewal at some point during the trial should any of the evidence become relevant or admissible. (*Ibid.*)

On March 23, 1998, still prior to trial, appellant made a second motion to compel discovery of the school records pertaining to Craig's counseling of Michael Lyons through the Bridge Street Elementary School arguing that Craig waived the psychologist privilege by talking to law enforcement. (7 CT 1802-1820.) These were the same records reviewed in camera by the Sutter County Superior Court prior to the change in venue to Sacramento County and which were deemed by the former court to be irrelevant and of no assistance to appellant's right to confront witnesses or present a defense. (7 CT 2068-2069.) On April 15, 1998, the trial court

ordered defense counsel to prepare subpoenas for custodians of record of parties who may be claiming a privilege to the subject records for hearing before the court. (8 CT 2256.) On May 5, 1998, appellant subpoenaed records from YCPD, Sutter Mental Health, SYMHS, Roxanne Gilpatric, DHS, and Craig of YCUSD. (11 RT 3468-3469; 8 CT 2281-2288.) A hearing was held on the matter in which various custodians appeared and testified. (11 RT 3470-3524.) The court took the matter under submission pending the receipt of the position of county counsel for two of the agencies. (11 RT 3524; 8 CT 2288.)

Opening statements for appellant's jury trial began on May 12, 1998. (8 CT 2291.) On May 14, 1998, appellant filed a brief in support of the discovery of the psychological and investigative records of Michael Lyons addressing the psychotherapist-patient privilege. (8 CT 2310-2317.) Appellant argued that there was no authorized representative to object pursuant to Evidence Code section 1014 and no individual capable of enforcing the prohibition under Welfare and Institutions Code section 5328, therefore, he was entitled to discovery of the relevant evidence. On June 1, 1998, the parties presented further arguments regarding the discovery motion by the defense. (8 CT 2350.) The trial court noted that the earlier ruling made by the Sutter County Superior Court denying appellant's motion indicated that most of the documents reviewed were rather remote to May, 1996. (16 RT 5077-5078.) The current court found this to be "a very accurate statement." (*Ibid.*) The prior court had denied the first motion subject to renewal at some point during the trial should any new evidence become available which could change the court's ruling. (16 RT 5078.) The current court stated, "Now what I'd like to hear tomorrow morning, if you care to address it, and I'm certainly not requiring it, is what have I heard that would make the information regarding this youngster any more relevant now than at the time this judge made his ruling." (*Ibid.*)

The following morning, the court clarified that the defense sought the discovery for the purpose of assisting the defense, including the defense theory that perhaps Michael Lyons was the victim of ongoing molestation by another person prior to any contact with appellant. (16 RT 5086-5090.) The court stated, and defense counsel agreed, that the court "based upon what you g[a]ve me would [] look for references to conduct of a sexual nature involving this child . . ." within the documents produced to the court. (16 RT 5090.) Final arguments were heard on June 3, 1998, and the trial court denied the motion. (16 RT 5084-5098; 17 RT 5246-5254; 8 CT 2360.) The trial court found,

> I - - I think I've read a lot of the theories behind all of this, and you certainly have the right of the defendant to know everything that he needs - - or can know in terms of presenting a defense in the matter, particularly as - - particularly as it relates to relevancy in the light.
>
> I just, as Judge Damron did, I don't find anything amongst the discovery that's been given me, and I'm going to hand the discovery to the clerk with the instruction to put it back in one of these envelopes where it was here before and not to furnish it to anyone except on a court order, but considering that information in there, I don't find anything that's relevant or additionally helpful to the defendant over that which he already has in terms of any defense he wishes to make considering all the remarks that have been made to the court as to what the defenses in this matter will be.
>
> And the only thing I'm still concerned about is whether someone has to assert [the privilege] or whether someone has to waive it. I don't have a real answer to that. I don't think that any authorities have been cited to me, and considering the comment I earlier made about anything that's relevant or helpful to the defense, the court feels that it does not penalize the defense in the slightest by denying the motion for discovery, and that will be the order.

(17 RT 5253.)

Prior to the second penalty phase trial, appellant again moved to compel discovery, this time seeking the health care, medical, psychiatric and counseling records of Michael Lyons and Sandy Friend from YCCPS, SYMHS, Dr. Alfred French, Bridge Street Elementary School, YCPD, SDHS, Sutter County Witness Program, Fremont Medical Center, Sutter North Medical Group, YCUSD psychologist Susan Craig, Andros Karparos School principal Roxanne Gilpatric, Dr. Sheridan Wailler, Donald Siggins, M.F.C.C., Del Norte Clinics, Inc., Rideout Memorial Hospital, Sandra L. Friend, Law Offices of Robert Fruitman, Robert Fruitman, and YCUSD.[30] (13 CT 3706-3732, 3768-3773.) Appellant asserted that while the first two discovery motions were directed at discovering information related to his defense, this third discovery motion was directed at discovering information related to the impeachment of prosecution witnesses Dr. Dibdin and Tina Lyons. (30 RT 9082.)

Various responses were filed and argued by the subject entities and individuals as well as the People. (30 RT 9076-9149; 13 CT 3733-3767, 3774-3813, 3869-3891; 14 CT 3922-3923.) The trial court released from their subpoenas Del Norte Clinic, Inc., Siggins, YCPD and YCUSD. (30 RT 9121, 9131-9132; 14 CT 3923.) On February 10, 1999, the trial court denied appellant's motion for the third time. The minute order of the court's ruling states,

> Other than for the asserted physician/patient privilege, which is not appropriate in a criminal case, the Court finds that remaining privileges are properly asserted. The Court has, however, examined the various files with a view to weighing the content

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[30] Appellant asserts that the court held an in camera hearing on January 7, 1999, regarding his sealed motion to produce mental health and medical records of Michael Lyons. (AOB 81-82.) The portions of the Reporter's Transcript cited by appellant (29 RT 8957-8979) are noted to be under seal.

> of the information furnished as against said privileges and again finds nothing that is relevant or additionally helpful to the defendant over that which he has considering everything that has been presented to the Court thus far.

(14 CT 4076.)

B. Discussion

Appellant asks this Court to review the confidential documents examined by the trial court to determine whether the trial court erred in refusing to disclose them which in turn may have denied appellant his federal due process and confrontation rights. (AOB 85-86.) The California Supreme Court has, on at least two occasions, reviewed sealed records in camera to determine whether disclosure was required. (*People v. Gurule* (2002) 28 Cal.4th 557, 595; *People v. Webb* (1993) 6 Cal.4th 494, 518.) Accordingly, respondent does not oppose appellant's request.[31]

II. THE TRIAL COURT PROPERLY ADMITTED LYNETTE RHOADES' HEARSAY STATEMENTS AS SPONTANEOUS DECLARATIONS AND DECLARATIONS AGAINST INTEREST, AND ANY ERROR UNDER *CRAWFORD* IS HARMLESS

Appellant argues that the trial court abused its discretion in admitting the statements of his wife, Lynette, as spontaneous declarations and declarations against social interest because there was insufficient evidence

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[31] Citing *People v. Memro* (1985) 38 Cal.3d 658, 684-685 (*Memro*), appellant seeks a reversal should this Court find that the trial court erred by refusing to disclose the subpoenaed documents. (*Ibid.*) However, this Court in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn.2, overruled *Memro* to the extent it suggested outright reversal, rather than remand, is the appropriate remedy when the trial court erroneously denies a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 571 without conducting an in camera review of the requested documents. In the event this Court determines relevant, discoverable information exists, respondent requests an opportunity to demonstrate there is no reasonable probability of a different outcome had the evidence been disclosed.

of a startling or disturbing event and because the statements would not subject Lynette to hatred, ridicule or social disgrace as required by Evidence Code sections 1240 and 1230, respectively. (AOB 87-97.) He also contends that admission of her statements violated his rights under the Confrontation Clause of the Sixth Amendment as held in *Crawford v. Washington* (2004) 541 U.S. 36, 60 (*Crawford*), and requires the reversal of his convictions. (*Ibid.*) As more fully set forth below, these arguments lack merit.

A. Background

In limine, the prosecution sought the admission of statements made by Lynette on May 20, 1996, concerning the identification of the bracelet found under the body of Michael Lyons and the blanket found near his body. (5 CT 1394-1408; 6 CT 1570-1576.) The People made the motion on the grounds the statements were admissible under Evidence Code sections 1240 and 1230.[32] (*Ibid.*) On April 14, 1998, during a hearing to determine the admissibility of the statements, Lynette declined to testify, invoking the marital privilege. (5 RT 1684.) As a result, the prosecution called Johnson of the YCPD to the stand. (5 RT 1686.) Johnson testified that on May 20, 1996, three or four days after the murder, he accompanied FBI Agent Rinek to Lynette's apartment in Stockton to interview her. (5 RT 1686-1688.) When they arrived, Lynette told Johnson and Agent Rinek that she had just gotten off the phone with appellant's attorney and that she would not talk to them unless they could prove to her that appellant committed a crime. (5 RT 1688-1689, 1696-1697.) The investigators told Lynette that they had found the boy's footprints inside appellant's truck. (5

[32] The People also made this motion on the grounds that Lynette's statements were admissible under the federal "catch-all" hearsay exception found in Federal Rules of Evidence, rule 807 (formerly rule 803(24)). (5 CT 1400-1401.) The trial court did not make a ruling on this ground.

RT 1689.) Upon hearing this, Lynette began hyperventilating and then dry heaving to the point that she actually vomited. (*Ibid.*) She was having a hard time breathing. (*Ibid.*) The investigators offered to call an ambulance to give her medical attention. (*Ibid.*) Lynette remained physically ill for about five minutes before she started to calm down and said she would talk to them. (5 RT 1689-1691, 1701.) She was still visibly upset with tears rolling down her cheeks but she could breathe fairly normally. (5 RT 1691.)

Johnson showed Lynette a picture of the bracelet found underneath Michael Lyons' body. (5 RT 1690.) Lynette responded that she had seen the bracelet in her husband's vehicle two days prior to the incident involving Michael Lyons. (*Ibid.*) On that morning, at about 10:30 a.m., she took appellant's truck and washed the outside and then cleaned the inside of the cab. (5 RT 1702-1703.) At that time she found the bracelet under the driver's seat, and she placed it on the dash. (5 RT 1703.) She had wondered to whom it belonged. (*Ibid.*) The investigators also showed her a picture of the blanket that was found near Michael Lyons' body. (5 RT 1690.) She recognized the blanket as one that was kept in the back of her husband's truck for use when they went camping or fishing. (*Ibid.*) Following these identification questions by Johnson, Rinek conducted a detailed interview with Lynette, and at the conclusion of the interview Lynette signed a written statement. (5 RT 1692; 6 CT 1576.)

The prosecutor argued that Lynette's statements were admissible as exceptions to the hearsay rule in that the statements were spontaneous declarations under Evidence Code section 1240. (5 RT 1704.) The prosecutor also argued that the statements were admissible as statements against interest under Evidence Code section 1230. (5 RT 1709-1710.) The defense contended that the statements were not spontaneous because Lynette already knew that appellant had been arrested and that police

wanted to question her. (5 RT 1705.) He argued that Lynette had time to reflect upon this information which had prompted her to say she would not make a statement unless law enforcement showed her something. (5 RT 1706.) He also contended that Lynette thought the information she gave the officers would be helpful to her husband. (*Ibid.*) Furthermore, enough time had passed that Lynette had calmed down. (5 RT 1707-1708.) Finally, the defense argued that Evidence Code section 1230 was inapplicable because it was inconsistent with the People's assertion that the statements were spontaneous declarations. (5 RT 1710-1711.)

The trial court ruled Lynette's statements admissible under Evidence Code section 1240. (5 RT 1709.) The court analogized the facts to those in *People v. Poggi* (1988) 45 Cal.3d 306 (*Poggi*), as cited by the People, in which statements made by the murder victim to a police officer 30 minutes after she had been stabbed were admissible under the spontaneous declaration exception to the hearsay rule. (*Ibid.*; 6 CT 1572-1573.) The court also agreed with the People that Lynette's statements to the officers were admissible as declarations against interest in that the statements created such a risk of making her an object of hatred, ridicule, or social disgrace in the community that a reasonable lady in her position would not have made the statements unless she believed them to be true. (5 RT 1711-1712.)

B. Discussion

1. Lynette's Statements Were Admissible As Spontaneous Declarations

Evidence Code section 1240 is a codification of the well-established common law exception to the hearsay rule for "excited utterances."[33]

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[33] Evidence Code section 1240 states in full:

(continued...)

(*Poggi, supra*, 45 Cal.3d at p. 318.) Under this exception, "[a] statement may be admitted, though hearsay, if it describes an act witnessed by the declarant and '[w]as made spontaneously while the declarant was under the stress of excitement caused by' witnessing the event." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809 (*Gutierrez*).)

> To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]

(*Poggi, supra*, 45 Cal.3d at p. 318.)

> The word 'spontaneous' as used in Evidence Code section 1240 means 'actions undertaken without deliberation or reflection . . . . [T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.' [Citations.]

(*Gutierrez, supra*, 45 Cal.4th at p. 811.)

"The crucial element in determining whether an out-of-court statement is admissible as a spontaneous statement is the mental state of the speaker." (*Gutierrez, supra*, 45 Cal.4th at p. 811.) The court considers a

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(...continued)

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

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

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

variety of factors to determine the mental state of the declarant. (*People v. Farmer* (1989) 47 Cal.3d 888, 903.)

> These factors include the length of time between the startling occurrence and the statement, whether the statement was blurted out or made in response to questioning, how detailed the questioning was, whether the declarant appeared excited or frightened, and whether the declarant's 'physical condition was such as would inhibit deliberation.' [Citations.]

(*People v. Lynch* (2010) 50 Cal.4th 693, 752.)

Whether the requirements of Evidence Code section 1240 are met is a question of fact largely within the discretion of the trial court, and "'each fact pattern must be considered on its own merits. . . .'" (*People v. Riva* (2003) 112 Cal.App.4th 981, 995; *People v. Phillips* (2000) 22 Cal.4th 226, 236; *Poggi*, *supra*, 45 Cal.3d at p. 318.) The trial court's determination of preliminary facts will be upheld if supported by substantial evidence (*People v. Brown* (2003) 31 Cal.4th 518, 541), however, this Court reviews for abuse of discretion the trial court's decision to admit evidence as a spontaneous declaration (*People v. Lynch*, *supra*, 50 Cal.4th at p. 752; *People v. Phillips*, *supra*, 22 Cal.4th at p. 236).

Here, substantial evidence supports the trial court's ruling that Lynette's statements qualified as spontaneous statements. First, there was ample evidence that Johnson's statement to Lynette was an event likely to induce stress and nervous excitement. Clearly, Lynette was "excited;" she was overwhelmingly distraught upon learning that Michael Lyons had been in appellant's truck and appellant could be responsible for the murder. She was overcome with emotion and could barely breathe. She started dry heaving and actually vomited at the thought of his involvement. The investigators deemed the situation serious enough to warrant medical assistance, which she declined, and had to wait until she could adequately breathe before talking to her. Thus, Johnson's statement that Michael

Lyons' footprints were found in appellant's truck qualified as a startling event under Evidence Code section 1240. Second, Lynette continued in a nervous and excited state while identifying the items in the pictures shown by the investigators. She remained excited even though she had calmed down enough to speak. (See e.g., *Poggi, supra*, 45 Cal.3d at p. 319 ["the fact that the declarant has become calm enough to speak coherently . . . is not inconsistent with spontaneity."].) Her reflective powers were still in abeyance at this point, and there was no opportunity for her to think about her answers or misrepresent information to the officers.

Moreover, her responses were in no way self-serving or helpful to appellant which further demonstrates that her identifications were not part of an attempt to contrive answers. Prior to being told about the footprints, Lynette tried to assist appellant by refusing to answer the investigators' questions. But after Johnson revealed appellant's involvement, Lynette was tremendously distressed and upset. There was nothing to suggest that Lynette engaged in a deliberative or reflective process prior to answering the questions, and her answers did not help appellant in any way. Rather, the identifications further corroborated appellant's guilt. It was also against her interests to identify the blanket and the bracelet as explained in more detail below. Further, the investigator's questions were not suggestive; Johnson at this point simply asked if Lynette could identify the bracelet and the blanket by showing her pictures. There is no evidence that the initial questioning by Johnson was detailed.[34] Finally, Lynette's identifications of the blanket and bracelet plainly relate to the startling event, that is, the revelation by Johnson that Michael Lyons was present inside appellant's

[34] Following her identifications of the bracelet and blanket, Agent Rinek started a detailed interview with Lynette. (6 CT 1576.)

truck prior to his murder. Thus, the trial court properly admitted the statements.

Appellant argues that "[Lynette's] statement was made days after her observations, which were hardly exciting events." (AOB 91.) This argument assumes that the event perceived by Lynette which caused the stress of excitement was the discovery of the bracelet in appellant's truck two days before the murder. This is incorrect. The stressful and exciting "act" or "event" perceived by Lynette was Johnson's statement to her that Michael Lyons' footprints were on the inside surface of the windshield of appellant's truck. It is this stressful event which prompted the overwhelming emotional and physical reaction by Lynette and the spontaneous declarations. The prosecutor at all times asserted that the triggering "act" or "event" was the revelation of her husband's involvement in Michael Lyons' murder, and the record shows that defense counsel understood this to be the case. (5 RT 1704-1709; 6 CT 1570-1574.) The trial court's ruling, analogizing the case to *Poggi*, *supra*, 45 Cal.3d 306, also demonstrates that the court understood the triggering event to be Johnson's statement to Lynette indicating Michael Lyons had been inside appellant's truck, a statement which was made minutes before Lynette identified the bracelet and blanket. (5 RT 1709.)

Next, appellant contends that Johnson's statement revealing appellant's involvement in the crime was not a disturbing or startling event sufficient to produce the required nervous excitement. (AOB 91.) He complains that "there was no evidence of an ongoing emergency or that Mrs. Rhoades had been threatened or feared appellant; the questioning occurred during a police investigation into Michael's murder," citing to *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1597 (*Saracoglu*). (*Ibid.*) While this assertion by appellant does relate to the issue of whether Lynette's statements were testimonial or not (see subsection 3, *post*), for a

spontaneous declaration to be admissible there is no requirement that the speaker must be threatened by or fear the defendant in an ongoing emergency. The startling event perceived by the declarant can be a secondary event, such as the disclosure of information, which is startling enough to produce a nervous excitement which in turn renders the declarant's statement spontaneous and unreflecting.

This Court found in *People v. Arias* (1996) 13 Cal.4th 92, 150 (*Arias*), that just such a statement was the perceived "act" or "event." There, the victim, Judy N. was kidnapped at gunpoint, robbed and repeatedly sexually assaulted. (*Id.* at pp. 116-120.) Shortly thereafter, and after contacting law enforcement, Judy N. was directed to stand next to another victim, McCord, who had just had her truck taken from her at gunpoint by the defendant. (*Id.* at p. 120.) During the time they were together, Ms. N. was visibly upset and repeatedly told McCord that her abductor had stated to her, "Haven't you been reading about me in the papers? I'm the man who killed the man in the Beacon Gas Station." (*Ibid.*) It was this incriminating statement by the defendant which was the "act" or "event" which Judy N. personally perceived during the course of her abuse by the defendant. (*Id.* at p. 150.) In rejecting the defendant's contention that the purported act or event was not perceived by the declarant, this Court declared that, "Nothing in the words or purpose of the "spontaneous declaration" exception makes it inapplicable when the "act" or "event" perceived and recounted is a statement implicating its declarant in another crime." (*Ibid.*) As in *Arias*, the startling event was the statement of another implicating appellant in the crime.

In light of these circumstances, there was sufficient evidence of the foundational requirements under Evidence Code section 1240 to make Lynette's statements admissible as spontaneous declarations, and the trial court properly exercised its discretion in their admission.

2. Lynette's Statements Were Admissible As Declarations Against Social Interest

Appellant also argues that the trial court abused its discretion in admitting Lynette's statements under the declaration against interest exception to hearsay found in Evidence Code section 1230. That section states:

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

"The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 462.)

> The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]

(*People v. Geier* (2007) 41 Cal.4th 555, 584.) "A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion. [Citation.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) An exercise of discretion will not be disturbed unless it is

"arbitrary, capricious, or patently absurd." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

In this case, the trial court properly admitted the statements of Lynette under Evidence Code section 1230. Lynette refused to testify at the hearing citing the marital privilege and was therefore unavailable. The statements were against Lynette's interest in that they created such a risk of making her an object of hatred, ridicule or social disgrace in the community. The declaration must be so far contrary to the Lynette's interests "that a reasonable [wo]man in [her] position would not have made the statement unless [she] believed it to be true." (*People v. Chapman* (1975) 50 Cal.App.3d 872, 878.) Being the wife of someone who kidnaps, sodomizes, tortures, and murders a defenseless child would unarguably bring social disgrace and ridicule. No reasonable person would want to incur the shame and repugnance that such statements would naturally bring about.

And finally, Lynette's statements were sufficiently reliable as to warrant admission. She would not have identified the blanket and bracelet, thereby assisting law enforcement by providing potentially incriminating evidence against her husband and risking her own ridicule if she did not believe in the truth of her identifications. In light of these circumstances, the trial court properly admitted the statements under Evidence Code section 1230.

3. Appellant Forfeited His Confrontation Clause Argument, And Any Error Was Harmless

Appellant contends that the admission of Lynette's statements violated his right to confrontation under the state and federal constitutions. (AOB 94-97.) However, appellant's hearsay objection at trial is insufficient to preserve a claim of violating the Confrontation Clause of the Sixth Amendment. A defendant's right to confrontation must be timely asserted

at trial or it is forfeited on appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19.) The objecting party must "make clear the specific ground of the objection or motion." (Evid. Code, § 353; see also *People v. Redd* (2010) 48 Cal.4th 691, 730 [hearsay objection at trial does not preserve confrontation clause claim]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 778-780 [same].) However, more recently, in *Gutierrez, supra*, 45 Cal.4th 789, the Supreme Court suggested that a *Crawford* claim might not be forfeited if the objection below was made on a hearsay basis. (See *Gutierrez, supra*, 45 Cal.4th at pp. 809, 812-813.) It explained that an objection on constitutional grounds is not forfeited if "'the new arguments do not invoke facts or legal standards different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, in addition to being wrong for the reasons actually presented to that court, had the legal consequence of violating the Constitution . . . .'" (*Id.* at p. 809.)

Regardless, whether this Court chooses to deem appellant's *Crawford* claim forfeited or to address the issue on the merits, the result is the same. Appellant cannot prevail on a *Crawford* claim because any error is harmless beyond a reasonable doubt.[35]

In *Ohio v. Roberts* (1980) 448 U.S. 56, 66, the Supreme Court held that an unavailable witness's hearsay statement could be admitted without violating the Sixth Amendment's Confrontation Clause if the statement bore "adequate 'indicia of reliability,'" such as if it fell "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." In *Crawford, supra*, 541 U.S. at p. 59, the Supreme Court

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[35] Although *Crawford* was decided after appellant's trial and while his appeal was pending, the high court's ruling applies retroactively to his case. (*People v. Cage* (2007) 40 Cal.4th 965, 975 fn. 4 (*Cage*).)

reconsidered its ruling in *Ohio v. Roberts* and held that if a hearsay statement is testimonial in nature, it is admissible only "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine" the declarant. The Supreme Court was careful to note that its decision implicated only testimonial hearsay and "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford, supra*, at p. 68.) The Supreme Court declined to spell out a comprehensive definition of "'testimonial'" but noted that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the Supreme Court explained further what it considered to be nontestimonial and testimonial statements. It held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Id.* at p. 822.) On the other hand, "[t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid.*)

In 2007, this Court identified several "basic principles" to assist courts in determining whether a particular statement is testimonial. (*Cage, supra*, 40 Cal.4th at p. 965.) The court explained that a testimonial statement need not be given under oath, but it must have some "formality and solemnity characteristic of testimony" and "must have been given and taken primarily . . . to establish or prove some past fact for possible use in a criminal trial."

(*Id.* at p. 984.) On the other hand, "statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Ibid.*) "[T]he primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation." (*Ibid.*)

Respondent concedes that the circumstances of this case demonstrate that the statements given by Lynette were testimonial in nature. Johnson testified that three or four days after the murder he went with FBI Agent Rinek to Lynette's apartment in Stockton for the purpose of interviewing her. (5 RT 1686-1688.) Although the information Johnson provided to Lynette triggered her identification of the blanket and bracelet, there was clearly no contemporaneous emergency occurring. The investigators were trying to obtain information about the murder of Michael Lyons which could be used in a later criminal trial. The question and answer format at her residence was somewhat formal. Johnson and Rinek identified themselves and asked to talk to Lynette. (6 CT 1575.) As detailed above, Lynette refused to speak with them at first. However, Lynette ultimately identified the bracelet and blanket when Johnson showed her pictures of the items. As such, Lynette's statements identifying the bracelet and blanket were testimonial in nature and subject to the requirements of *Crawford*, *supra*, 541 U.S. at p. 68.

Nevertheless, appellant is not entitled to the reversal of his conviction. This constitutional error is harmless if the court can "declare a belief that it was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) *Chapman* stands for the principle that "an otherwise valid conviction should not be set aside if the reviewing court

may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) Whether a confrontation clause error was harmless under *Chapman* depends on a number of factors, including (1) the importance of the witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. (*Id.* at p. 684)

Here, any Confrontation Clause error was harmless beyond a reasonable doubt because the jury would have convicted appellant even if Lynette's statements had been excluded. Lynette's identification of the bracelet and blanket suggest that Michael Lyons was in or around appellant's truck near the time of his murder. But based on other evidence admitted at trial, there was no question that Michael Lyons was in appellant's truck. Michael Lyons' footprints were found on the windshield. The presence of the blanket and the bracelet under and near Michael Lyons' body are merely corroborative of that fact. Even appellant's defense that someone else committed the murder in his truck is premised on the fact that Michael Lyons was inside his truck. Furthermore, the owner of the bracelet, Ottinger, testified that the last time she had seen her bracelet was when she placed it in her bag at appellant's home. (15 RT 4642.) Her bags were later placed in appellant's truck. (*Ibid.*) She did not see her bracelet after that but later identified it for law enforcement. Lynette's statements were therefore cumulative and corroborating to other admissible evidence, including Ottinger's.

Moreover, the evidence against appellant was overwhelming. The evidence showed appellant took Michael Lyons down to the river bottoms, a place with which he was intimately familiar and where he often went to

do drugs. After ferociously sodomizing and torturing the boy, appellant killed him by stabbing him viciously in various areas of his body and slashing his throat. Although appellant tried to avoid "mistakes" so he would not get caught, he failed to take into account several key pieces of evidence. Appellant's clothes, including his underwear, jeans and shirt, had blood on them. There was blood on the left arm and down the back of the shirt from carrying Michael's body to the bushes by the river. Footprints matching appellant's were found between Michael's body and the river where appellant tried unsuccessfully to rinse clean the murder weapon and his clothes. The knife with Michael Lyons' blood covered by river silt was found on the truck's tailgate. Michael Lyons' footprints were on the windshield. Michael's shirt and sweatshirt had five pubic hairs on them which matched appellant's pubic hairs. A green fiber matching Michael's sweater was found in appellant's pubic region. No doubt, even without considering Lynette's identifications, the evidence against appellant was tremendous. The admission of her statements was harmless.

Appellant also complains that Lynette's statements were prejudicial in that they suggested that she had turned on appellant and believed he was guilty because she had initially told the investigators that she would not talk to them unless they could prove appellant killed Michael Lyons. (AOB 97.) However, Lynette's belief about her estranged husband's guilt had little impact in light of the overwhelming evidence of appellant's guilt as set forth above. Thus, the admission of Lynette's statements were harmless beyond a reasonable doubt.

III. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENT TO HIS COUNSEL THAT "I CAN GIVE THEM A BETTER TIME OF DEATH THAN WHAT THEY HAVE."

Appellant argues that the trial court violated his rights to due process and counsel by admitting into evidence a statement he made to his attorneys which was overheard by two bailiffs guarding him. (AOB 97-102.) Appellant effectively waived the attorney-client privilege by making the statement where a third person was ostensibly present, thus his argument merits no relief.

A. Background

The prosecutor moved in limine to admit the statement of a deputy sheriff assigned to watch appellant when court was not in session and who heard appellant make a remark about Michael Lyons' time of death. (5 CT 1409-1413.) Appellant opposed the motion. (8 CT 2123-2128.) At an Evidence Code section 402 hearing, Officer Dinwiddie testified that on October 22, 1996, he was one of two deputy sheriffs assigned to transport appellant to court for his preliminary hearing and to maintain security by watching appellant when court was not in session. (5 RT 1725-1726.) Immediately preceding the morning recess, the testimony at the preliminary hearing had involved the time of Michael Lyons' death. (5 RT 1727.) At the morning recess, Dinwiddie accompanied appellant to the jury room located behind the courtroom. (5 RT 1726.) The jury room was roughly 20 by 30 feet and had two doors. (*Ibid.*) This was the only room in which appellant and his counsel could speak. (5 RT 1728.) The doors to the room remained open so that the officers could maintain a watch on appellant. (*Ibid.*)

Dinwiddie sat by one of the doors about 10 to 15 feet from appellant while the other officer stood by the other door to make sure there was no way for appellant to get out. (5 RT 1726, 1728.) Appellant's attorney, Mr.

Spangler, and the defense investigator accompanied appellant, and the three men sat at a table inside the jury room. (*Ibid.*) They were talking between themselves. (5 RT 1726.) When they first began talking, Dinwiddie could not hear what they were saying. (5 RT 1726-1727.) At one point during their conversation, however, appellant raised his voice, stood up, and said, "I can give them a better time of death than what they have." (5 RT 1727.) His attorney told appellant to be quiet and motioned him to quiet down. (5 RT 1727, 1729.) The attorney said that the walls have ears and, in this case, the doors have ears. (*Ibid.*) The three men continued to talk but once again Dinwiddie was no longer able to hear what they were saying. (*Ibid.*) Dinwiddie did not hear anything else they said. (5 RT 1729.) It was obvious that they were talking about the case. (5 RT 1730.)

The trial court ruled that appellant's statement was not a privileged communication. (5 RT 1731-1732.) Noting that during the presentation of a case there are often times when an attorney needs to speak with the defendant, the court stated:

> As it is, I - - I can only say this. I think the law that you've cited me would militate that I make the decision that the communication as made is not privileged. Is not privileged. I make the finding with a great deal of dislike for it. But I think that's what the cases you've cited indicate to me, and I try to rule with what I understand to be the law. It's not a ruling that I care for in the slightest.

(5 RT 1732.) Consequently, Dinwiddie testified to the incident at appellant's trial. (15 RT 4761.)

B. Discussion

Appellant argues that his constitutional rights to due process and a fair trial and to counsel were violated by the trial court's admission of his statement that "I can give them a better time of death than what they have." (AOB 99-102.) Specifically, the issue is whether the trial court erred in its

determination that appellant's statement was not protected by the attorney client privilege of Evidence Code section 954. (*Ibid.*) Here, the attorney client privilege did not apply.

The Sixth Amendment grants criminal defendants the right to effective assistance of counsel, including the right to private consultation with counsel. (See *McMann v. Richardson* (1970) 397 U.S. 759; *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1196.) Standing alone, the attorney-client privilege is merely a rule of evidence; it does not supply a constitutional right. (*People v. Navarro* (2006) 138 Cal.App.4th 146, 170; *Clutchette v. Rushen* (9th Cir. 1985) 770 F.2d 1469, 1471.) The privilege is a statutory creation (Evid. Code, § 950 et. seq.) and is an exception to the general rule requiring disclosure (Evid. Code, § 911). The privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between the attorney and the client, unless such privilege has been waived by the client. (*Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 291.) The objective of making a particular communication privileged is to encourage a client to disclose all relevant facts to his attorney by removing any apprehension that the confidential communications will later be disclosed to others. (*Sullivan v. Superior Court* (1972) 29 Cal.App.3d 64, 71.)

The party claiming the attorney-client privilege has the burden of proof before the court as the trier of fact. (*San Diego Professional Ass'n v. Superior Court* (1962) 58 Cal.2d 194, 199.) "In order for an individual to successfully invoke the attorney-client privilege it must be shown that he had relied on the confidentiality of the relationship in the communication to his attorney. [Citation.]" (*Gonzales v. Municipal Court* (1977) 67 Cal.App.3d 111, 118 (*Gonzales*).)

> Thus where the client communicates with his attorney with the intention that the communication be conveyed to another, the communication is not privileged. [Citation.] Similarly, *if the communication is made by the client in the open presence of a third party not present to further the interest of the client in the consultation, it is not privileged.*[36] In either case, the circumstances mandate the conclusion that the communication was not intended to be confidential, notwithstanding the protestations of the client as to his subjective intent.

(*Id.* at pp. 118-119 (emphasis added).) Here, there was no evidence presented as to appellant's subjective intent.

"On appeal, the scope of judicial review of a court's finding of the existence or nonexistence of the attorney-client privilege is limited." (*People v. Urbano* (2005) 128 Cal.App.4th 396, 403 (*Urbano*).)

> '"When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations]."'

(*Ibid.*, citing *People v. Gionis* (1995) 9 Cal.4th 1196, 1208.)

There are several cases which demonstrate these principles and support the finding of the trial court. In *Urbano*, one of the attorney client privilege issues addressed by the appellate court concerned a comment and a gesture that the defendant made as he sat in the jury box of his preliminary hearing courtroom while the court was not in session. (*Urbano*, *supra*, 128 Cal.App.4th at p. 402.) An investigating officer was seated in the middle of the row of seats closest to the back of the courtroom. (*Id.* at p. 402.) Lawyers involved in other matters were

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[36] The *Gonzales* court noted that such a disclosure is also said to constitute a waiver of the privilege. (*Gonzales*, *supra*, 67 Cal.App.3d at p. 119, fn. 8.)

engaged in conversation throughout the courtroom. (*Ibid.*) Also seated in the row with the officer was a witness named Ramsey. (*Ibid.*) Urbano sat in the jury box, and his attorney, who sat next to him, showed him a photo lineup card. (*Ibid.*) As Urbano and his attorney talked in the jury box, the investigating officer saw Urbano "'become very exorcised,' point to the area of the audience where Ramsey was sitting, and say '[T]hat guy was drunk.'" (*Ibid.*) Referring to cases spanning almost a century, including *Ruiz v. Dow* (1896) 113 Cal. 490, and *People v. Castiel* (1957) 153 Cal.App.2d 653 (*Castiel*), the court of appeal in *Urbano* affirmed the trial court's ruling admitting the evidence on the grounds that where a client makes a statement loudly enough that a third party who is openly present can hear, the attorney-client privilege is inapplicable. (*Id.* at p. 403.) Because Urbano, sitting next to his attorney in the jury box when court was not in session, spoke to his attorney loudly enough that the officer, openly present in the last row of seats in the courtroom, overheard his comment and saw his gesture, the court held the attorney-client privilege inapplicable.[37] (*Ibid.*)

Similarly, in *Poulin*, the defendant objected on appeal to the admission of the testimony of a bailiff, who was seated "at the far end of the jury box from where the Judge sits," as to a statement made by the defendant. (*Poulin*, *supra*, 27 Cal.App.3d at p. 64.) As a witness was on the stand testifying and drawing a diagram of the bomb that injured him, the bailiff saw appellant, who was seated next to his attorney, make an illustration with his hands to his attorney and say, "It was not quite like that" or "It wasn't like that." (*Ibid.*) The appellate court rejected the

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[37] The *Urbano* court noted *People v. Poulin* (1972) 27 Cal.App.3d 54 (*Poulin*), to be inapposite to its ruling in that in *Poulin* the statement was made by the accused to his attorney as he was seated at counsel table during the course of the trial. (*Urbano*, *supra*, 128 Cal.App.4th at p. 403, fn. 3.)

argument based on the defendant's failure to object at trial (Evid. Code, § 912) and because the attorney-client privilege does not attach to a statement "which is made in the presence of a third person who is ostensibly present . . . ." (*Ibid.*) The court explained:

> Evidence Code section 952 defines a confidential communication between client and attorney, in part, as a communication made 'by a means which, so far as the client is aware, discloses the information to no third persons . . . .' If a communication is made so that it can be overheard by a third person, it obviously is not calculated to insure confidentiality.

(*Ibid.*) The court further reasoned that there was no indication that the bailiff was eavesdropping, but merely that he was seated at the far end of the jury box.

Finally, in *People v. Castiel* (1957) 153 Cal.App.2d 653, the court held that the attorney-client privilege does not prevent a third person openly present and who overhears a conversation between attorney and client from testifying. (*Castiel, supra*, 153 Cal.App.2d at p. 659.) In that case, the court reporter was permitted to testify to a conversation which he overheard between the defendant and his attorney during a recess. The reporter testified also that he was in plain sight, and there was no question of surreptitious eavesdropping. (*Ibid.*)

In this case, Dinwiddie's testimony provides substantial evidence supporting the trial court's determination that the attorney-client privilege does not apply to appellant's statement. During a break in the court proceedings, appellant was seated in the jury room next to his attorney and investigator. The two doors to the jury room were open, and a security officer was visibly stationed at each door. The job of these two officers was to watch appellant when court was not in session. Thus, the officers were openly present. Presumably, one or more officers had been accompanying appellant throughout the course of the court proceedings

such that appellant was aware of their constant presence. Nevertheless, it is undisputed that the bailiffs were ostensibly present at the doors of the jury room. The facts demonstrate that appellant and his counsel were aware of their need to keep their voices low because when they first began talking, Dinwiddie could not hear what they were saying. At some point in the conversation, however, appellant stood up, and in a raised voice declared, "I can give them a better time of death than what they have." He was immediately admonished by his counsel to lower his voice and was reminded that other persons were within earshot. In fact, after appellant's attorney reminded appellant to keep quiet, Dinwiddie again could no longer hear any part of their conversation. Because appellant stood up and spoke in a raised voice sufficiently loud that Dinwiddie, who was openly present at the door of the room, could hear, the attorney-client privilege is inapplicable. The trial court properly admitted the evidence. Because the trial court did not err in admitting the evidence, appellant's constitutional claim must also be rejected. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 ["rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well."].)

Appellant complains that he had no choice but to speak with his lawyer in the jury room and within a few feet of the bailiffs, and this unavoidable situation should not be deemed a waiver of the attorney client privilege. (AOB 100-101.) Despite the fact that this was the only room available to appellant and his lawyer, the fact remains that both appellant and his lawyer were conscious of the officers' presence and must have known based on the close proximity of the officers that their conversation would be overheard if they spoke in raised voices. This is evidenced by the fact that appellant and his lawyer spoke about the case to each other in hushed tones so that Dinwiddie could not hear their conversation. While

appellant may have had no choice about using the jury room and the location of the bailiffs, he did have a choice about how loudly he spoke. And while it may have been undesirable for appellant and his lawyer to speak quietly, he was not, as appellant implies, forced to speak in a place and at such a volume such that the bailiffs would necessarily hear what he was saying. It was appellant's choice to stand and make this proclamation. In fact, no part of the conversation between appellant and his attorney, with the exception of appellant's overt declaration, was overheard by the bailiffs.

Appellant also argues that the bailiffs were unnecessarily close and that they were spying and snitching on him. (AOB 101.) There are simply no facts to support these assertions. Rather, the facts suggest that the bailiffs were positioned in the logical places for purposes of security - just outside each of doors of the jury room. Nothing suggests that either of the bailiffs were eavesdropping. They simply both heard appellant when he stood up and made the statement in a raised voice.

Even if appellant's statement was regarded as a confidential communication within the ambit of the attorney-client privilege, its introduction into evidence was harmless error. This is true under either the constitutional error test of *Chapman*, or the nonconstitutional error test under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). The jury was presented with crushing evidence proving appellant's guilt. (See, Argument II, *ante*.) Appellant's announcement that he could give them a better time of death for Michael Lyons had little effect in light of this monstrous evidence. Thus, beyond a reasonable doubt any possible error did not contribute to the verdict.

IV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S PRIOR UNCHARGED CRIMES AGAINST SHARON THORPE AND CRYSTAL T. PURSUANT TO EVIDENCE CODE SECTIONS 1101 AND 1108

Appellant argues that the trial court abused its discretion under Evidence Code sections 352, 1101, subdivision (b) (also referred to as Evidence Code section 1101(b)), and 1108 in admitting evidence of appellant's prior uncharged crimes against Sharon and Crystal, rendering the trial fundamentally unfair and denying him due process of law. (AOB 102-126.) This evidence was properly admitted under these statutes, and, consequently, appellant's argument should be denied.

A. Background

In limine, the prosecution sought to admit, and the defense sought to exclude, evidence of appellant's prior, uncharged crimes, specifically the 1985 incident in Yuba County in which appellant kidnapped, robbed and forced Sharon to orally copulate him and the 1993 incident in Amador County involving appellant's lewd and lascivious touching of four-year-old Crystal. (5 RT 1655-1675; 5 CT 1214-1229, 1230-1338; 6 CT 1750-1771; 7 CT 2081-2100; 8 CT 2234-2244.) Specifically, the People moved to admit evidence of the incidents pursuant to Evidence Code sections 352, 1101(b) and 1108. (*Ibid.*) On April 20, 1998, the trial court ruled on the parties in limine motions. (6 RT 2030-2032, 2036; 8 CT 2262-2263.) The court found that evidence of both incidents was admissible under Evidence Code sections 1108 and 352, allowing the fact of convictions and the circumstances of the forced oral copulation of Sharon and the lewd and lascivious touching of Crystal. (*Ibid.*) The court further ruled that both incidents were admissible under Evidence Code sections 1101(b) and 352, as the incidents tended to prove appellant's intent to commit the sexual offenses and allegations charged and tended to prove a common scheme

and plan.[38] (*Ibid.*) The court reiterated that it would allow the fact of the convictions and the circumstances of the forced oral copulation of Sharon and the lewd and lascivious touching of Crystal. (*Ibid.*)

B. Discussion

1. The Prior Crimes Evidence Was Admissible Under Evidence Code Section 1108

Evidence Code section 1108, provides in pertinent part as follows:

> (a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352.[39]

Evidence Code section 1108, which was enacted in 1995, deviates from the historical practice of excluding "propensity" evidence by permitting the admission, in a sex offense case, of the defendant's other sex

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[38]The trial court ruled, and the written ruling of the court reflects, that the prior uncharged crimes were admissible under Evidence Code section 1101(b) to prove intent and common plan. (6 RT 2030-2032, 2036; 8 CT 2262-2263.) During the in limine hearing, however, the trial court mentioned that the prior uncharged crimes were "germane to intent as well as modus operandi, so to speak." (6 RT 2036.) Additionally, the court instructed the jury that the prior crimes may be considered for the purpose of determining intent, common plan, and motive. (9 CT 2402.) On appeal, appellant only challenges the court's ruling as it pertains to intent and common plan. He does not challenge the admissibility of the evidence as it relates to motive, and thus respondent does not address this issue in the respondent's brief.

[39] Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

crimes for the purpose of showing his propensity to commit such crimes. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907 (*Falsetta*).) Section 1108 removed the restrictions imposed by section 1101, and permits the jury in sexual offense cases to consider evidence of other charged or uncharged sexual offenses for any relevant purpose. (*Id.* at 911.)

> [T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes. [Citations.]

(*Id.* at p. 915.) In *Falsetta*, this Court found that Evidence Code section 1108 did not violate a defendant's due process rights. While acknowledging the general rule against admitting such evidence due to its great potential to unduly prejudice the defendant, the court held that, "in light of the substantial protections afforded to defendants in all cases to which [Evidence Code] section 1108 applies, we see no undue unfairness in its limited exception to the historical rule against propensity evidence." (*Ibid.*; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 796-799.)

The substantial protections afforded to defendants refers to the requirement that the court engage in a careful weighing process under Evidenee Code section 352:

> Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the

> defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]

(*Falsetta, supra*, 21 Cal.4th at pp. 916-917.) Under Evidence Code section 1108, the trial court "retain[s] broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value. [Citations.]" (*Id.* at p. 919; see Evid. Code, § 352.) Therefore, an appellate court applies the abuse of discretion standard of review for an order admitting disposition evidence under Evidence Code section 1108. (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314-1315.)

> 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]

(*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

Under these standards, and viewing the evidence in the light most favorable to the trial court's ruling, the trial court did not abuse its discretion in admitting evidence of appellant's prior uncharged offenses against Sharon and Crystal. "[E]vidence of a 'prior sexual offense is indisputably relevant in a prosecution for another sexual offense' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282, 283.) Here, the probative value of the prior uncharged crimes was very strong.

First, the sexual offenses against Sharon and Crystal were sufficiently similar to the sexual offenses with which appellant was charged.[40] The act

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[40] The similarity analysis used for determining admissibility under Evidence Code section 1101(b), does not apply when evidence is admitted pursuant to Evidence Code section 1108. However, the relevant analytical framework for this issue is whether the evidence was "subject to exclusion" (continued...)

against four-year-old Crystal in which appellant pled guilty to lewd and lascivious acts with a child (§ 288, subd. (a)), involved appellant asking for Crystal to come to his trailer. Once there, appellant instructed her to take off her clothes, and she complied. Appellant then took off his clothes. He put his penis in Crystal's mouth. He also rubbed his penis on her vagina and buttocks. Crystal told law enforcement that this hurt her.[41] Similarly, in the case of Michael Lyons, the evidence showed appellant had removed his clothes and that of his victim who was found naked from the waist down. The evidence showed that the boy was forced to orally copulate appellant. The autopsy revealed Michael had bruising on the inside of his lips which was consistent with a penis being forcefully pushed into his mouth. (14 RT 4282-4283; 50 CT 14729.) Michael Lyons was also forcibly sodomized as revealed by the autopsy which showed lacerations and bruising to Michael's anus and semen in his rectum. (14 RT 4280-4281; 50 CT 14714, 14718, 14719.)

The incident involving Sharon also shared distinct similarities with the Michael Lyons case. Appellant held a hunting knife to Sharon's throat as he forced her to orally copulate him until he ejaculated. He consequently

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(...continued)
under Evidence Code section 352, and in that regard, the similarity of the crimes is still a consideration. Under Evidence Code section 352, it is the principle factor affecting probative value for the trial court to consider. (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274; see also *Falsetta*, *supra*, 21 Cal.4th at pp. 916-917; *Frazier*, *supra*, 89 Cal.App .4th at pp. 40-41.)

[41] Some of these facts are taken from the extensive police reports attached as Exhibits to the People's in limine motion rather than from the testimony provided at the Evidence Code section 402 hearing. (5 CT 1214-1229, 1230-1338.) In reviewing the trial court's ruling, this Court must consider the facts that were before the trial court at the time of its ruling. (*People v. Welch* (1999) 20 Cal.4th 701, 739; *People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.)

suffered a conviction for forcible oral copulation (§288a, subd. (c)). So too, Michael Lyons was forced to orally copulate appellant who meticulously and methodically sliced him with a knife on numerous parts of his body culminating with the vicious slashing of his throat multiple times.

Additionally, the offenses were relatively close in time. The offenses involving Sharon occurred in 1985. The crime against Crystal happened in 1993. That there was a span of only 11 years during which appellant committed three predatory assaults bolsters the probative value of the uncharged crimes evidence. (See *Ewoldt*, *supra*, 7 Cal.4th at p. 405 [offense 12 years earlier was not excessively remote]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393-1395 [offenses occurring 15-22 years before trial were not too remote in light of similarity to charged offense].)

In comparison with the probative value of the prior sex crimes, the risk of undue prejudice was minimal. The fact that appellant was convicted of lewd and lascivious acts with a child (§ 288, subd. (a)), involving Crystal and was convicted of forcible oral copulation (§288a, subd. (c)), involving Sharon lessened the risk that the jury would be inclined to punish appellant for these crimes once again. The jury's attention would not be diverted by having to make a separate determination regarding whether appellant committed the offenses against Sharon and Crystal because the jury was informed on multiple occasions, including by appellant's own testimony, that appellant suffered convictions for these offenses.

Further supporting the trial court's ruling is the fact that the evidence concerning the prior crimes was brief, taking up approximately one and a half hours.[42] (15 RT 4784; 16 RT 4846.) The totality of the testimony for

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[42] On May 21, 1998, the testimony of Crystal and Sharon began at the start of the afternoon session which was scheduled to begin at 1:30 p.m. (15 RT 4784-4785.) Their testimony concluded prior to the afternoon

(continued...)

these offenses took up 56 pages of transcript. (15 RT 4786-16 RT 4842.) Because of the extremely short duration of the testimony from Crystal and Sharon, particularly in light of the entire evidence phase which lasted several weeks, the jury was not likely to have been distracted from its principal inquiry which was whether appellant kidnapped, sexually assaulted, tortured, and murdered Michael Lyons. Moreover, it is not likely the jury would be inclined to punish appellant for the sexual offenses against Sharon and Crystal in light of the fact that those prior crimes were much less inflammatory in comparison to the crimes against Michael Lyons. The crimes committed against this young boy, included a brutal sexual assault, torture, and ultimately murder, and are arguably the most heinous crimes imaginable. In the crimes against Sharon and Crystal, the victims survived the sexual assaults. Thus, there was little likelihood of confusing, misleading, or distracting the jurors from the task at hand. Under these circumstances, the trial court properly admitted the prior uncharged sex acts under Evidence Code sections 1108 and 352.

Appellant complains that the trial court failed to properly consider all of the factors set forth in *Falsetta* in making its determination of admissibility under Evidence Code section 1108, but instead focused "myopically" on just one of the factors, the similarity of the offenses. (AOB 104.) He fails to cite any part of the record to support this contention, and respondent has found none. Nonetheless, it must be remembered that while the prior uncharged sex offenses and the current sex offense are sufficiently similar if they are both sex offenses as defined in Evidence Code section 1108 (see *People v. Frazier* (2001) 89 Cal.App.4th

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(...continued)
break, which the transcripts indicate was approximately 3:00 p.m. that same day. (16 RT 4846.)

30, 40-41; accord, *People v. Mullens* (2004) 119 Cal.App.4th 648, 660), the similarity factor is central to the trial court's determination of whether the probative value of the evidence outweighs its prejudicial effect under Evidence Code section 352, and to its analysis of whether the prior offenses tend to prove intent and common design under Evidence Code section 1101(b). (*People v. Kelly* (2008) 42 Cal.4th 763, 782-784; *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-406 (*Ewoldt*); *Falsetta, supra*, 21 Cal.4th at p. 917.) Both Evidence Code section 1101(b) and 1108 were at issue in this case. Thus, the trial court was right to consider the similarity between the prior uncharged sex acts and the charged offenses against Michael Lyons in its analysis under these statutes. And there is no evidence that the trial court unnecessarily focused on the similarity of the offenses to the exclusion of the remaining factors.

Furthermore, with respect to the various factors to be considered, "a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) In this case, the record shows that the court properly performed its duty to balance the probative value of the evidence against its prejudicial effect. The trial court heard extensive argument by both sides on the admissibility of the prior crimes and indicated in its written ruling that it specifically performed the required balancing under Evidence Code section 352, finding that the probative value was not outweighed by the possibility of undue prejudice. (5 RT 1655-1675; 8 CT 2262-2263.)

Appellant further argues that the trial court improperly admitted a non-sex offense, the kidnapping of Sharon, to prove a non-sex crime, i.e., Michael Lyons' kidnapping and murder, which is not permissible under Evidence Code section 1108. (AOB 105.) It is irrelevant whether the

kidnapping of Sharon was admissible under Evidence Code section 1108 because the trial court properly admitted this evidence under Evidence Code section 1101(b), as explained in subsection 2, *post*.

Appellant likens the admission of his prior sex crimes to the abuse of discretion found in *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*). He argues that the prior crimes against Sharon and Crystal consisted of "pure propensity evidence" admitted by the trial court. (AOB 105.) Simply put, that is the nature of acts admitted under Evidence Code section 1108. The statute specifically allows for the admission of prior sex offenses to show that a criminal defendant had the disposition to commit the sex offense with which he is charged, of course subject to the court's exercise of discretion under Evidence Code section 352. To the extent that appellant is arguing that the evidence should have been excluded under Evidence Code section 352 because the uncharged sexual offenses were not sufficiently similar to the conduct which formed the basis for the charges against him, his argument lacks merit.

In *Harris*, the defendant was charged with sexual assault of two women who were patients in a mental health facility where the defendant worked. Neither of the charged incidents involved the use of any weapon or the infliction of any physical injury. The prosecution was allowed to introduce evidence of a 23-year-old incident involving defendant's rape and severe beating of a woman in her apartment. Witnesses testified that the woman was found unconscious and severely beaten with blood on her vagina and her mouth. The defendant was found hiding nearby with blood on his jockey shorts, on the inside of his thighs, and on his penis. (*Harris*, *supra*, 60 Cal.App.4th at pp. 732-734.)

On appeal, the *Harris* court found that the introduction of the prior sexual assault was "inflammatory in the extreme" and concluded that the

trial court abused its discretion in admitting the evidence. (*Harris*, *supra*, 60 Cal.App.4th at p. 738.) The court explained:

> Without minimizing the trauma suffered by each victim, at worst defendant licked and fondled an incapacitated woman and a former sexual partner, both of whom were thereafter on speaking terms with him. Although the assaults described by Tracy and Brenda are criminal, involving a breach of trust by a caregiver, the abuse the victims suffered is, unfortunately, not unusual or shocking. On the other hand, the evidence of the 1972 incident described a viciously beaten and bloody victim who as far as the jury knew was a stranger to the defendant. The defendant's role in the attack and his subsequent conviction for burglary, while apparently violent and sexual, is unexplained. The jury is simply told that defendant was convicted of burglary with the infliction of great bodily injury.

(*Id.* at p. 738.) Thus, the *Harris* court found that the charged crimes were "of a significantly different nature and quality than the violent and perverse attack on a stranger that was described to the jury." (*Ibid.*) The court concluded the prior crime evidence was inflammatory and speculative in nature and that the prior crime was remote in time, weighing in favor of exclusion. (*Ibid.*) Additionally, the court disagreed with the trial court's determination that the prior crime evidence was probative, stating,

> The evidence did little more than show defendant was a violent sex offender. The evidence that defendant committed a violent rape of a stranger, as the jury was led to believe, did not bolster [the victims'] credibility nor detract from the evidence impeaching their stories.

(*Id.* at p. 740.) The court concluded that without the prior crime evidence it is reasonably probable that the jury would have acquitted the defendant and reversed the judgment. (*Id.* at p. 741, citing *Watson*, *supra*, 46 Cal.2d 818.)

The facts of this case are readily distinguishable from those in *Harris*. Unlike *Harris*, where the charged offense was "of a significantly different nature and quality than the violent and perverse attack" which made up the uncharged sexual offense, the offenses with which appellant was charged

were similar in many respects to the offenses against Sharon and Crystal. The prior offenses involved having the victim submit to oral copulation. Similarly, the autopsy revealed trauma to the mouth of Michael Lyons indicating he had been forced to submit to oral copulation. Appellant rubbed his penis against the buttocks of Crystal who complained to law enforcement that it hurt. Similarly, appellant brutally sodomized Michael Lyons. Appellant used a knife in his assault of both Sharon and Michael Lyons. He threatened to kill Sharon and in fact informed her that he was going to do just that and that he was taking her to the river bottoms. That is precisely where he took Michael Lyons to torture and kill the boy.

And while similar, the sexual offenses against Sharon Thorpe and Crystal can in no way be described as more violent or perverse than the offenses against Michael Lyons. Just the opposite it true. This is where the differences in the sexual offenses weigh in favor of admitting the evidence rather than in excluding the evidence as in *Harris*. While appellant placed his penis in Crystal's mouth after having her undress and forced Sharon to orally copulate him while holding a knife to her throat, it was Michael Lyons who was not only forced to orally copulate appellant but who was also forcibly sodomized so violently that those injuries were a major contributor to his death. (14 RT 4291.) The sex offenses perpetrated on Sharon and Crystal do not come close to the egregious nature of the heinous acts which Michael Lyons was forced to endure prior to his death. Thus, unlike in *Harris*, the sexual offenses against Sharon and Crystal were less inflammatory that the current charges. Moreover, the prior offenses were not remote. In *Harris*, the prior offense occurred 23 years prior to the charged offense. Here, there is no similar expanse of time between crimes committed by appellant. In light of these facts, this case is factually distinguishable from *Harris*.

In summary, the trial court properly exercised its discretion in admitting the convictions for section 288(a), as against Crystal, and section 288a(c), as against Sharon, under Evidence Code section 1108.

2. The Prior Crimes Evidence Was Admissible Under Evidence Code Section 1101

The evidence of the crimes against Sharon and Crystal was properly admitted by the trial court under Evidence Code sections 1101(b), also. The law pertaining to the admissibility of evidence under this section of the Evidence Code is clear.

> Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]

(*People v. Kipp* (1998) 18 Cal.4th 349, 369.)[43]

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[43] Evidence Code section 1101, provides:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act

(continued...)

In *Ewoldt*, this Court explained that the admissibility of evidence pursuant to Evidence Code section 1101(b) depends on the degree of similarity between the uncharged act and the charged offense. It explained the standards for admissibility of evidence to prove intent as follows:

> The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. . . . [T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . . In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance.
>
> A greater degree of similarity is required in order to prove the existence of a common design or plan. . . . [E]vidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.

(*Ewoldt*, *supra*, 7 Cal.4th at p. 402, internal quotation marks and citations omitted.)

If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence "is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)"

(. . . continued)
did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

(*Ewoldt*, *supra*, 7 Cal.4th at p. 404.) "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Factors increasing probative value include the tendency of the evidence to prove one of the specified facts and the independence of the source of the evidence of uncharged misconduct from the source of the charged offense. (*Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) Factors increasing prejudice include the absence of a conviction for the uncharged act and the strength and inflammatory nature of the testimony describing that act. (*Ibid.*)

"Rulings made under [sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130.)

> Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]

(*Hovarter*, *supra*, 44 Cal.4th at p. 1004.) In reviewing the trial court's ruling, this Court must consider the facts that were before the trial court at the time of its ruling. (*People v. Welch* (1999) 20 Cal.4th 701, 739; *People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.)

In this case, the trial court properly admitted the evidence of the prior uncharged acts because the evidence was relevant to prove appellant's intent and common scheme and the probative value of the evidence outweighed the probability that its admission would create a substantial danger of undue prejudice. An examination of the similarity between the prior uncharged crimes against Sharon and Crystal and the charged offenses

strongly suggests that appellant harbored the same intent in his attack on Michael Lyons – to kidnap, sexually assault his victim, and murder him in the river bottoms. Appellant was charged with the murder and kidnapping of Michael Lyons as well as with sexual offenses in counts five through eight and with special circumstances of sodomy and lewd and lascivious acts upon a child during the course of the murder. (7 CT 2033-2042.) The People were thus required to prove that appellant acted intentionally with premeditation and deliberation and with lewd intent. Evidence of appellant's prior conduct with Sharon and Crystal is sufficiently similar to these charged crimes to be relevant as tending to prove appellant's intent as charged.

In the crimes involving Sharon, for instance, appellant went to her house very grubby and unshaven and acted like he was "on something." In the Michael Lyons trial, the evidence showed an unkempt suspect being taken into custody who, by his own admission, had repeatedly ingested methamphetamine. With Sharon, appellant grabbed her hair and pulled her head back very hard. He handcuffed her hands in her bedroom and forced her to undress, and he undressed also. He then stuck his penis in her mouth while holding a knife to her throat. He threatened to kill her. Similarly, the evidence showed appellant was himself undressed, as he was arrested with no underwear, shirt, or shoes on. Michael Lyons was found nude from the waist down. The injury to Michael Lyons' mouth suggested appellant forced Michael Lyons to orally copulate him, and clearly a knife was used in many places on his body with the most deadly cuts across his neck being sufficient to kill the boy.

With Sharon, appellant wiped down everything in her apartment with a bandana and put everything he had touched into his shaving kit, including her bank card and postcards Sharon had from a recent vacation. Appellant told Sharon that "People who make mistakes get caught; people who don't,

don't." In the Michael Lyons case, the evidence suggested appellant attempted to, and with some success did, wash away evidence from his clothes and the murder weapon by rinsing them in the Feather River. Appellant forced Sharon into her own car and drove towards the river bottoms telling her they were going to the river. He made statements that she would not survive. When she jumped out of the car he again told her he was going to kill her, and backed up the car in an effort to run her over. Appellant was arrested later with an eight-inch hunting knife. Likewise, witnesses saw appellant take Michael Lyons from the street into his truck. The boy was taken to the river bottoms where he was sodomized, tortured and killed. The murder weapon, a knife, was recovered at the scene. (15 RT 4795-4841; 5 CT 1214-1229, 1230-1338.) Undoubtedly, these incidents are sufficiently similar to support a rational inference that appellant harbored the same intent in committing the current offenses.

The crime involving Crystal also shares similarities with the crimes inflicted upon Michael Lyons. With the four-year-old, appellant had her take off her clothes, and he did the same. He then stuck his penis in her mouth. He also rubbed his penis on her vagina and buttocks, and she told police that it hurt. Again, the evidence in the current case showed appellant was also naked, forced Michael Lyons to unclothe and forced him to orally copulate him and sodomized him. (15 RT 4787-4791; 5 CT 1214-1229, 1230-1338.) In light of these facts, the uncharged conduct is sufficiently similar to the charges involving Michael Lyons so as to support the inference that the appellant probably harbored the same intent in each of the instances.

Appellant relies on *People v. Thompson* (1980) 27 Cal.3d 303 (*Thompson*), to support his argument that the trial court abused its discretion. In *Thompson*, the only similarity between the uncharged robbery of a restaurant employee in a restaurant parking lot and the charged

home invasion burglary and robbery was the defendant's act of demanding and taking the victim's car keys. (*Thompson*, *supra*, 27 Cal.3d at p. 321.) This Court ruled, "Evidence that an individual intended to steal car keys on one occasion does not, by itself, substantially tend to prove that he intended to steal them on a second occasion." (*Ibid.*) The facts in this case are much different and reveal much greater similarities between appellant's uncharged and charged criminal conduct. *Thompson* is of no assistance to appellant.

The same can be said for *People v. Guerrero* (1976) 16 Cal.3d 719 (*Guerrero*), a case which concerned an appeal from a judgment of conviction for first-degree murder where the defendant challenged the trial court's admission of evidence of a prior uncharged rape involving a different victim. (*Guerrero*, *supra*, 16 Cal.3d at p. 722.) In that case, the defendant was on trial for the murder of a teenaged girl whose body was found fully clothed. Although the victim's blouse was above her bra, the bra was in place, and there was no evidence of a sexual molestation. (*Id.* at p. 723.) Despite the lack of evidence of sexual assault, the trial court allowed another teenaged victim to testify that the defendant sexually assaulted her. This Court stated:

> In the present case, it is indisputable that [the murder victim] died and there is ambiguity in the evidence over whether death was caused by blows from a blunt instrument or by a fall. Evidence of the [prior] rape does nothing to resolve that ambiguity. Defendant never struck [the victim in the prior crime] with his wrench . . . . Thus evidence of the earlier rape cannot be admitted to prove that [the murder victim] was killed intentionally rather than accidentally.

(*Id.* at pp. 726-727.)

Unlike the offenses in *Guerrero*, the prior crimes committed by appellant are the same crimes as charged in the current case. Like the prior offenses, appellant harbored the same intent when he kidnapped, sexually

assaulted and murdered Michael Lyons. Clearly, appellant took Michael Lyons down to the river banks in order to have him in a remote place, sexually assault him and kill him. In both cases, he tried to cover up his crimes, by removing evidence from Sharon's apartment and by washing items in the Feather River in the incident involving Michael Lyons. The only significant difference in the two cases is that Sharon was able to throw herself out of the moving car and escape. The intent was the same in both cases; no other plausible inference remains. As this Court once stated, "the doctrine of chances teaches that the more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous." (*People v. Steele* (2002) 27 Cal.4th 1230, 1244 [abduction and stabbing of victim relevant to prove intent in 1988 homicide by stabbing].) Thus, the prior crimes tend to establish that appellant had the same intent in each of the instances.

The common features also manifest the same general plan, and therefore support a finding that appellant acted in accordance with that plan. Appellant argues that the prior crimes and the charged crimes do not share any distinctive characteristics or connecting links to demonstrate a common design. (AOB 108-109.) Respondent disagrees. Appellant's sexual assault of Crystal consisted of getting her alone in his trailer, undressing both of them, having her orally copulate him, and rub his penis on her vagina and anus. So too, appellant got Michael Lyons alone in a secluded area, undressed them both, forced the boy to orally copulate him, and forcibly sodomized him. The offenses are sufficiently similar as to be admissible to demonstrate a common plan to sexually assault his victim. While it is true appellant did not try to kidnap Crystal or take her to the river bottoms, it is sufficient that appellant perpetrated a sexual offense on a child just as he perpetrated sexual offenses on Michael Lyons. And really the only difference between the crimes against Sharon and the crimes

against Michael Lyons is that Sharon was able to escape. Appellant's plan was to kidnap, sexually assault his victims, take them down to the river bottoms to kill them with his knife, and cover up any evidence of wrongdoing. The uncharged crimes and charged offenses are sufficiently similar to support the inference that appellant probably was acting under the same common plan or scheme.

Appellant relies on the fact that the jury was unable to reach a verdict on the charges of kidnapping and forcible oral copulation against Michael Lyons to argue that it violated his right to due process to permit the prosecutor to use the uncharged acts to bolster a weak case. (AOB 107-108.) Obviously the trial court had no way of anticipating a hung jury on those two counts. In reviewing the trial court's ruling, this Court must consider the facts that were before the trial court at the time of its ruling. (*People v. Welch* (1999) 20 Cal.4th 701, 739; *People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.) Regardless, the issue is whether the prior uncharged crimes are sufficiently similar to the charged offenses to support a rational inference that appellant probably harbored the same intent and operated under a common plan in both instances. The prior uncharged acts were probative not only of the intent in kidnapping and committing forced oral copulation but also on the issue of intent in focibly sodomizing the boy and the premeditated and deliberate murder.

Appellant contends that the prior uncharged acts were not sufficiently similar to support a finding of relevance on the issue of identity. (AOB 110.) The trial court did not find the prior uncharged acts admissible for purposes of identity under Evidence Code section 1101(b).

After determining that appellant's prior crimes were relevant to prove that appellant had the same intent and plan when he committed the acts against Michael Lyons, the trial court commenced an analysis under Evidence Code section 352. It properly determined that the probative value

of the evidence of the prior uncharged offenses was not substantially outweighed by the probability that the admission of the offenses would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

In weighing the probative value with the potential prejudicial effect, it is important to keep in mind what the concept of "undue prejudice" means in the context of section 352:

> 'Prejudice' as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of undue prejudice. . . . The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'
>
> The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.

(*People v. Branch* (2001) 91 Cal.App.4th 274, 286, internal quotations and citations omitted.)

The principal factor affecting the probative value of the uncharged offenses is the tendency of that evidence to demonstrate the existence of intent and a common plan, and in this case the tendency is strong. Again,

the similarity between the uncharged crimes and the charged offenses demonstrate that appellant acted with general intent for kidnapping, lewd intent in committing the sex offenses and with premeditation and deliberation in killing Michael Lyons. The offenses together suggest a planned course of action, both for sexual assault and kidnapping and murder, rather than spontaneous events. Appellant focuses on the dissimilarities among the three victims who were of different ages with one being male and the other two were female. (AOB 113-114.) However, the fact that appellant was indiscriminate with regard to age and sex in his choice of victim does not make the prior uncharged offenses irrelevant, particularly in light of the overwhelming similarities. Furthermore, appellant's argument that in the prior uncharged crimes the victims were not killed, sodomized or tortured is not convincing. (AOB 113.) There is no requirement that the prior uncharged offenses be exactly the same as the charged offenses. And were it not for Sharon's ability to escape, the outcomes would have had even more in common.

The court can also look to whether the source of the information regarding uncharged crime is independent of the source of the charged crime. (*Ewoldt, supra*, 7 Cal.4th at pp. 404-405.) The *Ewoldt* court explained that,

> For example, if a witness to the uncharged offense provided a detailed report of that incident without being aware of the circumstances of the charged offense, the risk that the witness's account may have been influenced by knowledge of the charged offense would be eliminated and the probative value of the evidence would be enhanced.

(*Ibid.*) Clearly, neither Crystal nor Sharon were aware of the offenses involving Michael Lyons when they provided their reports on the assaults by appellant since the offenses against Michael Lyons occurred later in time.

Looking at the prejudicial effect of this evidence, one factor is when the defendant's uncharged acts did not result in criminal convictions. (*Ewoldt, supra*, 7 Cal.4th at p. 405.) Where the defendant has not suffered a conviction for prior offenses the jury might be inclined to punish the defendant for those offenses regardless of whether it considered him guilty of the charged offenses and increasing the likelihood of "confusing the issues." (*Ibid.*) Here, the jury was informed that appellant suffered convictions for the offenses perpetrated against Sharon and Crystal. There was no "trial within a trial" as appellant argues. Appellant himself admitted during his testimony that he was convicted of these prior crimes. Thus, this factor decreases the potential for prejudice.

Appellant accuses the trial court of failing in its duty under Evidence Code section 352 to consider all the circumstances surrounding the prior offenses such as the degree of certainty in its commission. (AOB 116.) He suggests he was induced under *People v. West* (1970) 3 Cal.3d 595, to enter a guilty plea in the crime involving Crystal, and that despite his plea, the certainty that this crime occurred was minimal in light of the lack of physical evidence, the fact that the four-year-old did not immediately report the crime and that she told different stories about what had happened. (*Ibid.*) First, appellant failed to raise this specific ground before the trial court as part of his in limine motion for the guilt phase which is the court order he is now challenging on appeal. (See AOB 102-103.) Appellant at no time argued that the fact that his conviction involving Crystal arose from a *West* plea demonstrated he did not actually commit the crime against her, save for when he raised the argument prior to the second penalty phase trial in 1999. (30 RT 9218-9220; 9234-9235, 9469-9470.) Nor is there any indication in the record that the trial court considered this in making its ruling admitting the prior uncharged acts at the guilt phase. Appellant's failure to raise the specific ground prior to the guilt phase trial forfeits the

argument on appeal. (Evid. Code, § 353, subd. (a); *People v. Brown* (2003) 31 Cal.4th 518, 547.)

Second, his argument is refuted by the fact that Crystal herself testified about the crime, that she reported it to her mother that same evening (she told her mother at around 6:00 p.m. and was interviewed by law enforcement with an hour and a half (5 CT 1240-1241)), and that her accounts of the crime remained consistent over time (5 CT 1339-1348). Thus, there is certainty that appellant committed a lewd and lascivious touching of four-year-old Crystal based on appellant's no contest plea, regardless of whether it was a *West* plea or not.

The evidence of appellant's prior crimes was not stronger or more inflammatory than the evidence relating directly to the current offenses. Just the opposite is true. As stated above, it is difficult to imagine the jury's passions being inflamed by the evidence that appellant had a four-year-old orally copulate him, and committed forcible oral copulation and kidnapped a woman, when the jury was charged with receiving evidence that appellant kidnapped, sodomized, tortured, and killed a young boy. Appellant argues that the testimony regarding his prior crimes involving Sharon and Crystal was "calculated to incite great passion and anger, if not loathing, fear and hatred, against [him]" (AOB 118) and would "incense the jury such that they would be incapable of rationally considering the evidence about who murdered, tortured and sodomized Michael" (AOB 113). Although the prior crimes were sexual, and involved a four-year old and force, they were much less inflammatory than the evidence in the present case, in which appellant repeatedly scraped his knife against the skin of the young boy as he brutally sodomized him and then sliced his throat in both directions. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 18-19 [in evaluating whether the probative value of an uncharged crime was outweighed by its potential for prejudice, the court noted that the

uncharged incident involved a very serious assault, but the charged incident was a homicide].) In addition, as in *Demetrulias*, the jury was instructed not to consider the evidence to prove that appellant was a person of bad character or that he had a disposition to commit crimes, thereby "minimizing the potential for improper use." (*Id.* at p. 19.)

Appellant suggests that the presentation of evidence regarding the prior uncharged crimes, as well as the discussions between counsel and the court and the resulting instructions pertaining to the prior uncharged crimes, distracted the jury because of the consumption of time required. (AOB 114.) However, as pointed out above, the evidence concerning the prior crimes lasted approximately one and a half hours. (15 RT 4784; 16 RT 4846.) Moreover, the instructions did not overburden the jury; the trial court gave the jury only two instructions pertaining to the prior uncharged offenses. The parties and trial court discussed the jury instructions applicable to the prior uncharged acts involving Sharon and Crystal for only a short time. (18 RT 5541-5563.) This factor weighs in favor of admitting the evidence. Likewise, the remoteness factor, that is, the time that lapsed between the uncharged and charged crimes is minimal. This factor, therefore, does not decrease the probative value of the evidence.

And finally, the evidence is not merely cumulative of other evidence concerning appellant's intent and plan, because the balance of the evidence does not render his intent and actions beyond dispute. (See *Ewoldt*, *supra*, 7 Cal.4th at p. 406 ["if it is beyond dispute that the alleged crime occurred," evidence of uncharged conduct to demonstrate a common design or plan "would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value"].) Under these circumstances, the probative value of the evidence of the prior uncharged offenses was not substantially outweighed by the probability that the

admission of the offenses would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.[44]

In conclusion, the trial court properly exercised its discretion in determining that there were similarities between the prior crimes and the charged offenses sufficient for the evidence to be relevant to prove defendant's intent and common plan in committing the current offenses and properly exercised its discretion in determining that the probative value of this evidence was not outweighed by the risk of undue prejudice. The trial court's ruling in admitting evidence of the prior uncharged offenses was not arbitrary, capricious, manifestly absurd, and did not exceed the bounds of reason.

3. Admission Of The Evidence Did Not Violate Appellant's Constitutional Rights.

Appellant argues that the admission of the evidence of uncharged acts violated his right to due process and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. (AOB 119-122.) Not so.

The United States Supreme Court has explained that issues relating to the admission of evidence generally do not rise to the level of a federal constitutional question. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 68-72 (*McGuire*).) "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'

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[44] Appellant mentions that, even though the kidnap charges against him were dismissed, the prosecutor argued in his penalty phase closing that Sharon's kidnapping was proof appellant kidnapped and killed Michael Lyons. (AOB 110, citing 40 RT 12218.) The prosecutor's penalty phase argument is irrelevant to resolving the issue of admissibility of the prior uncharged acts in the guilt phase trial. And even if it were relevant, the prosecutor properly argued the crimes against Sharon were probative on the issue of penalty under section 190.3, factors (b) and (c). (40 RT 12214-12220.)

[Citation.]" (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, italics in original; see *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1026 [explaining that in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 (*McKinney*), the court "granted a writ of habeas corpus and overturned a murder conviction where the petitioner's trial had been infused with highly inflammatory evidence of almost no relevance"].) Where the evidence is relevant to an issue in the case, the court need not further address the defendant's assumption that admission of irrelevant evidence violates due process. (*McGuire*, *supra*, 502 U.S. at p. 70.)

Here, the admission of the evidence of the prior uncharged acts did not violate appellant's due process rights. The *McKinney* case, on which appellant relies, held that "'if there are no permissible inferences the jury may draw from the evidence,'" its admission can violate due process. (*McKinney*, at p. 1384.) McKinney was convicted of murdering his mother by slitting her throat after the jury heard evidence that he owned two knifes that could have caused the wound, that he was proud of his knife collection, that he occasionally carried a knife, and that he used a knife to scratch "Death is His" on his closet door. (*Id.* at p. 1382.) The court concluded that much of this evidence was probative only of character and thus was irrelevant. (*Id.* at p. 1384.) A much different set of circumstances was presented to the trial court. The prior uncharged crimes were relevant, as set forth extensively above, and the admission of the evidence did not violate appellant's right to due process. (Cf. *People v. Steele* (2002) 27 Cal.4th 1230, 1246; *People v. Yeoman* (2003) 31 Cal.4th 93, 122.)

4. CALJIC No. 2.50 Is Effective In Instructing The Jury As To The Proper Use Of The Prior Uncharged Acts

Appellant argues that the jury instruction relating to the prior uncharged offenses, CALJIC No. 2.50, was ineffective in protecting against the risk of prejudice. (AOB 122-125.) He asserts that in light of the People's closing argument where the prosecutor encouraged the jury to use the prior crimes evidence to convict appellant in the current case, the instruction did not prevent the jury from using the prior crimes evidence improperly. (*Ibid.*) This argument lacks merit.

a. Background

The parties and trial court discussed the jury instructions, including those applicable to the prior uncharged acts involving Sharon and Crystal. (18 RT 5541-5563.) With regard to the prior crime of kidnapping, the jury was instructed with CALJIC No. 2.50, as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. As to any evidence that the defendant violated Penal Code 207, kidnapping, if any, 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 a characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case, the existence of the intent which is a necessary element of the crime charged, a motive for the commission of the crime charged. 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.[45]

(19 RT 5848-5849; 9 CT 2402.) The jury was also instructed with a modified version of CALJIC No. 2.50.01, which applied to appellant's prior sex offenses against Crystal (lewd and lascivious touching of a child) and Sharon (forcible oral copulation). (19 RT 5849-5851; 9 CT 2404-2405.)

In his summation, the prosecutor used the evidence to argue that appellant had a predisposition to commit sexual offenses and that he intended to kidnap and murder Michael Lyons. He argued:

> Note the defendant is predisposed to commit violent sexual offenses. We know the defendant liked to take his victims, when possible, down to the river bottoms and that we know that he is willing to kill them to prevent testifying - - prevent them from testifying against him. In other words, basically he's a sexual predator. The person who killed Michael Lyons is a sexual predator. Robert Rhoades is a sexual predator.
>
> We know that in 1985 in Yuba County the defendant used a knife; he forced a woman to orally copulate him. We know that he could accomplish all these sexual acts in safety and comfort in her apartment. And yet he transports her.
>
> There was only one reason he would have transported her - - because he was going to kill her. And he basically told her in several different ways he was going to do it. One of which was "this is like Bonnie and Clyde, maybe Bonnie isn't gonna make it." That's why she jumped out of that car, exposing herself to basically great bodily injury. It's better to be have a broken arm or broken leg or a scratched up hip than to be killed.
>
> I want you to take a look again at the area where he was taking her in Yuba County. It's in the same Feather River bottoms. It's just two and a half, three miles north. That area is an area

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[45] Based on appellant's objection, the trial court excluded appellant's prior conviction for robbery from the jury instruction. (18 RT 5519-5521, 5541-5547.)

that is kind of startlingly reminiscent of the one you have here. You got an aerial photograph. It's a forested area right by a river course. He's gonna kill her. That's what he does to people. Because he doesn't want people testifying against him.

He uses sharp knives. This isn't a serrated knife. This is kind of a nasty knife. Somebody stuck that to your throat just like he did her, Sharon Thorpe, you'd probably do everything he told you. Isn't it kind of funny. Doesn't that remind you something about Michael Lyons, him sticking that right up to her throat? Remember what he did to Michael Lyons? He gets a kick out of that. That's the kind of guy Robert Rhoades is.

(19 RT 5704-5705.) He also used appellant's robbery of Sharon to argue that appellant is a liar. (19 RT 5705-5706.)

On rebuttal, the prosecutor spent a significant portion of his argument addressing the improbability of appellant's defense that he did not do it, but rather Bobbie Lemmons did the crimes. Concerning the prior crimes evidence, he further argued:

And part of that circumstantial evidence is his propensity to do this to people.

And this crime is very, very similar to Sharon Thorpe except for the victim that he had in that case, she was an adult, she jumped out of the car.

This was a little boy. He didn't. And you saw what happened to him.

But other than that, it's a very similar crime. Knife, truck, take him down to the river bottoms, orally copulate him.

Pretty damn close, I would say.

(19 RT 5800-5801.)

And then finally, the prosecutor concludes his rebuttal by arguing:

All the physical evidence points directly at him and points at nobody else. The defendant is guilty. And, ladies and gentlemen, this is not the first time he did it. Sharon Thorpe would have ended up dead, too, but she jumped out. Mr. Peters,

> who like to discuss evidence, doesn't like to discuss how similar those events are. Now, I'm not telling you that's the only reason you should vote guilty. I'm telling you you should vote guilty because all of the physical evidence and that, and that's what the judge is going to instruct you about. He's going to tell you you can consider that.

(19 RT 5814.)

b. Discussion

In support of his suggestion that the jury instruction provided on this issue was ineffective, appellant quotes *People v. Gibson* (1976) 56 Cal.App.3d 119, 129-130 (*Gibson*), in which the appellate court noted that,

> [i]t is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(AOB 123.) However, in *People v. Zack* (1986) 184 Cal.App.3d 409, 416 (*Zack*), which concerned the use of a modified version of CALJIC No. 2.50, the court held that *Gibson* is inapposite where there is no evidence that the jury ignored the court's instructions and committed misconduct by using limited evidence for an improper purpose. Instead, the *Zack* court followed this Court's oft-cited rule that, in the absence of evidence to the contrary, "[w]e must, of course, presume that the jury followed [the trial court's] instructions . . . ." (*Ibid.*, quoting *People v. Chavez* (1958) 50 Cal.2d 778, 790.)

So here, there is no suggestion that the jury disregarded CALJIC No. 2.50 and used the prior uncharged acts for an improper purpose. Moreover, the fact that the jury hung on the charges of kidnapping and oral copulation strongly suggests that the jury used the prior crimes evidence only for its

intended purpose as set forth in the limiting instruction and did not commit misconduct. The prosecutor's closing argument does not alter this analysis. At no time did the prosecutor encourage the jury to use the prior uncharged crimes as propensity evidence, even though such an argument would be permissible with regard to the sex offenses. At most, the prosecutor pointed out the similarities between the crimes, and drew attention to the important fact that Sharon was able to escape her would-be murderer while Michael Lyons was not. In the absence of evidence of misuse, this Court should presume that the jury understood and followed the court's instruction. As stated in *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17, "[t]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*Ibid.*, citing *Francis v. Franklin* (1985) 471 U.S. 307, 325, fn. 9.) This presumption stands unrebutted in this case, and appellant's argument to the contrary should be rejected.

5. Any Error Was Harmless

Last, appellant contends that under either the federal constitutional standard of *Chapman*, *supra*, 386 U.S. at p. 24, or the state evidentiary error standard of *Watson*, *supra*, 46 Cal.2d at p. 836, his convictions must be reversed. (AOB 125-126.) He explains that the evidence of his prior crimes against Sharon and Crystal was the linchpin for his convictions, for "[w]ithout the propensity evidence, the jury would have been presented with a case involving no witnesses, little or no physical evidence, and defense evidence that [he] was away from his truck when Michael was murdered." (AOB 125.) Respondent disagrees.

To be sure, ordinary errors in admitting or excluding evidence do not implicate the federal constitutional right to due process and are reviewable under *Watson*. (*People v. Harris* (2005) 37 Cal.4th 310, 336; *People v. Marks* (2003) 31 Cal.4th 197, 226-227.) Here, it is not reasonably probable

that absent admission of the prior incidents, appellant would have received a more favorable result. As discussed above, evidence that appellant sodomized, tortured, and stabbed Michael Lyons to death was beyond overwhelming. Even without the evidence of appellant's prior sexual attacks, the evidence of the murder and torture were staggering. The evidence was aptly summarized in Argument II, *ante*, and demonstrates that appellant was guilty beyond a reasonable doubt even without the prior sexual crimes evidence.

V. THE TRIAL COURT PROPERLY EXCLUDED IMPEACHMENT EVIDENCE RELATED TO BOBBIE LEMMONS

Appellant argues that the trial court erred in refusing to admit evidence of Bobbie Lemmons' prior conviction for misdemeanor child molestation (§ 647.6). (AOB 127-134.) He contends that the prior conviction was admissible as impeachment evidence and as character evidence under Evidence Code sections 1101 and 1108. (AOB 132-133.) He also argues that the trial court's exclusion of the impeachment evidence denied him his constitutional right to present a defense under the Sixth and Fourteenth Amendments and is therefore subject to the *Chapman* standard of review. (AOB 131.) This argument lacks merit.

A. Background

The prosecution moved in limine to preclude the defense from admitting third party culpability evidence as to Bobbie Lemmons without making a proper showing under *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*). (6 CT 1548-1560; 8 CT 2158-2161, 2224-2227.) The court and the parties thereafter discussed the extent to which the defense could mention in its opening statement the name of any particular person whom the defense believed committed the murder of Michael Lyons. After listening to extensive argument, and discussing the effect of the *Hall* case, the trial court ruled that prior to the defense specifically naming Bobbie Lemmons

in its opening statement as the person who may have committed the crimes against Michael Lyons, the defense would have to give an offer of proof and the court would determine the admissibility of such evidence in a Evidence Code section 402 hearing. (6 RT 1818-1822.)

During appellant's opening statement, the prosecution renewed his objection that appellant be precluded from mentioning third party culpability evidence with regard to Bobbie Lemmons. (12 RT 3674-3676.) The court reiterated its order that the defense not make reference to the fact that Bobbie Lemmons was required to register as a sex offender or suggest that he was responsible for the crimes against Michael Lyons. (12 RT 3676-3677.)

During the course of the trial, an Evidence Code section 402 hearing was conducted concerning Bobbie Lemmons. (17 RT 5127-5133, 5173-5261.) As Bobbie Lemmons was testifying, the defense attorney attempted to impeach him with his prior conviction, and the prosecutor objected on the grounds that a party may not impeach its own witness where the witness has not testified against the impeaching party at all. The court then heard argument from the parties as to whether Bobbie Lemmons' prior misdemeanor conviction for annoying or molesting a child (§ 647.6) was admissible for impeachment. The trial court ruled as follows:

> I don't find that at this juncture that there's any evidence that this man has testified to - - at least as I can hear his testimony, that's adverse to your client. And as I say, my understanding of the law is that you're entitled to impeach even if you call him, so long as he produces some of that kind of evidence. So the Court at this juncture and on this record would be prepared to sustain an objection to the question based on that matter.

(17 RT 5182.) The court made its ruling subject to change should new information be presented. (*Ibid.*)

A short time later, appellant moved to admit Bobbie Lemmons' prior conviction and resulting sex registrant status for purposes of third party culpability under *Hall*. (17 RT 5254, 5257-5258.) He also moved to admit the evidence under Evidence Code sections 1108 and 1101(b). (17 RT 5256.) Defense counsel clarified that he was no longer seeking to admit the prior conviction for purposes of impeachment but, rather, for the purpose of demonstrating the possibility that Bobbie Lemmons committed the crimes against Michael Lyons. (*Ibid.*) As an offer of proof, the defense argued:

> [The prior conviction] explains his deceptiveness, his changing of his story, his initial statement to the police, which was that he had only found the shoes the night afterwards and not seen the shoes the night before - - or the day before. It also explains his wife's testimony as to the fact that he was not in the trailer that night after 9:30, which is a statement she gave to my investigator. It also explains his statement that he had not told the police about the children screaming, the tires spinning, again, the finding of the shoes, the day before.

(17 RT 5258.) He further suggested the prior conviction and resulting registration requirement may be relevant to show motive or intent. (17 RT 5258-5259.) Ultimately, defense counsel focused on the inconsistencies in statements provided by Bobbie Lemmons and/or his wife. (*Ibid.*)

The trial court denied the motion finding there was no basis to admit the prior misdemeanor conviction for child molest under Evidence Code sections 1108 and 1101(b). (17 RT 5256-5257, 5260.) It recognized that Evidence Code section 1108 is inapplicable to a witness. As for Evidence Code section 1101(b), there was no showing of similarity between the prior conviction and the crimes with which appellant was charged, and the court would not allow the prior conviction into evidence to show Bobbie Lemmons' disposition to commit the crimes. (17 RT 5261.)

From the record, it appears that in 1992, Bobbie Lemmons was convicted of annoying or molesting a child in violation of section 647.6. (6

CT 1556.) The only indication of the underlying facts of this offense comes from the People's motion in limine which states that Bobbie Lemmons admitted to putting his hand down his daughter's pants, stopping when she protested. (6 CT 1557.)

B. Discussion

As a preliminary matter, appellant argues on appeal that Bobbie Lemmons' prior conviction was admissible to impeach Bobbie Lemmons' credibility. (AOB 131-132.) The problem with this argument is that appellant sought to admit Bobbie Lemmons' testimony as truthful. "Impeachment is the process of challenging or impugning the credibility of a witness." (*People v. Sam* (1969) 71 Cal.2d 194, 209.) Appellant had no intention of discrediting Bobbie Lemmons, that is, challenging Bobbie Lemmons' honesty and truthfulness on the stand. Bobbie Lemmons did not testify to anything that appellant was trying to dispute. Appellant at no time argued that Bobbie Lemmons was lying or that any part of his testimony was false. Bobbie Lemmons had inconsistencies in his statements and that is what the defense argued in their closing. (19 RT 5750-5759.) The true purpose in trying to admit the prior conviction was to demonstrate that Bobbie Lemmons may just be the kind of guy that would commit the crimes against Michael Lyons. So, while in the abstract, appellant is correct that impeachment evidence is relevant, the true purpose of admitting the prior conviction in this case was not to impeach this witness. Appellant, rather, capitalized on the inconsistencies in Bobbie Lemmons' testimony and prior statements in order to argue third party culpability. The trial court cannot be said to have erred in resisting appellant's attempts, under the guise of impeachment, to admit evidence of Bobbie Lemmons' prior conviction where appellant was not trying to discredit the witness' testimony. Because there is no adverse testimony to

which the prior conviction was directed, its only value to appellant would be as propensity evidence, and it was thus inadmissible.

Appellant also argues the true purpose in soliciting the admission of the prior conviction. He claims that the prior conviction is admissible to show Bobbie Lemmons may have committed the crimes with which appellant is charged. (AOB 131-134.) The standard for admitting evidence of third party culpability is set forth in the case of *Hall*, *supra*, 41 Cal.3d 826. In that case, this Court stated:

> To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act [as required by prior decisions]; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, [the law does] not require that any evidence, however remote, must be admitted to show a third party's possible culpability. [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.* [¶] . . . [¶] [C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352). [A]n inquiry into the admissibility of such evidence and the balancing required under section 352 will always turn on the facts of the case. Yet courts must weigh those facts carefully [to avoid a hasty conclusion as to the credibility of the evidence, because credibility determinations are for the jury].

(*Id.* at pp. 833-834, italics added.)

"The trial court has broad discretion in determining the relevance of evidence. [Citation.] [This Court] review[s] for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citations.]" (*People v. Harris*, *supra*, 37 Cal.4th at p. 337.) Further, "[a] trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion. [Citation.]" (*People v. Lewis* (2001) 26

Cal.4th 334, 372-373.) Because third-party culpability evidence is treated like any other evidence (*Hall*, *supra*, 41 Cal.3d at p. 834), a trial court's exclusion of such evidence is likewise reviewed for abuse of discretion. (*People v. Robinson* (2005) 37 Cal.4th 592, 625-626; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1137.)

Here, the trial court properly excluded the evidence of third party culpability. The purported evidence of third party culpability on the part of Bobbie Lemmons was his prior misdemeanor conviction for annoying or molesting a child (§ 647.6) which resulted in his duty to register as a sex offender.[46] The offer of proof by the defense was that such evidence may be relevant to explain Bobbie Lemmons' differing statements to police and investigators and possibly to show motive or intent. On appeal he reiterates this argument adding also that the prior conviction is relevant to prove Bobbie Lemmons' opportunity to kill Michael. However, appellant fails to make the required showing under *Hall* that Bobbie Lemmons' prior conviction and his duty to register as a sex offender raise a reasonable doubt as to appellant's guilt. For this defense to work, the jury would have to believe that under the cover of darkness on a stormy night, after appellant left his truck stuck in the mud of the river bottoms to walk out 10 miles to get his come-along, Bobbie Lemmons managed to break into appellant's truck and place Michael Lyons in the truck. Then Bobbie Lemmons would have had to have committed the sexual assault, torture and murder of the boy with appellant's hunting knife and then take the boy's body, with appellant's blanket and a bracelet that had been in the truck, down to a wet and muddy area where it was dumped under some bushes by

[46] It is unclear whether appellant is arguing that the third party culpability evidence is the fact that Bobbie Lemmons was required to register as a sex offender under section 290.

the river. This story is quite simply unbelievable and is in no way supported by the evidence. Specifically, the fact that Bobbie Lemmons suffered a misdemeanor child molest conviction and was required to register as a sex offender has no tendency whatsoever to prove that Bobbie Lemmons committed these crimes. At the trial level, and again on appeal, appellant cannot even articulate how the prior conviction and the registration requirement link Bobbie Lemmons to the commission of the crimes against Michael Lyons.

Nor did the testimony provided about Bobbie Lemmons at trial assist appellant in establishing a direct link to the crimes. Bobbie Lemmons testified that he found shoes the evening of May 16, and returned to take the shoe strings the following afternoon or evening. The shoes were later determined to be that of Michael Lyons. Bobbie Lemmons did not tell the defense investigator that he saw the shoes on May 16 until right before trial. On the evening of May 16, Bobbie Lemmons heard what sounded like children playing and a truck stuck in the mud down in the river bottoms. (17 RT 5192-5203.) Dugger testified that on May 18, Bobbie Lemmons asked Dugger if he would be an alibi for him for the night of the 16th. (17 RT 5219.) Bobbie Lemmons' storage locker contained a knife which may have belonged to Lynette and a fishing pole. None of this, however, provides direct or circumstantial evidence linking Bobbie Lemmons to the actual perpetration of the crimes. The fact that Bobbie Lemmons lived in the area is insufficient to establish opportunity. There was also no evidence presented that Bobbie Lemmons had a motive to kill Michael Lyons, despite appellant's claim to the contrary that the prior conviction establishes motive. (See discussion, *post.*)

And even if motive or opportunity were established, neither is sufficient under *Hall.* According to *Hall*, "evidence of mere motive or opportunity to commit the crime in another person, without more, will not

suffice to raise a reasonable doubt about a defendant's guilt," and thus appellant's suggestion that Bobbie Lemmons may have had the motive or opportunity to commit the crime is not sufficient. (*Hall, supra*, 41 Cal.3d at p. 833.) "[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) Because there was no evidence, either direct or circumstantial, linking Bobbie Lemmons to the actual perpetration of the killing of Michael Lyons, the proffered evidence failed to raise a reasonable doubt as to appellant's guilt. (*Ibid.*) The river bottoms were full of people who lived on the fringes of society, many of whom had criminal pasts. The fact that Bobbie Lemmons was one of many sex offenders camping out by the river does nothing to present the possibility that he committed the sexual assault and murder of Michael Lyons. The trial court did not err in excluding the prior conviction and the fact that Bobbie Lemmons was a registered sex offender.

Furthermore, even if the proffered evidence was relevant and admissible under *Hall*, the trial court did not abuse its discretion in that the probative value was substantially outweighed by undue consumption of time and potential confusion of the issues by the jury. The undue consumption of time would have resulted from the need for the defense to present evidence establishing Bobbie Lemmons' 1992 sexual offense and the resulting requirement to register under section 290. Additionally, presenting such evidence would only serve to confuse the jury as they sought to determine the fact of the prior conviction with a mini-trial of the events surrounding the child molest, which was collateral to the issues involving the murder of Michael Lyons.

Appellant also complains that his due process rights under the Fifth and Fourteenth Amendments and his right to present a defense under the Sixth Amendment were violated. (AOB 131.) While a criminal defendant

is constitutionally entitled to present "a complete defense" (*California v. Trombetta* (1984) 467 U.S. 479, 485), that right does not encompass the ability to present evidence unfettered by evidentiary rules. (*People v. Brown* (2003) 31 Cal .4th 518, 538.) "[T]he Constitution permits judges 'to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues."' [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 320 [stating evidentiary rules that preclude the admission of third party culpability evidence insufficiently connecting the third person to the crime are "widely accepted"].)

In this case, the trial court did not abuse its discretion in excluding the offer of third party culpability evidence. Bobbie Lemmons status as a sex offender and his misdemeanor child molest conviction were entirely irrelevant to the commission of the murder here. During trial, and continuing on appeal, appellant cannot even articulate a connection between Bobbie Lemmons' criminal past and Michael Lyons. The evidence simply has no tendency in reason and logic to prove or disprove any disputed fact that was of consequence to the determination of the action. (Evid. Code, § 210.) Under these circumstances, the exclusion of the evidence did not impermissibly infringe on appellant's federal constitutional rights. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1243.)

Appellant also argues admissibility for the evidence under Evidence Code section 1101(b). Lemmons' status as a sex offender and prior conviction implicated this statute insofar as under section 1101, subdivision (a), evidence of specific instances of a person's conduct "is inadmissible when offered to prove his or her conduct on a specified occasion." However, section 1101(b) provides that this evidence may be admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which

the perpetrator acted in the commission of the charged crimes. Section 1101 is applicable to any person, not just a defendant, and may therefore be used to admit evidence of uncharged acts by a third party alleged to have committed the charged offense. (See *People v. Davis* (1995) 10 Cal.4th 463, 501; *People v. Farmer* (1989) 47 Cal.3d 888, 921, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

The problem is that there are no similarities between the misdemeanor child molest and the crimes involving Michael Lyons as required under Evidence Code section 1101(b). The child molest involved Lemmons sticking his hands in his daughter's pants and removing them when asked. In contrast, the crimes against Michael Lyons involved forcible sodomy, torture, and murder. Evidence that does not "show a fact other than the third party's criminal disposition, such as motive or intent," but rather only that the third party is more likely the perpetrator because of his criminal history "does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Davis*, *supra*, 10 Cal.4th at p. 501.) Further, "[e]vidence that a third person actually committed a crime for which the defendant has been charged is relevant but, like all evidence, subject to exclusion at the court's discretion under . . . section 352 if its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 140.) Appellant's argument should be rejected.

VI. THE PROSECUTOR'S CROSS-EXAMINATION AND CLOSING ARGUMENT WERE PROPER

Appellant argues that the prosecutor's misconduct in his cross-examination of appellant, direct examination of Harris, and in closing argument, violated his Fifth, Eighth and Fourteenth Amendment rights and his right to due process under the Federal Constitution. (AOB 134-147.) For the reasons detailed below, this argument has no merit.

A. Background

1. Cross-Examination Of Appellant.

Appellant takes issue with a portion of the prosecutor's argument concerning the levee. (AOB 134-135.) The portion of the argument along with defense objections is as follows:

> Q. Now you say you've gone over the levee many times in your four-wheel-drive pickup?
>
> A. Yes.
>
> Q. And that's illegal?
>
> A. Yes, it is.
>
> Q. And it's illegal because it tears up the levees and might cause the levees to break; is that right?
>
> A. I - - that's probably the reasoning, yes.
>
> Q. Is there some reason you persist in doing this when it's dangerous to the whole community?
>
> Defense counsel: I'm going to object as speculation.
>
> Court: I'll sustain the objection to the form of the question.
>
> Q. Okay. Is there some reason you when you know this is dangerous that you continue to do it?
>
> Defense counsel: What's dangerous?
>
> Prosecutor: Driving on the levee.

Appellant: It's not necessarily dangerous. We - - everybody does it, so I'm not - - I'm not unusual.

Q. Okay. We had a flood in that area in '96; is that right?

A. Yes.

Q. Short distance from where you drive up and over the levee right?

A. Yes.

Q. Okay.

A. In '96 - - yeah, I was in custody then.

Q. Across the river in Yuba County the levee broke, right?

Defense counsel: I'm going to object as to relevancy as to the levee break.

Prosecutor: I'll withdraw the question - - well, I guess what I'm getting at is you just don't care about other people.

Defense counsel: I'm going to object to the form of the question.

Court: The objection is sustained.

(17 RT 5385-5386.)

2. Direct Examination Of Harris.

During the testimony of Harris, who testified concerning the demeanor of appellant upon being discovered by the Sutter County Sheriff's Department as he sat in his truck at the water's edge, the prosecutor asked Harris whether appellant looked happy to see him. (13 RT 4054.) Defense counsel objected on the grounds that the question called for an opinion, and the court sustained the objection. (*Ibid.*) After asking a similar question, the defense again objected, and the trial court excused the jury in order to hold an Evidence Code section 402 hearing. (13 RT 4055.) At the hearing, Harris testified concerning the sighting of

appellant. (13 RT 4056-4059.) The trial court ruled that Harris could testify as to his opinion based on his observations. Specifically, Harris could testify that appellant indicated no enthusiasm to see law enforcement. (13 RT 4059-4060.) He could also testify that the water was coming up, and the jury could decide what expression they might have expected appellant to have. (13 RT 4060.) The trial court wanted to limit the testimony in this regard to Harris' opinion and observations testified to at the hearing. (*Ibid.*)

When Harris was back in front of the jury, the following colloquy took placed:

> Q. Could you describe the demeanor of Mr. Rhoades when you approached him?
>
> A. He wasn't enthusiastic at all at our - - at us being there.
>
> Q. This is despite the fact he was in a fairly problematical state?
>
> Defense counsel: Oh, jeez.
>
> Prosecutor: I'll withdraw the question.
>
> Q. Did it appear to you that he was in any kind of predicament at that point?
>
> A. Yes. Under the circumstances, his lack of enthusiasm caught my attention due to the fact he was in quite some peril there and his pickup being in the location it was and the river rising and weather and the fact that he was stuck would have actually - - I thought he - - to the contrary, that he would be very glad to see us.
>
> Defense counsel: Your Honor, we just went through this. We just went through this. The Court said this is - -
>
> Prosecutor: I'm sorry. You said what you said.
>
> Court: The latter statement will go out. Proceed.
>
> Defense counsel: Oh, jeez.

Prosecutor: I'm going to drop that area.

Court: All right.

(13 RT 4062-4063.)

3. Rebuttal Argument Regarding Come-Along.

In his rebuttal argument, the prosecutor discussed the implausibility of appellant's defense that Bobbie Lemmons committed the crimes against Michael Lyons while appellant was out walking to his home in Sutter. He then focused on appellant's testimony and pointed out the parts of it which were lies. He argued,

> Now, the defendant's conduct once he gets down to the southern end of the river bottoms makes no sense.
>
> He - - and you can tell by these photographs, and I just now showed you that series of photographs - - I don't know much about four-wheel-drive vehicles or getting cars stuck, but, boy, that thing looks stuck to me.
>
> Walking ten miles in the rain, in the wet in his shoes. Take a look at those shoes and tell me Robert Rhoades walked ten miles in those when they were wet and didn't come up with one blister.
>
> I used to be a runner and I'm now a walker. And even with ideal footwear, you get wet and your feet are going to get chewed up real good. And he's wearing these - - these are actually the victim's in here.
>
> Right. He's wearing these cruddy things, okay? That the kind of thing you'd want to run a marathon in? That the kind of thing you want to walk long distances in or would you get blisters all over your feet if you tried what he tried that night? And even he admitted, my math was right, because he admitted he walked ten miles.
>
> Okay. That didn't happen.
>
> What else could he have done? He says he had nobody to call. Well, that's really not true. Because he didn't have to walk all the way up to Sutter. Remember, he walks by his dad's barber

shop. In fact, he even stops there. Who lives across the street, according to his own testimony? His girlfriend. He's just slept with her the night before. Why couldn't he borrow her car? I understand it's not a four-wheel-drive vehicle, but why can't he borrow her vehicle, get his come-along, get the hook that goes along with it, which, apparently, comes with the come-along and do that? You're not going to do that? You're going to go walk ten miles out there? That doesn't make any sense at all.

Okay. The come-along is another thing that doesn't make any sense.

Defense counsel: Your Honor, I'm going to object at this point. This is not proper rebuttal. If he wanted to argue this, he should have argued it in his initial argument.

Now, he wants to argue facts he should have argued before. It's improper rebuttal.

Prosecutor: I think he mentioned all these things.

Defense counsel: No, I didn't mention - -

Prosecutor: He mentioned the come-along, I recall.

Defense counsel: I don't think I did. And this is things he should have argued in his case in chief.

Court: The Court will ask that you proceed, but limit your argument to matters argued by counsel for defense, please.

Prosecutor: Okay. The come-along works. So why was it in the back of the pickup truck?

(19 RT 5810-5811.) There was no further objection about the argument regarding the come-along or walking in the dark during a storm. The court did not rule on the objection one way or the other. Appellant cites this portion of the closing argument as being not fairly responsive to the defense closing and introducing facts not in evidence. (AOB 141-142.)

4. Closing Argument Regarding Blood On Appellant's Shirt.

Appellant complains about the following argument made during summation by the prosecutor:

> The other thing we have is we have the defendant's shirt. And this has blood on it, and a fair amount of blood even though it's been washed off, over a large section which extends from his left shoulder, around his back, underneath his right armpit.
>
> The defendant can't explain to you how that blood got there, and particularly all that blood. He says he was scratched, and yet he has shown you no evidence whatsoever that he was scratched in those areas.
>
> As you know, some of the scratches you get on your body bleed and some don't. Most of them don't bleed much unless they're deep. When they are deep, they form healing scars that are visible for a period of time afterwards. There's no evidence that Mr. Rhoades had scratches or anything else. Not just here, not just on the left, but all the way across his back.
>
> Now the DNA coming off that shirt is Robert Rhoades'. As the DNA expert told you, she has no confidence that the DNA is coming from the blood. As a matter of fact, she indicates there's a good likelihood it's not because this shirt has been washed out.
>
> If you'd killed somebody and got their blood on your shirt, it probably would be a good idea to wash it out. We know Robert Rhoades was in that river that night, don't we. It's a good likelihood the DNA that's coming is coming off his skin or sweat from this. The defendant hasn't' given you a satisfactory explanation of where all that blood came from

(19 RT 5700-5701.) Appellant made no objection.

B. Discussion

A prosecutor violates the federal Constitution when he or she engaged in a pattern of misconduct so egregious that it infects the trial with such unfairness that it makes the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) Conduct by a prosecutor that does

not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Ibid.*, internal citations and quotations omitted.) "'In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]' [Citation.]" (*People v. Parson* (2008) 44 Cal.4th 332, 359.) This Court has also observed that "a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*Hill, supra*, 17 Cal.4th at pp. 819-820, internal citations and quotations omitted.)

Appellant first contends that the prosecutor committed misconduct in his cross-examination of appellant. (AOB 136-139.) Specifically, he points to the prosecutor questioning him about acting in a way which was dangerous to the community and, according to appellant, "inferentially suggesting that he was somehow responsible for the 1996 flood." (AOB 136.) He also takes issue with the prosecutor pointing out that appellant "just do[es] not care about other people." (AOB 138.) With regard to the first question, while it may have been argumentative and the court sustained an objection based on the form of the question, appellant nevertheless explained by stating, "It's not necessarily dangerous. Everybody does it, so I'm not - - I'm not unusual." Appellant's response diffused any potential prejudice by explaining that driving on the levee was a common occurrence. Moreover, respondent disagrees with appellant that the jury would have inferred appellant was responsible for the weakening of the levee and the resulting flood in 1996. Such an inference is not logical. The testimony indicated that the levee failed on the opposite side of the river

from where the murder occurred. There was no evidence appellant even drove on the levee on the other side of the river. Furthermore, it is unlikely that the jury was the least bit interested in the effect of appellant's driving on the levee in light of the seriousness of the questions they were there to answer, that is, whether appellant tortured and killed Michael Lyons.

The prosecutor then followed with the question that appellant did not care about other people. Defense counsel cut off the prosecutor with an objection before appellant had the chance to answer. The court again sustained appellant's objection, and there was no answer from appellant. While this question may have been improperly argumentative, a party generally is not prejudiced by a question to which an objection has been sustained. (*People v. Pinholster* (1992) 1 Cal.4th 865, 943.) In this case, it is hard to imagine that the jury would even take note that appellant's actions in driving on the levee demonstrated his lack of concern for others, particularly in light of appellant's admission to other far more serious illegalities such as purchasing and ingesting drugs and being a parolee in possession of knives and a shotgun, not to mention the heinous allegations he was defending against. In short, there is no likelihood that appellant was prejudiced.

Appellant next attacks the testimony of Harris who testified in defiance of the trial court's order. (AOB 136-139.) Although a prosecutor has "'a duty to guard against inadmissible statements from his witnesses . . .' [citation]" (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1170), there is no evidence whatsoever that the prosecutor in this case failed to do so. Misconduct is not present merely because a prosecutor's question to a witness elicited an inadmissible response. (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.) Prosecutorial misconduct is present when a prosecutor's question is inherently likely to elicit an improper response. Here there was no evidence that the prosecutor questioned Harris with the

intent to elicit a response in violation of the court's order. In front of the jury, the prosecutor at first asked whether appellant was in a problematic state. That drew an objection, and the prosecutor rephrased the question. The prosecutor's question was, "Did it appear to you that he was in any kind of predicament at that point?" (13 RT 4063.) Appellant's attempt to classify the prosecutor's rephrased question as a failure to admonish Harris or a deliberate attempt to violate the trial court's order is unavailing. The prosecutor was merely trying to rephrase the question in order to gain an admissible answer.

The fact that Harris, whether intentionally or unintentionally, violated the court's order by testifying that he thought appellant would be very glad to see the Sheriff's boat does not demonstrate misconduct on the part of the prosecutor. The record shows that an Evidence Code section 402 hearing was held in which Harris testified and that he, along with the parties, were present when the trial court instructed Harris that it was the jury who would determine what expression appellant would be expected to have upon seeing the law enforcement boat. (13 RT 4060.) Harris was instructed to limit his testimony to his observations and opinion of appellant's demeanor. (*Ibid.*) Furthermore, appellant suffered no prejudice from Harris' testimony because it came into evidence from another source. Appellant himself testified that when he first saw the police boat, he was not happy to see them because he had drugs in his truck. (17 RT 5354.)

Next, appellant contends that a portion of the prosecutor's rebuttal argument was not fairly responsive to the defense's closing argument. (AOB 141-142.) First, if appellant is arguing that the prosecutor committed misconduct by arguing the implausibility that appellant walked all the way to Sutter and back to the river bottoms in his deck shoes and in the rain and in the dark of night, his argument has been forfeited for failing to timely and properly object. A defendant may not complain of prosecutorial

misconduct on appeal if he has failed at trial either to object timely to the conduct or to request a proper admonition. (*Hill, supra*, 17 Cal.4th at p. 820.) Further, the objection must be specific as to the basis for the claim of prosecutorial misconduct. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 691-692 (*Pitts*).) The objection by defense counsel did not occur until the prosecutor finished the argument that appellant did not walk to his home in Sutter and moved on to another topic, the come-along. It appears from the record that defense counsel's objection was directed at the prosecutor's statement, "The come-along is another thing that doesn't make any sense." (19 RT 5810-5811.) There was also no request for an admonition. As such, appellant's argument that the prosecutor unfairly argued about his walk to Sutter is forfeited.

On the merits, and assuming appellant made a valid objection and requested an admonition, there is still no violation of state or constitutional law. In the passage quoted by appellant, the prosecutor argued that appellant lied when he testified he walked ten miles back and forth from his home in Sutter in the dark and rain while wearing his deck shoes. The prosecutor pointed out that if appellant was telling the truth his feet would have had blisters and been raw from the long walk in water. He also questioned the reasonableness of walking to Sutter versus borrowing a car from his girlfriend to retrieve his come-along from his house. The prosecutor's argument demonstrated appellant's lack of credibility. In light of the defense closing argument, this was entirely proper rebuttal as it was fairly responsive to appellant's closing argument. An examination of the defense closing reveals the defense argument that appellant testified honestly. For example, defense counsel stated, "From the moment Mr. Rhoades was arrested until today, he has never, never, never, never waivered." (19 RT 5756.) "Look at his testimony which is uncontroverted." (19 RT 5760.) Defense counsel argued repeatedly that

appellant could not have committed the crimes. Certainly the prosecutor's argument that appellant was lying was a fair and proper rebuttal to the defense closing argument.

Appellant also contends that the prosecutor introduced facts not in evidence concerning the fact that appellant's feet would have been "chewed up real good." (AOB 142.) "Argument is improper when it is neither based on the evidence nor related to a matter of common knowledge." (*Pitts*, *supra*, 223 Cal.App.3d at p. 702.) However, a prosecutor's argument may be properly based on the reasonable inferences or deductions drawn from the evidence presented, and on matters not in evidence but of common knowledge or drawn from common experience or history. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026 (*Cunningham*); *People v. Mendoza* (2000) 24 Cal.4th 130, 172.) The prosecutor also has broad discretion to state his or her views regarding what reasonable inferences may be drawn from the evidence. (*Cunningham*, *supra*, 25 Cal.4th at p. 1026.) It can be fairly said that it is common knowledge that walking for an extended period of time in shoes which are wet can cause blistering and chafing of the skin.

Another interpretation of appellant's argument on appeal is that the prosecutor unfairly presented an argument concerning the come-along. The objection by defense counsel occurred after the prosecutor segued into a new argument stating, "The come-along is another thing that doesn't make any sense." (19 RT 5811.) But like the argument above, the prosecutor here was almost certainly going to attack appellant's story about retrieving his come-along and hence, his credibility.

Next, appellant argues that prosecutor committed misconduct in arguing that the blood on appellant's shirt came from Michael Lyons. (AOB 142-145.) There was no objection by defense counsel regarding this argument. As with the previous argument, appellant has forfeited this

argument on appeal. He did not object nor did he request a curative instruction. Nevertheless, appellant's argument fails on the merits. A prosecutor is given wide latitude during closing argument and may vigorously argue provided it is fair comment on the evidence, including reasonable inferences from the evidence. (*People v. Wharton, supra*, 53 Cal.3d at pp. 567-568.) In this case, the prosecutor's argument was a fair inference. What person in the case lost a large amount of blood? Only one, Michael Lyons.

Finally, to warrant reversal, the challenged conduct must be prejudicial. "What is crucial to a claim of prosecutorial misconduct is . . . the potential injury to the defendant." (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Prosecutorial misconduct requires reversal only if it prejudices the defendant. (*People v. Fields* (1983) 35 Cal.3d 329, 363.) Where it infringes upon the defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083.) Prosecutorial misconduct that violates only state law is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the objectionable conduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

When the claim "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa, supra*, 15 Cal.4th at p. 841; see also, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 960.) To answer that question, this Court should examine the prosecutor's statement in the context of the whole record, including arguments and instructions. (*Hill, supra*, 17 Cal.4th at p. 832; *People v. Morales* (2001) 25 Cal.4th 34, 44.)

"In conducting this inquiry, [reviewing courts] 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved of on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 420; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647.)

Given the entirety of the record, the prosecutor's alleged misconduct was not prejudicial pursuant to either standard, and claim of cumulative error does not further assist him. As set forth more fully above, not one of appellant's four claims of error has any merit, or is a prejudicial error, and because each is not prejudicial in and of itself, there can be no error cumulatively. This Court should conclude that the errors do not warrant reversal of the judgment. (See *People v. Stitely* (2005) 35 Cal.4th 514, 560.)

VII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL DURING THE PENALTY PHASE

Appellant argues that his convictions must be reversed because Billy Friend yelled out during the penalty phase of the trial and had to be removed from the courtroom. (AOB 147-149.) He inferentially asserts that the trial court abused its discretion in denying his motion for mistrial because "the incident was not brief and all the jurors witnessed it." (AOB 149.) In light of the nature of the outburst, the trial court properly denied appellant's motion for mistrial.

A. Background

During the course of the penalty phase of the trial, as appellant testified, Billy Friend suddenly shouted to appellant, "You're going to die you slimy son of a bitch."[47] (38 RT 11403-11404.) Defense counsel

[47] Billy Friend later informed the court that he had said, "You're a slimy piece of shit." (38 RT 11417.)

immediately requested a recess which the court granted, admonishing the jury not to form or express an opinion concerning the matter nor discuss the same with anyone. (38 RT 11404.)

Outside the presence of the jury, appellant moved for a mistrial based on Billy Friend's outburst. (38 RT 11404-11407.) In listening to argument, the trial court indicated it was considering excluding Billy Friend from the court proceedings. (38 RT 11408-11409.) Defense counsel stated he would be calling Billy Friend as his next witness. (38 RT 11412.) The trial court permitted the defense to call Billy Friend as a witness and limited questioning of his criminal background to a prior domestic violence charge. (38 RT 11415.) The court found Billy Friend in contempt of court and ordered him to refrain from any more untoward conduct. (38 RT 11418-11419.) The court denied appellant's motion for mistrial. (38 RT 11420.)

When the jury entered the courtroom, the trial court admonished the jury as follows:

> All right. The Court will note for the record that all of the jurors have now entered the courtroom. And first of all, the Court wants to tell you all that you heard, I'm sure, an outburst that occurred in this court just before we took the recess.
>
> If you'll recall both before, during, et cetera, any time I've had contact with you, I've indicated time and time again that your judgment in the case is to be based on only evidence that comes from that witness stand and such documentary or physical evidence that the Court admits into evidence. Obviously I did not say that includes any outburst from somebody in the larger area of the courtroom.
>
> I run a public courtroom as long as I have, and so long as I can do it within my power this is going to be a public courtroom and anybody can come in. And they're supposed to act like ladies and gentlemen. When they don't, we have the kind of thing that occurred here today.
>
> The assurance I want from all 16 people in front of me is that you're not going to let that matter influence your decision in any

way. And in that regard I'm instructing you you're not to allow it to influence you in any way.

Now any one of the 16 of you who feel you could not follow that direction fully, I want you to please raise your right hand.

Court sees no hands.

Now also, this outburst can affect people in different ways. And any of you feel that either the outburst or anything up to right now has so badly affected you that you can't continue to be jurors and treat all parties to this litigation fairly? If you feel anything's happened in that regard, again please raise your hand.

I see no hands. When I ask these questions I sometimes have a feeling that maybe jurors think well, I'm not supposed to raise my hand, I'm going to cause a big stink if I do. That - - big stinks are what courtrooms are all about. That's what brings matters into Court. And I'm not afraid to face any of them. So if you'd have answered - - if you'd have raised your hand to either of those questions, please do so, because I seek honest opinions when I ask you questions.

All right. I see no hands, and I thank you very much. And at this juncture I believe we should continue with the examination of Mr. Rhoades.

(38 RT 11428-11430.)

B. Discussion

Spectator misconduct is grounds for a mistrial only if "what the jury 'saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial. . . .' The trial court is entrusted with broad discretion to determine whether spectator conduct is prejudicial. [Citation.]" (*People v. Chatman, supra*, 38 Cal.4th at p. 369.) Further, "'[P]rejudice is not presumed. Indeed, it is generally assumed that such errors are cured by admonition, unless the record demonstrates the misconduct resulted in a miscarriage of justice.'" (*People v. Hill* (1992) 3 Cal.4th 959, 1002, overruled on another ground in *Price v. Superior Court*

(2001) 25 Cal.4th 1046, 1069, fn. 13.) "[T]he defendant must establish prejudice." (*People v. Cornwell* (2005) 37 Cal.4th 50, 88.)

Appellant argues only that the outburst by Billy Friend was clearly prejudicial given the charges appellant was defending against and that the court's admonition did not cure the error. (AOB 149.) He offers no further argument as to how Billy Friend's statement was prejudicial to him, and therefore he has failed to carry his burden on appeal. The record fails to indicate that Billy Friend's outburst affected the jury, and in this case, the court's careful and detailed admonition cured any potential error.

The case of *People v. Lucero* (1988) 44 Cal.3d 1006, is instructive. There, the defendant was charged with and found guilty of the first degree murder of two young girls. During the guilt phase closing argument, the defense attorney argued that no screams or other unusual sounds were heard from appellant's house during the extended period that the girls were there. (*Id.* at pp. 1021-1022.) A short time later, as the jury was preparing to leave the courtroom to being guilty phase deliberations, one of the victim's mothers cried out:

> There was screaming from the ball park. They couldn't hear the girls because there was screaming from the ball park. That's why they couldn't hear it. The girls were screaming - screaming from the ball park, screaming, screaming, screaming. That wasn't in the case. Screaming, screaming from the ball park. Why wasn't that brought up? Why, why, why?

(*Id.* at p. 1022.) The mother was escorted from the courtroom but her continued outburst could still be heard coming from the corridor, and she was tended to for several minutes afterward. After the outburst, the court again directed the jurors to retire for deliberations, prefacing the order with a cursory admonition: "The jurors are admonished to disregard the outburst. The jurors, except for the alternate jurors, will go with the bailiff. The

alternate jurors will remain here." (*Ibid.*) The jury then left the courtroom. The trial court denied Lucero's motion for a mistrial. (*Ibid.*)

The *Lucero* court rejected the defendant's argument on appeal that the trial court abused its discretion in denying his motion for mistrial. (*Lucero*, *supra*, 44 Cal.3d at p. 1024.) The court pointed out that the victim's mother's outburst was an isolated incident in the case and had been followed by a prompt admonition. (*Ibid.*) So too, Billy's friend's outburst was an isolated and extremely brief incident. The trial court provided a prompt admonition immediately following the outburst in addition to a very complete admonition to the jury after the recess, ensuring that the outburst by Billy Friend would not influence their decision. (See *Lucero*, *supra*, 44 Cal.3d at p. 1024, fn. 11.) Further, Billy Friend's statement was made during the penalty phase of the trial, after the jury had already determined appellant's guilt. In *Lucero*, the outburst was made prior to the jury's determination of guilt, allowing Lucero to argue that "the outburst came at the worst possible time in terms of its prejudicial impact—just as the jury was preparing to leave the courtroom to begin deliberating on his guilt." (*Id.* at p. 1022.) The outburst in this case was not made at such a crucial juncture in the proceedings.

In addition, Billy Friend, unlike the victim's mother in *Lucero*, did not provide the jury with any facts outside the record. No evidence was disclosed that had not already been presented at trial. It was a purely emotional reaction. Clearly, the outburst in this case was much less egregious than in *Lucero*, and therefore this Court, as in *Lucero*, should find no abuse of discretion by the trial court.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NOS. 1.00 AND 2.01

Appellant argues that the trial court violated his right to due process and a fair trial by instructing the jury with the terms "guilt" and "innocence" as set forth in CALJIC Nos. 1.00 and 2.01. (AOB 149-150.) He contends that the instruction repeated the concepts of guilt and innocence and improperly suggested that appellant needed to prove his innocence rather than just raise a reasonable doubt as to guilt. (*Ibid.*) This claim is meritless.

A. Background

The trial court instructed the jury with CALJIC No. 1.00, and the relevant portion of the jury instruction is set forth here:

> You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a *defendant is more likely to be guilty than not guilty*. . . .

(19 RT 5837-5838; 8 CT 2380-2381, emphasis added.)

The trial court also instructed the jury with CALJIC No. 2.01, in pertinent part as follows:

> Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt.

(19 RT 5841-5842; 8 CT 2388.)

B. Discussion

Preliminarily, appellant has forfeited his challenge to the jury instructions on appeal for his failure to object in the trial court. The California Supreme Court recently explained that, "[t]he longstanding

general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given." (*People v. Rundle* (2008) 43 Cal.4th 76, 151.) A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (*People v. Hart* (1999) 20 Cal.4th 546, 622.) Appellant did not object below nor did he suggest any clarification or other correction during the discussion of the challenged jury instructions. Appellant's counsel specifically stated on the record that appellant had no objection to CALJIC No. 1.00 and CALJIC No. 2.01. (16 RT 4860-4866.) Therefore, his challenge to the correctness and clarity of the instructions is forfeited on appeal.

Regardless, his argument on the merits fails as well. In a criminal case, a trial court, even absent a request, is required to instruct the jury on the general principles of law that are closely and openly connected with the evidence before it and that are necessary for the jury's understanding of the case, including all the elements of the charged offense. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530; *People v. Ervin* (2000) 22 Cal.4th 48, 90; *People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Instructions are reviewed based on how a reasonable jury, sitting as a body, would construe them. (*Boyde v. California* (1990) 494 U.S. 370, 379-380; accord, *People v. Clair* (1992) 2 Cal.4th 629, 688; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492.) A reviewing court must presume that the jurors are intelligent people who are capable of understanding and correlating all of the instructions which they are given. (*People v. Billings* (1981) 124 Cal.App.3d 422, 427-428; cf. *People v. Wilson* (1992) 3 Cal.4th 926, 943.)

Appellant urges the Court to find error in CALJIC No. 1.00 and its use of the term "innocent." (AOB 149.) However, CALJIC No. 1.00 as used in this case did not use that term. The court instructed the jury that,

"[n]one of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty." (19 RT 5837-5838; 8 CT 2380-2381.) The term innocent was not used in this instruction, and therefore, it does not support appellant's argument that the jury was instructed that appellant was required to prove his innocence.

Turning to CALJIC No. 2.01, while the trial court did use the term innocence in this instruction, the instruction by itself did not change the burden of proof. CALJIC No. 2.01 merely provides a means of contrasting guilt with innocence in terms of how the jury may interpret circumstantial evidence. It does not tell the jury to use innocence as appellant's required burden. Furthermore, a jury instruction cannot be judged on the basis of the use of a single term taken out of context. Instead, "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." (*People v. Young* (2005) 34 Cal.4th 1149, 1202 [internal quotations and citations omitted]; *People v. Smithey* (1999) 20 Cal.4th 936, 963 [same].)

In the paragraph immediately preceding the one quoted by appellant, the jury was instructed that the burden of proof is proof beyond a reasonable doubt. Other instructions given to the jury also make clear that the correct burden of proof is proof beyond a reasonable doubt and that appellant is not required to prove his innocence, not the least of which is CALJIC No. 1.00 which uses the term "not guilty." The trial court in this case also instructed the jury with CALJIC No. 2.00 (direct and circumstantial evidence – inferences) and CALJIC No. 2.90 (presumption of innocence – reasonable doubt – burden of proof). (8 CT 2387; 9 CT 2413.) Additionally, the trial court instructed the jury with CALJIC No. 1.01 which required the jury to consider the instructions as a whole. (8 CT

2382.) It is presumed that jurors have and use intelligence and common sense in construing the instructions. (*People v. Coddington* (2000) 23 Cal.4th 529, 594, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) It must be presumed also that the jury followed the instructions given, not that it ignored them. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1121.) Under these circumstances and in light of the entire charge to the jury, it is very unlikely that the jury would construe this one sentence of CALJIC No. 2.01 to mean that appellant had the burden of proving his innocence. (See *People v. Estep* (1996) 42 Cal.App.4th 733, 739.)

IX. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANT FAILED TO MAKE A PRIMA FACIE SHOWING UNDER *BATSON/WHEELER* AFTER THE PROSECUTOR EXERCISED PEREMPTORY CHALLENGES AGAINST THREE AND THEN FOUR AFRICAN-AMERICAN WOMEN

Appellant's counsel made two motions under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*), claiming the prosecutor used peremptory challenges to purposely exclude African-American women from the jury. The trial court twice found no prima facie case of discrimination was shown. Appellant challenges the trial court's denials on appeal contending that the trial court committed reversible error. This argument lacks merit.

A. Background

1. *Batson/Wheeler* Motions

During the first round of peremptory challenges for the second penalty phase trial, the prosecutor first excused a black woman, Shirley Rakestraw. (30 RT 9016.) After next excusing a white man, the prosecutor used the People's third peremptory challenge to excuse Adrienne Ayers, also a black woman. (30 RT 9017-9018, 9021.) The fourth peremptory

challenge by the prosecution was to another white man. (30 RT 9018, 9021.) The prosecutor then exercised a fifth peremptory challenge by excusing Alice Spruill, a third black woman. (30 RT 9019.) At that time, defense counsel asked to approach the bench. (*Ibid.*)

Outside the presence of the jury, defense counsel made a *Batson/Wheeler* motion objecting to the prosecution's exercise of its peremptory challenges as to the three black women. (30 RT 9020.) Defense counsel claimed that he made a prima facie showing of group bias, and that the burden shifted to the prosecution to provide race-neutral reasons for the exclusion of the three jurors. (*Ibid.*) The prosecutor responded that appellant had not made a prima facie showing by just pointing out who the prosecution had excused and added that appellant himself was not black. (30 RT 9021.) The prosecutor stated that it was prepared to justify the challenges on a basis other than race but that the People were not required to do so in light of appellant's failure to establish a prima facie case of discrimination. (30 RT 9022.) The court denied appellant's motion without prejudice to renew it, finding that appellant had failed to make a prima facie showing. (30 RT 9021-9022.) The court noted that "there are a number of other [African-American] jurors in the venire in the courtroom." (*Ibid.*)

Upon resuming jury selection, the prosecutor exercised its next peremptory challenges to excuse two women who presumably were not African-American. (30 RT 9023-9024.) The prosecutor then twice accepted the jury as presently constituted as appellant exercised two more peremptory challenges. (30 RT 9024-9025.) Following a peremptory challenge to a juror seated in the box, Alicia Richard, a black woman, was called to sit on the jury. (30 RT 9025.) At the next opportunity to challenge a juror, the prosecution exercised a peremptory challenge to

excuse Richard. (30 RT 9026.) Appellant immediately objected and made a second *Batson/Wheeler* motion. (*Ibid.*)

The parties agreed that *People v. Howard* (1992) 1 Cal.4th 1132, set forth the requirements for a *Batson/Wheeler* challenge. (30 RT 9036, 9039.) Appellant argued that he need only make a prima facie showing that the relevant circumstances raise an inference that the government's use of challenges excluded a class of jurors because of their race. (*Ibid.*) He pointed out that all four of the potential jurors were black women. (*Ibid.*) He argued that in the case of Richard, the prosecutor excused her immediately upon hitting the stand. (*Ibid.*) He pointed out that Richard's answers to voir dire questions were quite similar to answers given by others, including white women, such as the fact that Richard and some other jurors had been involved with WEAVE.[48] (30 RT 9036-9037.) He further pointed out that Spruill, also excused immediately, had a brother who was in prison just like one of the white women sitting on the jury. (30 RT 9037.) Another white juror also had a relative in prison. (*Ibid.*) He argued that all of the jurors had no particular views toward the death penalty although some may be a bit in favor of it or opposed to it. (*Ibid.*) None of them had been challenged for cause. (*Ibid.*) Finally, he pointed out that the prosecution used four of their eight peremptory challenges on black women. (30 RT 9039.)

The prosecution argued that appellant had not met his burden under the first step, that is, to establish a prima facie case of bias. (30 RT 9038.) In *Howard*, two jurors out of two were excused while the prosecution in this case exercised a total of eight peremptory challenges. (30 RT 9039.)

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[48] WEAVE is Women Escaping a Violent Environment, an organization for battered women. (30 RT 9047-9048.)

Additionally, and as opposed to *Howard*, in this case appellant was not part of the same racial group as the excused jurors. (30 RT 9040.) In this case, both the appellant and the victim were white. (*Ibid.*) The fact that appellant is white is a factor for the court to take into consideration. (*Ibid.*) The prosecutor further argued that while four of the eight peremptory challenges were against black women, that alone is not sufficient to establish a showing of a strong likelihood that the jurors were excused based on race. (30 RT 9042.) The trial court noted that the defense had used two of its peremptory challenges, out of a total of eleven, to challenge jurors who were black. (30 RT 9040.)

After hearing argument by both sides, the court addressed defense counsel:

> All right. Do I not have before me right now I'm looking at either side of this case, what I have is one fact, I have four jurors who are of the black race who have been excused by the district attorney out of eight challenges.
>
> So I have whatever the significance is of that number.
>
> What else do I have other than that?
>
> No? Maybe, you think that's enough. I don't know. I'm just asking the question. What do I have other than that for me to make a judgment that there is discrimination and sufficient - -

(30 RT 9046.)

Defense counsel responded that there were no discernable differences between the four excused jurors and those remaining in the jury box. (30 RT 9046.) The prosecutor disagreed, stating there were significant differences, but refused to expand upon the differences because the defense had failed to meet its burden of making a prima facie showing that the jurors were excused because of race. (30 RT 9046-9047.) Defense counsel then listed some similarities, including that the jurors had relatives in prison, were former victims of assault, had strong religious views, and were

volunteers for WEAVE. (30 RT 9047.) The prosecutor reiterated that appellant had offered nothing specific to demonstrate race-based reasons for the challenges and that he had not met his burden. (30 RT 9048-9049.) The prosecution declined the trial court's request to provide the specific reasons for the prosecution's exercise of its peremptory challenges. (30 RT 9046-9047.) The court ruled as follows:

> All right, the Court is going to, at this juncture, accept the authority of this *Howard* case. In doing so, I need to look very carefully at the representatives of the People and say that any further matters of this kind will weigh heavily on this Court. . . . But I've indicated how the Court feels at this juncture. I'm very close, I'm going to go with *Howard* for the time being, but if I see very much more of this, I'm going to indicate to you, you may well have a serious problem on your hands.

(30 RT 9050.)

Following the denial of appellant's motion, the prosecution exercised three more peremptory challenges to excuse one man and two women. (30 RT 9056-9058.) The parties ultimately selected a jury. (30 RT 9058-9059.)

2. Information on Challenged Jurors

Shirley Rakestraw was a 60-year-old woman with two adult daughters and four grandchildren. (23 CT 6859-6860.) She worked at CSU Sacramento for 19 years as an administrative assistant. (25 RT 7662.) Her husband spent 20 years in the Air Force. (23 CT 6864-6865.) She was a member of the New Testament Baptist Church and a member of the church choir. (23 CT 6866.) Although she was a Southern Baptist she indicated her religious views would not affect her service as a juror. (23 CT 6869.)

When she was 12 years old, a friend of hers was a victim of a homicide. (25 RT 7663; 23 CT 6878.) As a child, Rakestraw saw a flasher, a man who yelled at her and then opened his coat. (25 RT 7664; 23 CT 6878.) Rakestraw's daughter had been the victim of spousal abuse. (23

CT 6874.) A very close family member had been convicted twice of shoplifting. (23 CT 6876.) Rakestraw visited the family member in jail several times. (23 CT 6877.) She had a close relative who had a drug problem, specifically "crack" and cocaine. (*Ibid.*)

Rakestraw's last daughter died when the child was three weeks old. (25 RT 7664-7665; 23 CT 6892.) Rakestraw was very sympathetic to and felt very strongly about any parent who loses a child. (*Ibid.*) She stated,

> And I remember the pain and I can still feel the pain that I felt then, so I can imagine how it would be magnified if it would happen to a child that you had spent a lot of time with and had raised. And I can imagine how this would be magnified even more. It's a very, very painful thing.

(25 RT 7665.) She indicated on the juror questionnaire that she had only some confidence in eyewitness testimony. (25 RT 7663.) When asked by defense counsel why she did not have more or less confidence in it, Rakestraw answered,

> Um, because I've - - I guess I've learned over the years that people see things differently and that some people can see the same thing and still come up with different conclusions. It's not always just cut and tried [sic] to me that because a person said this is the way they saw it that it's always true. People interpret things in different ways.

(*Ibid.*) She had a lot of confidence in DNA evidence. (*Ibid.*)

Rakestraw chose not to answer many of the questions on the juror questionnaire pertaining to the death penalty although she did indicate affirmatively on the juror questionnaire that she had a strong opinion about it. (25 RT 7665; 23 CT 6894-6900.) She thought that the verse in the Bible, "an eye for an eye," had been "grossly misinterpreted and misused." (23 CT 6895.) During voir dire she told defense counsel that she had strong feelings about the death penalty but thought she would be able to consider both the death penalty and life without the possibility of parole.

(*Ibid.*) The prosecutor then asked further questions about the death penalty, including, "I assume that you think that the death penalty is the appropriate punishment in some cases at some times under some circumstances. Is that a fair statement?" (25 RT 7666.) Rakestraw responded, "No, I can't truthfully say that." (*Ibid.*) Without another question, Rakestraw went on to explain,

> I've never been asked to elaborate on it, so all I can do is really truthfully explain my feelings. I try to lead a Christian life, and my Bible says thou shalt not kill. It doesn't say [sic] give me any exceptions, it just simply states to me, and I believe it, says thou shalt not kill. I would have to really hear the evidence and weigh everything before I could honestly, you know, make a decision to go against what I've been taught to believe.

(*Ibid.*) She could not truthfully say, however, that under no circumstances should the death penalty ever be considered. (*Ibid.*) She agreed that in many cases of murder the death penalty would be inappropriate but that there are some cases in which what the defendant did was so bad that the death penalty might be appropriate. (25 RT 7666-7667.) She could vote for the death penalty if she felt that the factors in aggravation far outweighed those in mitigation. (*Ibid.*) She also indicated on the juror questionnaire that she felt life in prison without the possibility of parole was more of a punishment than the death penalty. (23 CT 6897.)

26-year-old Adrienne Ayers lived with her parents and had never been married or had children. (22 CT 6403-6404.) She held a Bachelor's degree in interior design from CSU Sacramento and was a customer service representative for Sprint. (22 CT 6405-6406.) About ten years prior, her brother-in-law was murdered in a random act of violence, and the murder remained unsolved. (24 RT 7424; 22 CT 6418, 6422.) She had a friend who was the victim of sexual molestation and rape. (22 CT 6422.) She had a friend who had contacted WEAVE. (22 CT 6423.) Ayers' father had an alcohol problem. (22 CT 6431.) The effect on her family was to make

them angry, and she felt that drug or alcohol abuse makes children insecure, co-dependent, and abusers of other things such as food or work. (*Ibid.*)

Ayers' opinions on the death penalty and the purpose it serves included the statement, "I do not believe it serves any purpose." (24 RT 7425; 22 CT 6438.) In explaining that response, Ayers indicated that she had never really considered how she felt about the death penalty but that in some cases she had seen she did not see that the death penalty served a purpose. (24 RT 7425-7426.) She stated on the juror questionnaire, "I believe the death penalty is a sentence rarely followed. I think in some or most it is unnecessary." (*Ibid.*) When asked if she was in support of the reinstatement of the death penalty, Ayers wrote, "I did not support the effort. I can't support actions to kill a human as a sentence even if that individual has killed someone." (*Ibid.*) When asked about "an eye for an eye," Ayers wrote, "I don't believe God meant the term literally." (22 CT 6439.) When asked for the types of cases/offenses for which the death penalty should be imposed, Ayers stated, "None." (*Ibid.*) She did not believe enforcing the death penalty served as a deterrent for others who might otherwise commit crimes such as murder. (*Ibid.*) If Ayers was in charge of making all the laws, there would not be a death penalty. (22 CT 6440.)

These strong sentiments about the death penalty were contrasted with some of her other answers, such as that she felt the death penalty should be imposed if the killing was premeditated or intentional. (22 CT 6440-6441.) She thought the death penalty was imposed "about right," and stated she would not always vote for either the death penalty or life in prison without parole regardless of the facts or circumstances. (22 CT 6441.) She indicated that she would be able to consider the death penalty as a possible punishment in this case. (24 RT 7425.) On questioning from the prosecutor, Ayers agreed that she was there to decide the punishment and

that there were only two choices. (24 RT 7426.) She stated that if the evidence in aggravation far outweighed that in mitigation, she could vote for the death penalty. (24 RT 7426-7427.) She could be fair to both sides in the case. (24 RT 7427.)

Alicia Richard was the mother of three boys ages 15, 13, and 6. (28 CT 8340.) She was a customer service representative for an insurance company. (28 CT 8342.) Her spouse served in the military. (28 CT 8346.) She was currently in training to become a volunteer for WEAVE. (26 RT 7932; 28 CT 8347.) She was a member of the Church of God in Christ and went to services several times a month. (26 RT 7933; 28 CT 8350.) She listened to Dr. Laura on the radio.[49] (28 CT 8349.) She was physically assaulted one time but not hurt badly. (26 RT 7933-7934.) She and her husband had been the victims of robbery. (28 CT 8355.) She had previously been physically assaulted by an ex-boyfriend. (28 CT 8358.) The ex-boyfriend had a problem with alcohol or drugs which caused him to be verbally and physically abusive. (28 CT 8368.) When asked if she felt the courts are "too soft" on criminals, Richard stated that it depended on the circumstances such as whether the persons involved were black or white as well as the type of crime. (28 CT 8365.)

In the year prior, Richard had an unpleasant experience with law enforcement. (26 RT 7934; 28 CT 8362.) She explained that officers called her outside of her house because of a parked car. (*Ibid.*) She had just purchased the car and had forgotten to get a sticker she needed in order to park the car there without having it registered. (*Ibid.*) The officer told her that he was going to cite her for illegal tags on the car. (*Ibid.*) Richard

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[49] Wikipedia describes Dr. Laura Catherine Schlessinger as "an American talk radio host, socially conservative commentator and author." (http://en.wikipedia.org/wiki/Laura_Schlessinger)

said, "Well, I don't know anything about that. The car doesn't work, whatever. It's not even my car. If you want to cite me, fine. I'll go inside, whatever." (*Ibid.*) As she started to walk away, the officers rushed her and handcuffed her, and "they didn't even halfway try to talk with me or work with me or anything, you know, they was just being jerks." (26 RT 7934-7935.) Then the officers kept her in the car with the kids looking on for a while. (*Ibid.*)

The prosecutor asked Richard whether she thought there were some cops who are jerks and some cops who are nice people, and whether she could put her prior experience aside. (26 RT 7939.) She indicated she could. (*Ibid.*) Richard indicated that she could be fair to both sides in listening and evaluating the evidence by the parties. (26 RT 7935.) She would consider the death penalty, and could impose either penalty if supported by the facts. (26 RT 7936.) She could listen to all the evidence before she made a decision and could apply the law that the judge gave her. (26 RT 7939.) When asked by the prosecutor if she came to the conclusion based on the evidence that the correct verdict was the death penalty would she vote for it, Richard responded, "I suppose." (26 RT 7937-7938.) When asked the same question as to the punishment of life without the possibility of parole, Richard answered, "yes." (26 RT 7938.)

When describing her opinions about the death penalty, Richard stated on the juror questionnaire that in some cases the death penalty is acceptable and at other times it may have been considered unfairly. (28 CT 8375.) She did not agree with the Old Testament's statement of "an eye for an eye," but rather, stated that Christ dies on the cross for everyone's sins. (28 CT 8376.) Her views on the death penalty had changed over time as a

result of the case of Karla Faye Tucker, "because she proved that some people can change."[50] (28 CT 8376.)

Alice Spruill had a six-month-old baby. (26 CT 7770; 28 RT 8452.) The juror questionnaire revealed that Spruill worked for the Franchise Tax Board and had an MBA. (26 CT 7772-7773.) Her spouse served in the Air Force. (26 CT 7776.) She did not belong to any religious, civic, or social organizations. (26 CT 7777.) Losing a relative taught her never to take life for granted. (*Ibid.*) She was a middle of the road democrat. (26 CT 7780-7781.) She denied that the fact that she had a small child and the case involved the murder of a young child would make it difficult for her to be impartial. (*Ibid.*)

On the juror questionnaire, when asked about her view of prosecuting attorneys, she answered, "I don't have a lot of opinions except I do feel sometimes blacks are not always treated fairly by our system." (28 RT 8452; 26 CT 7786) She had seen some unfairness personally in her own family. (28 RT 8454.) Defense counsel asked Spruill whether she would try to get even with the prosecution for the wrongs they had done to others. (28 RT 8452.) Spruill said no, that she thought she could make a fair judgment, and explained that her questionnaire answer was just her opinion. (28 RT 8452-8453.) Defense counsel asked her if she felt that it was more likely that appellant, because he was white, was treated fairly. (28 RT 8453.) She answered, "I'm sure he was treated fairly." (*Ibid.*) He then

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[50] According to Wikipedia, Tucker was convicted of murder in Texas in 1984 and put to death in 1998. She was the first woman to be executed in the United States since 1984, and the first in Texas since 1863. Because of her gender and widely-publicized conversion to Christianity, she inspired an unusually large national and international movement advocating the commutation of her sentence to life imprisonment, a movement which included a few foreign government officials. (http://en.wikipedia.org/wiki/Karla_Faye_Tucker)

asked if she would have the same view if appellant was African-American. (*Ibid.*) She had no response. (*Ibid.*) The attorney stated it was a difficult question, and Spruill started to answer but was interrupted by someone coming into the courtroom (*Ibid.*) She then indicated she had personal experiences in her family where she had seen unfairness but that she knew that was a separate situation. (28 RT 8454.) She knew the difference between right and wrong and could "disseminate any facts" given to her about an individual. (*Ibid.*) She did not have any prejudices against defense attorneys. (*Ibid.*)

Spruill had learned about the Michael Lyons case before she came to court as a result of news reports. (28 RT 8454-8455.) She had not formed an opinion about what the punishment should be when she learned about the crime. (28 RT 8455.)

Defense counsel asked Spruill about the difficulty her brother had with alcohol. (28 RT 8455.) The following colloquy took place:

> Q. Now, your brother had difficulty with alcohol?
>
> A. Yes.
>
> Q. And is there anything about his difficulties with alcohol that might translate into impartiality one way or another in this case?
>
> A. No.
>
> Q. Your brother's situation is separate and distinct from anything, that is?
>
> A. (No response.)

(*Ibid.*) Defense counsel then asked whether Spruill knew that they were just there to decide life in prison without the possibility of parole or the death penalty. (*Ibid.*) Spruill said yes. (28 RT 8456.) She could consider both options fairly and impartially. (*Ibid.*) Spruill was unsure what she would do if she was the lone juror disagreeing with 11 other jurors for a

verdict. (26 CT 7783.) She answered that she did have preconceived ideas about expert witness testimony because, "People have different backgrounds and experiences and sometimes that forces even an expert to be biased towards individuals in a situation." (*Ibid.*)

She accepted that appellant was convicted of first-degree murder and knew her job was to listen to the aggravating and mitigating evidence. (28 RT 8458.) She stated she would weigh and determine the appropriate penalty. (*Ibid.*) The following colloquy took place:

> Q. If, at the end of the case after listening to the aggravating evidence and any mitigating evidence, if and the judge instructs you on the law, if you came to the conclusion, based on what you heard at the trial, that the death sentence was the appropriate sentence, could you vote to put another human being to death?
>
> A. I can't really answer that.
>
> Q. Okay. Unfortunately, we're here today because it's not a hypothetical question.
>
> A. And you need an answer.
>
> Q. And we don't need an answer how you're going to vote in this particular case.
>
> A. Uh-hum.
>
> Q. But in order for the People to get a fair trial, we need to get someone, although it's a serious decision, who will not hesitate because of personal reasons to impose the death penalty.
>
> A. If I'm given instructions from the judge and I have the facts in front of me, I will follow the instructions. And based on those facts, I will be able to make a decision.
>
> Q. Okay.

(28 RT 8458-8459.) The prosecutor again asked if she could vote for the death penalty if she felt it was an appropriate verdict, and Spruill answered, "yes." (28 RT 8460.)

When asked if caring for her child would interfere with her ability to serve on the jury, Spruill stated, "I don't know, I just had a baby (6 mos. old) I can't say. He's still young and my husband travels so I get very stressed at times." (26 CT 7781.) When asked if she was willing to stay as long as necessary to complete the trial and jury deliberations if the case lasted longer than estimated by court or counsel, Spruill answered "No." (26 CT 7781.) She explained that she was the only person working on a budget at work. (*Ibid.*)

Spruill indicated that she once called the police because someone broke into their home but the police would not come out because they could not dust for fingerprints on the window sill. (26 CT 7785.) She had a cousin who was the victim of a robbery. (*Ibid.*) Her brother was currently serving time in Virginia for sexual assault and sexual molestation of a teen, and her husband suffered a DUI years ago. (26 CT 7787.) Spruill had visited her brother while he was in jail. (26 CT 7788.) When asked about the testimony of law enforcement officers, Spruill indicated that officers could misuse their authority. (26 CT 7792.)

Spruill indicated she had a brother as well as a brother-in-law who had a drug or alcohol problem. (26 CT 7798.) Specifically, her brother caused a lot of stress on her parents in that he had no accountability because he was "always drunk or wasted." (*Ibid.*) When asked about this specific case, Spruill recalled that the little boy was missing, appellant may have committed these types of crimes before, the little boy was found naked and stabbed and had suffered quite a bit. (27 CT 7801.) She also thought appellant was a transient. (*Ibid.*) When asked how she felt about serving as a juror on this case, Spruill wrote:

> This is a very sensitive area for me because my brother was jailed for a sexual assault crime or molestation and I believe he is innocent to this day. I believe because he was an alcoholic that he had no accountability the day of the alleged crime.

(27 CT 7803.)

The prosecutor asked Spruill whether her brother had been convicted, and she responded that he had been convicted. (28 RT 8456.) He pointed out that on the questionnaire Spruill had indicated that she believed her brother was innocent. (*Ibid.*) Spruill stated that she believed that her brother did not commit the crime. (28 RT 8457.) She elaborated as follows:

> I believe he did not commit the crime but because of the alcohol, because of his alcoholic problem, he had no accountability. He was pretty much homeless and didn't have any place to live. So he basically had no accountability.
>
> And so part of that was, I think, I think was because of his innocence, he didn't really have anywhere to live. So he basically was out in the streets. And because he had no accountability as far as, you know, being impaired, you know, I felt like he is an alcoholic but he wasn't a molester or whatever.

(*Ibid.*) However, she did think that people should be held responsible if there was alcohol or drugs involved and the person suffered a conviction. (28 RT 8458.)

B. Discussion

The use of peremptory challenges to remove prospective jurors because of their race or gender violates both the federal and the California Constitutions. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 129; *Powers v. Ohio* (1991) 499 U.S. 400, 409; *People v. McDermott* (2002) 28 Cal.4th 946, 969.) The United States Supreme Court has confirmed the three-step process to be followed when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges. (See *Johnson v. California* (2005) 545 U.S. 162, 168 (*Johnson*).) First, the complaining party must make out a prima facie case of invidious discrimination. (*Ibid.*) Second, the party exercising the challenge must

state nondiscriminatory reasons for the challenge. (*Ibid.*) Third, the trial court must decide whether the complaining party has proved purposeful discrimination. (*Ibid.*) Both African-Americans and African-American women have been held to be cognizable groups for purposes of *Batson/Wheeler*. (*Wheeler, supra*, 22 Cal.3d at p. 280, fn. 26; *Batson, supra*, 476 U.S. at pp. 84-89; *People v. Clair, supra*, 2 Cal.4th at p. 652; *People v. Boyette* (2002) 29 Cal.4th 381, 422 (*Boyette*); *People v. Motton* (1985) 39 Cal.3d 596, 605-606.)

A party's use of peremptory challenges is presumed to be valid. (*People v. Williams* (1997) 16 Cal.4th 153, 187; *Wheeler, supra*, 22 Cal.3d at p. 278.) Counsel may develop a distrust for a potential juror's objectivity "'on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" [citation].'" (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1216; accord, *People v. Turner* (1994) 8 Cal.4th 137, 171, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536. 555, fn. 5.) Counsel may excuse potential jurors based on hunches or for arbitrary reasons, so long as they are unrelated to impermissible group bias. (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6; *People v. Turner, supra*, 8 Cal.4th at p. 165.) Thus, the burden is on the complaining party to make a prima facie showing that the peremptory challenges have been exercised in violation of the Constitution. (*People v. Johnson, supra*, 47 Cal.3d at p. 1216; see *People v. Crittenden* (1994) 9 Cal.4th 83, 115.) When a trial court denies a *Wheeler* motion finding the objector failed to make a prima facie case of group bias, the reviewing court should consider the entire record of voir dire of the challenged jurors. (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

Appellant points out that the trial court used a standard for the prima face case that was later found too demanding under *Batson*. (AOB 161; see *People v. Cornwell* (2005) 37 Cal.4th 50, 73.) However, even assuming the

trial court applied the wrong standard, reversal is not necessarily required. This Court has recognized that a different standard of appellate review is required in cases predating *Johnson* in which the trial court determined the defendant failed to make a prima facie case of group discrimination. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1293.) In those cases, the Court may not accord deference to the trial court's finding that no prima facie case has been made, but must be satisfied based on an independent review of the record that the defendant has made an insufficient showing at the onset to permit an inference of discrimination. (*Ibid.*) Thus, even if the more stringent standard is applied, "[this Court] review[s] the record independently to 'apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (*People v. Bell* (2007) 40 Cal.4th 582, 597, quoting *People v. Cornwell*, *supra*, 37 Cal.4th at p. 73 (emphasis in original).)

The issue in this case is whether appellant established a prima facie case of group bias. To do so, the burden rests on appellant to "'show[] that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*Johnson*, *supra*, 545 U.S. at p. 168; accord, *Miller–El v. Dretke* (2005) 545 U.S. 231, 239; *Batson*, *supra*, 476 U.S. 79, 96.) This is not a case in which, after a prima facie case is found, the state must offer permissible nondiscriminatory reasons for the strikes (i.e., the second stage of the *Batson/ Wheeler* analysis), or the trial court must decide whether the defendant has carried his burden of showing the discriminatory use of such strikes (i.e., the third stage of the analysis). (*Johnson*, *supra*, 545 U.S. at p. 168.) Just as the prosecutor indicated below, she was not obliged to disclose such reasons, and the trial court was not required to evaluate them, unless and until a prima face case was made. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104–1105 & fn. 3, overruled on other grounds in *People*

v. Doolin, *supra*, 45 Cal.4th at p. 421; see generally *People v. Bell*, *supra*, 40 Cal.4th at p. 596.)

The court in *Wheeler* gave illustrations of the type of evidence that could be used to establish a prima facie case of improper use of peremptory challenges. It stated,

> Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic-their membership in the group-and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all.

(*Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) A trial court may reasonably determine that the defendant failed to make the requisite showing when there are "obvious race-neutral grounds" for excusing the prospective juror. (*People v. Davis* (2009) 46 Cal.4th 539, 584; *Howard*, *supra*, 1 Cal.4th at p. 1018 [voir dire provided prosecution with "ample grounds" for excusing juror]; *People v. Williams* (2006) 40 Cal.4th 287, 313.) A prospective juror's skepticism regarding the death penalty can constitute a valid, race neutral reason for a peremptory challenge, even when not sufficient to support a for cause challenge. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Ochoa* (2001) 26 Cal.4th 398, 432-433; *People v. Turner*, *supra*, 8 Cal.4th at p. 171.)

In this case, an independent review of the record fails to show that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Appellant points to the statistical disparity that the prosecutor excluded three African-American female jurors (first motion) followed by a fourth African-American female juror (second motion), arguing this

evidence, along with evidence that the challenged group had diverse backgrounds, was sufficient to state a prima facie case. (AOB 180-185.)

On the contrary, the statistics here show that the prosecutor excluded three African-American female jurors out of five peremptory challenges, followed by a fourth African-American woman out of eight challenges, and the lack of information in the record to the contrary suggests that at the time the trial court heard appellant's second motion, there were no African-Americans sitting on the jury. (30 RT 9040.) The defense exercised two of its peremptory challenges against African-Americans, and there were other African-American jurors in the venire. (*Ibid.*) However, nothing in *Wheeler* suggests that the removal of all members of a cognizable group, standing alone, is dispositive on the question of whether a defendant has established a prima facie case of discrimination. (See, e.g., *People v. Johnson* (2003) 30 Cal.4th 1302, 1325-1326, overruled on another point in *Johnson*, *supra*, 545 U.S. 162 [the removal of all three African-American prospective jurors did not present a prima facie case of discrimination]; *People v. Crittenden* (1994) 9 Cal.4th 83, 119 [the excusal of all members of a cognizable group may give rise to an inference of impropriety but is not dispositive of whether defendant has shown purposeful discrimination]; *Howard*, *supra*, 1 Cal.4th at pp. 1154–1155 [the defendant relied solely on the fact that the prosecutor challenged the only two African–American prospective jurors and made no effort to set out other relevant circumstances; such a showing was "completely inadequate"]; *People v. Sanders* (1990) 51 Cal.3d 471, 500 [the removal of all members of a cognizable group is not dispositive on the question of whether a prima facie case has been shown]; *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536 [the defendant's prima facie showing was limited to his statement that "'there were only two blacks on the whole panel, and they were both challenged by the district attorney'"; this "statement was not a prima facie

showing of systematic exclusion."].) While defense counsel may not establish a prima facie case of *Wheeler* error simply by stating that all members of a cognizable class have been excluded (*People v. Box*, *supra*, 23 Cal.4th at pp. 1188-1189), a prima facie case of discrimination may be established where it is shown there was no apparent, legitimate reason to excuse the juror in question. (*Box*, *supra*, at pp. 1187-1188; *People v. Gray*, *supra*, 87 Cal.App.4th at p. 789.)

Nor is it the case, as set forth more fully below, that the four challenged jurors shared only the characteristic of being African-American women and were otherwise "as heterogeneous as the community as a while." (*Wheeler*, *supra*, 22 Cal.3d at p. 280.) Nor is there any indication in the record that the prosecutor engaged these prospective jurors in particularly "desultory" questioning on voir dire. (*Id.* at p. 281.) On the contrary, the prosecutor diligently and purposefully questioned each of the jurors. And finally, appellant is a Caucasian and not a member of the group to which the prospective jurors at issue belong, a factor which supports the trial court's ruling that appellant failed to establish a prima facie case of discrimination. (*People v. Kelly* (2007) 42 Cal.4th 763, 779.) Thus, under the totality of the relevant facts, appellant failed to raise an inference of discriminatory purpose.

Moreover, in this case, there were obvious, legitimate race-neutral reasons for challenging each of the four African-American women excused by the People. (See, *e.g.*, *People v. Young* (2005) 34 Cal.4th 1149, 1173-1174.) A trial court may reasonably conclude that no prima facie case of discrimination has been established when there are obvious race-neutral grounds for excluding the jurors. (*People v. Davis* (2009) 46 Cal.4th 539, 584.)

Beginning with Rakestraw, this potential juror revealed a strong religious conviction which the prosecutor may have reasonably believed

would prevent her from voting in favor of the death penalty as a punishment for appellant. Rakestraw indicated on her juror questionnaire that she was an active Southern Baptist but claimed her religious views would not affect her services as a juror. (23 CT 6866, 6869.) However, she also indicated that she had a strong opinion about the death penalty and declined to answer many of the death penalty questions. (25 RT 7665; 23 CT 6894-6900.) During voir dire, she stated, " I try to lead a Christian life, and my Bible says thou shalt no kill. It doesn't say [sic] give me any exceptions, it just simply states to me, and I believe it, says thou shalt not kill." (25 RT 7666.) She explained that she "would have to really hear the evidence and weigh everything" before she could "make a decision to go against what I've been taught to believe." (*Ibid.*) And while she did state that she believed there may be cases in which the death penalty was appropriate (25 RT 7666-7667), it would be reasonable for the prosecution to be concerned about her ability to make such a finding if warranted by the evidence. Rakestraw also wrote on her questionnaire that she believed life in prison without the possibility of parole was more of a punishment than the death penalty. (23 CT 6897.) Again, this viewpoint would have reasonably caused the prosecutor to be concerned about Rakestraw's ability to reach a just verdict.

Another concern for this juror was that she had "a close relative who had a problem with 'crack' and cocaine and had another family member who had been in jail several times. (23 CT 6877, 6887.) A family member's or friend's negative contact with the criminal justice system is a reason which justifies a peremptory challenge in the face of a *Batson/Wheeler* claim. (*People v. Garceau* (1993) 6 Cal.4th 140, 172 [family members had "run afoul of the law" and been incarcerated]; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1282 [brother convicted of a crime possibly prosecuted by another deputy in the same office]; *People v.*

Walker (1988) 47 Cal.3d 605, 626 [juror believed police had followed her husband home and harassed him by stopping him without cause]; *People v. Douglas*, *supra*, 36 Cal.App.4th 1681, 1690 [son convicted for grand theft auto].) The information collected on Rakestraw demonstrated obvious and legitimate race-neutral reasons for excusing her from the jury.

Like Rakestraw, Ayers would also have reasonably given the prosecution cause for concern. Ayers admitted on her juror questionnaire that she did not believe the death penalty served a purpose. (24 RT 7425; 22 CT 6438.) She also wrote, "I can't support actions to kill a human as a sentence even if that individual has killed someone." (*Ibid.*) When asked for the types of cases/offenses for which the death penalty should be imposed, Ayers stated, "[n]one." (*Ibid.*) These answers indicate that Ayers would not choose to impose the death penalty under any circumstances. She did not believe enforcing the death penalty operated as a deterrent for others who might otherwise commit crimes such as murder. (*Ibid.*) If Ayers was in charge of making all the laws, there would not be a death penalty. (22 CT 6440.) Clearly, this was a potential juror who it is reasonable to believe would be unable and/or unwilling to vote for the death penalty even if the evidence weighed in favor of it. While several other questions would lead one to believe Ayers could vote for the death penalty if the evidence in aggravation outweighed that in mitigation, the conflict in her answers may have led the prosecutor to reasonably conclude she was not a suitable juror. And, like Rakestraw, this juror had a close family member, her father, who was an alcoholic and whose drinking problem had negatively affected her entire family. (22 CT 6431.) She also had a friend who was the victim of sexual molestation and rape and a brother-in-law who had been murdered with the murder going unsolved. (22 CT 6418, 6422.) These factors also weighed in favor of excusing Ayers.

With regard to Richard, the prosecutor may have reasonably believed that this potential juror harbored ill feelings toward law enforcement that would prevent her from being impartial. Richard detailed an unpleasant experience with law enforcement and also indicated she felt courts may treat people differently depending on their race. (26 RT 7934; 28 CT 8362, 8365.) The prosecution may have also believed that Richard would be sympathetic to appellant based on her juror questionnaire response that her ex-boyfriend had become physically assaultive because of the alcohol and drugs he consumed. (28 CT 8368.) She was equivocal on one of the questions regarding the death penalty, answering that she "supposed" she would vote for the death penalty if the evidence supported the conclusion that it was the correct verdict. (26 RT 7937-7938.) She also admitted that her views on the death penalty had changed over time as a result of the case of Karla Faye Tucker, "because she proved that some people can change." (28 CT 8376.) The prosecutor could have reasonably assumed Richard may be biased against the death penalty and would not impose it when justified based on personal beliefs.

Additionally, Richard, when asked if she felt the courts are "too soft" on criminals, responded that it depended on the circumstances such as whether the person was black or white. (28 CT 8365.) A juror's assertion that the justice system discriminates against certain groups is a valid, race-neutral basis for a peremptory challenge. (*People v. Cornwell*, *supra*, 37 Cal.4th at pp. 69-70; *People v. Walker*, *supra*, 47 Cal.3d at pp. 625-626.) Thus, Richard's opinion concerning perceived discrimination based on race in the criminal justice system provided another basis for the prosecutor's challenge.

And finally, there were many causes for concern regarding Spruill. First, it was reasonable for the prosecutor to not want to risk Spruill being unwilling or unable to fulfill jury duty because she was responsible for the

care of her infant child. When asked if caring for her child would interfere with her ability to serve on the jury, Spruill stated, "I don't know, I just had a baby (6 mos. old) I can't say. He's still young and my husband travels so I get very stressed at times." (26 CT 7781.) When asked if she was willing to stay as long as necessary to complete the trial and jury deliberations if the case lasted longer than estimated by court or counsel, Spruill answered "No." (*Ibid.*) These responses indicate at the very least Spruill may not be able to complete her services as a juror.

Another major concern involving Spruill was the fact that she had a brother who had a drug or alcohol problem and who had caused a lot of stress on her family. (26 RT 7798.) Despite the fact that this brother had been convicted of sexual assault and molestation of a teen for which he was serving time, Spruill was convinced he was innocent because he was a substance abuser. (27 CT 7803.) His alcoholism was the reason for his criminal activity, and consequently Spruill believed him to be innocent. (*Ibid.*) Spruill explained in voir dire that her brother was not accountable for his criminal behavior because he was an alcoholic and a transient. (28 RT 8457.) It would be reasonable for the prosecutor to be concerned that she may not vote for the proper punishment in the case given the fact appellant was high on methamphetamine during the commission of his crimes.

Spruill also thought that African-Americans are not always treated fairly in the criminal justice system, and that she was sure appellant, who was white, had been treated fairly. (28 RT 8452-8453.) As with Richard, Spruill's assertion that the justice system discriminates against certain groups is a valid, race-neutral basis for a peremptory challenge. (See *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 69-70; *People v. Walker*, *supra*, 47 Cal.3d at pp. 625-626.)

Thus, in this case, based on an independent review of the record, the evidence was insufficient to permit an inference that discrimination had occurred. In addition, the record suggests race-neutral grounds on which the prosecutor reasonably might have challenged each of the four prospective jurors. Appellant's argument should be rejected.

C. Comparative Analysis Involving Sitting Jurors

Appellant also urges this Court to conduct a comparative analysis of responses given by non African-American women who were seated on the jury to determine whether a prima facie case was made. (AOB 163.) Respondent submits that such an analysis is not required when the trial court denies the motion in the first stage of the *Wheeler/Batson* review. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 80, fn. 3, abrogated on other grounds in *People v. McKinnon* (2011) 54 Cal.4th 610, ---P.3d---, 2011 WL 3658915, *13-14.) Appellant's reliance on *People v. Lenix* (2008) 44 Cal.4th 602 does not aid his position, for in that case the trial court bypassed the question of whether defendant established a prima facie case of discrimination. (*Id.* at p. 613, fn. 8.) In *People v. Howard* (2008) 42 Cal.4th 1000, 1019-1020, this Court declined to engage in comparative juror analysis in a first-stage *Wheeler/Batson* case finding such analysis has "'little or no use where the analysis does not hinge on the prosecution's actual proffered rationales.'" (See also *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 80.) In any event, a comparative analysis of the entire jury does not aid appellant.

Juror No. 149 (1) was a single 27-year-old female with a high school education. (19 RT 5642, 5645.) She had no children to care for which would interfere with her ability to serve on the jury and indicated she was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (19 CT 5653.) When asked whether it is better for society to let

some people go free then to risk convicting an innocent person, Juror No. 149 (1) responded that if a person is found guilty he or she should be convicted. (19 CT 5668.) She had an uncle who had used drugs but had passed away. (19 CT 5670.) When asked how she felt about serving as a juror in this case, Juror No. 149 (1) stated that she thought she could be fair and unbiased. (19 CT 5675.)

In her answers on the juror questionnaire, she stated, "If a person is convicted of murder the death penalty can be used." (19 CT 5677.) She stated that she believed in the death penalty and that it was a good law but it did not apply to everyone. (*Ibid.*) She also indicated that the death penalty should be imposed if, depending on the crime and circumstances, a heinous crime has been committed. (*Ibid.*) When asked what types of cases deserved the death penalty, Juror No. 149 (1) stated cases involving serial killers and parents who kill their own children. (19 CT 5678.) She believed that imposing the death penalty served as a deterrent for others who might otherwise commit such crimes. (*Ibid.*) She also indicated that she thought life without the possibility of parole was a good punishment under some circumstances. (19 CT 5680.) She believed that the death penalty was imposed about right. (*Ibid.*) When given a list of crimes for which the death penalty may be appropriate, this juror indicated that it may be appropriate for intentional killing, killing of a child, killing combined with rape or sexual assault, and killing of two or more persons. (*Ibid.*) Imposition of either the death penalty or life without the possibility of parole depended on the facts and circumstances of the case, and Juror number 149 (1) would not always vote for one or the other. (19 CT 5680-5681.)

Juror No. 149 (1) explained on voir dire that the death penalty could be used as a punishment if the evidence supported it. (26 RT 7827.) She understood that her duty as a juror would be to choose between the death

penalty and life without the possibility of parole. (26 RT 7828.) She stated that life without possibility of parole was an option. (*Ibid.*) She stated that if a heinous crime had been committed, the death penalty would be appropriate, however, she could not specify the precise circumstances in which the death penalty would apply. (26 RT 7828-7829.) She also indicated that there may be some circumstances in which a heinous crime has been committed but life without the possibility of parole was equally appropriate. (26 RT 7829.) She stated that after hearing all the evidence and the judge's instructions, and based upon a strong opinion that the correct decision was the death penalty, Juror No. 149 (1) could and would vote for the death penalty. (26 RT 7830.) Appellant argues, "This juror was remarkably similar to Ms. Ayers, except for her race." (AOB 173.) Not so. Juror No. 149 (1) was in favor of the death penalty for certain crimes and felt it was a deterrent while Ayers clearly was opposed to the death penalty.

Juror No. 142 (2) was a 43-year-old woman with five children and one grandchild and who had completed some college. (19 CT 5686-5687.) She was a Protestant who attended church services about once a week and was a middle-of-the-road Republican. (19 CT 5693, 5696-5697.) She had no children to care for which would interfere with her ability to serve on the jury and indicated she was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (19 CT 5697.) She had been the victim of a burglary, and her mother had been the victim of purse snatching. (20 CT 5701.) Her niece had been the victim of child molestation. (20 CT 5705.) When asked how she felt about the statement that a defendant in a criminal trial should be required to prove his or her innocence, Juror No. 142 (2) agreed somewhat, explaining that "the defendant should be able to provide some

kind of testimony/evidence regarding innocence if innocent." (20 CT 5711.)

Juror No. 142 (2)'s ex-husband was a drowning victim who had methamphetamine in his system. (20 CT 5714.) The ex-husband's wife said that she did not know he used the drug, and Juror No. 142 (2) was unaware of this also. (*Ibid.*) She indicated that if she served as a juror in this case she knew she would be attentive, fair, and able to apply the laws in making a decision. (20 CT 5719.) She did not have strong opinions about the death penalty but believed that the death penalty was appropriate sometimes. (20 CT 5721.) She did not know for which types of cases the death penalty should be reserved but she did believe that the death penalty served as a deterrent for those who might otherwise commit crimes such as murder. (20 CT 5722.) She thought the death penalty was imposed "about right." (20 CT 5724.) She would not always vote for either the death penalty or life in prison without the possibility of parole regardless of the facts and circumstances. (*Ibid.*)

During voir dire, Juror No. 142 (2) indicated that she understood the purpose of her service as a juror would be to determine whether appellant was to be put to death or sentenced to life in prison without the possibility of parole. (25 RT 7737.) Upon learning of appellant's arrest in this case, Juror No. 142 (2) did not come to any conclusions or judgments at the time. (25 RT 7738-7739.) On her juror questionnaire, Juror No. 142 (2) indicated that if she was the person who made the laws there would be a death penalty, and one of the effects of the death penalty is that it deters crime. (25 RT 7739.) However, she would not vote for the death penalty in this case simply based on the desire to deter future criminals. (25 RT 7740.) The prosecutor then asked Juror No. 142 (2) whether she could and would vote for the death penalty in this case if, after hearing all the evidence, instructions, factors in aggravation, and factors in mitigation, she

determined that the death penalty was appropriate. (*Ibid.*) She stated that she would vote for the death penalty under such circumstances. (*Ibid.*) She also stated that she thought she could be fair to both sides in this case. (25 RT 7741.) Appellant claims that the excused African-American women had less surprising and objectionable answers than this juror. (AOB 174.) Respondent disagrees. Again, the four women excused by the prosecutor all expressed strong opinions against the death penalty, while Juror No. 142 (2) consistently expressed the opinion that the death penalty was appropriate for certain crimes.

Juror No. 69 (3) was a 55-year-old married man with 2 children. (20 CT 5730.) He held an AA degree from American River College and worked full time in electronics. (20 CT 5732-5733.) He served for 22 years in United States Air force. (20 CT 5736.) He was a Catholic who rarely went to Mass. (20 CT 5740.) He did not have a party affiliation politically. (*Ibid.*) He had been the victim of burglary and car theft, and his daughter had been the victim of car theft. (20 CT 5745.) He had no children to care for which would interfere with his ability to serve on the jury and indicated he was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (20 CT 5741.)

Juror No. 69 (3) owned several firearms which he kept for sport and self protection. (20 CT 5753.) He agreed strongly with the statement that it is better for society to let some guilty people go free than to risk convicting an innocent person because, "we must be sure the person is guilty without question because that is what I would want if I was the accused." (20 CT 5756.) He had a son who had a drug or alcohol problem but was currently clean and attending Narcotics Anonymous. (20 CT 5758.)

Juror No. 69 (3) indicated that he felt he could make a logical determination in the case when all the evidence was presented. (20 CT

5763.) He felt that the death penalty was the most severe of penalties and served as a deterrent to others. (20 CT 5765.) He indicated he had strong opinions concerning the death penalty and was in support of reinstatement of the death penalty because, "without such a deterrent, I think a criminal loses fear of punishment." (*Ibid.*) He agreed with the Old Testament statement, "an eye for and eye." (20 CT 5766.) He believed the death penalty should be imposed where the defendant did not care about what he did and had no respect for human life. (*Ibid.*) He explained that over time he saw many cases in which criminals had not shown responsibility for their crimes, did not care about the lives of other people, or have not paid for their crimes. (*Ibid.*) If he was in charge of making all the laws, there would be a death penalty because it serves as a deterrent. (20 CT 5767.) He felt the death penalty should be imposed when there was a wanton disregard for another person's life. (*Ibid.*) He would not always vote for either the death penalty or life in prison without the possibility of parole regardless of the facts and circumstances. (20 CT 5768.) He agreed somewhat with the statement that a defendant who is convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances, but then indicated in his explanation that the circumstances of the crime must be taken into consideration. (20 CT 5769.)

During voir dire, Juror No. 69 (3) stated, "I favor the death penalty." (28 RT 8660.) He went on to explain that he believed the death penalty was a just penalty in certain cases and that it was the ultimate deterrent. (*Ibid.*) He also thought that life in prison without the possibility of parole was enough of a deterrent in some cases. (28 RT 8661.) Juror No. 69 (3) thought that he could make a fair judgment after being presented with the evidence. (28 RT 8663-8664.) He indicated that he could return a verdict of death if he came to a decision that the death penalty was appropriate

based on the evidence presented at trial and the law that the judge gave him. (28 RT 8665.)

Juror No. 74 (4) was a 31-year-old female with 3 children. (20 CT 5774.) She worked three-quarters time and had attended Heald Business College in Sacramento. (20 CT 5776-5777.) She listened to Dr. Laura on the radio. (20 CT 5783.) She was a Catholic who attended church several times a month. (20 CT 5784.) She indicated that she would be able to follow the law as given to her by the court regardless of her personal feelings. (20 CT 5787.) She had no children to care for which would interfere with her ability to serve on the jury and indicated she was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (20 CT 5785.)

Juror No. 74 (4) had witnessed an armed robbery in which the criminal held a gun to a clerk's head. (20 CT 5790, 5798.) Juror No. 74 believed that one purpose of the death penalty was to deter those who may consider committing crimes. (20 CT 5809.) She did not have strong opinions concerning the death penalty. (*Ibid.*) When asked what types of cases the death penalty should be reserved for, Juror No. 74 (4) indicated "international crimes, mass destruction, mass murderer, and serial murders." (20 CT 5810.) If she were in charge of making the laws there would be a death penalty in order to punish those committing international crimes. (20 CT 5811.) She indicated that the death penalty may be appropriate when the crime involved intentional killing, killing of a child, killing of two or more persons, and torture. (20 CT 5812.) She thought the death penalty was imposed "about right." (*Ibid.*) When asked whether a defendant who was convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances, Juror No. 74 (4) disagreed stating that some persons may benefit from rehabilitation. (20 CT 5813.)

On voir dire, this juror explained that her involvement with WEAVE consisted of a one-time donation of clothes. (27 RT 8357.) Her mother believed in the death penalty, but this would not affect Juror No. 74 (4) in any way. (27 RT 8357-8358.) If she were sitting in appellant's position, she would want twelve jurors with her present state of mind. (27 RT 8361.) The prosecutor pointed out that this juror indicated in her juror questionnaire that being a mother makes you feel life is precious. (*Ibid.*) The prosecutor then asked, assuming after hearing the evidence and law that this juror came to the conclusion that the death penalty was the appropriate verdict, whether this juror would have difficulty imposing it on someone knowing that that person is someone's child. (27 RT 8361-8362.) She responded, "[n]o." (*Ibid.*) Juror No. 74 (4) could vote for the death penalty if it was an appropriate decision based on the facts. (*Ibid.*) For this juror, appellant again argues that the excused women had less surprising and objectionable answers. (AOB 175.) However, Juror No. 74 (4) did not demonstrate the anti-death penalty opinions expressed by the jurors who were excused. And, although a mother, this juror stated she would stay as long as needed to complete the trial and deliberations, unlike Spruill.

Juror No. 111 (5) was a 51-year-old male with 3 adult children. (20 CT 5818.) He worked full time doing advanced composite repair and had served in the U.S. Army for 20 years. (20 CT 5819-5821, 5824.) He was a Baptist who rarely went to church. (20 CT 5828.) He did not watch movies, seldom read books, newspapers or magazines, did not watch television, did not listen to talk radio, and described himself as a middle-of-the-road politically. (20 CT 5825-5829.) He explained that he does not keep up with current events because he works the grave yard shift and sleeps whenever he can. (20 CT 5843.) He had no children to care for which would interfere with his ability to serve on the jury and indicated he was willing to stay as long as necessary to complete the trial and jury

deliberations even if it lasted longer than estimated by the court and counsel. (20 CT 5829.)

This juror believed that the death penalty should be used sparingly but that it should be imposed for execution style murders, murders for hire, and may be appropriate for intentional killing, killing with a gun, killing of two or more persons, and torture. (20 CT 5854-5856.) He thought the death penalty served as a deterrent for others. (20 CT 5853-5854.) If he were in charge of making all the laws, there would be a death penalty. (20 CT 5855.) Juror No. 111 (5) thought the death penalty was imposed "about right." (20 CT 5856.) He also stated that the imposition of either the death penalty or life in prison without the possibility of parole would depend upon the facts and circumstances of the case. (20 CT 5857.)

On voir dire Juror No. 111 (5) indicated that he was willing to accept the verdict that appellant had been found guilty of first degree murder with special circumstances. (27 RT 8397.) He understood if selected as a juror it would be his job to weigh any aggravating evidence presented by the people and any mitigating evidence presented by the defense. (*Ibid.*) When asked if he came to the conclusion based on the evidence presented at trial and the law the judge gave him that the appropriate verdict in the case would be the death penalty could he vote to put another human being to death, this juror responded that he believed he could. (27 RT 8398.) Appellant complains that this juror's "moderate and temperate views about the death penalty did not get him excused . . . ." (AOB 176.) The four jurors excused by the prosecutor did not have moderate views about the death penalty. They held anti death penalty views which this juror did not express.

Juror No. 188 (6) was a 52-year-old male with 3 adult children and 2 grandchildren. (20 CT 5862-5863.) He spent several years working in the U.S. Navy and National Guard. (20 CT 5868.) He was a Catholic who

rarely attended church and was a somewhat conservative republican. (20 CT 5872-5873.) He had no children to care for which would interfere with his ability to serve on the jury and indicated he was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (20 CT 5873.)

He had been the victim of an assault as a juvenile and participated in a court proceeding in which he testified against four defendants. (20 CT 5877.) He had been charged with a DUI. (20 CT 5878.) He owned a couple of firearms and had used a gun in prior military duty. (20 CT 5885.) When asked whether prison inmates who have been convicted of horrible crimes received too many luxuries in prison, Juror No. 188 (6) agreed strongly stating that we should "bring back hard labor." (20 CT 5888.) He thought prosecutors should be more aggressive in what they file. (20 CT 5889.) He refused to answer a question asking whether he knew anyone, including himself, who has or has had an alcohol or drug problem. (20 CT 5890.)

He believed that the death penalty was used to eliminate from society people who are predators and who take the lives of innocent people. (20 CT 5897.) He had strong opinions about the death penalty and was in support of reinstatement of the death penalty. (*Ibid.*) He thought the death penalty should be reserved for murder with special circumstances. (20 CT 5898.) He also believed that the death penalty served as a deterrent. (*Ibid.*) He specifically listed as appropriate crimes for the death penalty as intentional killing, killing during the course of a robbery, and killing combined with rape or sexual assault. (20 CT 5900.) He thought that the death penalty was imposed "about right." (*Ibid.*) He indicated that he would impose either the death penalty or life in prison without the possibility of parole depending upon the evidence. (20 CT 5901.)

During voir dire it was revealed that this juror was a crime scene identification technician. (27 RT 8110.) This juror did latent print processing and identification as well as fingerprint comparisons. (27 RT 8113.) He also did auto theft detail meaning he did a lot of photography and searches. (*Ibid.*) When asked by defense counsel whether he thought that he would give a leg up to the prosecution because he worked with law enforcement, Juror No. 188 (6) said, "[n]o." (27 RT 8112.) He indicated that he would keep a very open mind and examine the evidence, making a determination solely on the evidence. (*Ibid.*) The prosecutor asked if the juror heard all the evidence and heard the law from the judge and formed an opinion that death penalty was appropriate, would he vote for it. (27 RT 8116.) This juror answered, "Yes." (*Ibid.*)

Juror No. 179 (7) was a 32-year-old, single female with no children who worked full time as a computer operator. (20 CT 5906-5907.) She did not belong to any civic, social, religious, professional or trade clubs or organizations. (20 CT 5912.) She was a Catholic who went to church several times a year and described herself as a middle-of-the-road democrat. (20 CT 5915-5916.) She had no children to care for which would interfere with her ability to serve on the jury and indicated she was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (20 CT 5916.) Her brother had been shot in his arm, and the perpetrator had not been identified. (20 CT 5920.) This juror was a victim of child molest. (20 CT 5924.) She agreed somewhat with the statement that regardless of what the law says a defendant in a criminal trial should be required to prove his or her innocence. (20 CT 5930.)

She thought that the purpose of the death penalty was to remove repeat offenders from society. (20 CT 5940.) She did not have strong opinions concerning the death penalty but was in favor of its reinstatement.

(*Ibid.*) She also thought that the death penalty served as a deterrent, and if she were in charge of making the laws there would be a death penalty in order to keep repeat offenders from society. (20 CT 5941-5942.) She thought that the death penalty should be reserved for cases of murder, including intentional killing, killing with a gun, killing of a child, killing with a knife, killing combined with rape or sexual assault, killing of an elderly person, killing of one person, and killing of two or more people. (20 CT 5941, 5943.) There was only one type of killing in which she did not believe the death penalty may be appropriate and that was killing during the course of a robbery. (*Ibid.*) She thought that the death penalty was imposed "about right." (*Ibid.*) She answered that she would not always vote for life in prison without the possibility of parole or the death penalty regardless of the facts and circumstances for someone who was convicted of first degree murder with special circumstances. (20 CT 5943.)

On voir dire, Juror No. 179 (7) indicated that she believed in the death penalty "because if somebody kills somebody, then maybe they should be killed too. I don't know." (25 RT 7725-7726.) This juror indicated that if under all the facts and circumstances and law if she felt that the death penalty would be the appropriate punishment she could vote for it. (25 RT 7727.) She would vote for the death penalty if that was the correct verdict. (25 RT 7728.) She believed that she could be fair to both sides in the case. (*Ibid.*)

Juror No. 107 (8) was a 47-year-old female with 3 adult children and 4 young grandchildren. (20 CT 5948-5949.) Her husband had served in the Marines. (20 CT 5954.) She was a Mormon who went to church several times a year, and described herself as a middle-of-the-road republican. (20 CT 5958-5959.) She was willing to determine as best she could what the appropriate sentence was and return a verdict reflecting that determination. (20 CT 5962.) She indicated she could be fair and impartial

in judging the case. (*Ibid.*) She had no children to care for which would interfere with her ability to serve on the jury and indicated she was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (20 CT 5959.)

In the past she had worked for the San Joaquin County District Attorney's Office. (20 CT 5969.) She would tend to believe the testimony of law enforcement officers but would keep an open mind. (20 CT 5970.) She agreed that sometimes courts are "too soft" on criminals, and agreed strongly with the proposition that a defendant in a criminal trial should be required to prove his or her innocence. (20 CT 5973.) She also disagreed strongly with the proposition that it is better for society to let some guilty people go free then to risk convicting an innocent person. (20 CT 5974.) She thought that the criminal justice system made it too hard for the police and prosecutors to convict people accused of crimes and indicated she had heard of cases being thrown out for something that did not make sense. (20 CT 5975.) When asked about the right to remain silent and that a defendant is not required to testify, this juror indicated that she would wonder why they did not want to defend themselves. (*Ibid.*) If a witness currently or formerly used methamphetamine this juror would wonder whether that person knew what he or she was talking about. (20 CT 5977.)

She had strong opinions about the death penalty and was in support of its reinstatement. (20 CT 5983.) She had always been in favor of the death penalty and thought it should be imposed for special circumstances and premeditated and intentional killing. (20 CT 5984-5986.) If she were in charge of making all the laws there would be a death penalty and it would serve the purpose of removing the convicted person from society so the person could not commit such crimes again. (20 CT 5985.) She would not always vote for either the death penalty or life in prison without the possibility of parole regardless of the facts and circumstances. (20 CT

5986.) She disagreed that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances and explained that she would want to hear about the defendant's background and mental state before she made any decisions. (20 CT 5987.)

Despite having worked for the San Joaquin County District Attorney's Office, Juror No. 107 (8) stated that she felt that she could be "partial [sic]." (24 RT 7452.) She was not automatically against the defense but rather found law enforcement work to be interesting and exciting. (*Ibid.*) She would be able to follow the court's instructions about what she could consider in determining whether the death penalty or life without the possibility of parole was appropriate. (24 RT 7456-7457.) She indicated that she could be fair to both sides in the case. (24 RT 7461.) She also stated that if after hearing the evidence and instructions and applying the principles the judge gave her she determined in her own mind the death penalty was appropriate, she could vote for it. (*Ibid.*)

Juror No. 86 (9) was a 54-year-old married man with two adult children. (20 CT 5992.) He had no children to care for which would interfere with his ability to serve on the jury and indicated he was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (21 CT 6003.) He was employed full time as an engineer and had served in the United States Air force for 21 years. (20 CT 5998.) He described himself as a Christian who rarely went to church and a somewhat conservative republican. (21 CT 6002-6003.) He had been the victim of burglary in 1987. (21 CT 6007.) He did not believe the justice system worked properly in the burglary case because the perpetrator was not caught and properly punished nor restitution made to him. (*Ibid.*)

This juror had no strong opinions about the death penalty and stated that he was neither for nor against the death penalty. (21 CT 6027.) He believed that the punishment should fit the crime. (21 CT 6028.) He thought that the death penalty should be reserved for the most serious of crimes and stated that life in prison without the possibility of parole "could be worse than death for some people." (21 CT 6030.) He indicated that the death penalty may be appropriate for all the types of killing listed in the juror questionnaire. (*Ibid.*) He thought the death penalty was imposed about right. (*Ibid.*) He denied that he would always vote for the death penalty or for life in prison without the possibility of parole regardless of the facts and circumstances. (*Ibid.*)

On voir dire Juror No. 86 (9) stated that in determining the penalty he would not favor the death penalty over life without the possibility of parole. He stated, "I don't know which is worse, the death penalty or life without parole." (24 RT 7444.) He stated, "me, personally, I wouldn't want to spend the rest of my life in jail. Um, but I wouldn't want to be executed either. So I don't know. So there's--I think on that basis I can look at both sides." (*Ibid.*) He made the point that to him both punishments were on an even keel and that he would have to listen to all the information presented before determining what was appropriate. (*Ibid.*) He stated that if after hearing the law and all the facts he came to the conclusion that the right decision was to vote for the death penalty, he could vote and would vote for the death penalty. (24 RT 7448.) He indicated that he could be fair to both sides in the case. (*Ibid.*)

Juror No. 88 (10) was a 67-year-old, retired female with 3 adult children and 4 grandchildren ranging in ages from 7 to 27. (21 CT 6036-6038.) She was divorced. (21 CT 6040.) She belonged to the American Cancer Society and Friends of the California Fair. (21 CT 6043.) She was a somewhat conservative republican who attended church services once a

week. (21 CT 6046-6047.) She had a son who was convicted of using drugs, and she had visited him in jail. (21 CT 6053-6054.) She agreed that some of the most heinous crimes are those committed against children. (21 CT 6056.) She agreed strongly with the statement that too many people charged with serious crimes try to excuse their crimes by claiming that they were abused as children. (21 CT 6062.) This juror indicated that she felt she could be impartial and listen to the testimony. (21 CT 6069.) She had no children to care for which would interfere with her ability to serve on the jury and indicated she was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (21 CT 6047.)

She indicated that she was in favor of the death penalty when the crime involved children. (21 CT 6071.) She indicated she had strong opinions concerning the death penalty and supported its reinstatement. (*Ibid.*) She thought the death penalty should be reserved for cases in which a child or an elderly person was murdered. (21 CT 6072.) She indicated that the death penalty may be appropriate for the killing of a child, killing of an elderly person, torture, and child molestation. (21 CT 6074.) She thought that the death penalty sentence was imposed too seldom. (*Ibid.*) She agreed with the statement that a defendant who was convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances of his background or mental state. (21 CT 6075.)

She disagreed that a defendant convicted of the same crime should receive life in prison without the possibility of parole. (*Ibid.*) She thought evidence concerning the age of the victim and the manner in which the victim was killed were very important factors in making a decision between the death penalty and life in prison without the possibility of parole. (21 CT 6076.)

On voir dire, Juror No. 88 (10) explained that she was retired from working in special education for 5th and 6th graders at a North Sacramento School District. (28 RT 8430.) She thought it would be easier for her to sit on a jury that did not involve children but that she could be fair and listen. (28 RT 8431.) She had a son who was serving his sixth year in prison and was due to be paroled in May. (*Ibid.*) She felt that it was really good that her son was incarcerated when he was although she thought that was a terrible thing for a mother to say. (28 RT 8433.) However, her son had received a lot of help since being incarcerated and had received his college degree. (*Ibid.*) Her son-in-law had a problem with alcohol and drugs. (*Ibid.*)

On questioning by the defense attorney, Juror No. 88 (10) indicated that she was afraid she would not be able to be fair based on the heinous nature of the crime and the very graphic evidence that would be presented to her. (28 RT 8435.) This juror stated that it would be difficult for her to see the pictures depicting the crime and because of that she was afraid that it would be difficult for her to be fair. (28 RT 8436.) However, she thought she could listen to the testimony and be fair and impartial. (28 RT 8436-8437.) When asked about her answer on the jury questionnaire agreeing with the statement that a defendant who is convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances, this juror explained that she felt that a lot of times people blamed their actions on what happened to them as children. (28 RT 8437.) Her difficulty laid in the fact that there was a child involved. (28 RT 8439.) Because a child was involved it would be difficult for her to consider life without the possibility of parole until she heard all of the evidence herself. (28 RT 8439-8440.) Defense counsel asked this juror whether she would make the defense team prove to her that life without the possibility of parole was an appropriate sentence. (28 RT 8440.) She

responded that they would have to prove it to her, and if they failed to do so she would vote for the death penalty. (*Ibid.*) Defense counsel then clarified that the judge would instruct her that the defense was not required to prove anything. (*Ibid.*) He then asked whether because a child was involved she would still want them to prove that the death penalty was not appropriate, and she replied yes. (28 RT 8440-8441.)

The trial court then interjected and asked this juror whether she was going to follow the court's instructions. (28 RT 8441.) The juror stated that she would. (*Ibid.*) When asked by defense counsel, this juror agreed that if she were sitting in the defendant's spot and was seeking twelve jurors would she want jurors with her state of mind. (28 RT 8441-8442.) She explained that she was leaning toward the death penalty but she would have to listen to all the evidence first before she could decide definitively on the appropriate punishment. (28 RT 8442.) Defense counsel then asked whether the prosecution started out ahead because she was leaning towards the death penalty, and the juror replied "yes." (*Ibid.*)

Questioning by the prosecutor revealed that Juror No. 88 (10) understood she was permitted to consider the fact that the victim in the case was an eight-year-old child and that fact could and should weigh into her decision as to the appropriate verdict. (28 RT 8443.) She said she was able to consider all the factors that the judge read to her a week earlier. (28 RT 8444.) She indicated that she was willing to listen to the evidence of the defense and to consider those factors in mitigation. (*Ibid.*) She could do that before she ultimately made a decision in this case. (*Ibid.*) She agreed that, after hearing the instructions and all the evidence, if she came to the conclusion based on the facts and evidence that the appropriate decision was life without the possibility of parole, she would impose that as a sentence. (28 RT 8444-8445.) She agreed with the same proposition as it applied to the sentence of death. (*Ibid.*)

After the prosecutor finished questioning this juror, the court proceeded to undertake voir dire as well. The court first reread some of the applicable instructions that had been read to the jurors previously. (28 RT 8445-8446.) Juror No. 88 (10) explained that she leaned toward the death penalty in this case based on the synopsis of the case which had been provided to her. (28 RT 8446.) She agreed when the court stated that he assumed she made the judgment that the death penalty was appropriate because of what she read in the synopsis about how the young child passed away. (*Ibid.*) She agreed that she was willing to consider all the evidence in aggravation and mitigation and not predispose herself to select the death penalty. (28 RT 8447-8448.) If she was the defendant she would be satisfied in having twelve jurors with her frame of mind. (28 RT 8448.) She could say honestly that she would be fair in terms of deciding whether not to impose the death penalty. (28 RT 8449.) This juror was the subject of Argument X, *post*.

Juror No. 146 (11) was a 46-year-old divorced man with 3 adult children and 2 young grandchildren. (21 CT 6080-6081.) He was employed full time in a warehouse. (21 CT 6082-6083.) He rarely went to church and was not registered to vote. (21 CT 6090.) He had no children to care for which would interfere with his ability to serve on the jury and indicated he was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (21 CT 6091.)

His father had been the victim of an assault. (21 CT 6095.) His mother had been convicted of a DUI. (21 CT 6098.) His youngest son had been physically assaulted under the Rainbow Bridge in Folsom. (*Ibid.*) This juror once had a knife pulled on him. (21 CT 6104.) He disagreed that some of the most heinous crimes are those committed against children. (21 CT 6100.) He agreed strongly with the statement that a defendant in a

criminal trial should be required to prove his innocence. (21 CT 6105.) This juror had a lot of confidence in DNA and forensic evidence. (21 CT 6107.) He answered one question on the juror questionnaire indicating he was uncertain of his ability to be unbiased. (21 CT 6113.) This juror did not have strong opinions concerning the death penalty and was not in support reinstating it. (21 CT 6115.) Depending on the circumstances, this juror agreed with the statement of the Old Testament concerning "an eye or an eye." (21 CT 6116.) In some cases life without the possibility of parole was a just punishment. (21 CT 6118.) He disagreed that a defendant convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances of his background or mental state and also disagreed that the same defendant should be given life in prison without the possibility of parole regardless of the facts and circumstances of his background or mental state. (21 CT 6119.)

On voir dire this juror indicated that he would have to wait until he heard all the evidence and the facts before determining whether the death penalty should be imposed. (26 RT 7862.) He agreed that he would he able to listen to the evidence and evaluate the evidence fairly before making a determination as to which punishment was appropriate. (26 RT 7863.) Asked about his statement on the juror questionnaire that he was not certain of his ability to be unbiased, this juror explained that he thought he could be fair and unbiased. (26 RT 7863-7864.) He had now had time to think about this question. (*Ibid.*) If he were the defendant he would want 12 people like himself on his jury. (*Ibid.*) The prosecutor asked this juror whether after having heard the evidence and the instructions from the judge, if he determined that the death penalty was appropriate would he vote for it, and the juror responded "yes." (26 RT 7864-7865.)

Juror No. 131 (12) was a 58-year-old married female with 6 children and many grandchildren. (21 CT 6124-6125.) She was employed full time

as a financial aide analyst. (21 CT 6126.) She had completed post-graduate work. (21 CT 6127.) She was a Roman Catholic who attended church several times a week and described herself as a somewhat-conservative Republican. (21 CT 6134-6135.) She volunteered for a hot line for Sacramento Life Center which is a hot line for crisis pregnancy issues. (21 CT 6144.) She had no children to care for which would interfere with her ability to serve on the jury and indicated she was willing to stay as long as necessary to complete the trial and jury deliberations even if it lasted longer than estimated by the court and counsel. (21 CT 6135.)

This juror's 7-year-old niece had been sexually molested, raped and murdered, and the murderer was on death row. (21 CT 6139, 6143.) Her brother-in-law and uncle had both been murdered. (*Ibid.*) She had been the victim of bicycle theft, and her daughter had been held at gun point as a victim of robbery. (*Ibid.*) She felt that the police had done a very poor job regarding her uncle's murder and that her brother-in-law's killer should have served time. (*Ibid.*) This juror had two cousins who served prison time and a son who was arrested a DUI. (21 CT 6141.) When she was about 10 years old her father assaulted her mother when he was drunk. He came into the house with a gun frightening the whole family. (21 CT 6142.) He tried to shoot himself. (*Ibid.*) She had been afraid of her father because he had a bad temper and at times had been afraid of her brother-in-law who could be mean when he was using drugs. (*Ibid.*)

Juror No. 131 (12) pointed out that in some cases criminals are let go on a technicality and justice is not served in such cases. (21 CT 6150.) She also agreed that the rights of persons charged with crimes are better protected then the rights of victims. (*Ibid.*) She had grandparents and children who both suffered with either alcohol or drugs. (21 CT 6152.) Regarding the death penalty, Juror No. 131 (12) felt that the purpose of the death penalty was to take the life of someone who willfully and illegally

took the life of another. (21 CT 6159.) While this juror believed in the right to life she also believed that a person can forfeit that right. (*Ibid.*) She described herself as having a strong opinion about the death penalty and believed that the state had the right to use this penalty because there are crimes that called for it. (*Ibid.*) She felt that when someone willfully and knowingly murdered another person the perpetrator forfeited their own life. (21 CT 6160.) She felt that the death penalty could be a deterrent for others as long as the criminal did not "sit on death row watching TV for the rest of his/her life." (*Ibid.*) This juror felt that the death penalty was appropriate for willful and intentional murder of any type. (21 CT 6161-6162.)

On voir dire Juror No. 131 (12) explained that her niece, Marcie Davis, was murdered when she was 7 years old. (26 RT 7851-7852.) The murderer was Troy Ashmus. (*Ibid.*) After the niece was murdered, the niece's father slid down hill into drugs and violence and was shot and killed by a tow truck driver in Sacramento. (*Ibid.*) This juror's uncle was murdered during the commission of a robbery. (26 RT 7852-7853.) Her grandparents were alcoholics, and her husband had alcoholics on his side as well. (*Ibid.*) Despite the murder of her niece and the fact that the perpetrator was on death row, this juror thought that she could be impartial in the current case. (26 RT 7855.) This juror did not know all of the details of her niece's murder and did not want to follow the case entirely. (26 RT 7856.) She indicated that quite a few times there were defendants who served time for a crime and are released from prison only to reoffend. (26 RT 7857-7858.) She did not think that the death penalty was the only appropriate penalty in that instance but rather thought that you had to look at each case individually. (*Ibid.*) If after receiving all the evidence and the instruction from the judge she formed the opinion that the death penalty was the appropriate punishment, she would vote for it. (26 RT 7859.)

As noted above, a comparative analysis in a first-stage *Batson/ Wheeler* case has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales. Nevertheless, such an analysis does not assist appellant in this case. Appellant argues that four of the seated jurors provided responses which were more surprising and more objectionable than the black women who were challenged by the prosecutor. These include Juror Nos. 149 (1), 142 (2), 74 (4), and 111 (5). (AOB 173-176.) The record does not support appellant's argument. As discussed avove, none of these seated jurors expressed the anti-death penalty sentiments expressed by the excused women. The seated jurors all believed that the death penalty was appropriate for certain cases and that the death penalty served as a deterrent for others who might otherwise commit such crimes. They believed the death penalty was imposed about right and testified they would vote for the death penalty if the evidence and instructions demonstrated that it was the correct decision. The women excused by the prosecutor, on the other hand, expressed much stronger views against imposition of the death penalty and their ability to vote for the death penalty in this case was questionable at best. Moreover, the prosecutor was likely much more mindful of the death penalty views held by prospective jurors given that the first penalty phase had resulted in a hung jury. Under these circumstances, appellant's argument regarding comparative analysis fails.

For the foregoing reasons, the evidence was insufficient to permit an inference that the prosecutor excused the challenged jurors on the basis of race.

X. THE TRIAL COURT PROPERLY DENIED APPELLANT'S CHALLENGE TO EXCUSE A JUROR FOR CAUSE

Appellant challenged Juror #88 (10) for cause on the ground that she was biased in favor of the death penalty, and the trial court denied appellant's challenge. He now argues that the trial court's denial of his challenge for cause was in error and deprived him of his right to due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under the California Constitution. (AOB 200-203.) This claim has not been preserved for appeal. Nonetheless, because the trial court properly determined that this juror's views would not prevent or substantially impair the performance of her duties as a juror, appellant's argument must be denied.

Preliminarily, appellant has failed to preserve this claim for appeal because he did not exhaust his peremptory challenges or express dissatisfaction with the jury ultimately selected.

> To preserve an objection to the trial court's failure to excuse a juror for cause, a defendant must (1) exercise a peremptory challenge against the juror in question, (2) exhaust all peremptories, and (3) express dissatisfaction with the jury as finally empanelled.

(*People v. Bonilla* (2007) 41 Cal.4th 313, 339; *People v. Ramirez* (2006) 39 Cal.4th 398, 448; *People v. Avila* (2006) 38 Cal.4th 491, 539.) Appellant did not exercise a peremptory challenge against Juror No. 88 (10) and exercised only 16 of his 20 peremptory challenges leaving him with 4 remaining peremptory challenges when he accepted the jury. (29 RT 8935; 30 RT 9015-9063.) Additionally, there is no indication in the record that he notified the trial court that he was dissatisfied with the jury that was selected to determine his penalty. (30 RT 9058, 9063.) As such, he has forfeited this claim of error on appeal. (See *People v. McKinnon*, *supra*, 2011 WL 3658915, *14.)

Even if appellant did not forfeit this claim, he cannot show error with respect to Juror No. 88 (10). The proper standard for exclusion of a juror based on bias with regard to the death penalty—the so-called *Witherspoon–Witt* standard—is whether the juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522–523, fn. 21.) "A trial court may discharge a juror whose views on the death penalty meet this standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 661-662; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140.) The standard of review of the trial court's ruling regarding the prospective juror's views on the death penalty is "if the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence." (*People v. Horning* (2004) 34 Cal.4th 871, 896–897.) "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9; see also *People v. Stewart* (2004) 33 Cal.4th 425, 451.)

As explained in the previous argument, Juror No. 88 (10) was a 67-year-old retired female with 3 adult children and 4 grandchildren ranging in ages from 7 to 27. (21 CT 6036-6038.) She thought that some of the most heinous crimes are those committed against children. (21 CT 6056.) Her answers to the jury questionnaire initially demonstrate that she had strong opinions concerning the death penalty and was in favor of it when the crime involved children. (21 CT 6071, 6074.) She agreed with the statement that a defendant who was convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances

of his background or mental state. (21 CT 6075.) She disagreed that a defendant convicted of the same crime should receive life in prison without the possibility of parole. (*Ibid.*) She thought evidence concerning the age of the victim and the manner in which the victim was killed were very important factors in making a decision between the death penalty and life in prison without the possibility of parole. (21 CT 6076.) Nevertheless, this juror indicated on the questionnaire that she felt she could be impartial and listen to the testimony. (21 CT 6069.)

The voir dire conducted by the parties and the court helped clarify Juror No. 88 (10)'s position on the death penalty and her ability to serve on the penalty phase jury. She was a retired special education teacher who thought it would be easier for her to sit on a jury where the crime did not involve children. (28 RT 8430-8431.) But she maintained that but that she could be fair and listen. (*Ibid.*)

Defense counsel questioned the juror who explained that she was afraid she would not be able to be fair based on the heinous nature of the crime and the very graphic evidence that would be presented to her. (28 RT 8435-8436.) However, she thought she could listen to the testimony and be fair and impartial. (28 RT 8436-8437.) When asked about her answer on the jury questionnaire agreeing with the statement that a defendant who is convicted of sexual assault and murder of a child should receive the death penalty regardless of the facts and circumstances, this juror explained that she felt that a lot of times people blamed their actions on what happened to them as children. (28 RT 8437.) Her difficulty laid in the fact that there was a child involved. (28 RT 8439.) Because a child was involved it would be difficult for her to consider life without the possibility of parole until she heard all of the evidence herself. (28 RT 8439-8440.)

Defense counsel asked whether she would make the defense team prove to her that life without the possibility of parole was an appropriate

sentence. (28 RT 8440.) She responded that they would have to prove it to her, and if they failed to do so she would vote for the death penalty. (*Ibid.*) Defense counsel then clarified that the judge would instruct her that the defense was not required to prove anything. (*Ibid.*) He then asked whether because a child was involved she would still want them to prove that the death penalty was not appropriate, and she replied "yes." (28 RT 8440-8441.) The trial court then interjected and asked whether the juror was going to follow the court's instructions, and she stated that she would. (28 RT 8441.)

The juror explained that she was leaning toward the death penalty but she would have to listen to all the evidence first before she could decide definitively on the appropriate punishment. (28 RT 8442.) Defense counsel then asked whether the prosecution started out ahead because she was leaning towards the death penalty, and the juror replied "yes." (*Ibid.*)

When questioned by the prosecutor, Juror No. 88 (10) stated she understood she was permitted to consider the fact that the victim in the case was an eight-year-old child and that fact could and should weigh into her decision as to the appropriate verdict. (28 RT 8443.) She said she was able to consider all the factors that the judge read to her a week earlier. (28 RT 8444.) She indicated that she was willing to listen to the evidence of the defense and to consider those factors in mitigation. (*Ibid.*) And she could do that before she ultimately made a decision in this case. (*Ibid.*) She agreed that, after hearing the instructions and all the evidence, if she came to the conclusion based on the facts and evidence that the appropriate decision was life without the possibility of parole, she would impose that as a judgment. (28 RT 8444-8445.) She agreed with the same proposition as it applied to the sentence of death. (*Ibid.*)

The court then read for the second time some of the applicable jury instructions that had been read to the jurors previously. (28 RT 8445-8446.)

Juror No. 88 (10) explained that she leaned toward the death penalty based on the synopsis of the case which had been provided to her. (28 RT 8446.) She agreed when the court stated that he assumed she made the judgment that the death penalty was appropriate because of what she read in the synopsis about how the young child passed away. (28 RT 8447.) She stated she was willing to listen to and consider all the evidence in aggravation and mitigation and not predispose herself to select the death penalty. (28 RT 8447-8448.) She could say honestly that she would be fair in terms of deciding whether or not to impose the death penalty. (28 RT 8449.)

It is evident from the questioning by the parties and the court that while this juror may have formed an opinion that the death penalty was appropriate based on early information provided to her about appellant's guilt trial, when questioned she revealed that she would follow the jury instructions and consider all the facts and circumstances of the case before fairly determining whether to vote for the death penalty or life in prison without the possibility of parole. Thus, the trial court properly determined that this juror's views would not prevent or substantially impair the performance of her duties and properly denied appellant's challenge for cause, and its determination is binding. (See *People v. Horning*, *supra*, 34 Cal.4th at p. 896-897.)

Appellant analogizes the trial court's denial to the error found by this Court in *Boyette*, *supra*, 29 Cal.4th at pp. 416-418, arguing that the juror at issue in *Boyette* was less biased than Juror No. 88 (10). (AOB 201.) In *Boyette*, the prospective juror, K.C., indicated to the trial court in voir dire and on his juror questionnaire that he was "strongly in favor" of the death penalty. (*Boyette*, *supra*, 29 Cal.4th at p. 417.) He also indicated that the death penalty should automatically be imposed on those defendants convicted of committing a multiple murder. (*Ibid.*) When the court asked

whether he could return "a verdict of life imprisonment without [the] possibility of parole if you thought it appropriate," he replied, "I would probably have to be convinced," but he did not similarly qualify his answer when asked whether he could impose the death penalty. (*Ibid.*) He explained he "would be more inclined to go with the death penalty." (*Ibid.*) He equivocated when asked whether he would exclude consideration of a life term, saying, "Never having been in that situation, I have no idea." When asked whether he could impose a life term if he thought it appropriate, he replied: "Yeah, if there was enough to make it seem appropriate, yes, I could." Importantly, K.C. told the trial court in response to questioning that he would not follow an instruction to assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released. (*Id.* at pp. 417-418.)

On appeal, this Court found the trial court should have sustained the defendant's challenge for cause against K.C. (*Boyette*, *supra*, 29 Cal.4th at p. 418.) It reasoned that K.C. did not give equivocal answers, was strongly in favor of the death penalty, indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death, and felt that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. (*Ibid.*) K.C. also admitted he would not follow the trial court's instruction concerning life in prison without the possibility of parole meaning the prisoner would never be released. (*Ibid.*) Thus, K.C.'s views would have prevented or substantially impaired the performance of his juror duties under *Witt*. (*Ibid.*)

Our juror, on the other hand, gave many equivocal answers considering both her answers to the juror questionnaire and voir dire. Although strongly in favor of the death penalty, she repeatedly indicated she could be fair and impartial in determining appellant's penalty. Unlike

the juror in *Boyette* who blatantly stated he would not follow the jury instruction given by the trial court, Juror No. 88 (10) told the trial court that she would follow the court's instructions. (28 RT 8441.) It appears from the record that while this juror tended to lean toward the death penalty based on the early information provided to her, voir dire clarified that she would listen and consider all the evidence in aggravation and mitigation and not predispose herself to voting for the death penalty. Under these circumstances, *Boyette* is distinguishable.

Finally, appellant's contention that the denial of his challenge for cause to this juror is reversible error because it in effect would have deprived him of a peremptory challenge should likewise be rejected. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." (*Ross v. Oklahoma* (1988) 487 U.S. 81, 88 [the court also rejected a challenge under the 14th Amendment]); see *People v. Richardson* (2008) 43 Cal.4th 959, 987-988 ["where defendant did not exhaust all his peremptory challenges, he cannot even begin to demonstrate that his right to an impartial jury was impaired"]; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315-317 [recognizing that the right to exercise peremptory challenges is not violated where the defendant expends them removing jurors who should have been excused for cause]; *People v. Farley* (2009) 46 Cal.4th 1053, 1095-1096.) In sum, the trial court properly denied appellant's challenge for cause to Juror No. 88 (10), and appellant was not deprived of any constitutional rights by the denial.

XI. THE PENALTY PHASE RETRIAL FOLLOWING THE FIRST JURY'S DEADLOCK WAS NOT VIOLATIVE OF THE STATE OR FEDERAL CONSTITUTIONS

In Argument XI, appellant argues he is entitled to the reversal of his death penalty sentence on the ground that the penalty phase retrial after the original jury was unable to reach a unanimous verdict violated his federal and state constitutional rights to a fair jury trial, to a reliable penalty determination, to be free of cruel and unusual punishments, and to due process as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution as well as the state constitutional protections in Article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 204-213.) His emphasis lies in the argument that such a retrial violates the constitutional provision against cruel and unusual punishment. (*Ibid.*)

This Court has recently rejected these very arguments. In *People v. Taylor* (2010) 48 Cal.4th 574, 633-634 (*Taylor*), this Court held that in a death penalty case, retrial of the penalty phase following a deadlock by the first jury does not offend the constitutional proscription against cruel and unusual punishment. In *Taylor*, the defendant, "[a]rmed with a lengthy string citation to statutes of other jurisdictions that mandate a sentence of life without parole if the penalty jury deadlocks," argued that California is "'out of step with an emerging national consensus against allowing retrial under these circumstances.'" (*Id.* at p. 633.) So too, appellant points to 27 out of 36 states that do not permit a retrial of the penalty phase following a failure of the jury to reach a unanimous verdict to argue that California is in conflict with a clear majority of the states whose legislatures enacted laws evidencing "contemporary values and evolving standards of decency." (AOB 208-210.) The *Taylor* court disagreed:

> We have previously found no constitutional infirmity in a death verdict rendered by a second penalty phase jury at a retrial following the first jury's deadlock on sentencing,

> notwithstanding that the second jury had not heard all of the guilt phase evidence. (*People v. Hawkins* (1995) 10 Cal.4th 920, 966–967; *People v. Gurule* (2002) 28 Cal.4th 557, 645.) Although we have never addressed the precise Eighth Amendment challenge defendant raises, we have determined that 'California's asserted status as being in the minority of jurisdictions worldwide that impose capital punishment' does not establish that our death penalty scheme per se violates the Eighth Amendment. (*People v. Thornton* (2007) 41 Cal.4th 391, 470; see *People v. Moon* (2005) 37 Cal.4th 1, 47–48.) Likewise here, that California is among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or 'evolving standards of decency that mark the progress of a maturing society.' (*Trop v. Dulles* (1958) 356 U.S. 86, 101.)

(*Id.* at pp. 633-634.) Accordingly, appellant's argument should also be rejected.

Appellant contends further that retrial of the penalty phase under these circumstances violates the double jeopardy clause and due process clause, but admits these arguments have been rejected by the United States Supreme Court in *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101 and *Richardson v. United States* (1984) 486 U.S. 317, 324-326. (AOB 211-212.) The *Taylor* court finished by explaining:

> Arguing points more typically raised in a claim of double jeopardy, defendant further contends that compelling a capital defendant to endure the '"embarrassment, expenses and ordeal"' (*United States v. Scott* (1978) 437 U.S. 82, 95) of a second trial on the question of whether he should live or die is inconsistent with Eighth Amendment principles. But, as defendant concedes, in *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108–110, the high court held that the double jeopardy clause did not bar a penalty retrial after appellate reversal of the capital defendant's conviction, notwithstanding that in accordance with Pennsylvania law, the defendant had been sentenced to life without parole following juror deadlock at the penalty phase. Given that the double jeopardy clause permits retrial following juror deadlock under such circumstances, we fail to see how subjecting defendant to retrial of the penalty phase in this case

could offend the constitutional proscription against cruel and unusual punishment.

(*Taylor*, *supra*, 48 Cal.4th at 634.) So here, since a defendant may be held for a retrial without violating double-jeopardy principles, it is inconceivable that the fact of retrial alone — which has nothing to do with punishment — could be considered cruel or unusual.

And finally, appellant argues that the penalty phase retrial after a hung jury at the first penalty trial violates the California Constitution, Article I, sections 5, 7, 16, and 17. (AOB 212.) This Court has rejected similar constitutional challenges. (See *People v. Gurule*, *supra*, 28 Cal.4th at pp. 645-646; *People v. Davenport* (1995) 11 Cal.4th 1171, 1192-1194, overruled on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536.) Indeed, the trial court had no discretion to do anything other than select a new jury for a new penalty phase. (*People v. Thompson* (1990) 50 Cal.3d 134, 176-177, citing § 190.4, subd. (b).) These decisions appropriately resolve this issue, and appellant provides no compelling reason for reconsidering this established law.

XII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS CONCERNING MITOCHONDRIAL DNA TESTING

Appellant contends that the trial court violated his Fifth, Eighth, and Fourteenth Amendment and due process rights to a fair penalty determination, (1) by denying him funding to conduct mitochondrial DNA (mtDNA) testing on his shirt, the fingernail scrapings of Michael Lyons, and the pubic hairs found on Michael Lyons' sweatshirt and shirt; (2) by refusing to allow him to demonstrate that mtDNA testing was acceptable in the scientific community; and (3) by prohibiting him from commenting on this lack of evidence. (AOB 214-227.) These arguments have no merit and should be denied.

A. Background

On September 21, 1998, after the first penalty phase jury hung, defense counsel filed a declaration under seal to inform the court of items that needed to be examined by experts in the case which were not examined during the first trial. (10 CT 2860-2864.) He sought a DNA-DQ ALPHA survey of appellant's shirt, mtDNA testing on the pubic hairs found on Michael Lyons' sweatshirt and shirt, and PCR 6 marker DNA testing of the fingernail scrapings of Michael Lyons. (*Ibid.*)

The record shows that on December 23, 1998, the Sutter County Superior Court ruled on appellant's Confidential Request for Funds based on the recent decisions in *Bean v. Calderon* (1998) 163 F.3d 1073 and *Caro v. Calderon* (1999) 165 F.3d 1223 (decided October 27, 1998, amended decision January 11, 1999). (46 CT 13766.) It appears the funding court denied funding applicable to items C (fingernail scrapings), D (DNA testing), and E (pubic hair testing). (*Ibid.*)

On February 1, 1999, appellant argued in limine that he be allowed to introduce evidence that mtDNA testing of the pubic hairs was not completed by the district attorney. (30 RT 9243.) He also wished to argue that the testing could have excluded appellant as a donor of the pubic hairs. (*Ibid.*) He wanted the court to take judicial notice of the fact that the defense was denied funding to have the samples tested. (30 RT 9244.) He wanted to preclude the prosecution from arguing that the defense could have done the testing because the defense had in fact asked for funding twice and had been denied. (*Ibid.*) And finally, appellant asked the trial court to grant funds for mtDNA testing of the hair samples. (*Ibid.*) In opposition, the prosecutor pointed out that he had "never heard of mitochondrial DNA before last Monday" and so appellant should not be allowed to argue that the People failed to conduct such testing. (30 RT 9244-9245.) He also questioned whether review of the denial of funding

was appropriate and stated appellant had "a lot of hoops to jump through before he gets any of this." (30 RT 9245-9246.) The court denied the motion without prejudice stating,

> Based on the record furnished to the Court at this juncture, the Court is not prepared to make any rulings on this test as to rule for it or not.
>
> The Court is going to make somewhat reference to this as I did to the witness that's not appearing here, as I said in relation to that that the defendant was entitled to hear from the doctor who says this lady can't appear. I do not know, I'm given no authority at all from any expert who's familiar with this as to what this test is, what it's going to show, whether it's admissible.
>
> And I have not received as yet, even if I got all those matters properly presented to me, I still, counsel says that there's ample authority that the Court can become a [Penal Code section] 987 judge. And if that's true, fine, I'll consider it in that context. But I've seen no authority for that up until the time I'm sitting here right now.
>
> So unless and until I see that authority and further have an adequate record upon which to consider the matters, the Court will deny the matter without prejudice at this juncture.

(30 RT 9247; 14 CT 4042-4043.) After further argument and a request for a hearing, the court stated, "[t]he Court's going to proceed in the fashion that it has already indicated." (30 RT 9257.) The court indicated that it would be looking for evidence that mtDNA testing "is proper testing, admissible before me and can be done" before making a ruling. (30 RT 9258-9259.)

On February 8, 1999, appellant filed a motion for funding and to allow mtDNA testing to be conducted. (14 CT 4049-4053.) At the same time, the prosecutor filed a motion to exclude argument, evidence and instruction on the People's failure to conduct mtDNA testing. (14 CT 4054-4065.) The prosecutor pointed out that the defense motion was also a

motion to continue the trial because the testing, were it allowed to take place, would take 12 to 14 weeks to complete. (31 RT 9358.) The court proceeded with a hearing on these issues. (31 RT 9356-9358, 9367-9403.) Prior to hearing testimony, the trial court denied appellant's motion asking the court to order funding under section 987.9, stating that to do so would be a violation of that statute. (31 RT 9368-9369, 9413.) The trial court relied also on *People v. Anderson* (1987) 43 Cal.3d 1104, 1133, and the prior denials by both the funding court and the Third District Court of Appeal. (*Ibid.*)

That same day the court conducted a hearing. Appellant presented testimony by Lisa Calandro. Calandro was a supervisor of the DNA Analysis Section of Forensic Analytical. (31 RT 9371.) The primary function of Forensic Analytical is to screen for the presence of body fluids such as semen, saliva, hairs and to extract and type DNA using PCR (polymerase chain reaction) type medicines. (*Ibid.*) Neither Calandro nor Forensic Analytical did mtDNA testing. (31 RT 9380.) She explained that mitochondrial DNA is the DNA found in the mitochondrian within cells and is inherited from the mother. (31 RT 9374.) Calandro was aware that work related to mitochondrial DNA analysis had been going on since before 1994. (31 RT 9374-9375.) She read literature on mtDNA and did not know of any controversy regarding the scientific acceptance of mtDNA testing. (31 RT 9376-9377.) However, she had not conducted any laboratory research on mtDNA testing. (*Ibid.*) In her reading, she came across one criminal case in Tennessee in which mtDNA testing had been litigated but she did not know what the opposition was. (31 RT 9378-9380.) Calandro agreed that mtDNA testing had never been allowed into evidence in the State of California. (31 RT 9380-9381.) No laboratory in California performed mtDNA testing. (31 RT 9381-9382.)

Appellant then attempted to call Robert Beaver as a witness via telephone from Virginia, and the prosecution objected citing Evidence Code section 711.[51] (31 RT 9382-9395.) The court denied appellant's request to have Beaver testify via telephone from Virginia, and clarified that Beaver most certainly could testify at the section 402 hearing, just not by telephone from Virginia. (31 RT 9404, 9407-9408.) The prosecution pointed out that one year prior, in January 1998, the district attorney sent to Calandro approximately 30 items of evidence including the hairs, sweatshirt, shirt, etc. so that the defense could do their own examination and testing. (31 RT 9396-9397.) At no time did Calandro mention or suggest mtDNA testing on the items. (31 RT 9396-9399, 9402-9403.) This was not disputed by the defense. (*Ibid.*)

The trial court denied appellant's request that he be allowed to argue that the prosecution did not conduct mtDNA testing on the pubic hairs and that the failure to conduct the testing denied appellant a defense. (31 RT 9404, 9413-9414.) The denial was without prejudice, and the court stated that the motion could be renewed within the course of the trial if the defense wished to present appropriate evidence in support of the motion. (31 RT 9405-9406.) The court reserved the right to change the ruling and to make a further ruling on whether the defense could make the argument to the jury. (*Ibid.*) The court further ordered that mtDNA not be mentioned until there was a further hearing conducted. (31 RT 9406.)

On March 2, 1999, defense counsel requested that he be allowed to argue that the fingernail scrapings of Michael Lyons were not DNA-tested. (36 RT 10821-10827.) On March 9, 1999, defense counsel asked the court

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[51] Evidence Code section 711 provides, "At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine."

to take judicial notice of the fact that the defense was denied funding to do DNA testing. (38 RT 11662-11663.) The court stated it would not make a ruling on the request at that point. (38 RT 11663-11665.) The court later stated that, subject to the parties providing additional evidence, the court would not permit comment on why DNA testing was not performed. (39 RT 11740.) More argument was heard March 10, 1999. (39 RT 11756-11773.) The court again ordered that neither party was allowed to comment on the issue of DNA funding or testing. (39 RT 11774-11775.) Defense counsel stated that he still had every intention and would argue before the jury that there is no evidence of DNA testing. (39 RT 11775.) The court reiterated its ruling, "I'm ordering both parties not to refer to DNA testing in the course of their argument in terms of the circumstances of this case . . ." (39 RT 11777.) More argument was heard. (11775-11780.)

The court repeated its order:

> No. The more I hear both of you, I'm satisfied that right or wrong, the fairest ruling I can make, because in both cases, we're talking about something that did not happen.
>
> Dixie Bell did not testify.
>
> Nobody brought proof into this court that either DNA testing was or was not done or what it would likely or likely not show.
>
> And the Court, based on all that, and based upon the fact that if I allow defendant to mention the lack of DNA testing, then I feel I would have to allow the People to indicate all the samples were delivered to defense experts for that purpose and to allow testimony to that effect and the like.
>
> I'm not going to do that because then when I allow that, we move to the next step: Why didn't we get the funding for the defense to do the DNA testing. . . .
>
> I don't have the reason for it, but I have a minute order I was just given that says that's denied.

So we're not going to go through all that.

And the Court's order is just as indicated, that the Court is not going to permit any evidence on, quote, the failure to produce evidence, both as it might relate to DNA testing and as it might relate to the lack of production of Dixie Bell's examination.

(39 RT 11780-11781.)

When the defense again stated it was entitled to argue that there was no DNA testing done, the court stated,

No, you're not going to argue it, sir. I'm going to order you at this time you will not mention that. And you have your remedy of appeal, but you will not mention that, sir, for reasons I've just indicated. Now that's my order.

(39 RT 11952-11953.) A stipulation was suggested by the defense. (39 RT 11955-11957.) After more discussion (40 RT 12110-12121, 12150-12177), the parties agreed that the following stipulation be read to the jury:

The fingernail scrapings taken from the body of Michael Lyons were appropriately transported to Forensic Analytical, a DNA laboratory for the defense. The defense had the possession of the scrapings from January 1998 until April 1998 after which time they were returned to the People. The defense did not test the fingernail scrapings.

(40 RT 12177-12178, 12200-12201.)

B. Discussion

First, appellant argues that the trial court committed error by refusing to allow him to make a showing that mtDNA testing was acceptable in the scientific community. (AOB 224-266.) The record, however, shows just the opposite is true. The trial court repeatedly informed appellant that the trial court was open to hearing and accepting evidence in support of appellant's motions concerning DNA. (30 RT 9247, 9258-9259; 31 RT 9405-9406; 39 RT 11740.) Each time appellant made an insufficient showing, the trial court denied his motion without prejudice, specifically stating the trial court was open to appellant providing the court with further

evidence. (*Ibid.*) At no time was appellant precluded from making the required showing concerning mtDNA testing. With regard to Beaver, the court ruled that he would allow Beaver to testify at a section 402 hearing but declined to hear telephonic testimony from someone out of state. The prosecutor stated, "Your Honor, I just wanted to make a record, the Court did not order that Mr. Beaver could not testify. He ordered that Mr. Beaver could not testify via telephone from Virginia." (31 RT 9408.) The court agreed: "Oh, most certainly he can testify, just like I said. If anybody can give me authority he can do it by telephone in Virginia, I'll certainly reconsider that as well." (*Ibid.*) This was not improper. (Evid. Code, § 711.) Appellant's statement that the trial court refused to listen to Beaver's testimony by telephone "or otherwise" is patently false. (AOB 225.)

Second, appellant argues that the trial court erred in suggesting mtDNA testing was unreliable and not accepted in the scientific community. However, appellant failed to present sufficient, competent evidence on this subject.

> [U]nder the *Kelly-Frye* rule the proponent of evidence derived from a new scientific methodology must satisfy three prongs, by showing, first, that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that '"correct scientific procedures were used in the particular case."'[52]

(*People v. Roybal* (1998) 19 Cal.4th 481, 505; see also *People v. Allen* (1999) 72 Cal.App.4th 1093, 1098-1099.) The reliability requirement

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[52] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. United States* (D.C.Cir.1923) 293 F. 1013 (*Frye*). The *Frye* decision has been abrogated by the Federal Rules of Evidence (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, but the *Kelly* standard is the law of this state. (*People v. Leahy* (1994) 8 Cal.4th 587, 604.)

demands a preliminary showing of general acceptance of the new technique in the relevant scientific community. (*Kelly, supra*, 17 Cal.3d at p. 30.) This requirement "is not fulfilled merely by evidence that one expert personally believes the challenged procedure is reliable; the court must be able to find that the procedure is generally accepted as reliable by the larger scientific community in which it originated." (*People v. Shirley* (1982) 31 Cal.3d 18, 54, fn. 32 (re: hypnosis); see also *Kelly, supra*, 17 Cal.3d at p. 37.)

> The objective of the *Kelly–Frye* rule is to preclude the use of untested and developing scientific methods of fact determination. The proof of a fact in issue is not permitted by use of new or novel methods until it can be shown that the new procedure has achieved reliability. This determination is made not upon the basis of the trial judge's determination of scientific reliability, but upon the judge's discovery as to whether there is 'substantial agreement and consensus in the scientific community' regarding the process's reliability.

(*People v. Cegers* (1992) 7 Cal.App.4th 988, 995, quoting *People v. Kelly, supra*, 17 Cal.3d at p. 31.)

> On appeal, the general acceptance finding under prong one of *Kelly* is a mixed question of law and fact subject to limited de novo review. [W]e review the trial court's determination with deference to any and all supportable findings of historical fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance.

(*People v. Hill* (2001) 89 Cal.App.4th 48, 57, internal citations and quotations omitted.)

In this case, appellant failed to make the required showing that mtDNA testing was at the time generally accepted as reliable by the scientific community. Calandro, the only witness presented by the defense and not qualified as an expert in mtDNA testing, testified that based on literature she read, she did not know of any controversy regarding the scientific acceptance of mtDNA testing. She was aware that work related

to mtDNA analysis had been going on since prior to 1994. However, Calandro and her employer, Forensic Analytical, did not conduct mtDNA testing. Calandro testified that mtDNA testing had never been allowed into evidence in the State of California and no laboratory in California performed such tests. This evidence was clearly insufficient to show that the scientific community had generally accepted mtDNA testing at that time. In light of the scarce evidence presented by appellant demonstrating the reliability that mtDNA testing, the trial court properly denied appellant's motions involving mtDNA testing. Appellant cites several cases in an effort to establish that mtDNA testing was accepted. (AOB 224-225.) None of these cases were decided at the time of the penalty phase retrial in this case, and could not have been presented to the trial court for consideration.[53]

Third, appellant urges this Court to find trial court error by its limiting of appellant's argument during summation. (AOB 223.) He contends, as he did below, that he should have been allowed to comment on the prosecution's failure to conduct mtDNA testing. (AOB 225-227.) The trial court's restriction on defense counsel was proper.

"A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citations.]" (*People v. Marshall* (1996)13 Cal.4th 799, 854.) The defense is given wide latitude in closing argument. (*People v. Farmer* (1989) 47 Cal.3d 888, 922,

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[53] Appellant also relies on section 1405 to argue that he would have been entitled to mtDNA analysis. This section provides a means by which a convicted felon serving a prison term may seek to have DNA testing performed in the underlying case. The statute was enacted in 2000, well after appellant's guilt and penalty phase trials, and therefore did not exist at the time of appellant's motions before the trial court.

disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) However,

> [t]his is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion. [Citations.]

(*Herring v. New York* (1975) 422 U.S. 853, 862.)

California law requires a judge to control proceedings including the argument of counsel to the jury. Section 1044 mandates:

> It shall be the duty of the judge to control all proceedings during the trial and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

Thus, a trial court has the responsibility to exercise its discretion to prevent improper argument by the parties, including attempts to present factually unsubstantiated contentions to the jury. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387-1389.) "It is axiomatic that counsel may not state or assume facts in argument that are not in evidence." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.)

As set forth above, the trial court properly determined that appellant failed to demonstrate the admissibility of mtDNA testing. Appellant repeatedly failed to meet his burden of establishing that mtDNA testing was at that time a generally accepted means of testing in the scientific community. Because the fact of mtDNA testing was inadmissible, the trial court properly ordered appellant not to comment on DNA testing or the prosecution's "failure" to conduct such testing during closing argument.

Logically, the prosecution should not be held responsible for conducting a method of DNA testing which was virtually unheard of and was certainly not a generally accepted means of testing.

And finally, appellant argues the trial court erred in denying him funding to conduct mtDNA testing. (AOB 223.) The trial court properly denied this request. According to section 987.9,

> Upon receipt of an application [for funds], a judge of the court, *other than the trial judge presiding over the case in question*, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney.

(Emphasis added.) Thus, the statute specifically precludes the trial court hearing the matter from ruling on a defendant's application for funds. The trial court properly refused to entertain the motion. (31 RT 9368-9369, 9413.)

Under these circumstances, the trial court properly denied appellant's motions. Appellant's attempt to transform his arguments into constitutional violations similarly fails. (See *Boyer*, *supra*, 38 Cal.4th at p. 441, fn. 17 ["rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well."].)

XIII. THE PROSECUTOR'S CLOSING ARGUMENT FOR THE PENALTY PHASE TRIAL WAS PROPER

Appellant argues that the prosecutor committed misconduct, violating his Fifth, Eighth, and Fourteenth Amendment and due process rights, by arguing to the jury: A) appellant's normal childhood was a factor in aggravation; B) the jury could not find lingering doubt because appellant did not call every prosecution witness from the guilt phase trial; C) appellant failed to call logical witnesses concerning Michael Lyons' kidnapping even though the charge was dismissed; D) the defense failed to conduct DNA testing on Michael Lyons' fingernail scrapings; and E) the

jury should conduct their own comparison of the knife wounds on Michael Lyons. (AOB 227-255.) He further contends (in Arguments F and G) that his failure to request an admonition should not prohibit the court from reviewing his claims and that the cumulative effect of the prosecutor's misconduct denied him his right to due process mandating reversal. (AOB 252-255.) As set forth below, each of these arguments are meritless.

The applicable law is well established. As at the guilt phase of the trial, at the penalty phase a prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *People v. Earp* (1999) 20 Cal.4th 826, 858.) In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108.) A prosecutor's misconduct "that does not render a criminal trial fundamentally unfair" violates California law "only if it '"involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; accord, *People v. Farnam* (2002) 28 Cal.4th 107, 167.)

> Regarding the scope of permissible prosecutorial argument,
>
> a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature. A prosecutor may vigorously argue his case and is not limited to 'Chesterfieldian politeness', and he may 'use appropriate epithets....

(*People v. Williams* (1997) 16 Cal.4th 153, 221, internal citations and quotations omitted.)

For prosecutorial misconduct at the penalty phase, the reviewing court applies the reasonable possibility standard of prejudice first articulated in *People v. Brown* (1988) 46 Cal.3d 432, 448, which is the same in substance and effect as the beyond-a-reasonable-doubt test for prejudice articulated in *Chapman*. (*People v. Gonzales* (2011) 51 Cal.4th 894, 953; *People v. Wallace* (2008) 44 Cal.4th 1032, 1092.)

A. The Prosecutor's Rebuttal Argument Concerning Appellant's Background and Childhood was Proper

In his first argument, appellant complains that the prosecutor argued appellant's childhood was a factor in aggravation. (AOB 227-228.) According to appellant, the prosecutor argued to the jury that appellant had a "'normal childhood' and inferentially, deserved death." (AOB 227.) Respondent disagrees with this interpretation. Looking at the introductory remarks preceding the argument appellant cites, it is abundantly clear that the prosecutor was discussing the evidence presented under section 190.3, factor (k), and the lack of weight that should be given to such evidence. The prosecutor stated, "Now, I'm going to go over with you and review the evidence that has been presented under Factor K" (40 RT 12223), and "Now, back to Factor K" (40 RT 12224). The only inference to be drawn is that the jury should not assign any weight to appellant's childhood as a mitigating factor.

The prosecutor later added,

> The final thing that I want to talk to you about is the process of which you go [sic] when you weigh these factors.
>
> The first thing I want to explain to you is that it isn't, and again the judge has explained this to you before, this isn't a process of counting up, okay, we've got five aggravating factors and two mitigating factors, let's give him the death penalty.

You don't do that.

What you do is each of you individually assign a weight, you assign a weight to each of the factors.

Now, for example, let's talk about Factor B evidence as to Crystal. Some of you may feel in comparison to what he did to Sharon, the crime to Crystal was very brutal because she was so young because she was four years old, and you may find and assign that high value of weight in your mind.

[¶] . . . [¶]

Now you have to consider it because you have a duty to consider all the evidence. But that doesn't mean you have to give it a weight. Because if you find that the fact that the defendant sings means nothing, that it isn't mitigating, that it doesn't diminish what he did to Michael Lyons, then you can say, Zero.

You can say the fact that the defendant had a normal childhood, Zero.

Lingering doubt, I don't believe it, Zero.

Because that's not mitigating evidence.

It's not mitigating what the defense has said, and it's your right to do that.

(40 RT 12231-12232.) No reasonable juror would have interpreted the prosecutor's argument to be that appellant's childhood should be considered as a factor in aggravation. In any event, defense counsel cleared up any possible misconception in his closing: "Just because a factor is found by you not to be a factor in mitigation doesn't mean that it's a factor in aggravation." (40 RT 12253.)

Appellant quotes a passage from the prosecutor's final closing at 41 RT 12356. However, he failed to include the prosecutor's statements just prior to this quote. The entire passage is as follows:

Thank you, ladies and gentlemen. I'll try to be brief.

> I want you to go back and I want you to remember what [defense] counsel said - - he had evidence in mitigation in this case in his opening statement. I want you to go back to yesterday and look at what he says the mitigating evidence is in this case. Because I don't see any mitigation in this case whatsoever.
>
> He presented a whole lot of facts. But as Susan [Nolan, co-prosecutor] said, *you can attribute that zero if it is deserving of zero*. All you have heard is that Mr. Rhoades had a somewhat privileged upbringing, that there was no reason for him to turn into a rotten egg, none whatsoever. And that's Robert Rhoades right there. Twelve felony convictions since 1984. That's who Robert is right there.
>
> As counsel said in his opening statement, he's correct. Mr. Rhoades is not a very nice person. But there's no reason that they presented to you why he turned out this way. I want you to keep that in mind. That's why the whole defense in this case is lingering doubt, is because they can't - - they can't offer you anything good to say about this man.

(42 RT 12356, emphasis added.) Clearly, the prosecutor was urging the jury to assign to his childhood no weight as a mitigating factor.

Appellant contends that the prosecutor's argument was disapproved in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033 (*Edelbacher*). *Edelbacher* held that evidence of a defendant's background and character is admissible under section 190.3, factor (k), only to mitigate the gravity of the crime, and that it is improper for the prosecutor to urge that such evidence should be considered in aggravation. Preliminarily, appellant failed to object on these grounds, and he therefore forfeited this argument for consideration on appeal. (*People v. Champion* (1995) 9 Cal.4th 879, 939, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Davenport* (1985) 41 Cal.3d 247, 289.) Nonetheless, appellant's argument should be denied. The prosecutor never argued that appellant's background and childhood should be considered as factors in

aggravation. Rather, in rebuttal to appellant's argument, the prosecutor urged the jury to find the evidence of appellant's childhood lacked weight as a mitigating factor. He pointed out that the evidence concerning appellant's childhood did not give rise to an inference that appellant deserved leniency. (Cf. *Edelbacher*, *supra*, 47 Cal.3d at p. 1033 [when defense offered no evidence of statutory mitigating factors, prosecutor in his closing argument improperly relied on a chart listing the factors as aggravating].) Such an argument is entirely proper. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 740; *People v. Cox* (1991) 53 Cal.3d 618, 683, overruled on another point in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22 ["A prosecutor does not mischaracterize [mitigating] evidence by arguing it should not carry any extenuating weight when evaluated in a broader factual context. We have consistently declined to criticize advocacy of this nature. [Citations.]"].)

At the conclusion, the prosecutor summarized the argument:

> The defendant has two main lines of defense in this case: One seems to be that 'I'm guilty but because of my horrid upbringing you should have mercy on me.'
>
> Okay. That's one line of defense.
>
> The other line of defense is kind of inconsistent with it. It's 'I didn't do it.'
>
> Okay. They're going both ways at the same time, ladies and gentlemen. They're going this way and they're doing that way. Those are 180 degree different directions.
>
> I said, as I told you before, I failed to see anything in this man's background that is mitigating.

(41 RT 12415-12416.) The prosecutor's closing argument regarding the evidence in mitigation was in no way violative of *Edelbacher*, and appellant's argument on appeal should be rejected.

B. The Prosecutor Properly Argued the Subject of Lingering Doubt

Appellant complains that his death sentence should be reversed because the prosecutor denigrated his lingering doubt theory by arguing to the jury that lingering doubt was impossible to find unless the second penalty jury had heard the entire case the prosecutor presented to the first jury. (AOB 228-244.) The prosecutor's argument cannot be interpreted as such, and even if it could, appellant suffered no prejudice.

1. Background

The prosecutor argued,

> Now what the defense did is they took little bits and pieces of the case I presented the jury last year. They didn't do it in any particular order that made any sense to you, and I'm sure most of you - -

(41 RT 12357.) Defense counsel objected, "What Mr. Schroeder is about to do is to argue the evidence that he presented in the guilt phase of the trial." (*Ibid.*) The prosecutor stated that he was not going to refer to evidence that was presented to the first jury. (41 RT 12358.) Without the court ruling on the objection, closing argument continued. The prosecutor argued,

> He presented little bits and pieces, and there are huge gaps. And you can tell there's huge gaps just by listening to the way he presented it and what he presented.
>
> Now for you to have a lingering doubt, you have to hear the entire case I put on last year.

(*Ibid.*) Defense counsel objected, stating, "Objection, your Honor. That is what we just talked about. Objection." (*Ibid.*) The trial court sustained the objection and admonished the jury to disregard the statement. (41 RT 12358-12359.)

The prosecutor continued his argument,

> I'm going to read to you from counsel's opening statement. And remember, this is his opening statement
>
> 'So we're going to do - - what we're going to do is we're going to present the prosecution's case to you. They're going to present some, we're going to present the rest.'
>
> So he's admitting that he has to put on the entire case I put on - -

(41 RT 12359.) Defense counsel objected, "Your Honor, objection. That is what we talked about, Judge." (*Ibid.*) The trial court sustained the objection once again, and following the appellant's motion for mistrial, denied the motion. (*Ibid.*) The court declined to admonish the jury on defense counsel's request because "I just did, counsel." (41 RT 12359-12360.)

Defense counsel objected again when the prosecutor argued "They're going to put on the whole case, counsel, right? Apparently not. They did not over and over and over again." (41 RT 12360.) The court overruled the defense objection stating, "I believe that's a proper presentation." (*Ibid.*) After allowing the prosecutor to proceed briefly, defense counsel asked for a side bar, and complained,

> He is arguing that he presented additional things at another trial. That's what he's doing, Judge. He's doing by it inference and he's doing it directly. Now that is exactly what he's doing.
>
> Now the fact that I chose not to call another witness is why - - he can say he didn't call that witness back, but he can't say there was other stuff Bentley could have testified to because that's not before this jury.

(41 RT 12361.) The trial court ruled that the prosecutor could comment on the fact that the defense told the jury that it was going to produce a certain witness and did not do so. (41 RT 12362.)

Defense counsel moved for a mistrial again:

> Your Honor, I'm asking for a mistrial. The denial of the mistrial denies my client of his state and federal constitutional rights as previously stated.
>
> This witness - - this prosecutor has gone so far out of balance and has engaged in so much prosecutorial misconduct in this case that it - - we'll, number one, Judge, this also goes beyond the scope of direct examination - - I mean not beyond the scope of direct. It also goes beyond the scope of my closing. I didn't talk about any of this stuff. Okay. So it is - - it's well beyond the scope.

(41 RT 12362.) After some discussion, the court instructed the prosecutor, "You may only argue these matters that are in this trial before the jury excluding any questions by the defendant - - by the defense counsel." (41 RT 12364.) The court denied the motion for mistrial. (41 RT 12365.)

The prosecutor proceeded with his argument:

> I want you to think of the names mentioned to you of people who have things to say in this case that are mentioned by the witnesses that are listed on these various diagrams. We stipulated certain of these marks were made by Mike Johnson. But Mike Johnson, sergeant with the Yuba City Police Department, never testified. I think if you go back, think of all the people who are logical witnesses the defense didn't present, it's a lot of people.
>
> As I said, even some of the people who testified didn't testify to things they obviously had that were important to [the] case. For example, the defendant's father. The defense questioned him only on defendant's background. But we know from the defendant that he was present that day at the barber shop when the defendant left. He made a phone call to his father and other things like that. So even though he was called, he didn't testify to the things he knew.
>
> Okay. I just want you to count up the number of people mentioned in the evidence here who didn't testify. If you doesn't [sic] hear my whole case, how can you have a lingering doubt?

(41 RT 12365.) The defense objected without specifying the grounds, and the court sustained the objection and admonished the jury to disregard the last sentence of the argument. (41 RT 12365-12366.)

The prosecutor continued with his argument for some time before stating,

> Again, as I have said before, they failed to call Charlie Wilber. He gives a little texture to Ray Clark's testimony, doesn't he? Because he placed it at 3:30 to 4 o'clock. Now counsel didn't bring that out. But that was part of the evidence I put on in front of the guilt jury - -

(41 RT 12370.) Defense counsel objected, asked to approach the bench, and stated at side bar, "What he just said to the jury, Judge, is that was the evidence that I put in front of the guilt jury. Didn't we have a ruling on that?" (41 RT 12371.) The court sustained the objection on that ground and agreed to admonish the jury. Defense counsel again moved for a mistrial, "Your Honor, this entire closing - - this is - - he's going to do this the entire closing, your Honor. It's not proper. Its isn't proper. You've ruled it's not proper. Let me again move for mistrial." (*Ibid.*) He also asked the court to sanction the prosecutor. (41 RT 12372.) The trial court denied the motion and sanction request. (*Ibid.*) The trial court admonished the jury, stating,

> All right. Ladies and gentlemen, the district attorney made a reference to evidence at the guilt phase of the trial, which of course you were not participants in, and the Court's sustained an objection to that question and will admonish you at this time to disregard that portion - - that matter insofar as it references the guilt phase of the trial.

(*Ibid.*)

Appellant also points to a portion of the record concerning DNA testing. (AOB 231-232.) The prosecutor questioned why the defense did not examine the fingernail scrapings for DNA evidence. (41 RT 12389.)

Defense counsel objected and stated that he "asked for money to get this done and you know it." (41 RT 12390.) The trial court overruled the objection. (41 RT 12389-12390.) After a sidebar discussion, the court struck from the record both the prosecutor's argument and the defense attorney's comment. (41 RT 12397.) It admonished the jury that counsel was not to go beyond the stipulation the court read to the jury during the course of the trial and that the remarks of counsel prior to the sidebar were stricken and were to be disregarded. (41 RT 12403.) The prosecutor thereafter commented on "unanswered questions" with regard to the fingernail scrapings, and that "He didn't provide it to you." (41 RT 12403.) Defense counsel objected, and the trial court sustained the objection. (41 RT 12403-12404.) These objections did not pertain to the lingering doubt argument made on appeal, but rather concerned the prosecutor allegedly arguing beyond the scope of the stipulation. (See Argument D, *post*.)

2. Discussion

Appellant argues that the prosecutor improperly denigrated his lingering doubt theory by telling the jury it could not find lingering doubt without hearing the entire case put on in the guilt phase. However, a fair interpretation of the prosecutor's closing argument can only be that the evidence of lingering doubt presented by the defense lacked mitigating force. The prosecutor did not argue that the jurors were prohibited from considering appellant's theory of lingering doubt. Rather, he argued that the defense failed to demonstrate lingering doubt with the evidence it presented. In other words, the evidence lacked mitigating force. Such an argument is proper. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1241; *People v. Raley* (1992) 2 Cal.4th 870, 917.)

Even assuming the prosecutor committed misconduct by arguing that lingering doubt could only be found if the jury was presented with the entire body of evidence admitted during the guilt trial, appellant cannot

show he was prejudiced. Defense counsel argued at length there remained "lingering doubt" about defendant's guilt and that this was a factor in mitigation. (40 RT 12269-12295; 41 RT 12312-12343.) The instructions given reinforced these concepts. (15 CT 4352, 4356.) Additionally, the trial court sustained the objections by the defense and admonished the jury regarding the prosecutor's argument. Thus, in this case, appellant cannot show that the prosecutor's conduct infected the trial with such unfairness as to make the conviction a denial of due process, or that the prosecutor used deceptive or reprehensible methods to persuade the jury.

C. The Prosecutor Properly Argued Appellant Failed to Call Logical Witnesses Concerning Michael's Kidnapping

Appellant faults the prosecution for arguing appellant kidnapped Michael Lyons and that appellant failed to call logical witnesses about the kidnapping because the kidnapping charge had been dismissed after a hung jury at the first guilt phase trial. (AOB 244-245.) He contends it was improper to hold against him the fact that appellant did not again raise a reasonable doubt about his guilt of the crime of kidnapping. (*Ibid.*) This argument has no merit whatsoever.

First, appellant has forfeited this argument on appeal. "A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) In this case, appellant failed to make any objections on the ground that the argument was improper because the kidnapping charge had been dismissed and failed to request an admonition. On forfeiture grounds alone appellant's argument should be rejected.

Nevertheless, his argument fails on the merits because the prosecutor's remarks were fairly responsive to appellant's counsel's closing arguments to the jury regarding Michael Lyons' kidnapping. Appellant argued at length in his closing argument of the penalty phase that there was lingering doubt as to his guilt. Much of this argument focused on the allegations of kidnapping Michael Lyons, a charge which was ultimately dismissed by the prosecutor following the first jury's inability to reach a verdict. (40 RT 12272-12288.) Appellant argued the inconsistencies in the witnesses accounts of the time in which Michael Lyons was kidnapped and whether appellant's truck was the vehicle seen by the witnesses. The focus of the argument was to create a doubt as to appellant's involvement in the kidnapping. Clearly, the prosecutor's arguments that appellant did kidnap Michael Lyons and that the defense strategically called only the witnesses which would support its theory of lingering doubt were proper rebuttal argument. Because the rebuttal evidence was specific and related directly to appellant's assertion that there was doubt about his kidnapping Michael Lyons, the argument was proper. (See *People v. Fierro* (1991) 1 Cal.4th 173, 238, disapproved on a different point in *People v. Letner and Tobin* (2010) 50 Cal.4th 99.) Otherwise improper arguments may be fair if made in response to a defense argument. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; *People v. Hill* (1967) 66 Cal.2d 536, 560–562 ["a prosecutor is justified in making comments in rebuttal, perhaps otherwise improper, which are fairly responsive to argument of defense counsel and are based on the record"].)

In any event, even if the prosecutor's argument was not made in response to appellant's closing argument, evidence and argument concerning the nature and circumstances of the present offense, which includes evidence involving the kidnapping of Michael Lyons, are matters which are relevant to aggravation and sentencing. (§ 190.3.) Under these

circumstances, the prosecutor's rebuttal argument concerning the kidnapping of Michael Lyons and appellant's failure to call logical witnesses was proper.

D. The Prosecutor's Argument Concerning DNA Testing was Proper

Appellant takes issue with the prosecutor's closing remarks concerning DNA testing. In this argument he asserts the prosecutor engaged in "reprehensible lying" by misleading the jury into believing appellant could have conducted DNA testing on his shirt, the fingernail scrapings of Michael Lyons, and the pubic hair found on Michael Lyons' sweatshirt and shirt, all the while knowing that the court denied appellant funding to conduct such tests.[54] (AOB 246-249.) Contrary to appellant's argument, the prosecutor's comments during summation were fair comments on the evidence.

1. Background

During the defense closing, defense counsel raised the issue of DNA analysis with the jury.

> But I want to look again - - I want to look again at some more physical evidence, the scientific evidence. Now the prosecution is putting their best foot forward called Nicky Duda. You recall she is their - - actually they called Stephen Bentley, who's the forensic analyst but doesn't do DNA testing. He examines physical evidence.
>
> Nicky Duda - - the things that he collected were then turn[ed] over to Nicky Duda. I forget her last name now. But anyway, she was the young woman who did the DNA analysis for the

---

[54] Appellant includes the "pubic hairs found on the blanket" as evidence which the prosecution suggested could have been tested by the defense. (AOB 246.) However, the prosecutor made no mention of the pubic hairs on the blanket and this evidence was not the subject of earlier defense motions regarding DNA testing.

People. And one of the things that she received in evidence were fingernail scrapings. And one of the things that she testified to is that she did not examine those fingernail scrapings. Didn't do DNA analysis on those fingernail scrapings. Bentley testified he didn't examine the fingernail scrapings either.

Prosecutor: Objection. That's not true. He was never asked that question, your Honor.

Defense counsel: That - -

Court: Ladies and gentlemen - -

Defense counsel: All right. I'll rephrase.

Court: Just a moment, counsel. So that question get by this, as far as all the arguments are concerned either side may say this or that is the evidence. Your memory of the evidence is what controls. Proceed, please.

Defense counsel: He did not testify that he examined the evidence.

Now there was also a stipulation that was read in - - read in, and that is that Mr. Rhoades' first lawyers received this same evidence. They didn't examine it either. And I frankly don't know why no one examined it. What I do know is that it was not and has not been examined. We know from Miss Duda that DNA evidence can identify within a statistical probability and can eliminate.

What is DNA evidence? DNA evidence is - - we went through - - we went through that stuff a little bit before, but it is the examination of biological material. Cell matter. Biological material that contains cells, I guess is the better way to do it.

We know that they attempted to examine the spermatozoa that was found on Dr. Dibdin's swabs. They were not able to - - Miss Duda, at least, I believe she testified was not able to do a DNA analysis because of the damage to the cell structure. Ten years ago we couldn't do DNA testing on anything. We couldn't do DNA analysis on anything.

Now since technology has permitted us to examine biological matter for the presence of human DNA, and that to match it to

possible donors, do you have any idea how many people have actually been released from death row and imminent execution because they have been scientifically proven not to be the donor of blood or sperm or epithelial cells such as would be found under fingernails?

What scientific evidence is there that connects Robert Rhoades, my client, to this very horrific crime? There is none.

Let me posit a question. Five years from now might a technique of analysis be developed that would enable scientists to repair or to analyze the spermatozoa found on Michael Lyons by Dr. Dibdin who did the swab? What if that technological breakthrough comes ten years from now? What if that technological breakthrough comes after Robert has been executed? These are all things that you might rightfully consider in attempting to determine whether you really want to execute Robert Rhoades.

What [] if a DNA examination of the fingernail scrapings eliminates Robert Rhoades? That's scary. That's real scary.

Now yeah, Mr. Rhoades' first lawyers had the stuff. They had it until - - I forget the date, but long before we were involved. And then it was given back to the D.A. All of these are things that you can and should consider.

(41 RT 12331-12334.)

During the prosecutor's rebuttal argument, the prosecutor argued, "Okay, counsel makes a big deal about the fingernail scrapings, and he's the one who brought this whole idea up." (41 RT 12389.) He then pointed out that the defense expert had possession of the fingernail scrapings but did not examine the evidence. The prosecutor asked, "Why didn't he present their expert to tell you why that wasn't done?" (*Ibid.*) Defense counsel objected, and the trial court overruled the objection. (41 RT 12390.) At sidebar, the parties discussed the issue, and defense counsel contended that the prosecutor was arguing about testing which the defense could not due for lack of funding. (41 RT 12391.) However, the

prosecutor pointed out that he asked why the defense had not called the expert Calandro in to explain why she had not examined the evidence while she had possession of it for three months. (*Ibid.*) Defense counsel then complained that the defense had no money to call the expert, however, the prosecution pointed out that the expert had recently testified at the section 402 hearing concerning mtDNA testing. (41 RT 12392-12393, 12396.)

The court ruled that it would read the stipulation to the jury again and would permit comment relating to the stipulation to be made by either party. (41 RT 12396.) The court further struck the prior comment by the district attorney as well as the defense counsel's comment about money. (41 RT 12397.) The prosecutor pointed out that he was going to comment on the fact that the defense did not call anyone from Forensic Analytical to say why the evidence was not tested. (41 RT 12398-12400.) The court ordered that he could comment that the person from Forensic Analytical did not testify but not comment on why defense counsel did not produce the expert. (41 RT 12400.)

Back in front of the jury, the prosecutor resumed rebuttal argument, and the court admonished the jury that remarks made prior to the resumption of argument by either counsel regarding testing were stricken and should be disregarded. (41 RT 12402-12403.) The prosecutor then argued,

> Okay. He's the one who wants to prove lingering doubt.
>
> And as he told you, when somebody goes forward and tries to prove something, they bear the burden of showing it.
>
> If there are unanswered questions with regard to the fingernail scrapings, that's where you look for the answer. He didn't provide it to you.

(41 RT 12403.) Defense counsel objected, and the court sustained the objection. The stipulation on this issue was as follows:

> The fingernail scrapings taken from the body of Michael Lyons were appropriately transported to Forensic Analytical, a DNA laboratory for the defense. The defense had the possession of the scrapings from January 1998 until April 1998 after which time they were returned to the People. The defense did not test the fingernail scrapings.

(40 RT 12177-12178, 12200-12201; 41 RT 12394-12395.)

2. Discussion

First, appellant argues that the prosecutor engaged in misconduct by misleading the jury about items of evidence that could be tested forensically such as appellant's shirt, the fingernail scrapings of Michael Lyons, the pubic hair on the blanket, and the pubic hair on Michael Lyons' sweatshirt and shirt. (AOB 223, 246-249.) However, the prosecutor's closing argument mentioned none of these items of evidence with the exception of the fingernail scrapings. The prosecutor did not mislead or lie to the jury, must less mention, the remaining items of evidence.

Second, to the extent the prosecutor did comment on the fingernail scrapings of Michael Lyons, his argument was a fair comment on the evidence particularly in light of defense counsel's closing argument. The defense attorney discussed the fact that the prosecution's expert, Nicky Duda, had possession of the fingernail scrapings of Michael Lyons and did not conduct DNA testing of this evidence. (41 RT 12331.) He also pointed out that appellant's prior attorneys had the evidence and did not have it examined, claiming, "And I frankly don't know why no one examined it." (41 RT 12332.) He asked the jury, "What [] if a DNA examination of the fingernail scrapings eliminates Robert Rhoades?" (41 RT 12333.) Counsel made this argument even though he was aware that the fingernail scrapings were examined by the prosecution's expert, Stephen Bentley, who determined that the scrapings had no evidentiary value. (31 RT 9399; 41 RT 12399.) In any event, the prosecutor fairly questioned why the defense

had not called the defense expert to testify as to why testing was not done on the fingernail scrapings. (41 RT 12389.) This argument was in rebuttal to the inference by the defense that DNA testing on the fingernail scrapings could have demonstrated appellant's innocence.[55] The prosecutor's argument was a proper rebuttal. (*People v. Panah, supra*, 35 Cal.4th at p. 464; *People v. McDaniel* (1976) 16 Cal.3d 156, 177; see also *People v. Wash* (1993) 6 Cal.4th 215, 263, quoting *People v. Szeto* (1981) 29 Cal.3d 20, 34 ["prosecutorial comment upon a defendant's failure to 'introduce material evidence or to call logical witnesses' is not improper"].) A prosecutor is allowed in rebuttal argument to respond fairly to defense counsel's arguments. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 184.)

Finally, even if the prosecutor's comments constituted misconduct, any error was harmless. The defense objection to the first comment was ultimately sustained as the trial court struck the comment and the defense objection from the record. (41 RT 12390, 12397.) Similarly, the trial court sustained the defense objection to the prosecutor's comment that "If there are unanswered questions with regard to the fingernail scrapings, that's where you look for the answer. He didn't provide it to you." (41 RT 12403-12404.) The trial court admonished the jury to disregard the question. (41 RT 12404.)

As set forth above, the proper standard of prejudice is whether there is a reasonable possibility that the jury would have returned a different penalty verdict absent the prosecutor's statements. (*People v. Gonzales*,

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[55] Appellant's argument implies that the defense had requested funding to conduct DNA testing on the fingernail scrapings during the time the defense had possession of the evidence from January to April, 1998, and that the court had denied the request. However, the defense's first request for funding came after the conclusion of the guilt phase trial, in September of 1998. (10 CT 2860-2864.)

supra, 51 Cal.4th at p. 953; *People v. Wallace*, *supra*, 44 Cal.4th at p. 1092.) The issue of the fingernail scrapings was extremely minor in light of the overwhelming evidence presented by the People. The circumstances of the killing of Michael Lyons and the horror and torture he was forced to endure before he was brutally murdered greatly supported the jury's determination that appellant be put to death. Thus, there is no reasonable possibility that the jury was diverted from returning a life sentence by the prosecutor's arguments concerning fingernail scrapings.

E. The Prosecutor Properly Suggested The Jury Look At The Photographs With A Magnifying Glass

Appellant contends that the prosecutor committed misconduct by suggesting to the jurors that they obtain a magnifying glass to look at the photographs of Michael Lyons' skin in order to examine the knife marks. (AOB 249-251.) The prosecutor's comment was proper.

> Appellant objects to the following portion of the People's argument:
>
> Prosecution: Dr. Dibdin was wrong about one thing, and it's because he's not an expert in this one thing. He's not an expert in matching up marks with knives.
>
> There are experts that DOJ has to do such things.
>
> These marks right here, I want you to take a look at them, because Dr. Dibdin said that he did not look at the marks under a magnifying glass that were made by a knife on Michael's skin.
>
> Do yourself a favor. Have the bailiff get yourself a magnifying glass and look at the - -
>
> Defense: Objection, I think that would actually be improper.
>
> Prosecution: That's not improper at all. They can examine the evidence in any way they want.
>
> Court: Overruled, proceed.
>
> Prosecution: You will see if you closely examine those that what Dr. Dibdin thinks he's seeing, he's not seeing, because some of

the - - some of the lines on there, there's no pattern to them at all. And other ones, you can literally see them veering out, okay?

(41 RT 12387-12388.)

When, as here, the claim is based upon "comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another ground in *Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1; *People v. Clair*, *supra*, 2 Cal.4th at p. 663 & fn. 8.) The prosecutor started to suggest to the jury that they examine the photographs of Michael Lyons with a magnifying glass. Such an argument is not improper.

A jury must decide the guilt or innocence of a defendant based solely on the evidence introduced at trial. (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 314.) As a consequence of this rule, a jury may not independently investigate the facts or create evidence through experiments designed to determine disputed facts. (E.g., *Id.* at pp. 313-314; *People v. Castro* (1986) 184 Cal.App.3d at 849, 853.) Yet, jurors have wide latitude to use common experiences and illustrations in reaching their verdicts. (*People v. Cumpian*, *supra*, 1 Cal.App.4th at p. 316.) Jurors may use an exhibit introduced at trial "according to its nature to aid them in weighing the evidence" and "may carry out experiments within the lines of offered evidence," as long as the experiments do not "invade new fields" that do not "fall fairly within the scope and purview of the evidence." (*People v. Bogle* (1995) 41 Cal.App.4th 770, 778-779, quoting *Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651, 656-657.)

In *People v. Turner* (1971) 22 Cal.App.3d 174 (*Turner*), the jury used magnifying glasses to assist them in analyzing documentary evidence. The appellate court determined that the use of magnifying glasses did not

constitute either introduction of new evidence or improper experimentation. (*Id.* at p. 182.) The court reasoned:

> As stated in *United States v. Beach*, 296 F.2d 153[ ] at pages 158-159: '"the mere making of a more critical examination of an exhibit than was made during the trial is not objectionable. For example, the use of a magnifying glass not introduced in evidence, without the knowledge and consent of the parties and without permission of the court, is not reversible error where such action involves merely a more critical examination of an exhibit."' At most, the use of the magnifying glass involved an extension of the jury's sense of sight [citations].

(*Id.* at pp. 182-183.)

Here, as in *Turner*, the use of a magnifying glass would have simply allowed the jury to examine the evidence more closely. There is nothing new about this. Had the jury used a magnifying glass, the photographs examined would be the same photographs referred to repeatedly at trial and shown to the jury. Seeing the photographs more closely does not make the evidence "new." In light of this law, any suggestion by the prosecutor that the jury use a magnifying glass cannot be considered improper argument. And even if it this comment could somehow be construed as misconduct, the comment was so brief and the prosecutor moved on so quickly that no conceivable prejudice could have resulted. Furthermore, there is no evidence whatsoever that the jury did use a magnifying glass in this case. Appellant's argument should be denied.

F. Appellant's Claims Are Forfeited

Appellant contends that this Court should review the misconduct alleged in the preceding subsections because he objected numerous times and any further objections would have been futile. (AOB 252.) As set forth above, specifically in Arguments A and C, *ante*, appellant neither objected (or objected on the same grounds) nor requested an admonition. Appellant has presented no evidence that an objection on the grounds

challenged on appeal would have been futile. His claims should be viewed as being raised for the first time on appeal and should be deemed forfeited. (*People v. Champion*, *supra*, 9 Cal.4th at p. 939, overruled on other grounds in *People v. Combs*, *supra*, 34 Cal.4th at p. 860; *People v. Davenport*, *supra*, 41 Cal.3d at p. 289.)

G. There is no Cumulative Error

Last, appellant asserts that the cumulative effect of the prosecutor's misconduct during the penalty phase closing argument denied his due process right to a fair trial thus requiring reversal of the judgment. (AOB 252-255.) As set forth in detail above, however, there has been no error based on the prosecutor's closing argument, and any possible error was necessarily harmless. Therefore, there is no cumulative effect of penalty phase errors for consideration in this case. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.)

XIV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO CONTINUE SENTENCING

Appellant argues that the trial court violated his Fifth, Eighth and Fourteenth Amendment rights, as well as his due process right to a fair penalty determination, by denying his motion to continue sentencing in order to investigate newly discovered evidence. (AOB 255-257.) The record demonstrates that the trial court properly denied appellant's motion.

On September 10, 1999, just prior to sentencing, appellant made a motion to continue the proceeding. (42 RT 12647, 12689; 16 CT 4660.) The motion was based on 1) newly discovered evidence consisting of a letter from "Raymond Walton" informing the court that Michael Lyons was not killed by appellant but by a man named Timothy Clark who was incarcerated in Yolo County; 2) a defense request to examine the fingerprints found on the windshield of appellant's truck to see if other individuals were in or around the crime scene; and 3) the need to make a

motion for a new trial on the grounds of newly discovered evidence (the letter) and ineffective assistance of counsel at the guilt phase. (42 RT 12647-12649.)

The People opposed the motion pointing out that the newly discovered evidence was questionable at best. The anonymous letter was from a person named Raymond on Walton Avenue; no last name was provided. (42 RT 12649.) The phone number provided in the letter was disconnected. (42 RT 12650.) And, most importantly, besides offering an opinion, the letter offered no factual information whatsoever. (42 RT 12651.) The prosecutor also pointed out that if appellant's motion were granted this would permit appellant to file a third motion for new trial, and that the guilt phase of appellant's trial had concluded approximately 15 months earlier. (42 RT 12651-12652.) The trial court denied the motion. (42 RT 12653.)

"Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) In ruling on a motion to continue, the court must consider not only the benefit that the moving party anticipates, but also the likelihood that such benefit will result, the burden on other witnesses, jurors, and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) The trial court decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*Ibid.*) Defendants bear a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.)

Here, the trial court was fully justified in denying appellant's motion for a continuance. There was very little likelihood that appellant would be able to obtain meaningful evidence as a result of the letter from "Raymond of Walter Avenue." As the prosecutor pointed out, all the contact information provided in the letter resulted in dead ends. (42 RT 12649-

12652.) The letter was obtained from a relative of appellant's who did not know who Raymond was or who he might be. (*Ibid.*) Furthermore, Timothy Clarke, the alleged murderer, could not be located. In addition to the baseless and speculative nature of the letter, there was no showing that any further evidence, assuming it was material, could be obtained in a reasonable time. At the time of appellant's motion to continue sentencing, 15 months had passed since the guilty verdict, and appellant had already made two unsuccessful motions for new trial. And finally, the defense had had ample opportunity to examine the fingerprints found on the inside of the windshield and to bring a motion for new trial on the ground of ineffective assistance of counsel during the guilt phase. Under these circumstances, the trial court properly denied appellant's motion for a continuance.

XV. THE TRIAL COURT PROPERLY IMPOSED CONCURRENT SENTENCES FOR COUNTS FOUR, FIVE, SIX, AND SEVEN, AND THEN STAYED ALL OF THESE COUNTS PURSUANT TO SECTION 654 AS ARISING OUT OF THE SAME SET OF OPERATIVE FACTS

Appellant contends that the concurrent sentences for his convictions for lewd act upon a child (count six), forcible lewd act upon a child (count seven), and torture (count four), should be stayed under section 654 because the prosecutor argued in closing that these offenses were based on the same conduct which was the basis for his forcible sodomy conviction (count five). (AOB 258-260.) He also urges this Court to reconsider its ruling in *People v. Pearson* (1986) 42 Cal.3d 351, 356-358 (*Pearson*). (AOB 260.) Contrary to appellant's implied premise, the trial court stayed execution of the sentences on all four of these counts under section 654 as arising out of the same set of operative facts as the first degree murder conviction with special circumstances of torture, sodomy and lewd act on a child. (16 CT 4523-4540, 4654-4659; 42 RT 12689-12692.) Furthermore,

appellant offers nothing new that should cause this Court to reconsider its prior holding in *Pearson*. The solution adopted in *Pearson* is to permit multiple convictions on counts that arise from a single act or course of conduct — but to avoid multiple punishment, by staying execution of sentence on all but one of those convictions. (*Pearson*, *supra*, 42 Cal.3d at p. 360.) This Court has consistently upheld this principle. (See e.g., *In re Pope* (2010) 50 Cal.4th 777, 784; *People v. Reed* (2006) 38 Cal.4th 1224, 1227; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034; *People v. Benson* (1998) 18 Cal.4th 24, 29.) Argument XV should be denied.

XVI. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE PENALTY PHASE JURY WITH APPELLANT'S PROPOSED JURY INSTRUCTIONS

Appellant contends that the trial court violated his constitutional right to due process by declining to instruct the penalty phase jury with proposed instructions concerning the following: (A) the scope of mitigating circumstances that should be considered and the manner in which such circumstances should be considered; (B) evidence concerning appellant's background could only be considered as mitigating evidence; (C) the jury should assume a sentence of death will be carried out; and (D) the jury could decide that the aggravating evidence was insufficient to warrant death even in the absence of mitigating evidence. (AOB 261-268.) As detailed below, the trial court's denial of appellant's requests to include these instructions was proper.

A. Instruction Concerning the Kind of Mitigating Factors the Jury Could Consider

Appellant requested that the trial court provide the jury with the following instruction:

> Scope and Proof of Mitigation
>
> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors.
>
> A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.
>
> A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.
>
> Any mitigating circumstance may outweigh all the aggravating factors.
>
> A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

(40 RT 12068-12070; 15 CT 4406.)

The trial court refused to so instruct the jury, stating that the subject was appropriately covered in CALJIC No. 8.88.[56] (40 RT 12070.) This

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[56] CALJIC No. 8.88, as given to the jury, provides,

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [the] defendant.

(continued...)

Court has previously rejected appellant's proposed jury instruction, and the trial court did not err in refusing to give it. In *People v. Lewis*, *supra*, 26 Cal.4th at p. 393, and *People v. Smith* (2003) 30 Cal.4th 581, 638 (*Smith*), this Court ruled that an instruction informing the jury it can consider "mercy" is inappropriate. Such an instruction suggests the jury may engage in arbitrary decision-making rather than use reasoned discretion based on the particular facts. (*Ibid.*) The Court held in both cases that the instruction

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(...continued)

> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(15 CT 4385-4386.)

was also cumulative because CALJIC No. 8.85 already informed the jury it could consider "any sympathetic . . . aspect of the defendant's character, or record in connection with the relevant statutory factors." (*People v. Lewis*, *supra*, 26 Cal.4th at p. 393; accord, *Smith*, *supra*, 30 Cal.4th at p. 638.) The trial court in this case instructed the jury with CALJIC No. 8.85.[57] (15 CT 4351-4352.)

The refusal was also proper because the standard instructions the court gave fully explained the applicable law. In *Smith*, the Court ruled that proposed instructions on how the jury should consider mitigating circumstances were unnecessary because CALJIC No. 8.88 already informed the jury that the "weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale . . . ." (*Smith*, *supra*, 30 Cal.4th at p. 638, quoting CALJIC No. 8.88.) Appellant contends that the proposed jury instruction would have protected his Eighth and Fourteenth Amendment rights by informing the jury that mitigation is not limited to the enumerated factors but includes any mitigating information that may convince it to

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[57] The jury was instructed with CALJIC No. 8.85, which provides in pertinent part,

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereinafter instructed. You shall consider, take into account and be guided by the following factors, if applicable: [¶] . . . [¶] (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record 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.

(15 CT 4351-4352.)

impose a sentence less than death. (AOB 262.) CALJIC No. 8.88, given to the jury, adequately informed the jury that "A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (15 CT 4385.)

Moreover, this Court has ruled that any instruction directing the jury that one mitigating circumstance may outweigh all of the aggravating circumstances, without also stating the opposite, is argumentative. (*Smith*, *supra*, 30 Cal.4th at p. 638, citing *People v. Seaton* (2001) 26 Cal.4th 598, 689.) Finally, this Court repeatedly has held the trial court does not have to instruct the penalty phase jury that a juror may find that a mitigating circumstance exists if there is any substantial evidence to support it, no matter how weak. (*People v. Lee* (2011) 51 Cal.4th 620, 679.) For these same reasons, appellant's claim regarding the proposed instruction, which incorporates all of the above, must be rejected. The instructions given to the jury provided adequate guidance on how to consider the aggravating and mitigating factors. Appellant has provided no compelling reason for this Court to reconsider its prior decisions.

B. Instruction Regarding Appellant's Background As A Mitigating Factor

Appellant requested that the trial court instruct the jury as follows:

> Defendant's Background is Mitigating Only
>
> The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence.

(15 CT 4402.) The trial court properly denied appellant's request to so instruct the jury on the ground that the subject was adequately covered by

another instruction. (40 RT 12050.) The contention that the instructions should identify the various aggravating and mitigating evidence has been rejected by this Court. (E.g., *People v. Lewis*, *supra*, 26 Cal.4th at p. 395; *People v. Box*, *supra*, 23 Cal.4th at p. 1217; *People v. Medina* (1990) 51 Cal.3d 870, 909.)

Appellant points to *People v. Hardy* (1992) 2 Cal.4th 86 (*Hardy*), to support his theory the court erred in failing to instruct that evidence of a defendant's background can only be mitigating. The *Hardy* court, however, did not reach the question whether such an instruction was required, holding instead that no prejudicial error occurred, because no reasonable possibility existed that the jury improperly considered any of the defendant's background evidence as aggravating. (*Hardy*, *supra*, 2 Cal.4th at pp. 207–208.) The same point applies in this case. The portion of the closing argument to which appellant refers does not assist him. The prosecutor argued that there was nothing offered concerning defendant's background which could be mitigating ("But there's no reason that they presented to you why he turned out this way"), but he did not argue conversely that the appellant's background could be considered as evidence in aggravation. (See Argument XIII, A, *ante*.) Thus, the trial court properly denied appellant's proposed instruction concerning his background.

C. Instruction Regarding Assumption Death Penalty Will Be Carried Out

Appellant requested that the trial court instruct the jury that, "If you sentence the defendant to death, you must assume that the sentence will be carried out." (15 CT 4409.) The trial court denied the request, stating,

> The Court's going to refuse that because I - - I do believe even as frankly you've cited here in your *Kipp* case, the jury should be told to assume that whatever penalty it selects will [be] carried out if requested by counsel or if there is a reason to

believe the jury has concerns or misunderstanding. If the jury comes up with concerns or misunderstandings, I, of course, will take that up with counsel.

But the Court, in the abstract, so to speak, will refuse to give the instruction; and all defense's objections to the Court's ruling are reserved.

(40 RT 12077-12078.)

The trial court's determination on this instruction was proper. Due to the possibility of appellate reversal or a gubernatorial pardon, this Court has ruled that an instruction informing a jury that the sentence imposed will be carried out would be inaccurate and erroneous. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1091; *People v. Kipp* (1998) 18 Cal.4th 349, 378 (*Kipp*).) Furthermore, other than a conclusory allegation concerning the existence of "widespread public opinion that the death penalty is not carried out frequently," appellant offers no evidence that the jury in this case may have had some concerns or misunderstanding in this regard. (See *Kipp*, *supra*, 18 Cal.4th at p. 377-379.) Thus, the trial court properly refused to so instruct the jury.

D. Instruction Regarding Insubstantial Aggravating Evidence

Finally, appellant also requested that the trial court instruct the jury that, "A jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (15 CT 4415.) The trial court again properly denied the request. (40 RT 12083-12084.)

As conceded by appellant, this Court has consistently rejected arguments that the jury must expressly be told it may return a sentence of life without the possibility of parole even if it finds no mitigating evidence. This Court has reasoned that no reasonable juror, having heard the standard instructions given in the case, "'would assume he or she was required to

impose death despite insubstantial aggravating circumstances merely because no mitigating circumstances were found to exist.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 52; also cf. *People v. Jones* (1998) 17 Cal.4th 279, 314.) Because appellant's argument has been repeatedly rejected and because he offers no compelling reason to reconsider these prior decisions, his argument should be rejected.

XVII. APPELLANT WAS NOT PREJUDICED BY THE CUMULATIVE IMPACT OF ANY ALLEGED ERRORS DURING THIS CASE

Appellant argues that he was prejudiced by the cumulative impact of the alleged errors set forth in the preceding arguments and was deprived his due process right to a fair trial and penalty phase. (AOB 269-272.) He seeks a reversal of the guilt verdicts and the judgment of death. (*Ibid.*) However, he cannot show that he was denied a fair trial or penalty phase because he failed to show any error or that he suffered prejudice as a result of any particular error or combined errors. (See Arguments I – XVI, *ante*.) Because appellant has failed to show error or that he suffered prejudice as a result of any particular error or combined error in either the guilt or penalty phase, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 968 [finding cumulative impact of two arguable errors in prosecutor's argument, which were harmless when considered separately, did not result in prejudice to defendant in penalty phase] (*Martinez*); *Panah*, *supra*, 35 Cal.4th at pp. 479-480 [no cumulative error in penalty phase where court identified few errors and such errors are harmless].) As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, overruled on another ground in *Martinez*, *supra*, 47 Cal.4th at p. 948, fn. 11; *People v. Barnett*,

supra, 17 Cal.4th at p. 1182; see also *People v. Horning*, *supra*, 34 Cal.4th at p. 913 [no denial of right to fair trial where there was "little, if any error to accumulate"].) There is no reasonable possibility of a result more favorable to appellant in the absence of any of the alleged errors and their cumulative impact was harmless beyond a reasonable doubt. (*People v. Brown* (1988) 46 Cal.3d 432, 448; *Chapman*, *supra*, 386 U.S. 18, 24.)

XVIII. THE DELAY INHERENT IN APPELLATE REVIEW DOES NOT VIOLATE THE FEDERAL CONSTITUTION OR INTERNATIONAL LAW

Appellant claims that his death sentence should be vacated because the "extraordinary delay" in judicial review of his conviction and judgment of death violates the cruel and unusual punishment provision of the Eighth Amendment, the due process and equal protection provisions of the Fourteenth Amendment, and the International Covenant on Civil and Political Rights. (AOB 273-277.) To support this claim, appellant cites the time it has taken for appointment of counsel, record correction, and for counsel to file the opening brief. Appellant also notes the additional time that will pass while waiting for the filing of the respondent's brief, counsel to file a reply, and this Court to decide the appeal. (AOB 273, 276.)

The automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect because it assures careful review of the defendant's conviction and sentence. (*People v. Anderson* (2001) 25 Cal.4th 543, 606.) This Court recently reiterated its rejection of the claim that the delay in execution while a capital defendant awaits appellate review of his conviction and death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. This Court found """that delay inherent in the automatic appeal process if not a basis for concluding that either the death penalty itself, or the process leading to its execution, is cruel and unusual punishment."""" (*People v.*

Vines (2011) 51 Cal.4th 830, 892; see also *People v. Salcido* (2008) 44 Cal.4th 93, 119-120 ["We repeatedly have concluded that delay, whether in the appointment of counsel on appeal or in processing the appeal, or both, does not inflict cruel or unusual punishment within the meaning of the state or federal Constitution. [Citations.]"].) "'One under judgment of death does not suffer cruel and unusual punishment by the inherent delays in resolving his appeal. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while, if the judgment is affirmed, the delay has prolonged his life.' [Citations.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1037.) Appellant "'fails to demonstrate that the delay inherent in the procedures by which California recruits, screens, and appoints attorneys to represent capital defendants on appeal, is not necessary to ensure that competent representation is available for indigent capital appellants.' [Citations.]" (*People v. Blair* (2005) 36 Cal.4th 686, 755.) This Court has repeatedly ruled the delay in appointing counsel and processing the appeal is necessary to protect condemned prisoners' rights, and is not violative of a defendant's federal constitutional rights to equal protection and due process. (*People v. Brady* (2010) 50 Cal.4th 547, 589; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1068.) And "any reliance on international law or extraterritorial decisional law has no bearing on the validity of a death sentence that satisfies federal and state constitutional mandates." (*People v. Vines*, *supra*, 51 Cal.4th at p. 892.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

XIX. APPELLANT HAS NOT DEMONSTRATED PREJUDICE BASED ON AN INCOMPLETE RECORD ON APPEAL

Appellant claims that his conviction must be reversed because the trial court's failure to follow state law and place all proceedings in a capital case on the record resulted in an incomplete record on appeal in violation of his federal constitutional right to due process. (AOB 278-282.) Appellant's claim is without merit because he has not met his burden of demonstrating prejudice with regard to his ability to prosecute his appeal.

This Court has addressed similar claims stating, "If any part of the proceedings was not reported as required by section 190.9, subdivision (a), '[e]rror it was; in the absence of prejudice, however, it is not reversible.' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 204 (*Huggins*).) *Huggins* explained:

> "'A criminal defendant is . . . entitled to a record on appeal that is adequate to permit meaningful review. . . . The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. [Citation.] It is the defendant's burden to show prejudice of this sort.'" [Citation.]

(*Ibid.*)

Here, appellant identifies as missing from the appellate record four unreported conferences during the penalty phase jury voir dire conducted in 1998 and 1999, "several 'off-the-record' discussions" relating to record correction and certification occurring in 2000, and trial counsel's section 987.2 fee requests and court orders granting or denying such requests. (AOB 278-279.) A settled statement for the unreported conferences was sought during record correction, but the identified unreported conferences were not settled due to trial counsel's lack of recollection, or differing recollections, of the hearings, and the death of the trial judge. (See AOB 278.) Copies of trial counsel's section 987.2 fee requests were also sought

from trial counsel, but none were provided. (See AOB 279.) However, section 987.9 documents were located and included in the certified record. (See AOB 279.) Appellant argues, "Without these transcripts, it is impossible for appellant to make an argument about any reversible error that may have occurred." (AOB 279-280.) Appellant also speculates that the missing attorney fee petitions might "bolster a claim of ineffective assistance of counsel." (AOB 282.) These assertions are insufficient to establish that appellant has suffered prejudice as a result of the unreported conferences and off-the-record discussions. Further, appellant's speculation that the missing fee requests may have assisted him on appeal does not demonstrate that the appellate record is inadequate to permit meaningful appellate review. (See *People v. Richardson, supra*, 43 Cal.4th at p. 1037.) This argument should be rejected.

XX. No Alleged Trial Court Error Violated Appellant's Right To Due Process

Appellant makes the sweeping claim that "any deprivation of a state law right constituted a violation of federal due process." (AOB 282-283.) Appellant, however, does not state what violation of state law allegedly violated his right to due process in this case nor does he allege that he is entitled to any type of relief. Neither respondent nor this Court should be tasked with the duty to identify the specific claims to which appellant's constitutional argument may pertain. Appellant forfeited this claim by failing to identify a specific violation of state law, and to identify and argue facts to support such a claim.

Moreover, appellant has coated virtually every prior argument with the claim that a violation of his right to due process occurred as a result of state law error. But "'[a] state-law violation is not automatically a violation of federal constitutional due process. . . .' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 695.) To the extent necessary, respondent has

responded to these arguments individually, *ante*. Because the trial court did not err in regard to any state-law claim alleged by appellant, his constitutional claim for each must also be rejected. (See *Boyer*, *supra*, 38 Cal.4th at p. 441, fn. 17 ["rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well."].)

XXI. THE FAILURE TO OBJECT TO THE JURY INSTRUCTIONS AT TRIAL FORFEITS APPELLANT'S ARGUMENTS ON APPEAL

Appellant claims that this Court should excuse any failure by his "incompetent lawyer" to request or to object to jury instructions because it is the trial court's duty to adequately instruct the jury on the relevant law, and any instructional error affected his substantial rights, his right to due process, and his right to a reliable penalty determination. (AOB 283-284.) He asserts his "instructional claims" should be considered by this Court without specifying the precise jury instruction or claim to which this argument applies. In Argument VIII of the AOB, however, appellant complains that CALJIC Nos. 1.00 and 2.01 as given to the jury during the guilt phase of his trial violated his right to due process and a fair trial. (See Argument VIII, *ante*.) In response, the People have urged that appellant forfeited his challenge to the jury instructions for his failure to object in the trial court. (*Ibid.*) Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. (§ 1259.)

Here, appellant makes no argument that instructing the jury with CALJIC Nos. 1.00 and 2.01 affected his substantial rights and led to a miscarriage of justice. Furthermore, and as set forth more fully in Argument VIII, *ante*, these jury instructions did not alter the burden of proof or require appellant to prove his innocence, therefore appellant's fundamental rights were not affected. Thus, the failure of appellant to object to these instructions should operate to forfeit his argument on appeal.

XXII. FORFEITURE RULES APPLY IN CAPITAL CASES

Appellant claims that this Court should "discontinue the 'gotcha' nature of dismissing claims on the arcane and technical minutiae forfeiture 'rules'" and review all his claims on the merits because he has been sentenced to death. (AOB 285-286.) This Court has rejected this same claim stating, "We have recognized exceptions to the forfeiture doctrine with respect to certain constitutional claims raised for the first time on appeal. [Citations.] But we have never held that forfeiture is inapplicable to an entire class of cases and we will not do so here." (*People v. Richardson, supra*, 43 Cal.4th at p. 984, fn. 11.)

This Court has recently reiterated,

> '[A]s a general rule, "the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal." [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations .] [¶] The reasons for the rule are these: "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling of the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'" [Citation.]' [Citation.]

(*People v. McKinnon, supra*, 2011 WL 3658915, *14.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

XXIII. CLAIMS RAISED ON HABEAS CANNOT BE INCORPORATED BY REFERENCE ON APPEAL

Appellant asks this Court to incorporate by reference any claim raised in his petition for writ of habeas corpus that this Court finds should have been raised on appeal. (AOB 286.) This Court has declined this same request in a different capital case stating,

> The rules of court do not permit such incorporation. [Citation.] Moreover, 'habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.' [Citation.]

(*People v. Richardson*, *supra*, 43 Cal.4th at p. 1038; see also *People v. Abilez* (2007) 41 Cal.4th 472, 536.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

XXIV. CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL IN GENERAL AND AS APPLIED

Appellant repeats challenges to California's death penalty scheme that have been rejected by this Court in order to preserve them for review by the United States Supreme Court and/or federal habeas review. (AOB 286-288.) This Court has consistently and repeatedly rejected these claims. None of appellant's claims, which are discussed separately in Arguments XXV through XXX, *post*, warrant reconsideration by this Court.[58]

XXV. CALIFORNIA'S DEATH PENALTY SCHEME IS NOT IMPERMISSIBLY BROAD

Appellant claims that his death sentence is invalid because it was improperly imposed pursuant to a statutory scheme that fails to narrow the

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[58] The following arguments by no means contain an exhaustive list of decisions addressing these claims.

class of offenders eligible for the death penalty in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and prevailing international law. (AOB 289-290.) This Court has "considered and consistently rejected" this claim. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837, and cases cited therein.) Specifically, this Court has found that "[t]he special circumstances set forth at section 190.2 are not impermissibly broad and adequately narrow the class of murders for which the death penalty may be imposed. [Citations.]" (*People v. Elliot* (2005) 37 Cal.4th 453, 487.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

XXVI. FACTOR (a) OF SECTION 190.3 IS CONSTITUTIONAL

Appellant claims that factor (a) of section 190.3, which directs jurors to consider the "circumstances of the crime" in determining penalty, "has been applied in such a wanton and freakish manner" that it allows "arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." (AOB 291-292.)

This Court has repeatedly rejected this claim finding that "section 190.3, factor (a) is not impermissibly overbroad facially or as applied." (*People v. Robinson* (2005) 37 Cal.4th 592, 655, and cases cited therein; see also *People v. Vines*, *supra*, 51 Cal.4th at p. 891, and *id.* at p. 889 [discussing admissibility of victim impact evidence under factor (a)].) Section 190.3, factor (a) correctly allows the jury to consider the "circumstances of the crime." (*People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

XXVII. CALIFORNIA'S DEATH PENALTY SCHEME CONTAINS SUFFICIENT SAFEGUARDS TO GUARD AGAINST THE ARBITRARY IMPOSITION OF DEATH

Appellant claims that California's death penalty scheme contains no safeguards to guard against the arbitrary imposition of death. (AOB 293-313.) Specifically, appellant complains that: (1) the jury was not instructed that it had to unanimously find aggravating factors true beyond a reasonable doubt and that the aggravating factors outweighed any mitigating factors beyond a reasonable doubt in violation of his right to a jury (AOB 294-303), right to due process, and prohibition against cruel and unusual punishment (AOB 303-305); (2) the jury was not required to make written findings regarding the finding of aggravating factors in violation of his rights to due process and meaningful appellate review (AOB 306-308); (3) the absence of intercase proportionality review violates the Eighth Amendment (AOB 309-310); (4) unadjudicated criminal activity as a factor in aggravation must be found by a jury unanimously and true beyond a reasonable doubt (AOB 310-311); and (5) the jury was not instructed that certain statutory factors were relevant solely as to mitigation in violation of state law as well as the Eighth and Fourteenth Amendments to the federal Constitution (AOB 311-313). This Court has consistently rejected each and every one of these claims.[59]

> This Court has found that section 190.3 is not unconstitutional, for failing to require unanimity as to the applicable aggravating factors. [Citation.] Nor is the law unconstitutional for failing to impose a burden of proof except as to other-crimes evidence. The existence of other aggravating circumstances, the greater weight of aggravating circumstances relative to mitigating circumstances, and the appropriateness of a death sentence are not subject to a burden-of-proof qualification. [Citations.]

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[59] Again, the cases cited herein are in no way an exhaustive list of authority.

(*People v. Elliot, supra*, 37 Cal.4th at pp. 487-488.) "'Nothing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466 []) compels a different answer to these questions.' [Citation.]" (*People v. Thomas* (2011) 51 Cal.4th 449, 506; see also *People v. Lee* (2011) 51 Cal.4th 620, 651-652.)

"The death penalty law is not unconstitutional for failing to require that the jury base any death sentence on written findings. [Citation.]" (*People v. Elliot, supra*, 37 Cal.4th at p. 488; see also *People v. Thomas, supra*, 51 Cal.4th at p. 506-507.) Further, "[t]he absence of intercase proportionality review does not violate the Eighth and Fourteenth Amendments." (*People v. Lee, supra*, 51 Cal.4th at p. 651, and cases cited therein.) Moreover, "[t]he jury may properly consider evidence of unadjudicated criminal activity under section 190.3, factor (b) [citation], jury unanimity regarding such conduct is not required [citation], and factor (b) is not unconstitutionally vague. [Citation.]" (*People v. Lee, supra*, 51 Cal.4th at pp. 652-6533; *People v. Thomas, supra*, 51 Cal.4th at p. 504; *People v. Murtishaw* (2011) 51 Cal.4th 547, 596-597.)

> The trial court was not constitutionally required to instruct the jury that certain sentencing factors can be considered only in mitigation, and CALJIC No. 8.85's instruction to the jury [(15 CT 4351-4352.)] to consider 'whether or not' certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors was aggravating.

(*People v. Lee, supra*, 51 Cal.4th at p. 653, and cases cited therein.)

> The use of adjectives such as 'extreme' and 'substantial' does not prevent the jury from considering relevant evidence. [Citation.] 'The jury need not be instructed that section 190.3, factors (d), (e), (f), (g), (h), and (j) are relevant only as possible mitigators. [Citation.] Nor is the trial court required to instruct

> that the absence of a particular mitigating factor is not aggravating. [Citation.].

(*People v. Thomas*, *supra*, 51 Cal.4th at pp. 506-507.) Similar to the instruction in *People v. Thomas*, *supra*, 51 Cal.4th 449, the jury in this case was instructed that "[t]he absence of a statutory mitigating factor does not constitute an aggravating factor." (*Id.* at p. 507; 15 CT 4355.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting these same challenges to California's death penalty scheme.

XXVIII. CALIFORNIA'S DEATH PENALTY LAW DOES NOT DENY CAPITAL DEFENDANTS EQUAL PROTECTION UNDER THE LAW

Appellant claims that California's death penalty scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it denies procedural safeguards to capital defendants that are afforded to noncapital defendants. (AOB 314-316.) Specifically, appellant claims that the death penalty scheme is unconstitutional because there is no requirement of juror unanimity on the aggravating factors, no standard of proof in the penalty phase, and no reasons need be given for a death sentence. On the other hand, sentencing allegations in a noncapital case must be found unanimously, beyond a reasonable doubt, and a trial court must orally state its reasons on the record for selecting an upper-term sentence. (*Ibid.*)

As this Court has stated, "The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two categories of defendants are not similarly situated. [Citations.]" (*People v. Lee*, *supra*, 51 Cal.4th at p. 653.)

> 'The availability of certain procedural protections in noncapital sentencing---such as a burden of proof, written findings, jury

> unanimity and disparate sentence review---when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]' [Citation.]

(*People v. Thomas*, *supra*, 51 Cal.4th at p. 507.)

Once again, appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

XXIX. APPLICATION OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW OR THE FEDERAL CONSTITUTION

In this argument, appellant claims that California's use of the death penalty as a "regular" form of punishment violates international law and the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 317-318.) This claim has also been rejected repeatedly.

> California's use of capital punishment as an assertedly 'regular form of punishment' for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does not offend the Eighth and Fourteenth Amendments by violating international norms of human decency. [Citation.]

(*People v. Lindberg* (2008) 45 Cal.4th 1, 54; see also *People v. Lee*, *supra*, 51 Cal.4th at p. 654; *People v. Thomas*, *supra*, 51 Cal.4th at p. 507; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [California does not use capital punishment as "'regular punishment for substantial numbers of crimes'"].) Appellant offers nothing new that should cause this Court to reconsider its prior decisions.

XXX. APPELLANT WAS AFFORDED A FAIR TRIAL, AND THERE HAS BEEN NO VIOLATION OF INTERNATIONAL LAW

In his final argument, appellant asserts that the violations of state and federal law alleged in his opening brief also constitute violations of international law. (AOB 318-323.) Specifically, he contends that his trial and sentence of death are in violation of customary international law under

the Universal Declaration of Human Rights, the ICCPR, and the American Declaration of the Rights and Duties of Man. However, as set forth above, appellant has failed to establish that any aspect of his trial or penalty determination involved violations of state or federal constitutional law. Because there has been no violation of state or federal constitutional law, this Court need not consider the applicability of international treaties and laws to appellant's appeal. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1356; *People v. Solomon* (2010) 49 Cal.4th 792, 844; *People v. Hoyos* (2007) 41 Cal.4th 872, 925.) "'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]' [Citation.]" (*People v. Solomon*, *supra*, 49 Cal.4th at p. 792.) Appellant's contention is without merit.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Dated: October 14, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC CHRISTOFFERSEN
Assistant Deputy Attorney General

JENNIFER M. POE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 89189 words.

Dated: October 14, 2011

KAMALA D. HARRIS
Attorney General of California

JENNIFER M. POE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rhoades**
No.: **S082101**

I declare:

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

On October 17, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Richard Jay Moller
Attorney at Law
So'Hum Law Center of Richard Jay Moller
P.O. Box 1669
Redway, CA 95560-1669
Attorney for Appellant
2 Copies

County of Sacramento
Gordon D. Schaber Downtown Courthouse
Superior Court of California
720 9th Street
Sacramento, CA 95814-1398

The Honorable Carl Adams
District Attorney
Sutter County District Attorney's Office
446 Second Street
Yuba City, CA 95991

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

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 October 17, 2011, at Sacramento, California.

Declarant

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